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The Constitutional Party Right of Informational Privacy: Does it Protect Children Suffering From AIDS?

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THE CONSTITUTIONAL RIGHT OF INFORMATIONAL PRIVACY: DOES IT PROTECT CHILDREN SUFFERING FROM AIDS?

I. Introduction

The affliction of a child with acquired immune deficiency syndrome (AIDS)[1] has ramifications that confront the legal community[2] as well as the medical community.[3] First reported in 1981,[4] AIDS has struck

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1. AIDS is a condition which destroys an individual's immune system and leaves him vulnerable to certain infections and cancers. The acronym AIDS stands for "acquired" to show that it is not hereditary or caused by medication, "immune" to relate to the body's defense system against disease, "deficiency" to indicate the lack in cellular immunity, and "syndrome" to show the set of diseases that signal the diagnosis. NEW YORK CITY DEPARTMENT OF HEALTH, AIDS: A SPECIAL REPORT ON ACQUIRED IMMUNODEFICIENCY SYNDROME 3 (October 1985) [hereinafter cited as SPECIAL REPORT]; *see Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 507 (1982), *reprinted in* REPORTS ON AIDS PUBLISHED IN MORBIDITY AND MORTALITY WEEKLY REPORT JUNE 1981 THROUGH SEPTEMBER 1985, at 17 (1985) [hereinafter cited as REPORTS ON AIDS]. AIDS is also known as acquired immunodeficiency syndrome. *See* L. MASS, MEDICAL ANSWERS ABOUT AIDS 1 (1985) [hereinafter cited as MEDICAL ANSWERS]. For a more extensive discussion of AIDS see *infra* notes 190-211 and accompanying text.

2. For instance, the screening for AIDS raises a host of privacy issues. *See, e.g.*, Carroll, *State Permits Closing of Bathhouses to Cut AIDS*, N.Y. Times, Oct. 26, 1985, at 1, col. 4 (closing of bathhouse); Boffey, *Military Services Will Be Screened for AIDS Evidence*, N.Y. Times, Oct. 19, 1985, at 1, col. 1 (military screening); Barron, *Insurers Study Screening for AIDS*, N.Y. Times, Sept. 26, 1985, at B12, col. 4 (insurance screening). See *infra* notes 218-25 and accompanying text for a discussion of the legal issues raised by the admittance of AIDS-afflicted children into school. *See generally* Comment, *AIDS: A Legal Epidemic?*, 17 AKRON L. REV. 717, 726-37 (1984); Shipp, *Concern Over Spread of AIDS Generates a Spate of New Laws Nationwide*, N.Y. Times, Oct. 26, 1985, at 30, col. 1; *cf.* O'Boyle, *More Firms Require Employee Drug Tests: Legal Questions Surround Spread of Mandatory Screening*, Wall St. J., Aug. 8, 1985, at 6, col. 1 (employer-employee screening).

3. *See infra* notes 190-211 and accompanying text.

4. In June, 1981, the Federal Center for Disease Control (CDC) first reported the occurrence in five homosexual men of pneumocystis carinii pnuemonia, a disease that later was attributed to AIDS. *See Pneumocystis Pneumonia—Los Angeles*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 250 (1981), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 1. A month later, the CDC reported that Kaposi's Sarcoma (KS) had been diagnosed in twenty-six homosexual men within the prior two and a half years. *See Kaposi's Sarcoma and Pneumocystis Among Homosexual Men—New York City and California*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 305 (1981), *reprinted in* REPORTS

over 15,000 victims to date,[5] more than 200 of whom are children.[6] Although much of the legal controversy has focused on whether AIDS-afflicted school children should be permitted to attend school, an equally important secondary issue is whether their identities should be disclosed to school personnel and the community at large.

Although these issues currently affect only a handful of school districts,[7] they have unleashed an unprecedented emotional reaction among parents who fear that AIDS could spread throughout the school system.[8] While advocating that the identities of these children be disclosed to the entire community, many parents claim that, at the very least, disclosure should be made to school personnel. They contend that such disclosure would ensure better medical protection for healthy children as well as AIDS-infected children.[9] Public disclosure, however, could have severe repercussions for the children, including ostracism by both classmates and teachers.[10]

This Note will examine the constitutional right of privacy of children with AIDS. First, it will discuss the history and current status of the right to nondisclosure of personal information.[11] The Note then will analyze constitutional protections enjoyed by children,[12] specifically the extent of their right to confidentiality.[13] It

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ON AIDS, *supra* note 1, at 2. KS is a rare cancer infecting the lining of blood vessel, and it frequently afflicts AIDS victims. *See* Laurence, *The Immune System in AIDS*, SCI. AM., Dec. 1985, at 84 [hereinafter cited as Laurence].

The Federal Center for Disease Control (CDC) is a federal health agency, a subdivision of the Public Health Service, that is located in Atlanta, Georgia and "charged with protecting the public health of the Nation by providing leadership and direction in the prevention and control of diseases and other preventable conditions and responding to public health emergencies." THE UNITED STATES GOVERNMENT MANUAL 1985-86 276 (1985).

5. *See infra* note 198 and accompanying text.

6. *See infra* note 214 and accompanying text.

7. *See infra* note 219 and accompanying text.

8. *See infra* notes 219-20 and accompanying text.

9. *See* Perlez, *6 AIDS Children to Attend Schools, City Officials Say*, N.Y. Times, Aug. 26, 1986, at B1, col. 5; *see also* Petitioners' Post-Hearing Brief at 48-56, District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. Queens County 1986) [hereinafter cited as Brief of Petitioners]; *infra* notes 255-56 and accompanying text.

10. *See* Respondents' Post-Trial Memorandum of Law at 61-68, District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. Queens County 1986) [hereinafter cited as Brief of Respondents]; Post-Trial Brief of Respondent-Intervenor John or Jane Doe at 50-60, District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. Queens County 1986) [hereinafter cited as Brief of Respondent-Intervenor]; *see also infra* notes 220, 242, 249-50, 269 and accompanying text.

11. *See infra* notes 18-142 and accompanying text.

12. *See infra* notes 143-89 and accompanying text.

13. *See infra* notes 186-89 and accompanying text.

will then discuss the medical and social effects of AIDS.[14] This Note will determine that states must protect the constitutional right of confidentiality by limiting disclosure of their condition to medical personnel within the school system.[15] Since public policy interests supporting even limited disclosure to school administrators and teachers do not outweigh children's constitutional right of informational privacy,[16] this Note will conclude that any disclosure other than to school health officials would be constitutionally impermissible.[17]

II. Privacy Encompasses the Right of Confidentiality

In its legal context, the right of privacy involves two different interests.[18] The first is the "individual interest in avoiding disclosure of personal matters."[19] The other is "independence in making certain kinds of important decisions."[20] This Note concerns the former interest, the right of an individual to control the disclosure of personal medical information.

The government can abridge this informational privacy right in one of two ways: either by the initial collection and storage of private information or by the dissemination of that information to

14. *See infra* notes 190-225 and accompanying text.

15. *See infra* notes 226-62 and accompanying text.

16. *See infra* notes 248-58 and accompanying text.

17. *See infra* notes 248-62 and accompanying text.

18. *See* Whalen v. Roe, 429 U.S. 589, 599-601 (1977).

19. *Id.* at 599. One commentator describes this interest as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." A. WESTIN, PRIVACY AND FREEDOM 7 (1967) [hereinafter cited as WESTIN]; *see also* Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) ("privacy . . . is control over knowledge about oneself") [hereinafter cited as Fried]; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) (privacy is "autonomy or control over the intimacies of personal identity"); Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35-36 (1967) ("privacy is the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited") (emphasis omitted).

20. *Whalen*, 429 U.S. at 599-600. One commentator terms this facet of privacy as the autonomy interest. *See* Beardsley, *Privacy: Autonomy and Selective Disclosure*, in PRIVACY, NOMOS XIII, at 56 (J. Pennock & J. Chapman eds. 1971). Violation of autonomy is "conduct by which one person Y restricts the power of another person X to determine for himself whether or not he will perform an act A or undergo an experience E . . . ." *Id.*

The Supreme Court has more zealously safeguarded autonomous actions in areas in which the decision to engage in such actions implicates fundamental rights. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Roe v. Wade, 410 U.S. 113, 155 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraceptives); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (child-rearing and education).

the public or other entities.[21] The danger of unchecked or inadvertent disclosure by the government to third parties poses the greater and more tangible harm to privacy,[22] and, thus, it is the focus of most informational privacy claims.[23]

The function of informational privacy is to preserve one's sense of individualism and identity.[24] It is viewed also as a necessary foundation for the formation of respect, love, friendship, and trust in human relationships.[25] In addition, by permitting conditions to

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21. *See* Kurland, *The Private I*, U. CHI. MAG. 7, 8 (1976) (*cited in* Whalen v. Roe, 429 U.S. at 599 n.24); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-17, at 966 (1978) [hereinafter cited as TRIBE]; Bazelon, *Probing Privacy*, 12 GONZAGA L. REV. 587, 612-13 (1977) [hereinafter cited as Bazelon].

22. *See* Bazelon, *supra* note 21, at 611-14.

23. As one commentator noted, "an absolute right to privacy against the collection of personal information would severely restrict government." Bazelon, *supra* note 21, at 613. In *Whalen*, the Supreme Court decided that statutory reporting requirements of persons with prescriptions for dangerous drugs could not be "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." *Whalen*, 429 U.S. at 602. Examples of such invasions include medical disclosure requirements relating to venereal disease, child abuse, fetal death, and injuries caused by a deadly weapon. *See id.* at 602 n.29. The Court concluded that "[r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy." *Id.* at 602.

