Privacy and AIDS

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HIV/AIDS SYMPOSIUM

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I. Introduction

I shall advance the thesis that if there is a general right to privacy, it follows that each person has a right not to be intruded upon in respect to their HIV status. I call this right RNIIH (the Right to Non-Intrusion on HIV status). The basis for this right will be explained below. Closely related to RNIIH is society’s compelling interest to protect against the spread of a fatal disease. In cases where the two conflict, the state’s interest dominates but only to a point. Determining where that point lies in respect to the AIDS crisis raises profound policy questions.

In this article, I will sketch out a theoretical basis for believing that the RNIIH exists. I will then rely on the RNIIH to resolve several issues that have arisen since the first reported case of AIDS in 1981. In doing this, I hope to provide a serious legal mechanism for the protection of the right to privacy in the context of AIDS.

II. Meaning

What does RNIIH mean? Clearly, it means that every person has a right not to have information about their HIV status disclosed without their permission. It also means that government does not have a legitimate ground to interfere with their actions so long as they do not pose a substantial health threat to others. It follows that

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the RNIH has aspects of both negative freedom (in the sense of the self to be let alone) and self-regardingness (in that the actions protected are only those that do not effect others). Were RNIH protection sought for an action that affected others, then as between those it affected and the agent, the claim would be invalid.

Thus for the RNIH to be meaningful, there must be actions that do not effect others in the sense I am concerned about here. J. S. Mill described this category of actions as effecting only oneself, directly and in the first instance.1 However, Mill’s specification was not precise enough to identify when an action would fit this category especially if all that was required for it to have an effect on another was the mere knowledge that it was permitted. In contrast, I hold the view that if the description of the action does not logically entail an intrusion on another’s basic interest, then as between oneself and the other there is a prima facie claim to be able to perform the act.

By a “basic” interest, I mean to include only those interests in freedom (such as expression, privacy, thought and worship) and well-being (life, health, physical integrity, mental equilibrium) which can be conceived independently of particular conceptions about facts or social conventions. The rationale behind this restriction is to prevent the extension of the concept of interest from becoming so broad by the inclusion of additional facts or casual theories as to take away with the left hand what my specification of it in the first instance gives with the right. The standard objection that at some level every action can potentially affect every other person, if for no other reason than that the person may know about it, thus fails to undercut the plausibility of a RNIH claim. Such a claim could, of course, be overridden were it to conflict either with a stronger rights claim or governmental interest. In the latter case, however, the infringement would have to be determined in the presence of empirical scientific (although not religious or personal moral) evidence. Moreover, the interest itself would have to be one that a court would find sufficiently compelling to override the RNIH.

This latter requirement is in most cases satisfied where there is a provable injury to another. This is because the RNIH protects only self-regarding actions and not actions that affect others. The RNIH is a species of the general right to privacy in that every person has a right to be free from intrusions on their self-regarding actions. In most cases where there was an actual injury to another, the state

would have a compelling interest in the preservation of autonomy to allow liability.

Thusfar, in this discussion, I have been focusing on the coverage of the RNIH, that is, the kinds of actions and information that can be the basis of a prima facie claim. In the case of AIDS, however, the paramount policy issue is not whether one can make out a prima facie claim, but whether or not the state may discover who is seropositive for HIV and whether or not that person's freedom can then be subject to a form of prior restraint. Since these latter issues go to the protection of the RNIH, I must shift the discussion from the conceptual question of what the RNIH means to the normative question of how it is justified. In doing so, I will be laying the groundwork for determining the relative strength of the RNIH when compared with other important societal interests. In the end, I hope to show that the only time the state is ever justified in interfering with a person's RNIH is when it is necessary to defend a compelling interest.

III. JUSTIFICATION

The justification for the RNIH derives from the justification of the general right to privacy which I have argued for in detail elsewhere. Here I will simply sketch out the highlights of that justification so that the RNIH might also be thought valid. Obviously, if a general right to privacy can be established with a scope that incorporates the whole of what the RNIH protects, then the RNIH is certainly valid as a lesser included instance of that general right.