Although the Court noted that it upheld the recordkeeping requirements of a state abortion law in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), this disclosure requirement is distinguishable from other informational privacy cases in that it was evaluated in terms of its effect on a woman's decision to have an abortion, not in terms of an informational privacy interest. *See id.* at 79-81. *But see* Buckley v. Valeo, 424 U.S. 1, 64 (1975) (Supreme Court reaffirmed principle that "compelled disclosure [of information to the government], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment").

24. One author lists four ways in which informational privacy is essential to an individual: (1) it protects personal autonomy that is "vital to the development of individuality and consciousness of individual choice in life"; (2) it promotes emotional release from the pressures of daily life, especially at times of loss, shock and sorrow; (3) it allows self-evaluation, including exercise of conscience; and (4) it permits limited and protected communications which, in turn, provide the individual with opportunites for shared experiences and intimacies while maintaining a sufficient mental distance in interpersonal relationships. WESTIN, *supra* note 19, at 34-38; *see, e.g.*, Bazelon, *supra* note 21, at 589-91; Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1227-30 (1975).

25. "To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion." Fried, *supra* note 19, at 477-78. In some situations, however, the right to privacy may be used as a pretext to conceal, manipulate, defraud or otherwise deprive another of the opportunity to make an informed judgment. *See* Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 466-74 (1978); Posner, *Privacy, Secrecy, and Reputation*, 28 BUFFALO L. REV. 1, 11-17 (1979).

exist that promote an individual's self-development, privacy serves an important role in a democratic society—it "fosters the growth of autonomous, free-thinking individuals necessary for self-government."[26]

A. Historical Development of the Constitutional Right of Privacy

In 1890, the concept of a legal right to privacy was first articulated as the "right to be let alone."[27] This notion was premised on the argument that the common law protected individual privacy from emerging threats of business and industry.[28] This unprecedented concept led to the development of a right of privacy under tort law.[29]

A constitutionally-based privacy right developed from explicit constitutional protections involving search and seizure, probable cause, and self-incrimination.[30] Specifically, the third[31] and fourth[32] amendments provided legal protection against the invasion of physical privacy. In 1886, the Supreme Court widened this privacy interest by holding that the fourth and fifth[33] amendments guarantee a right of private property.[34] The Court held that governmental intrusions

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26. Bazelon, *supra* note 21, at 592; *see* WESTIN, *supra* note 19, at 34; Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 455 (1980).

27. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) [hereinafter cited as Warren & Brandeis]. This phrase was borrowed from Judge Thomas Cooley in his treatise of torts: "[t]he right to one's person may be said to be a right of complete immunity: to be let alone." T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (1888). Cooley's treatise was published two years before the Warren & Brandeis article. *See* Warren & Brandeis, *supra*, at 193-95.

28. *See* Warren & Brandeis, *supra* note 27, at 195-98. "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." *Id.* at 198.

29. *See generally* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 328 (1966).

30. *See* Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 177 [hereinafter cited as Posner].

31. The third amendment to the Constitution provides: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

32. The fourth amendment to the Constitution guarantees: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

33. The fifth amendment to the Constitution provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

34. *See* Boyd v. United States, 116 U.S. 616 (1886) (Court struck down customs

on the "sanctity of a man's home and the privacies of life"[35] implicate constitutional rights of liberty and security.[36]

Not until *Olmstead v. United States*[37] did the Court interpret the underlying policy objectives of the amendments. The issue addressed in *Olmstead* was whether the fourth amendment safeguarded against nontrespassory governmental intrusions by means of wiretap.[38] The result depended on the Court's interpretation of a constitutionally-based privacy interest.[39] If the fourth amendment protected only physical privacy, then the wiretapping would not invade a constitutionally protected privacy interest. But if the fourth amendment protected privacy in terms of confidentiality, the wiretapping would be unconstitutional.[40] Although the majority strictly construed the language of the amendment to deny an expansive reading of privacy, holding that it protected only physical privacy,[41] Justice Brandeis' forceful dissent has prevailed as the precursor to the development of a constitutional right of privacy.[42] Brandeis broadened the view of privacy beyond seclusion and secrecy, declaring it to be a general right to be free from governmental interference.[43]

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statute requiring accused to choose between producing his business papers in court after seizure of his goods or forfeiting those goods as contraband). The Supreme Court, however, has subsequently discredited the view in *Boyd* that the fifth amendment is a basis for privacy rights. *See* Fisher v. United States, 425 U.S. 391, 401 (1976).

35. *Boyd*, 116 U.S. at 630.

36. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the [government's] offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, . . . which underlies and constitutes [it]." *Id.*

37. 277 U.S. 438 (1928).

38. *See id.* at 456-57.

39. *See* Posner, *supra* note 30, at 177.

40. *See id.* at 177-78.

41. Liberal construction "can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight." *Olmstead*, 277 U.S. at 465.

42. *See* Posner, *supra* note 30, at 181. Posner thought this dissent especially significant in that it articulated the existence of a constitutional right of privacy without citing express support from the Constitution. *See id.* at 181-82.

43. The founding fathers "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting).

Justice Brandeis' expansive view of the constitutional right to privacy has never been fully accepted by the Supreme Court. *See* D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY 53 (1979) [hereinafter cited as O'BRIEN].

In 1967, the Supreme Court overruled the *Olmstead* decision and expanded the concept of privacy to include a component of a confidentiality interest.[44] While contending that its holding "cannot be translated into a general constitutional 'right to privacy,' "[45] the Court, nevertheless, declared that the "Fourth Amendment protects people, not places . . . what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[46]

Just two years earlier, *Griswold v. Connecticut*[47] had marked the arrival of a different constitutional right of privacy. In striking down Connecticut's contraceptive statute, the Court proposed a "penumbra" theory[48] which established constitutional underpinnings to support an individual's privacy right. Noting that the first, third, fourth, and fifth amendments protected privacy, Justice Douglas maintained that the Bill of Rights protected an individual's privacy interests as "penumbras" or "emanations" of express constitutional guarantees.[49] In his concurrence, Justice Goldberg relied on the ninth amendment,[50] arguing that it guaranteed the existence of certain fundamental rights not expressly enumerated in the first eight amendments.[51]

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44. *See* Katz v. United States, 389 U.S. 347, 353 (1967). *Katz* involved the wiretapping of a public telephone booth. *See id.* at 348. The Court did not define the nature of the privacy interest. *See id.* at 350-51. Rather, it focused on whether a telephone booth was within its scope and whether the tapping was unreasonable under the given facts. *See id.* at 351-59; *see also* Posner, *supra* note 30, at 186.

45. *Katz*, 389 U.S. at 350.

46. *Id.* at 351-52 (citations omitted). For further discussion of the roles of the fourth and fifth amendments in the protection of privacy, see O'BRIEN, *supra* note 43, at 35-88; Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

47. 381 U.S. 479 (1965).

48. *See infra* note 49 and accompanying text.

49. *Griswold*, 381 U.S. at 484. "[F]oregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.*

50. The ninth amendment to the Constitution states: "[T]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

51. *See Griswold*, 381 U.S. at 499 (Goldberg, J., concurring). Justice Harlan contended that the due process clause of the fourteenth amendment, guaranteeing that a person will not be deprived of life, liberty, or property without due process of law, protected basic values "implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see* U.S. CONST. amend. XIV, § 1. Also finding the right of privacy in the fourteenth amendment, Justice White invalidated the statute since it did not prove "reasonably necessary for the effectuation of a legitimate and substantial state interest." *Griswold*, 381 U.S. at 504 (White, J., concurring). For a discussion of the different views, see Dixon, *The Griswold Penumbra: Constitutional Charter*

Shortly thereafter, in *Roe v. Wade*,[52] the Supreme Court revised its theory, and declared that the right of privacy was a liberty interest[53] protected by the due process clause of the fourteenth amendment.[54] Using this rationale, the Court invalidated an abortion statute.[55]

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for an Expanded Law of Privacy?, 64 MICH. L. REV. 197 (1965); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

52. 410 U.S. 113 (1973).

53. The Court stated that the guarantee of personal privacy included only those rights deemed "fundamental" or "implicit in the concept of ordered liberty." *Roe*, 410 U.S. at 152-53. Fundamental rights may encompass activities relating to marriage, procreation, contraception, family relationships, childrearing, and education. *See id.* They must be balanced against state interests to determine whether any abridgement by the state is justified. *See id.* at 153-54. Here, the state interests were: (1) to discourage illicit sexual conduct; (2) to protect the pregnant woman from a hazardous medical procedure; and (3) to protect prenatal life. *See id.* at 147-52. Only a compelling state interest will justify the infringement of a fundamental right. *See id.* at 155. In *Roe*, the Court balanced the state interests in protecting maternal health and potential life against the mother's right to privacy. *See id.* at 159-64.

In a recent abortion decision, Chief Justice Burger, who voted with the majority in *Roe*, questioned the soundness of that decision and stated that the Court should re-examine it. *See* Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169, 2192 (1986) (Burger, C.J., dissenting).

54. The due process clause of the fourteenth amendment states in part: "nor shall any State deprive any person of life, *liberty*, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1 (emphasis added). In holding that the right of privacy is a liberty protected against state infringement by the fourteenth amendment, the Court adopted a substantive due process approach. *See Roe*, 410 U.S. at 153; *see also id.* at 167-71 (Stewart, J., concurring). This approach uses the due process clause to invalidate federal and state legislation based on their substance as opposed to their procedures. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting teaching of foreign languages in public school unconstitutionally restricts liberty of parents to have their children learn foreign languages).