The justification of the general right to privacy depends on a peculiar relationship of the four concepts of privacy, autonomy, democratic government, and other fundamental ends of government. The distinguishing feature that separates out Western democratic from all other forms of government is that it has autonomy as one of its fundamental ends. Here I am not assuming that democracy implies autonomy, only that if one values being able to vote on one's own interests, then one must also value autonomy at least to the extent that it makes meaningful the guarantee to the right to vote.

"Autonomy" here means the conditions that qualify a person to be participating in an activity (like playing the stock market) are only those conditions that which are set by the activity itself (by the mar-

ket) and not by any entity outside the activity (such as the government). The way Western democratic institutions manifest autonomy is through the election of a government in which individual autonomy will be fostered to the maximum extent consistent with the other ends of government and with a like liberty for all. The freedom to vote obviously underlies such a democracy and is presupposed by autonomy. The freedom to discover what is in one's interest is also implied in Western democracy and presupposed by autonomy. This is why one should be free to act at least on one's self-regarding interests and also to be free to act so as to discover what one's interests are. Moreover, it is what protects a person by providing a civil remedy in tort when others would attempt to restrict a person's actions either through invasions on their solitude or seclusion or by publications of various sorts. It is also what protects them from unwarranted government intrusions for the purpose of gathering evidence of a crime. Consequently, under a democratic government, the protection of certain acts as private is justified in order to foster individual autonomy.

Still, the protection is not absolute. This is because democratic government is a species of government generally. This means that democratic government has to fulfill all the other fundamental ends of government, such as providing some form of an economic system for the exchange of goods and services. Consequently, the permissible extent to which protection will be afforded autonomous acts is the maximum consistent with the promotion of the other fundamental ends of government.

In cases where a democratic government is trying to foster an end other than autonomy, privacy issues do not arise. The reasoning is that the alternative end can be viewed as an interest of some individual or group. Hence, no act can be private once it is shown to impinge another fundamental interest. This follows out of the definition of a private act which I have elsewhere provided. Therefore, under the theory of privacy promoted here, autonomy need not be the only fundamental end of democratic government so long as it is one of the fundamental ends.

Privacy is the criterion to determine those acts that government can or cannot proscribe. In other words, privacy is not the same as autonomy because there are many acts that people do perform autonomously (e.g., murder) that are not private and that government can, therefore, prohibit. Privacy does reduce to autonomy, how-

8. Id. at Ch. 2.
ever, in the sense that autonomous acts which a democratic government should want to protect include all the self-regarding acts with respect to the citizens at large.

Under this analysis, certain autonomous acts (such as using contraceptives) are to be protected a priori. For these acts do not impinge in the first instance a basic interest of another in the relevant group of comparisons. Similarly, certain states of affairs, which are less directly related to autonomy, but which, nevertheless, set out the conditions necessary for the performance of autonomous actions (either by guaranteeing selective disclosure or by protecting certain environments for the performance of private acts) should be protected a posteriori. In neither case does the protection extend to acts or states of affairs that are inconsistent with the other fundamental ends of government. Traditional fourth amendment and tort protections fit under this second category, as should protection against the unauthorized gathering of information from computer data banks and electronic transfer services.

Conflicts of rights involving privacy can be resolved by asking, "Which of the rights better promotes maximal autonomy?" The reason for the appeal to "maximal autonomy" is that the right to privacy will only conflict with other active rights—i.e., with other rights for which the democratic end of autonomy provides a justification. Thus, the press has the freedom to publish a great deal about the lives and thoughts of public officials and public figures so that the voters can discover what aspects of the person's life or opinions are relevant to their interests. The press does not have the same freedom to publish such material about private persons, however, because people would be greatly inhibited from finding out what their interests are if they expected their activities to be published in newspapers or other media. In no event, can the right to a fair trial conflict with a right to privacy since the former is a passive right (that might be thought of as an interest) held by the accused. In other words, privacy is not at stake here by definition.

Of particular concern to the AIDS crisis is the kind of interest the state has in trying to protect the health and well-being of its citizens. Clearly, if autonomy is to be thought of as a fundamental end of democratic government and privacy a fundamental right, then the state must have a compelling interest in order to limit privacy. By "compelling interest" I mean that the government has an interest to protect which is more essential to fostering autonomy generally than protecting individual privacy. For example, the government's interest in limiting the spread of an epidemic is a compel-
ling interest, since the preservation of life is a natural necessity for the development of autonomy. Whereas, the argument for permitting sodomy statutes because they promote a certain societal view of morality is not justified as it permits far fewer behaviors than would be permitted, treating autonomy as an end of democratic institutions.

A peculiar and interesting thing happens when one talks about the compelling state interest in this way, because privacy does not drop out of the picture. It is not an either/or thing. Privacy is still there. Where privacy comes in now is in the regulatory sense, and it comes in to regulate just how far government can go in order to satisfy its interest. Thus, by virtue of the government’s compelling interest it can invade privacy, but the maximum amount of the government’s intrusion into privacy must be the minimum necessary to achieve its compelling interest. It is in this sense, then, that the RNHI is justified as a particular specification of the general right to privacy. For the RNHI is just that aspect of the protection of the general right to privacy that focuses on the individual who is seropositive for HIV or is symptomatic for AIDS.

IV. SCREENING AND TESTING FOR AIDS

Since March of 1984, when researchers confirmed that a woman who had received a transfusion of blood that had come from a gay man had contracted the deadly AIDS disease, a major effort was launched to develop a test that could guarantee the safety of the nation’s blood supply. Since that time, several antibody tests have been developed for the purpose of screening for the AIDS virus.

4. While AIDS is not a so-called gay disease (in Africa, where it is believed to have originated, it is found almost exclusively among heterosexuals) in the United States gay men, intravenous drug users and those who engage in frequent sexual contacts are the most susceptible. Blattner, Gallo & Temin, HIV Causes AIDS, Science, July 22, 1988 at 515.

5. [After the introduction of the AIDS antibody screening test in the United States, the transmission of HIV [the viral agent that most scientists believe causes AIDS] in the blood supply of the United States was reduced from as high as 1 in 1000 infected units in some high risk areas to less than an estimated 1 in 40,000 countrywide. Blattner, Gallo & Temin, supra note 3 at 515.

In addition, a number of states have passed statutes affecting who can have access to the test results.\footnote{7}

All of this has led to obvious concerns from the standpoint of privacy, which have been expressed by Tom Stoddard, Legislative Director of the New York Civil Liberties Union, who stated:

Our greatest fear is that employers, insurers, and others will latch onto test results to screen out those people they don't want to serve. That will lead to unnecessary suffering.

This test can lead to a list of people who are assumed to be gay. The test is widely overinclusive and will implicate a majority of people who impose no threat at all. It could become a list of undesirables, a list of people who are viewed as disease spreaders who will be unable to hold their jobs, their insurance.\footnote{8}

Similarly, with respect to military testing, Ron Naiman, speaking for the National Gay and Lesbian Task Force, stated: "While it's reasonable to administer the test to people who would be subject to battlefield transfusion...we don't see a reason to test people with desk jobs in Arlington."\footnote{9}

Clearly, the privacy problem, with the screening and diagnosing of AIDS, centers on trying to balance the legitimate interest of the state to halt the spread of this epidemic against the RNIHs of individuals to selectively disclose information that could have devastating consequences for them. Also, in this balance is the interest of the state (in capitalistic societies) to allow insurance companies the maximal amount of economic freedom consistent with the national interest of making available at least a minimal degree of health care