Justice Douglas' reluctance to embrace substantive due process in *Griswold* may have stemmed from the Court's repudiation of Lochner v. New York, 198 U.S. 45 (1905), which invalidated economic and social welfare legislation on a substantive due process liberty of contract theory. *Compare Lochner*, 198 U.S. at 58 *with Griswold*, 381 U.S. at 481-82, 484-85.

The reaffirmation of substantive due process has stirred much debate and controversy. *See generally* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 222-27 (1965) (substantive due process issue raises host of controversial questions respecting the relation of law and morals); Katin, Griswold v. Connecticut: *The Justices and Connecticut's "Uncommonly Silly Law"*, 42 NOTRE DAME LAW. 680, 689 (1967) (Justice White's view of due process clause subject to challenge).

55. *See Roe*, 410 U.S. 113 (1973). In Bowers v. Hardwick, 106 S. Ct. 2841 (1986), the Supreme Court held that the right to privacy does not extend to homosexual sodomy. Flatly refuting the view that its previous privacy cases supported the "proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription," *id.* at 2844, the Court found "[n]o connection between family, marriage, or procreation . . . and homosexual

B. Supreme Court Decisions on the Right of Informational Privacy

To date, the Supreme Court has provided no definitive statement about the status of a constitutional right of informational privacy. In *Paul v. Davis*,[56] it first considered the right of confidentiality and limited its application. The majority rejected the contention that the publication of flyers that announced to local merchants that respondent had been arrested for shoplifting violated his constitutional right of privacy.[57] Holding that protection against public disclosure of the arrest was not within the scope of the right of privacy, the Court restricted the right of informational privacy to those areas involving constitutionally protected fundamental rights.[58] In other words, the Court refused to equate a claim against the publication of information in an official police record with a violation of an autonomy interest of privacy.[59] The Court, however, never explicitly differentiated between autonomy and nondisclosure. Its language spoke only of a general right of privacy.[60]

In *Whalen v. Roe*,[61] the Court attempted to remedy this problem by recognizing a right of informational privacy. *Whalen* addressed the question of whether a state's statute that required recording the names of persons using certain prescription drugs violated constitutional privacy rights.[62] Acknowledging that the dual protec-

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activity . . . ." *Id.* In an angry dissent Justice Blackmun claimed that the "essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embrace[d] the right to engage in nonreproductive, sexual conduct that others [might] consider offensive or immoral." *Id.* at 2858 (Blackmun, J., dissenting).

56. 424 U.S. 693 (1976).

57. *See id.* at 712-14. The respondent's name and photograph appeared on the flyer which was captioned "Active Shoplifters" after his arrest on a shoplifting charge. *See id.* at 695. At the time of circulation, the respondent's guilt or innocence had not been resolved; in fact, shortly thereafter, the charges were dismissed. *See id.* at 696. Respondent brought an action under § 1983 of title 42 of the United States Code, 42 U.S.C. § 1983 (1979), alleging violation of his constitutional rights. *See id.* at 696-97. In addition to the privacy claim, respondent brought a fourteenth amendment claim alleging that the police dissemination had deprived him of liberty without due process of law. *See id.* at 697.

58. *See id.* at 713. In subsequent cases, the Court abandoned the fundamental rights requirement. *See infra* notes 61-79 and accompanying text.

59. *See supra* notes 19-20 and accompanying text.

60. *See Paul*, 424 U.S. at 712-14. Commentators have criticized the Court for its failure to distinguish between these separate and independent privacy interests. *See* Note, Roe *and* Paris: *Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161 (1974).

61. 429 U.S. 589 (1977).

62. *See id.* at 591. The Court determined that the state had a legitimate purpose for its law requiring the recording of patient-identification information before it

tions of privacy involve rights of autonomy and confidentiality,[63] the Court elevated the "interest in avoiding disclosure of personal matters"[64] to a constitutionally protected right.[65] In doing so, the Court discussed the development and the parameters of an informational privacy right.[66] It then carefully reviewed the statutory safeguards employed to prevent dissemination of protected information to the public.[67]

The Court, however, did not identify the constitutional provisions supporting its recognition of this right.[68] Nor did it articulate a test to balance an individual's privacy rights against the interests of the state.[69] Instead, the Court's analysis focused on the provisions in the statute designed to prevent public dissemination of the information.[70] Furthermore, in its conclusion, the Court cast doubt on

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addressed the individual's privacy claims. *See id.* at 597-98. Such a law could assist in the "[s]tate's vital interest in controlling the distribution of dangerous drugs." *Id.* at 598.

63. *See supra* notes 18-20 and accompanying text. The contested statute threatened to impair both privacy interests. *See Whalen*, 429 U.S. at 600. Appellees argued that the statute created a "genuine concern" among users of the prescribed drugs that the information would be publicized and hurt their reputations. *See id.* In addition to the disclosure interest, this concern would make patients reluctant to use, and doctors reluctant to prescribe drugs. *See id.*

64. *Id.* at 599.

65. *See infra* notes 118-24 and accompanying text. The Court concluded, however, that the statute, itself, did not establish a constitutional violation. *See Whalen*, 429 U.S. at 600-04.

66. *See id.* at 598-600; *see also infra* notes 121-22.

67. *See id.* at 600-02.

68. As support, the opinion cited an article that delineated the different aspects of a constitutional right to privacy. *See* Kurland, *The Private I*, U. CHI. MAG. 7 (1976) (*cited in Whalen*, 429 U.S. at 599 n.24). For precedential support, the Court also cited Griswold v. Connecticut, 381 U.S. 479 (1965) (several provisions of Bill of Rights create zones of privacy), Stanley v. Georgia, 394 U.S. 557 (1969) (first amendment protects right to read and observe what one chooses in privacy of one's home), *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting) (privacy right encompasses right to be free of governmental intrusion), California Bankers Ass'n v. Schulz, 416 U.S. 21, 78 (Powell, J., concurring) (governmental intrusion upon financial transactions could implicate legitimate expectation of privacy), and *California Bankers*, 416 U.S. at 79 (Douglas, J., dissenting) (same). *See Whalen*, 429 U.S. at 599 n.25.

69. *But see infra* note 78 and accompanying text.

70. The Court discussed three possible means of public disclosure: (1) health department employees may fail to maintain proper security; (2) the stored data may be offered in evidence in a judicial proceeding against a patient or doctor accused of a violation; and (3) a doctor, pharmacist, or patient may reveal this information on a prescription form. Since the third means already existed under prior law, the Court focused on the other two means, deeming them conjectures, unsupported by the record, and unable to mount facial attack on the statute. *See Whalen*, 429 U.S. at 600-02; *see also supra* note 23.

whether informational privacy was a constitutional right.[71] In "[a] final word about issues we have not decided,"[72] the Court seemingly undermined its prior holding by declaring that the government's duty to avoid disclosure of personal information "in some circumstances . . . arguably has its roots in the Constitution."[73]

Nevertheless, later in the same term, the Supreme Court reaffirmed its recognition of a right to nondisclosure of private information in *Nixon v. Administrator of General Services*.[74] In *Nixon*, the former President claimed that his constitutional privacy right was violated by a Congressional Act that authorized the General Services Administrator to take custody of his papers and tapes for subsequent screening by government archivists.[75] Citing *Whalen*, the Court defined the informational aspect of privacy as "the individual interest in avoiding disclosure of personal matters."[76] After recognizing this privacy interest, the Court explicitly employed a balancing test that weighed the statute's possible intrusion into privacy against both the statutory purpose and the public interest.[77] This balancing test was, in fact, similar to the analysis applied in *Whalen*.[78] In both situations, the Court weighed the scope of the intrusion against the interests that the intrusion advanced.[79]

C. Conflict Among the Circuits

In both *Whalen* and *Nixon*, the Court evaluated legislation that infringed on an individual's privacy by authorizing the disclosure

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71. *See Whalen*, 429 U.S. at 605.

72. *Id.*

73. *Id.* The Court claimed that it had decided no constitutional questions concerning the disclosure of private information stored in government computer banks. *See id.* at 605-06. In his concurrence, Justice Brennan de-emphasized this disclaimer by reiterating the Court's earlier recognition of a privacy right. *See id.* at 606-07 (Brennan, J., concurring). He further noted that state dissemination of private information would "clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." *Id.* at 606 (Brennan, J., concurring). Justice Stewart, however, contested this interpretation, stating that there is no "general constitutional 'right to privacy.'" *Id.* at 607-08. (Stewart, J., concurring) (quoting Katz v. United States, 389 U.S. 347, 350 (1967)).

74. 433 U.S. 425, 457 (1977).

75. *See id.* at 429.

76. *Id.* at 457 (quoting *Whalen*, 429 U.S. at 599).

77. *See id.* at 458. As in *Whalen*, the Court deemed the privacy claim legitimate, but concluded that the feared intrusion was minimal and, therefore, did not outweigh the greater public interest of preserving and making available historical documents. *See id.* at 458-59, 467-68.

78. *See Whalen*, 429 U.S. at 600-05.