\footnote{7}{In states with donor-notification procedures, if a positive result on an antibody test is confirmed, the donor's name, social security number, and test results are logged into a computerized file which is usually inaccessible to all but top-ranking laboratory personnel. In all but one state, Connecticut, and some of the larger cities, the blood collection center will notify the donor whose blood has been confirmed to contain the AIDS antibody. One state, Colorado, has undertaken, and several other states are reportedly considering undertaking, regulations to require the reporting of all positive test results so that the state health department can monitor the donor's medical history. In addition, four states (Florida, Illinois, New Jersey and Texas) and the District of Columbia allow insurance companies to require that policy applicants be tested for the AIDS antibody. And forty states allow the use of ELSIA related questions to be asked of insurance applicants. Only California and Wisconsin prohibit the use of ELSIA results as a determining factor for the granting or rejecting of insurance or employment applications. Blau, \textit{Blood Foul: A Test Called ELSIA Divides a Society Paralyzed by AIDS}, Chicago Tribune, December 15, 1985, sec.10, at 4.}

\footnote{8}{Id., sec. 10, at 11-12.}

\footnote{9}{Id., sec. 10, at 12.}
to all persons. The national interest here may manifest itself through different means but is essentially an interest to provide a basic amount of health care protection at the least direct cost to the state. How, then, is the balance to be struck?

Surely the answer depends on recognizing that the state’s interest in protecting the health and physical well-being of its citizens is more compelling than its interest in protecting privacy. That is because health and physical well-being are, as a matter of fact, essential to the very possibility of autonomy. Consequently, the state’s interest in protecting the health and physical well-being of its citizenry generally overrides individual RNIHs in particular cases.

Here is where an important caveat must be noted for the legal institution that truly recognizes both the legitimate privacy rights of the individual and the state’s legitimate interest to protect the health and well-being of its citizens. That caveat requires that the intrusion on the privacy of any individual be no greater than the minimum necessary to achieve the state’s interest to secure the health and well-being of its citizens generally. This accommodation should be thought of as mandatory over any alternative which would deny either the legitimate interest of the state to protect the health and well-being of its citizens or the privacy of the individuals. The rationale underlying the accommodation is the commitment in a Western democratic society to autonomy as a fundamental end, which is what allows privacy to play the regulatory role of limiting just how far the state can go in achieving its interest.

Thus, in screening for the AIDS virus, it is a compelling interest of the state (over any privacy interest of the individual) to require blood banks to test donations of blood before such donations are dispersed to the public. It is not a compelling interest of the state, however, that a blood bank should create a computerized list of persons whose blood tests are positive since the testing of the individual blood donations would adequately protect autonomy generally without any invasion of individual RNIHs. Furthermore, absence from such a list might be relied upon in emergencies to avoid testing of blood where a donor had previously donated. Since a donor could have become infected since the last donation, this result could prove more detrimental to society’s interest than any delay caused by a testing of the new donation. For these reasons, the creation of such a list would not be justified on the basis that it protects an interest which is more fundamental for autonomy than privacy.

The best reason a blood bank may have for maintaining such a list is that it diminishes the probability of a false negative on a subse-
quent donation. However, a less intrusive means on an individual's
RNHIH for achieving the same result is to run a second test. Obvi-
ously, this would incur greater costs, but considering the interests
involved (both privacy and health), such increased costs might be
justified. In any event, if a blood bank maintains such a list, it must
assume the responsibility to insure the privacy of their donors. This
responsibility can be bolstered through the enactment of laws that
would require blood banks which keep such lists to meet stringent
requirements to protect the confidentiality of their donors. The
blood bank’s responsibility can also be enhanced by allowing civil
suits against those who through negligence or intention release such
information. In either case, the justification for the enactment of
such laws is that they would further promote the democratic end of
autonomy.

A more difficult question arises in the context of medical treat-
ment: Should healthcare workers be allowed to order an HIV test
on anyone who submits to general treatment? Should they be al-
lowed to order the test if a nurse gets accidentally pricked with a
needle and does not want to wait through the incubation period to
discover his or her status? Should surgeons be allowed to require
the test before surgery if they are to incise the patient? The inter-
est of the medical community are enormously important, but so are
the interests of the patient who if the test is taken and the informa-
tion is reported may find himself or herself uninsurable. Fortu-
nately, there have been relatively few instances of healthcare worker
infections even though the number of needle pricks is comparatively
high. More important, there are now available universal healthcare
precautions (such as wearing gloves of a certain gauge of plastic
when administering medications through needles) that the Center
for Disease Control recommends to prevent the spread of many dis-
ases including AIDS. Clearly, taking appropriate precautions will
be costly and ultimately will have to be borne by everyone. Still, this
financial investment may be just what is needed to walk the fine line
between healthcare workers and patient privacy. Moreover, insofar
as these precautions would prevent the spread of diseases other

10 A recent study by Charles E. Lewis, M.D., professor of medicine at the Uni-
versity of California at Los Angeles indicates that a significant number of hospitals
in the United States have HIV testing policies that violate patients’ rights. Many
physicians and surgeons routinely order HIV tests of asymptomatic individuals
without their consent. See AIDS Alert 81-86 (American Health Consultants, Atlanta,
than AIDS, they should for that reason as well be part of the regular healthcare protocol.

On the question of state monitoring of individuals, say through "contract tracing" of persons believed to be in high risk groups (which in one proposed version involves tattooing individuals who test positive), the risks to autonomy are even greater. The reason is that such monitoring has the effect of limiting the privacy of both those originally identified as seropositive for the AIDS antibody (which is believed to be an indication of the presence of the virus in the system) and of those with whom they have come in contact. Now, such monitoring might be justified if it reasonably could be expected to lead to information that may eventually be used to halt the spread of this deadly epidemic or if it would provide a warning to persons who might come in contact with infected individuals. The problem with this point of view, however, is that it is by no means evident that public identification or monitoring of individuals who test positive will not cause people to turn away from seeking medical treatment. Moreover, any attempt to publicly identify those who are seropositive for the virus could give a false sense of security to those who come in contact with someone who became infected after the time of the examination or within the period where the infection would not show up. Furthermore, through the use of grants (like the one endowing the National Institute of Health’s study project on AIDS) other methods can be designed that are less intrusive on individual privacy and are scientifically more reliable for studying the spread of this disease. Consequently, it is not at all evident that the state has a compelling interest to identify and monitor individuals merely on the basis of a positive test for the AIDS antibody.

Of course, it would be reckless and irresponsible for a person who knew he or she had tested positive to be sexually active without either first informing the other party of the HIV status, or taking medically reasonable steps to avoid transmission of the virus. This could be accomplished by limiting the opportunities for the exchange of body fluids through mutual masturbation or the use of

12. “There is a period of about 4 to 8 weeks in which newly HIV-infected persons are capable of transmitting HIV, but have not yet developed antibodies.” Blattner, Gallo & Temin, supra note 3, at 515.
13. The study consists of volunteers from across the country who undergo three years of confidential physical examinations.
condoms in conjunction with spermicides containing Nonoxynol-9. Luckily, such instances can be limited if all parties have available to them relevant information on how to protect themselves.

Similarly, it would be gross recklessness for a prison not to take steps to insure against forcible sexual assault. Obviously, the question in each of these situations is one of fact to be evaluated relative to the situation at hand. Still, in each of these cases, it would be the individual or the prison that was potentially disregarding the autonomy interest of another. Consequently, only in cases where there was actual disregard of the autonomy of others as, for example, in cases of sexual assault or criminal deception but not simple prostitution (where autonomy is not violated) could the state be justified in requiring the assailant to submit to a HIV test. For only under these circumstances where there had been a threat to the autonomy of others would the state have a compelling interest to invade privacy.

In terms of more general health care policy, the focus should not be only on abstinence from sex, although this may be the safest choice. To the contrary, it is doubtful that a focus only on abstinence is good public policy. First, most people will not comply with abstinence, just as they will not give up driving to avoid risks on the road, although they may be willing to use seatbelts. Second, both parties to any sexual act can take reasonable (in the sense of medically cautious) steps to protect themselves by lowering the probability of infection. It suffices to say that in an environment where people are informed about “safe” sex practices, the risk of AIDS may be substantially reduced.