79. *See supra* notes 70, 77 and accompanying text.

of personal information to the government.[80] The Court determined, under both sets of facts, that the risk of public disclosure was slight and that this risk could not offset a more important state purpose.[81] In contrast, in *Paul v. Davis*, the Court ruled on the constitutionality of the public dissemination of personal information by the government[82] and refused to recognize a right of informational privacy unless the dissemination implicated protected fundamental rights.[83]

When confronted with a case involving either collection and storage of private information or dissemination of the information to the public,[84] lower courts have employed different tests and criteria in their determinations, emphasizing different Supreme Court decisions. The use of these varied approaches has led to entirely inconsistent results.[85] Lower courts disagree about: (1) whether the Supreme Court has recognized a constitutional right to informational privacy; (2) what test, if any, should be used to weigh the competing interests; and (3) what information should be deemed personal.[86]

1. Informational Privacy Not Recognized as a Constitutional Right

In *J.P. v. DeSanti*,[87] the United States Court of Appeals for the Sixth Circuit emphatically rejected the contention that informational privacy interests implicate constitutionally protected guarantees.[88] The case arose when a class of juveniles sought to enjoin the compilation and dissemination of their social histories.[89] Finding their privacy

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80. *See supra* notes 62, 75 and accompanying text.

81. *See supra* notes 70, 77 and accompanying text.

82. *See supra* note 57 and accompanying text.

83. *See supra* note 58 and accompanying text.

84. See *supra* notes 21-23 and accompanying text for a discussion of these types of infringement.

85. *See infra* notes 87-116 and accompanying text.

86. *See id.*

87. 653 F.2d 1080 (6th Cir. 1981).

88. *See id.* at 1090. *But see In re* Zuniga, 714 F.2d 632, 641 (6th Cir.) (court assumes "arguendo" existence of constitutional right of informational privacy), *cert. denied*, 464 U.S. 983 (1983).

89. *See id.* at 1081. The class encompassed juveniles who previously appeared or were scheduled to appear before a juvenile court on complaints of delinquency, unruliness, neglect, dependency, and abuse. *See id.* Social histories contain material from many sources, including the complaining parties, the juveniles, their parents, their school records, and their past court records. *See id.* at 1082. Written consent of juveniles or their parents is unnecessary for release of these social histories. *See id.* Only a juvenile's lawyer has access to these histories. *See id.* After the conclusion of a case, the histories are stored on file at the juvenile court and are available to fifty-five government, social and religious agencies that are part of a social services clearinghouse. *See id.*

interest "indistinguishable" from that in *Paul*,[90] the *Desanti* court concluded that there was no "indication in any of [the Supreme Court's prior] decisions of a constitutional right to nondisclosure of juvenile court records."[91] Specifically limiting the precedential value of *Whalen*[92] and *Nixon*,[93] the court refuted the notion that these decisions overruled *Paul*.[94] The Sixth Circuit criticized the recognition of an informational privacy right by other circuits,[95] and cited the decisions of the Seventh and Ninth Circuits as being in accord with its holding.[96]

In contrast, the Seventh Circuit has neither rejected nor embraced the idea of a constitutional right to informational privacy. In *McElrath v. Califano*,[97] appellant contested federal and state regulations requiring the disclosure of social security numbers of appellant and her family as a prerequisite to welfare assistance.[98] Characterizing the receipt of welfare payments as a nonfundamental right,[99] the court refused to raise the disclosure requirement to constitutional scrutiny.[100] The court thus avoided the issue of informational pri-

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90. *Id.* at 1088. Juvenile court proceedings, however, are functionally very different from adult criminal proceedings. The juvenile court system recognizes a child's incapacity and aims to protect the delinquent child from the harshness of adult proceedings. *See infra* note 163.

91. *Id.* at 1088.

92. The Court focused on the concluding disclaimers in the *Whalen* decision, *see supra* notes 71-73 and accompanying text, its lack of precedential support, *see supra* note 68 and accompanying text, and Justice Stewart's concurrence. *See supra* note 73.

93. The *DeSanti* court narrowly interpreted the scope of the privacy interest recognized in *Nixon* by claiming that the reference to *Whalen* was for the "apparent purpose of establishing that Mr. Nixon had an expectation of privacy in his papers that entitled him to fourth amendment protection." *DeSanti*, 653 F.2d at 1089. Holding that *Whalen* did not overrule *Paul* to create a constitutional right of confidentiality, *see id.* at 1088-89, the *DeSanti* court cited Justice Stewart's concurrence in *Whalen* to prove that the Supreme Court did not establish a "general right to nondisclosure of private information." *Id.*; *see supra* note 73.

94. *See DeSanti*, 653 F.2d at 1089.

95. The court claimed that "none cite[d] a constitutional provision in support of its holding." *Id.* at 1090.

96. *See id.*; *see also infra* notes 97-105 and accompanying text. In its conclusion, however, the *DeSanti* court did acknowledge the importance of a right to privacy and implied that some aspects of informational privacy may warrant constitutional protection. *See DeSanti*, 653 F.2d at 1090. However, the court asserted that in the case at bar, the protection of privacy interests must "be left to the states or the legislative process." *Id.* at 1091.

97. 615 F.2d 434 (7th Cir. 1980).

98. *See id.* at 435-36.

99. *See id.* at 441. The right of privacy "embodie[s] only those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' " *Id.* (citations omitted).

100. *See id.*

vacy.[101]

Similarly, the Ninth Circuit has refused to take a firm position. In *St. Michael's Convalescent Hospital v. California*,[102] the court rejected a privacy claim by health care providers that a statute mandating the public release of information concerning the costs of a medical reimbursement program violated their informational privacy right.[103] Comparing this claim to that in *Paul*,[104] the court concluded that since the disclosure did not " 'restrict freedom of action in a sphere contended to be private' . . . no cognizable constitutional right of privacy is implicated . . . ."[105]

2. Recognition of a Constitutional Right to Informational Privacy

In sharp contrast to the Sixth Circuit, both the Third and the Fifth Circuits have accepted a constitutional right of informational privacy. In *Plante v. Gonzales*,[106] the Fifth Circuit interpreted *Whalen* as recognizing a constitutionally protected right of informational privacy.[107] *Plante* involved a claim by five state senators that financial disclosure provisions in a state statute violated their right of confidentiality.[108] In analyzing the claim, the court rejected both the "strict scrutiny" and "mere rationality" tests for determining the

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101. *See generally* Note, *Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536, 548 (1982). In a more recent case, however, the Seventh Circuit seemingly recognized a constitutional right to informational privacy. *See* Kimberlin v. United States Dep't of Justice, 788 F.2d 434 (7th Cir. 1986). After quoting from the *Whalen* opinion and citing Justice Brennan's concurrence, the court held that a privacy interest in information "depends upon whether [the plaintiff] has a reasonable expectation of privacy in the information." *Id.* at 438.

102. 643 F.2d 1369 (9th Cir. 1981).

103. *See id.* at 1371-72.

104. *See id.* at 1375; *see also supra* notes 57-58 and accompanying text.

105. *Id.* at 1375 (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)). However, in a footnote, the court employed the balancing test implemented in *Whalen* and *Nixon* in case "it could be said that a privacy interest is infringed upon . . . ." *Id.* at 1375 n.3; *see* United States v. Choate, 576 F.2d 165, 182 (9th Cir.) (governmental surveillance of mail does not invade any constitutionally protected zone of privacy), *cert. denied*, 439 U.S. 953 (1978); Crain v. Krehbiel, 443 F. Supp. 202, 208-10 (N.D. Cal. 1977) (disclosure of personal information is recognized as derivative right and violates Constitution only when it infringes on exercise of an independently secured constitutional right). For a recent case, see Thorne v. City of El Segundo, 726 F.2d 459, 468-70 (9th Cir. 1983) (police department violated constitutional right of informational privacy of job applicant by requiring her to reveal information regarding her personal sexual activities in "unbounded, standardless" polygraph examination), *cert. denied*, 469 U.S. 979 (1984).

106. 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

107. *See Plante*, 575 F.2d at 1133.

108. *See id.* at 1121-22.

constitutionality of the statute.[109] Rather, it embraced a balancing test similar to that delineated in *Whalen* and *Nixon*: "the constitutionality of the [contested Act] will be determined by comparing the interests it serves with those it hinders."[110]

In *United States v. Westinghouse Electric Corp.*,[111] the Third Circuit also relied on *Whalen* in recognizing a constitutional right of nondisclosure. In that case, the National Institute for Occupational Safety and Health brought an action to enforce an administrative subpoena directing Westinghouse to produce certain medical records of its employees. Westinghouse contended that the disclosure requirement violated its employees' constitutional privacy rights.[112] In analyzing the claim, the court first held that medical records constituted a privacy interest.[113] It then applied an extensive balancing test to weigh the government's interest in obtaining the information against the implicated privacy interest.[114] In deciding that the government's interest in investigating and verifying a health hazard outweighed the employee's privacy interest in the records,[115] the court considered: (1) the type of record requested; (2) the information it possibly contained; (3) the potential for harm in subsequent nonconsensual disclosure; (4) the potential injury from disclosure to the relationship in which the record was generated; (5) the adequacy of

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109. *See id.* at 1134. Although the strict scrutiny test is used for privacy cases involving the right of autonomy, it is an inappropriate test for cases involving the issue of informational privacy as the "Supreme Court has warned against giving heightened attention to cases involving new 'fundamental interests.' " *Id.* at 1134 (citation omitted). Application of the strict scrutiny test would pose potential problems for many common forms of regulation such as federal income tax, social security, and securities and exchange acts. *See id.* at 1134 n.24.

However, the mere rationality standard cannot adequately preserve an individual's privacy right. *See id.* at 1134. "[S]crutiny is necessary . . . . Otherwise, public disclosure requirements . . . could be extended to anyone, in any situation." *Id.* (footnote omitted); see *infra* notes 140-41 for a more detailed discussion on the strict scrutiny and mere rationality standards of judicial review.