This then puts a burden on the government to insure that people are informed. For no other institution is as capable to deal with this question of the public health. More importantly, government in dealing with this question must do so in an open and scientifically reasonable manner. Information should not be withheld because some may be offended in their personal, moral or religious beliefs. If such information is not made available, then the autonomy of those who do not learn of this information may be compromised. This point is particularly applicable to school sex education programs which may be the only place young people have the opportun-

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14. It has been suggested that spermicides containing Nonoxynol-9 may kill the AIDS virus. It is unclear how effective this method is and, therefore, it is usually suggested that the spermicide be used along with a condom.

nity to learn about this disease. Consequently, government has an obligation to provide mandatory, adequate sex education courses, as this will help to foster autonomy generally.

With respect to military testing no compelling reason seems to exist for testing those who are not likely to be called upon to provide immediate blood transfusions. Moreover, such testing could serve as a check on the private lives of the individual members of the armed forces. While it is true that persons in the military are subject to more restrictions on their private lives than those outside the military (as, for example, the fact that they cannot belong to partisan political organizations), in most cases, the rationale behind these restrictions is in service of the basic end of autonomy. For instance, the restriction against too much involvement in partisan political activities can be seen as a way of preventing these institutions from becoming mere extensions of the military's influence. However, no such obvious connections to the protection of autonomy seem to be served by requiring the whole of the armed forces to be tested for the AIDS virus antibody. 16

It could be argued that such testing is justified in order to limit increased health care costs in the defense budget for those who may have contracted AIDS while in the service. Essentially, this is the same sort of argument an insurance company might make on behalf of testing before granting coverage. Since I specifically address myself to the insurance argument next, it suffices to note here that the defense budget could be treated analogously to that of an insurance company. In other words, to the extent that an insurance company should be allowed reimbursement from a general government fund designed to protect against losses due to AIDS, so might the defense budget be similarly protected.

With respect to insurance, the question is one of economic incentives. Should the government restrict insurance companies from being able to set whatever qualification requirements they deem appropriate to protect their investments? Here it is important to understand that insurance companies do not exist in a vacuum. They are heavily regulated, even though they are privately run. This is because insurance companies provide an important public function. In the United States, residents still do not have access to national

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16. To the extent that the testing may be used to weed out so-called undesirables who the military believes are morale problems, the burden is on the military to show why the morale problem could not be solved through better education of its members and strict enforcement of regulations designed to promote respect for the individual autonomy of all members of the armed forces.
health insurance, in part because private health insurance companies have lobbied against it. Consequently, if insurance companies are going to monopolize this function of government (viz., to provide for health care for all the people as part of maximizing autonomy generally), then they must take on the same burdens and responsibilities as government in this area.

Autonomy enters in at the level of the shareholders whose interest is to protect their economic positions. In this case, the autonomy of the shareholders can be limited to the extent that the government has a more compelling interest to protect the health and physical well-being of (including making adequate health care available to) its citizens generally. Since a lack of health care would restrict autonomy generally, even though it might enhance the freedom of the shareholders in the setting of company policy, the government is certainly warranted to prevent the exclusion of any identifiable class of persons or group from receiving such health care. Moreover, if insurance companies are allowed to restrict those whom they are going to insure based on the results of an antibody test, the likelihood that this information may filter down to employers and others (who will wonder why some of their younger employees don’t qualify for health insurance) is greatly increased. Consequently, the impact on privacy of being uninsured increases.

Still, taking account of the legitimate economic interests of the shareholders, an accommodation that would allow for both the provisions of health care and the protection of the shareholder investments would be for the government to set up a fund to cover the costs associated with persons who actually contract AIDS. Such a fund would be available for withdrawals either by an insurance company or by persons who come down with the disease, depending on whether the insurance company had chosen to afford coverage for these illnesses. In the event the insurance company had chosen to refuse coverage, no antibody test would be required. However, this is even less justifiable where a fund is available, for the additional reason that information may filter down to the employer. If the insurance company had granted coverage, the antibody test would only be required if the applicant were seeking to purchase insurance well in excess of the amount customary for a person in his or her economic circumstance. In either case, the justification for the government picking up this tab would be that these two diseases represent a national health crisis of epidemic proportions.

Still, one might object that the government has no duty to pick up the health care costs for those who became infected after infor-
mation on the transmission of the disease had been made generally available to the public. Such an argument might claim that requiring taxpayers to pay for health services in this context is paternalistic at best and unjustified at worst. The problems with this view are threefold. First, it assumes that everyone has the same knowledge available which means that the government has been doing all that it reasonably could to make information on how to protect oneself available. Given that former President Ronald Reagan never even used the word "AIDS" until 1985 (more than four years into the epidemic) and that former Surgeon General C. Everett Koop admits to having been prohibited from discussing it before then, this is a highly doubtful assumption. Second, the argument assumes that because government has a duty to provide general health care, a recipient must owe a duty to the society (a duty to oneself would not logically suffice) to do whatever one can to protect his or her own health. While the former duty follows from the obligation of a democratic government to maximize autonomy generally, the latter duty has no clear foundation. Consequently, those who would rely on a breach of the latter "duty" to excuse the former must first show that it exists. In short, the burden of proof to show the existence of a duty owed to the society to protect one's own health is on the opponents of health care in the instance described. This transfer of the burden of proof is necessary if we are not to sacrifice a clear right for what is only the breach of an alleged duty.

A third assumption the above argument makes is that one is unreasonably endangering their health if they stop short of doing the most that can be done to insure self-protection. This is a particularly problematic point in the context of AIDS given that one's actions can involve degrees of safety. Should, for example, someone be denied government supported health care because they may have used a condom that broke or used a condom without a prescribed lubricant? Should they be held to forfeit health care because they engaged in sexual activity at all? What justifies drawing the line at one place and not at another? Without clear and convincing answers to these questions, there can be no support for this assumption. Moreover, any answers would have to be reasonable given human beings as they are constituted. Answers which would be acceptable to a saint may not be reasonable public policy.

Even so, one might claim to be justified in denying health care in this context on the ground that the autonomy of everybody is made better off by letting a few people serve as examples for responsible behavior. This view is flawed in that it would seek to use
some autonomous individuals (rather than respect their autonomy as an end in itself) for the benefit of other (presumably a greater number of) autonomous individuals. This is not equivalent to fostering autonomy generally. For in fostering autonomy generally, one also fosters it for the individual involved. To the contrary, this approach suggests, without justification, that one can benefit one group of people by setting up another group as a warning. Consequently, there is no reason from the standpoint of autonomy to use some autonomous individuals merely for the sake of other autonomous individuals.

Another view that favors denial is that while government may have a duty to provide everyone health care on the basis that it will foster autonomy generally, when a person autonomously decides to harm their health (as in the case of engaging in unsafe sexual activities or using intravenous drugs) they are, in effect, waiving any right they have to such health care. In other words, health care in this context is available only to those who become ill through no fault of their own. The problem with this argument is twofold. First, it illogically assumes that a decision to take a health risk is tantamount to a decision to waive health care. If this were true, then health care would be available only to people who live extremely isolated lives. Certainly, smokers would not be entitled to health care under this analysis. Second, the argument assumes that fostering autonomy generally is the only justification for government action. In fact, as was discussed earlier, fostering autonomy generally is a particular responsibility of a democratic government that has autonomy as a fundamental end. Still, a democratic government is a species of government generally. If it is true that a moral responsibility of government generally is to provide its people with humane health care based on need alone, because this is not something that individuals can do for themselves, then the problem of providing health care to someone who is partially at fault in their own health situation is eliminated. Certainly, to maximize autonomy, this would be required. In any event, since privacy is not at stake here, this matter is better dealt with under a broader theory of the moral responsibilities of government generally.