110. *Id.* The court then determined that the state's interests served by disclosure outweighed the senators' interest in avoiding disclosure. *See id.* at 1137; *see also* Fadjo v. Coon, 633 F.2d 1172, 1175-76 (5th Cir. 1982) (state's release of subpoenaed testimony containing confidential and privileged information invaded individual's privacy right and, therefore, must be balanced against any proper state interest); Duplantier v. United States, 606 F.2d 654, 670-71 (5th Cir. 1979) (state interest in requiring disclosure of personal finances of federal judges balanced against privacy right of judges), *cert. denied*, 449 U.S. 1076 (1981).

111. 638 F.2d 570 (3d Cir. 1980).

112. *See Westinghouse*, 638 F.2d at 572-73.

113. The court concluded that medical records are "well within the ambit of materials entitled to privacy protection." *Id.* at 577.

114. *See id.* at 577-78.

115. *See id.* at 580.

safeguards to prevent unauthorized disclosures; (6) the degree of need for access; and (7) the existence of an express statutory policy or any other recognizable public interest for access.[116]

D. The Status of a Constitutional Right to Informational Privacy

The Third and Fifth Circuits' interpretation of *Whalen* and their application of the *Nixon* balancing test are consistent with the most recent holdings and dicta of the Supreme Court on informational privacy. In addition, their interpretation of *Whalen* and *Nixon* as expanding the privacy right to include an informational component is better reasoned than the varying approaches taken by the Sixth, Seventh, and Ninth Circuits.[117]

As Professor Tribe has argued, the *Whalen* Court would not have evaluated the statute's procedural safeguards against public dissemination so extensively[118] if it had intended to limit the informational privacy right to the holding in *Paul*.[119] In addition, the holding in *Whalen* should be construed from the opinion in its entirety, not from its ambiguous concluding remarks.[120] When reviewing the privacy claim, the *Whalen* Court extensively traced the nature of privacy

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116. *See id.* at 578.

117. *See infra* notes 118-24 and accompanying text; *see also* Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984) (public interest in assuring security of prisons and effective rehabilitation must be weighed against prisoner's privacy right in family history), *cert. denied*, 106 S. Ct. 388 (1985); Slayton v. Willingham, 726 F.2d 631, 635 (10th Cir. 1984) (finding that district court improperly applied *Paul* to privacy claim and remanded to evaluate claim in light of *Whalen*); Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1012 (D.C. Cir. 1984) (district court's order to unseal corporation's deposition transcript containing confidential commercial information violates privacy right in absence of overriding reason to disclose); Barry v. City of New York, 712 F.2d 1554, 1558-61 (2d Cir.) (privacy interest implicated in financial disclosure law weighed against governmental purpose of deterring conflicts of interest among city official and employees), *cert. denied*, 464 U.S. 1017 (1983).

118. *See supra* note 67 and accompanying text.

119. *See* TRIBE, *supra* note 21, at 971-72. In Professor Tribe's view, *Paul* is a "case about federalism-based limits on the remedial powers of a federal court acting under § 1983 rather than as a repudiation of deep substantive principles under the fourteenth amendment . . . ." *Id.* at 971-72 (footnotes omitted). Tribe contends that the motivation of the *Paul* Court was to prevent "the unthinkable consequence of federalizing the entire state law of torts whenever government officers are the wrongdoers." *Id.* at 970 (footnote omitted). As support, Tribe noted the Court's validation of state rights in National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled*, Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985), and the abstention doctrine as set forth in Younger v. Harris, 401 U.S. 37 (1971). *See id.* at 971; *accord* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979).

120. *See supra* notes 61-73 and accompanying text.

rights[121] and cited, with approval, an article analyzing the different facets of privacy rights.[122] The Court then carefully weighed the interests of the states against the likelihood of public dissemination.[123] If the Court had not recognized a constitutional confidentiality right, this entire discussion would have been pointless.[124]

Limited to its facts, however, the *Paul* holding, that disclosure of information contained in the public record does not implicate a constitutionally protected privacy interest, retains precedential value.[125] Moreover, not all "personal information" merits constitutional protection. Stating that "in *some* circumstances that duty [to avoid unwarranted disclosure] arguably has its roots in the Constitution,"[126] the *Whalen* Court suggested that this duty is not absolute.[127] Hence, the question is not whether the Constitution safeguards some component of informational privacy. Rather, the inquiry is first, what categories of information are protected,[128] and second, under what circumstances does disclosure of confidential matters implicate a constitutionally protected right.[129]

1. The First Prong: Confidential Information Protected by the Constitution

The Supreme Court provides little guidance in determining which

121. *See Whalen*, 429 U.S. at 598-600. Furthermore, the *Whalen* Court's citations of *Griswold* and *Stanley* are instructive in that both implicitly held that a constitutional right of informational privacy exists. *See* Comment, *A Constitutional Right to Avoid Disclosure of Personal Matters: Perfecting Privacy Analysis in* J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981), 71 GEO. L.J. 219 (1982) [hereinafter cited as *Perfecting Privacy Analysis*].

122. *See Whalen*, 429 U.S. at 599; *see also supra* note 68 and accompanying text.

123. *See supra* notes 67, 70 and accompanying text.

124. *See Perfecting Privacy Analysis*, *supra* note 121, at 233.

125. In Crain v. Krehbiel, 443 F. Supp. 202 (N.D. Cal. 1977), a district court noted that the holding in *Paul* may be limited. *Crain*, 443 F. Supp. at 209 n.3. The court narrowly viewed its precedential effect: "[i]f a legitimate governmental interest is served by maintaining the record publicly . . . any additional notoriety given the information in that record may not inflict any constitutionally cognizable injury on the subject of the record." *Id.* To support this view, the court compared *Paul* with a tort privacy claim in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *See id.* In *Cox*, the Supreme Court stated that the privacy interests in tort law diminish when implicated information appears on the public record. *See id.* (citing *Cox*, 420 U.S. at 494-95).

Indeed, a possible criticism of the *DeSanti* holding is its automatic extension of *Paul* to cases in which personal information is not part of the public record. *See supra* notes 56-60, 87-96 and accompanying text.

126. *Whalen*, 429 U.S. 589, 605 (1977) (emphasis added); *see supra* note 73 and accompanying text.

127. *See supra* notes 71-73 and accompanying text.

128. *See infra* notes 130-35 and accompanying text.

129. *See infra* notes 136-42 and accompanying text.

personal information merits constitutional protection.[130] Neither the *Whalen* decision nor the *Nixon* decision directly addressed this issue.[131] In *Whalen*, the Court avoided the question by implicitly acknowledging that the contested statute involved the disclosure of private medical information.[132] The *Nixon* opinion refers to the concept of a "legitimate expectation of privacy."[133] The Court, however, does not analyze what constitutes constitutionally "privileged" information,[134] and, as a result, lower courts must determine the precise standard themselves.[135]

2. *The Second Prong: The Standard of Review*

Despite a finding that disclosure of a personal matter implicates

130. *See* Kimberlin v. United States Dep't of Justice, 788 F.2d 434 (7th Cir. 1986) (exact nature and scope of informational privacy rights have never been fully defined); Barry v. City of New York, 712 F.2d 1554, 1558 (2d Cir.) (same), *cert. denied*, 464 U.S. 1017 (1983).

131. Although both cases held that the contested statutes disclosed constitutionally protected information, each holding was fact specific. *See infra* notes 132, 134.

132. *See Whalen*, 429 U.S. at 602. In *Whalen* the Court listed several areas which, if publicly disseminated, could threaten privacy interests: "[t]he collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws . . . ." *Id.* at 605. Although noting that the right to collect and use this data for public purposes is usually accompanied by a statutory nondisclosure provision, the Supreme Court flatly refused to address when this right rises to a level warranting constitutional scrutiny. *See id.* at 605-06; *see also infra* notes 230-33 and accompanying text.

133. *Nixon*, 433 U.S. at 458.

134. The Court declared:

> [P]ublic officials . . . are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening . . . . We may assume . . . *for the purposes of this case*, that this pattern of *de facto* Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in [his papers].

Id. at 457-58 (emphasis added) (footnotes and citations omitted).

135. *See, e.g.*, Kimberlin v. United States Dep't of Justice, 788 F.2d 434, 438 (7th Cir. 1986) (existence of privacy interest in inmate's commissary account depends upon existence of reasonable expectation of privacy); Slayton v. Willingham, 726 F.2d 631, 635 (10th Cir. 1984) (remanded to determine whether legitimate expectation of privacy implicated in public disclosure of photographs). Holding that "personal rights found in [the] guarantees of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty,' " *DeSanti*, 653 F.2d at 1088 (quoting Paul v. Davis, 424 U.S. 693 (1976)), *DeSanti* would probably restrict this right to information related to marriage, procreation, contraception, family relationships, childrearing, and child education.

One author has suggested that the definition should encompass matters "personal in character and potentially harmful or embarrassing if disclosed." *Perfecting Privacy Analysis*, *supra* note 121, at 235 (quoting *Whalen*, 429 U.S. at 605).

a constitutionally protected interest,[136] in certain situations the government may still collect and disseminate this information without violating the Constitution.[137] Therefore, it is necessary to apply the proper standard of review to determine if the collection or disclosure is constitutionally permissible.

In upholding various disclosure statutes, the Supreme Court has employed a straight balancing test which weighs the government's interest in gathering the confidential data against the extent to which the disclosure transgresses the constitutionally protected privacy right.[138] As the Fifth Circuit noted, proper application of a balancing test[139] escapes both the severity of a "strict scrutiny" test[140] and the leniency of a mere "rationally related" test.[141] The balancing test allows the

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136. *See supra* notes 130-35 and accompanying text.