Finally, there is the issue of children having AIDS attending school. Recently, we have heard of more and more cases in which the courts have had to intervene to tell a school district that they

could not refuse to admit a child who has AIDS. The rationale
that is usually relied upon is that a person cannot catch AIDS by
casual contact. Nevertheless, the issue becomes emotional when
the medical practitioners who assert the claim that one cannot catch
AIDS by casual contact couch it with phrases like "there are no re-
ported cases" or "the probability is."  

Even so, the medical practitioners are not wrong in their careful
use of language, nor are the courts wrong in ordering the schools to
admit these children. The fact is that in the physical world in which
we live, where the information we have is often incomplete, there is
very little that any of us can be absolutely certain about. When we
cross the street, or walk next to a building, we cannot be sure that a
car will not run us down or that an earthquake will not cause the
building to come toppling down over us. Yet, we have little hesi-
tancy in making these probability judgments since crossing a street
or walking next to a building are events familiar to us. The difficulty
comes in when what we are asked to believe is not familiar and the
consequences of a mistake are grave.

Still, we may have to accept the opinions of experts unless we
ourselves are willing to become experts on every issue. Of course,
we do not have to be naive in accepting the opinions of experts.

1986); District 27 Community School Bd. by Granirer v. Board of Educ. of the City of
Court Cent. Dist. of California, 840 F.2d 701 (9th Cir. 1988); cf. New York State
Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2nd Cir. 1979) (involving an
analogous situation where a student was a carrier of serum hepatitis B). But cf. Child
v. Spillane, 866 F.2d 591 (4th Cir. 1989) (which denied an award of attorney fees
where the plaintiff had not proven that the filing of the lawsuit was what caused
the school board to readmit the child).

19. Even in the case of a child who bit one of his classmates, the court noted
that there is no reported case of the transmission of the AIDS virus in a school
setting and that the overwhelming weight of medical evidence is that the AIDS virus
is not transmitted by human bites, even bites that break the skin. Atascadero Unified

20. See Chalk, 840 F.2d at 706-707.

21. In School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987), the
Supreme Court held that a school teacher who contracted the contagious disease of
tuberculosis was protected against discharge under Section 504 of the Rehabili-
tation Act of 1973, 29 U.S.C. Section 794 (1982). In arriving at this decision, which
has since been applied in AIDS cases (See, e.g., Chalk v. United States District Court
Cent. Dist. of California, 840 F.2d at 704-706, the court stated that in most cases
there must be an individualized inquiry with the appropriate findings of fact so that
"Section 504 [may] achieve its goal of protecting handicapped individuals from
derprivations based on prejudice, stereotypes, or unfounded fear, while giving ap-
Especially on the matters of the gravest importance to us, we should ask critical questions, consider alternative points of view, and demand that those who would ask us to accept their view explain why we can discount whatever risk may be involved. More important, we should all do this with as much cool-headedness as is possible. Only in this way can we be assured that the decision we make will be both the best decision we could make in light of what we know and the decision most likely to respect the legitimate interest of all the parties concerned.

In the case of AIDS, the casual contact a child is likely to engage in at school will not likely spread the disease according to most medical authorities. Consequently, recognizing the legitimate interest of both the child with AIDS to live as much as possible a normal life and of the children without AIDS to be free from disease and of the interest of all the parties to a good education, which in this case would include knowing how to survive and accept people with different infirmities, the courts are correct when they order school districts to admit children with AIDS.

V. Conclusion

In this article, I have tried to show how an argument for demonstrating the existence of a general right to privacy would similarly demonstrate the existence of the RNIH. I, then, sought to apply the RNIH in the context of AIDS in order to delineate in a precise way the appropriate realms of governmental interference and private action. In doing both of these things, I sought to extend our human rights thinking about privacy into a new and developing area of the law where privacy issues are obviously acute. If I have made a contribution by this work, it lies in articulating the principles that judges and legislators should follow when making public policy in this area.

propriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.” Id. at 1131. The  residue decision requires trial courts to make findings of fact on four related factors: “(a) the nature of the risk (how the disease is transmitted); (b) the duration of the risk (how long is the carrier infectious); (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.” Id.