137. *See, e.g., Whalen*, 429 U.S. at 600 (while contested statute threatened to impair privacy interests, it did not establish constitutional violation); *Nixon*, 433 U.S. at 465 (same).

138. *See supra* notes 77-79 and accompanying text.

139. *See* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). In *Westinghouse*, the Third Circuit listed the most important considerations for purposes of evaluation. *See Westinghouse*, 638 F.2d at 578; *see also supra* note 116 and accompanying text.

140. The strict scrutiny standard requires that the statute be necessary to promote a compelling governmental interest. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW, § 14.3, at 530-31 (1986). Professor Gunther has described the strict scrutiny test as a "rigid two-tier attitude" that is " 'strict' in theory and fatal in fact." Gunther, *The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther]. Only one case has survived a strict scrutiny analysis. *See* Korematsu v. United States, 323 U.S. 214 (1944) (World War II military order excluding all persons of Japanese ancestry from certain West Coast areas was necessary to serve compelling need to prevent espionage and sabotage); *see also* Fullilove v. Klutznick, 448 U.S. 448 (1980) (Powell, J., concurring) (affirmative action set-aside provision necessary to accomplish governmental objective of eradicating effects of racial discrimination).

There are two other reasons why the balancing test is preferable to strict scrutiny: (1) balancing avoids the potential arbitrariness involved in identification of compelling state interests; and (2) balancing depicts the true process of judicial decision-making and, thereby, may reduce "unprincipled decision-making." *Perfecting Privacy Analysis*, *supra* note 121, at 245.

141. *See* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978). The rational relation standard requires a rational relationship between the statute and a legitimate state objective. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW, § 14.3, at 530 (1986). Gunther depicts this test as one "with minimal scrutiny in theory and virtually none in fact." Gunther, *supra* note 140, at 8; *see* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (law will be upheld as long as classification is not "purely arbitrary"). *But see* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"). As of yet, the Supreme Court has reached no consensus as to the applicable standard of review. *See* City of Cleburne v. Cleburne Living

government to perform its functions effectively while safeguarding the sanctity of vital privacy interests.[142]

III. Assessing Minors' Rights of Confidentiality

While constitutional rights are not automatically extended to children,[143] "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[144] Precisely because of children's legal minority status,[145] both parents[146] and the state as *parens patriae*[147] have

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Center, 105 S. Ct. 3249, 3258-60 (1985) (majority opinion); *id.* at 3263-75 (Marshall, J., dissenting) (criticizing majority's application of rationally-related test and contending that majority invalidated zoning ordinance on heightened scrutiny grounds); Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294 (1982) (Court implies that *Royster Guano* standard may no longer be proper standard of review).

142. For other Supreme Court cases employing a balancing test, see Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 313-17 (1979) (interests of N.L.R.B. and labor union in access to employees' psychological aptitude tests weighed against confidentiality interest of employees); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (court weighed state interest in housing ordinance restricting ability of family members to live together against interest of family members to live as they choose); Poe v. Ullman, 367 U.S. 497, 553-55 (1961) (Harlan, J., dissenting) (statute prohibiting use of contraceptives to curb extra-marital sexuality weighed against intrusion into marital intimacy).

143. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (*Bellotti II*).

144. *In re* Gault, 387 U.S. 1, 13 (1967).

145. A minor is defined as a "person who is under the age of legal competence." BLACK'S LAW DICTIONARY 899 (5th ed. 1979).

In differentiating between the constitutional status of minors and adults, the Supreme Court has emphasized "the peculiar vulnerability of children[,] their inability to make critical decisions in an informed, mature manner[,] and the importance of the parental role in child rearing." *Bellotti*, 443 U.S. at 634.

146. At one time the law viewed children as the property of their parents. *See Legal Rights of Children in the United States of America*, 13 COLUM. HUM. RTS. L. REV. 675, 676 (1981-82) [hereinafter cited as *Legal Rights of Children*]. Although this view has been repudiated, *see id.* at 676-77, parents exercise an enormous amount of control over the activities of their children. *See* L. HOULGATE, THE CHILD & THE STATE 22-23 (1980). In fact, parental authority enjoys constitutional protection. *See* Parham v. J.R., 442 U.S. 584 (1979) (parents have constitutional right to decide whether to commit children to mental institution). The right of parents to raise children free of unreasonable state interference has been categorized as fundamental. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents have right to exclude children from compulsory school attendance); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (Oregon statute requiring parents to send children to public school violates due process clause of fourteenth amendment by unreasonably interfering with liberty right to rear children); Meyer v. Nebraska, 262 U.S. 390 (1923) (Nebraska statute prohibiting teaching of foreign languages to children below eighth grade impermissibly infringed liberty interest guaranteed by fourteenth amendment). *But see* Quilloin v. Walcott, 434 U.S. 246 (1978) (Georgia statute requiring only consent of illegitimate child's mother for adoption does not violate father's due process right in matters of family life); Prince v. Massachusetts, 321 U.S. 158 (1944) (despite wishes of parent to contrary, state can prohibit minors from distributing religious literature on public streets).

147. Literally meaning "the sovereign as parent," the *parens patriae* power denotes

authority to restrict their rights.[148] The exercise of this authority, however, is not absolute; neither parent[149] nor sovereign[150] can abridge

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the state's authority and duty to safeguard the welfare of dependent persons. *See* Melton, *Children's Competence to Consent: A Problem in Law and Social Science*, in CHILDREN'S COMPETENCE TO CONSENT 2 n.7 (1983). Accordingly, the state enacts measures to protect children from abuse, neglect, and abandonment. *See* L. HOULGATE, THE CHILD & THE STATE 17-20 (1980). As *parens patriae*, the state has broad authority over the affairs of children. *See, e.g., Legal Rights of Children*, *supra* note 146, at 677. For instance, children are denied the right to vote, hold office, marry, drive motor vehicles, shoot firearms, gamble, enter into contracts, and consent to sexual acts. *See* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to their "Rights"*, 1976 B.Y.U. L. REV. 605, 613 [hereinafter cited as *Children's Liberation*]; *see also* New York v. Ferber, 458 U.S. 747, 760-61 (1982) (state may ban distribution of materials showing children engaged in sexual conduct even when materials not legally obscene); Ingraham v. Wright, 430 U.S. 651, 671 (1977) (state may inflict corporal punishment on school children without violating eighth amendment prohibition of cruel and unusual punishment); Ginsberg v. New York, 390 U.S. 629, 638-39 (1968) (minors may be denied access to pornographic material otherwise available to adults).

Under *parens patriae*, the state has created separate juvenile criminal proceedings. *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193 (1970). In an attempt to insulate youthful offenders from the harshness of the adult system, the state seeks to promote rehabilitation rather than to adjudicate guilt or punish juveniles. *See id.*; *see also infra* note 163.

148. These ideas date back to the Enlightenment. *See, e.g.*, J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 52-76 (1690). Denying children the legal status of adults was seen as an ultimate good:

> To turn [a child] loose to an unrestrained liberty before he has reason to guide him is not . . . allowing him the privilege of his nature to be free, but to thrust him out amongst brutes and abandon him to a state as wretched and as much beneath that of a man as theirs. This is that which puts the authority into the parents' hands to govern the minority of their children.

Id. § 63.

149. When first addressing the issue of children's rights, the Supreme Court presumed that the interests of the parent and child were the same. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Since then, the Court has been confronted with cases in which the two interests were diametrically opposed. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 626 (1979) (*Bellotti II*) (unmarrried minors seeking abortions without the involvement of parents). These cases typically concern parental consent statutes for pregnant minors seeking abortions. *See* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439 (1983) (statute requiring blanket parental consent for all minors under the age of fifteen seeking abortions held unconstitutional); H. L. v. Matheson, 450 U.S. 398, 399-400 (1981) (statute requiring parental notice "if possible" of minors seeking abortion upheld); Planned Parenthood v. Danforth, 428 U.S. 52, 72 (1976) (statute containing blanket parental consent requirement as condition for minors' abortions during first trimester of pregnancy invalidated).

150. The Supreme Court has also held that the *parens patriae* power of the state is not absolute. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (prohibition of distribution of contraceptives to minors violates privacy right); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (prohibition preventing students from wearing black armbands in school to protest Vietnam War violated first amendment freedom of expression); School Dist. v. Schempp,

certain constitutional rights enjoyed by children.[151]

A. Minors' Constitutional Guarantees of Protection and Liberty

The Supreme Court has held that the Constitution guarantees minors certain affirmative liberty rights[152] as well as specific rights of protection.[153] Categorized as "choice rights,"[154] these liberty rights presuppose a basic capacity for responsible action and permit the child to make his own decisions.[155] Although children necessarily lack many of these rights because of their immaturity,[156] in certain situations the Constitution guarantees minors' choice rights.[157] By contrast, "protection rights"[158] are available to minors despite their incapacity for mature action.[159] Indeed, protection rights require no minimum intellectual or psychological capacity.[160] Because these rights are more widely available to children, most children's rights cases focus on constitutional guarantees safeguarding protection rights rather than choice rights.[161]

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374 U.S. 203 (1963) (state law may not require reading of Bible passages nor recitation of Lord's prayer in public school).

151. Cases involving a child's constitutional rights generally fall in three categories: (1) juvenile court procedures, *see infra* notes 162-75 and accompanying text; (2) school settings, *see infra* note 185; and (3) reproductive autonomy. *See infra* notes 176-85 and accompanying text.

152. *See infra* notes 176-85 and accompanying text.

153. *See infra* notes 162-75 and accompanying text.

154. *See* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 511-17 (1983) [hereinafter cited as *Constitutional Status of Marriage*].

155. *See id.* Hafen, Book Review, 81 MICH. L. REV. 1045, 1048 (1983) (reviewing F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982)) [hereinafter cited as Book Review].

156. The state prevents minors from exercising many choice rights based upon the belief that children often lack the capacity for meaningful choice. *See, e.g., supra* note 148.

157. Such choice rights include a minor girl's decision to terminate her pregnancy, *see infra* notes 177-85 and accompanying text, and a child's first amendment rights. *See infra* note 185.

158. *See Constitutional Status of Marriage, supra* note 154, at 511.

159. *See* Book Review, *supra* note 155, at 1048.

160. *See Constitutional Status of Marriage, supra* note 154, at 511. Protection rights include rights to protection of property, physical protection, and procedural due process. *See id.*

161. *See id.* The distinction between choice rights and protection rights is often blurred because the denial of choice rights is intended to protect the immature and vulnerable minor from exploitation by others. *See id.* at 513; Book Review, *supra* note 155, at 1048-49; *see, e.g.*, Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (state may require court hearing to determine if minor girl is sufficiently mature or emancipated to make her own decision to have abortion).

1. Protection Rights

Cases safeguarding children's constitutional protection rights have arisen primarily within the juvenile court system.[162] Although established to foster a protective and nonadversarial relationship between the state and the child-offender,[163] juvenile court proceedings had often disregarded due process standards.[164] In reviewing these cases,[165] the Supreme Court expressly rejected the idea that a child has a right to custody, but not to liberty.[166] The Supreme Court, in holding due process guarantees as an "indispensable foundation of individual freedom,"[167] has mandated that juvenile court procedures be measured by due process standards whenever the child is in danger of loss of liberty due to confinement.[168]

Accordingly, in juvenile proceedings, children possess constitutional rights to notice, counsel, confrontation, cross-examination, and privilege from self-incrimination.[169] The Constitution also protects juvenile offenders against double jeopardy[170] and the use of coerced confessions in criminal proceedings.[171] In addition, the standard of

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162. *See In re* Gault, 387 U.S. 1, 14-16 (1967). The Constitution also guarantees protection rights for children in school. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (fourteenth amendment due process clause requires notice and hearing before children can be suspended from school); Brown v. Board of Educ., 347 U.S. 483 (1954) (equal protection clause protects school children from racial discrimination).

163. The juvenile court movement began at the turn of the century as a way to insulate children from the harshness and severities of both substantive and procedural criminal law. "The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than 'punitive.' " *In re* Gault, 387 U.S. 1, 15-16 (1967). *See generally* S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (1985) [hereinafter cited as DAVIS].

164. *See, e.g., In re* Gault, 387 U.S. 1 (1967) (juvenile offender denied constitutional rights to notice, counsel, confrontation, cross-examination of witness, and privilege against self-incrimination).

165. *See infra* notes 167-75 and accompanying text.

166. *See Gault*, 387 U.S. at 17. It is the loss of liberty which is significant, not whether the proceeding is criminal or juvenile. *See id.* at 29.

167. *Id.* at 20.

168. *See id.* at 27-28. "[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process' [in juvenile proceedings]. Under our Constitution, the condition of being a [minor] does not justify a kangaroo court." *Id.*; *see infra* notes 169-72 and accompanying text.

169. *See Gault*, 387 U.S. at 31-57.

170. *See* Breed v. Jones, 421 U.S. 519 (1975). Double jeopardy is the constitutional "prohibition against a second prosecution after a first trial for the same offense." BLACK'S LAW DICTIONARY 440 (5th ed. 1979).

171. *See* Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948). In the early criminal cases concerning the admissibility of confessions by juveniles, the Court went beyond the existing adult standard, and indicated that special care should be exercised whenever evaluating the validity of juvenile confes-

proof in juvenile proceedings is "beyond a reasonable doubt."[172] Nevertheless, as long as the juvenile court system recognizes basic constitutional rights for an accused person's protection, it need not conform with all criminal trial requirements.[173] For example, the Supreme Court has held that juveniles do not possess a constitutional right to a jury[174] because it would not give juveniles greater protection than they already possess.[175]

2. *Choice Rights*

The Supreme Court's growing recognition that children are persons entitled to certain affirmative constitutional guarantees has been exemplified by the constitutional protection extended to minor's rights to procure contraceptives[176] and to make decisions on whether to obtain abortions.[177] Holding that "[c]onstitutional rights do not ma-

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sions: "[w]hen . . . a mere child—an easy victim of the law—is before us—*special care* in scrutinizing the record must be used." *Haley*, 332 U.S. at 599 (emphasis added). Since then, the Court has formulated a new test for the admissibility of confessions. *See* Miranda v. Arizona, 384 U.S. 436 (1966). While the Supreme Court has not ruled specifically on whether the *Miranda* test applies to juveniles, virtually all courts have applied the *Miranda* safeguards to minors. *See* Davis, *supra* note 163, § 3.10 -.12.

172. *In re* Winship, 397 U.S. 358 (1970).

173. *See* Kent v. United States, 383 U.S. 541, 562 (1966).

174. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

175. On the contrary, the Court found that imposition of a jury trial would impair the special function of the juvenile court to protect the child from the adult criminal process:

> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of prejudgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

Id. at 550. Specifically, the Court feared that the juvenile process would be subject to unwarranted publicity. *See id.*

176. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). The Supreme Court struck down a New York law prohibiting the distribution of nonprescription contraceptives to children under the age of sixteen years. Describing "decisions whether to accomplish or to prevent conception [as] . . . the most private and sensitive," *id.* at 685, the Court held that the restrictions were valid only if they served a "significant state interest . . . that [was] not present in the case of an adult." *Id.* at 693 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976)).

177. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (state may not impose blanket requirement of third party consent to abortion for unmarried minor during first trimester of pregnancy); *see also* Bellotti v. Baird, 443 U.S. 622, 647-48 (1979) (*Bellotti II*) (although requiring parental consent to abortion may reflect state's important interest in protecting immature minors, state must

ture and come into being magically only when one attains the state-defined age of majority,"[178] the Supreme Court has invalidated statutes requiring an unmarried minor female to acquire parental consent for an abortion.[179] Moreover, the Court has adopted a mature minor rule, holding that if a minor can prove herself mature and able to understand the consequences of her decision, neither the state nor her parents can infringe upon her right to exercise her own judgment.[180]

In distinguishing a minor's fundamental rights in this area of autonomous privacy, however, the Court has implemented a less vigorous variation of the strict scrutiny test.[181] In contrast to the compelling state interest standard applicable to adult women, the Court permits restrictions on minor's privacy rights if they serve a "significant state interest."[182] The Supreme Court premised this test on the fact that the state has "greater latitude to regulate the conduct of children . . . and [the fact that] the law has generally regarded minors as having a lesser capability for making important decisions."[183] Nonetheless, despite this less stringent standard of review,[184] these cases are significant in that they allow a minor's constitutional rights to supersede the rights and interests of both the parent and the state.[185]

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provide mature minors with judicial alternative to consent, allowing proof of maturity or that abortion is in minors' best interests).

178. *Danforth*, 428 U.S. at 74. The Court, however, did not resolve the question of when a state may justifiably restrict a minor's right to obtain an abortion.

179. *See supra* note 177.

180. *See* Bellotti v. Baird, 443 U.S. 622, 647-48 (1979) (*Bellotti II*).

181. See *supra* note 140 for a discussion of the strict scrutiny test.

182. *Danforth*, 428 U.S. at 75; *see* H. L. v. Matheson, 450 U.S. 398, 411 (1981) (statute requiring parental notice of minor seeking abortion served "significant state interest" by providing opportunity for parent to supply essential medical information to physician). The *Carey* Court interpreted "significant state interest" in *Danforth* as more lenient than the strict scrutiny standard. *See Carey*, 431, U.S. at 693 n.15. *But see infra* note 184.

183. *Carey*, 431 U.S. at 693 n.15.

184. Justice Powell, however, asserted that the significant state interest test, "for all practical purposes approaches the 'compelling state interest' standard." *Id.* at 706 (Powell, J., concurring).

185. The Court has also held that children are entitled to first amendment rights in certain situations. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). In *Tinker*, the Supreme Court declared that public school students had a first amendment right to wear armbands to publicize their protest against governmental involvement in Vietnem: "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ." *Id.* at 511. However, as opposed to the abortion decision, *Tinker* can also be viewed as a case protecting parental child-rearing rights. *See Children's Liberation*, *supra* note 147, at 646. In affirming students' right to wear armbands, the Court implicitly vindicated the child-rearing

B. The Scope of a Constitutional Right of Informational Privacy Extended to Minors

The Supreme Court has never attempted to define a constitutional right of informational privacy for minors. Its major confidentiality decisions involving privacy rights of adults, however, do not preclude application of the holdings to children.[186] In addition, the Court has specifically emphasized the importance of juvenile confidentiality as part of the rehabilitative model of the juvenile justice system.[187]

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and speech rights of parents who encouraged their children to make political statements. *See id.*; *see e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compelling students to salute flag violated first amendment right to free speech).

Despite the holding in *Tinker*, first amendment rights of speech are not co-extensive with that of adults. The "state may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (footnote omitted) (constitutionally permissible for New York statute to prohibit sale of pornographic materials to persons under seventeen years of age).

186. *See, e.g., supra* notes 176-80 and accompanying text.

187. *See Gault*, 387 U.S. at 24-25. While it did not evaluate the juvenile's right to confidentiality on a constitutional level, the Court recognized that the state has an interest in protecting juvenile anonymity precisely because of the juvenile's minority status. *See id.* at 25. As opposed to adult criminal defendants, juveniles are afforded anonymity in criminal proceedings so as to preserve rehabilitative efforts. *See id.* In fact, the maintenance of juvenile confidentiality is considered essential to the ultimate rehabilitation of juvenile delinquents. *See* Kfoury, *Confidentiality and the Juvenile Offender*, 24 N.H. B.J. 135 (1983); *see also* Geis, *Publication of the Names of Juvenile Felons*, 23 MONT. L. REV. 141 (1962).

However, this confidentiality interest is not always of primary importance when weighed against a conflicting constitutional right. For example, in Davis v. Alaska, 415 U.S. 308 (1974), a criminal defendant sought to cross-examine a juvenile and alleged that a protective order prohibiting references to the juvenile's "delinquent" record violated his sixth amendment right to confrontation. *See* 415 U.S. 308, 310-15 (1974). Although it acknowledged the juvenile's interest in confidentiality, the Court held that this interest was outweighed by the defendant's right to confront adverse witnesses. *See id.* at 320. This case, however, does not address substantive juvenile issues; rather, it is regarded as an evidentiary decision. *See* Kfoury, *Confidentiality and the Juvenile Offender*, 24 N.H. B.J. 135, 137 (1983). In addition, the Court has held that the first amendment's mandate of freedom of the press overrides a juvenile's confidentiality interest. *See* Smith v. Daily Mail Publishing, 443 U.S. 97, 104-05 (1979) (unconstitutional for state to impose criminal penalty on newspaper for publishing identity of juvenile when it obtained information lawfully); Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 310 (1977) (per curiam) (state may not prohibit publication of information obtained at judicial proceedings when open to the public). *See generally* Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Conditional Access,"* 13 U.C.D. L. REV. 123, 126-31 (1979-80).

Hence, while nondisclosure of a juvenile's name and record may be deemed a constitutionally protected interest, other constitutional rights mandating the dissemination of this information in some circumstances may outweigh the privacy right.

A constitutional right to confidentiality, therefore, should be extended to children. As a substantive protective right,[188] a right of informational privacy is necessary to safeguard the privacy interests of all minors. In fact, it is precisely because of children's immaturity and vulnerability[189] that informational privacy is necessary to safeguard their privacy interests.

IV. Protecting the Identities of AIDS' Youngest Victims

A. AIDS: A Deadly Disease

AIDS is a fatal disease complex characterized by a collapse in the body's resistance against disease.[190] AIDS is caused by the retrovirus, HTLV-III,[191] which damages an individual's immune system.[192]

188. The right to informational privacy is a protection right as opposed to a choice right. *See supra* notes 153, 158-61 and accompanying text.

189. *See, e.g., supra* notes 158-61.

190. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FACTS ABOUT AIDS (Aug. 1985) (available in AIDS packet compiled by the CDC); *see infra* notes 191-95 and accompanying text.

191. Researchers at the Pasteur Institute in Paris first identified this causative agent in 1983, and called it lymphadenopathy-associated virus ("LAV"). *See* Laurence, *supra* note 4, at 84. In April 1984, federal researchers announced that human T-lymphotropic virus type III (HTLV-III) was the cause of AIDS. *See id.* These two viruses are in fact the same. *See id.*; *see also Antibodies to a Retrovirus Etiologically Associated with Acquired Immunodeficiency Syndrome (AIDS) in Populations with Increased Incidences of the Syndrome*, 33 MORBIDITY & MORTALITY WEEKLY REP. 377 (1984), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 62; Altman, *French Sue U.S. Over AIDS Virus Discovery*, N.Y. Times, Dec. 14, 1985, at 1, col. 4. In medical literature, this virus also has been called the AIDS virus, AIDS-associated virus (AAV), AIDS-related virus (ARV), HTLV-III/LAV, and LAV/HTLV-III. *See* MEDICAL ANSWERS, *supra* note 1, at 1. This Note will refer to the virus as HTLV-III.

AIDS is the most severe manifestation of the HTLV-III infection. The immune system is so supressed that its victims become susceptible to malignancies and opportunistic infection. *See* SPECIAL REPORT, *supra* note 1, at 3; *see also infra* notes 192-95 and accompanying text. A less serious form of AIDS is AIDS-related complex (ARC). Caused by infection with HTLV-III, ARC has at least two symptoms of AIDS, carrying a significant but imprecisely determined likelihood of progression to AIDS. *See* MEDICAL ANSWERS, *supra* note 1, at 13; *See* SPECIAL REPORT, *supra* note 1, at 5. Most people exposed to HTLV-III, however, do not develop symptoms. *See* SPECIAL REPORT, *supra* note 1, at 5. It is estimated that over one million Americans have this asymptomatic infection. *See id.*

192. For a detailed and technical discussion on how HTLV-III attacks and destroys the immune system, see Laurence, *supra* note 4, at 84. Recent evidence suggests that this deadly virus can devastate the victim's brain as well as his immune system. *See* Ho, *Isolation of HTLV-III from Cerebrospinal Fluid and Neural Tissues of Patients with Neurologic Syndromes Related to the Acquired Immunodeficiency Syndrome*, 313 NEW ENG. J. MED. 1493 (1985); Schmeck, *Grim New Ravage of AIDS: Brain Damage*, N.Y. Times, Oct. 15, 1985, at C1, col. 6.

As a result, the normal functioning of the immune system becomes so impaired that AIDS victims are vulnerable to rare illnesses, cancers, and other opportunistic infections.[193] The reduced resistance caused by HTLV-III unleashes these infections,[194] and hence, it is not AIDS, but the HTLV-III virus that is transmissible.[195]

From July, 1981 to December, 1985, the number of AIDS-related cases reported by the Federal Center for Disease Control (CDC)[196] rose from twenty-six[197] to over 15,000.[198] Of all the reported cases to date, half of the victims have died[199] and none has been cured.[200] Currently, eighty percent of AIDS victims die within two years after diagnosis.[201] Government and health experts expect the number of AIDS-related deaths to continue to escalate.[202]

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193. *See* Laurence, *supra* note 4, at 84.

194. *See* MEDICAL ANSWERS, *supra* note 1, at 2.

195. *See* District 27 Community School Bd. v. Board of Educ., No. 14940/85, slip op. at 3 (Sup. Ct. Queens County, Feb. 11, 1986) (other portions published in 130 Misc. 2d 398, 502 N.Y.S.2d 325); *Public Health Service Plan for the Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, 100 PUBLIC HEALTH REPORTS 453 (1985) [hereinafter cited as *Public Health Service Plan*].

196. See *supra* note 4 for a discussion on the functions of the CDC.

197. *Kaposi's Sarcoma and Pneumocystis Among Homosexual Men—New York City and California*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 305 (1981), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 2.

198. As of December 1, 1985, AIDS-related cases numbered 15,172. *See Recommendations for Assisting in the Prevention of Perinatal Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus and Acquired Immunodeficiency Syndrome*, 34 MORBIDITY & MORTALITY WEEKLY REP. 721 (1985) [hereinafter cited as *Prevention of Perinatal Transmission*].

199. *See* CENTER FOR DISEASE CONTROL ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS) WEEKLY SURVEILLANCE REPORT (Feb. 17, 1986).

200. There is presently no known cure for AIDS. *See* MEDICAL ANSWERS, *supra* note 1, at 25-26; *Public Health Service Plan*, *supra* note 195; Hunt, *Teaming Up Against AIDS*, N.Y. Times, Mar. 2, 1986, § 6 (Magazine), at 42 ("[M]aking an effective vaccine will be extremely difficult. The effects of the virus are far wider than most people realize . . . ."); *see also* Altman, *Who Will Volunteer For an AIDS Vaccine?*, N.Y. Times, Apr. 15, 1986, at C1, col. 1 (due to the extreme difficulty in producing safe vaccine, "catch-22" situation exists for those who use it). Although a new experimental drug called azidothymidine ("ATZ") has proven effective in improving the health of certain AIDS patients for a limited time, the drug is not a cure for AIDS and might even be harmful to some patients. *See* Eckholm, *AIDS Test Drug Prolongs Lives In Some Cases*, N.Y. Times, Sept. 20, 1986, at 1, col. 2; *see also* Eckholm, *AIDS Drug Is Raising Host of Thorny Issues*, N.Y. Times, Sept. 28, 1986, at 38, col. 1 ("effectiveness of AZT has been shown only briefly among particular kinds of patients").

201. *See* PUBLIC HEALTH SERVICE, AIDS INFORMATION BULLETIN: THE PUBLIC HEALTH SERVICE RESPONSE TO AIDS 1 (Sept. 1985) (available in AIDS packet compiled by CDC) [hereinafter cited as AIDS INFORMATION BULLETIN].

202. Using conservative figures, government researchers estimate that one million Americans have already been infected with HTLV-III and project that within five to ten years, that number will rise to at least two or three million. *See* Boffey,

1. *Means of Transmission*

HTLV-III has been detected predominantly in blood and semen and, to a lesser degree, in saliva and tears.[203] Since the virus is transmitted only through the exchange of bodily fluids,[204] it spreads through sexual intercourse with an infected partner,[205] injection of infected blood or blood products,[206] and pre-natal exposure to an

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AIDS in the Future: Experts Say Deaths Will Climb Sharply, N.Y. Times, Jan. 14, 1986, at C1, col. 4; *see also* MEDICAL ANSWERS, *supra* note 1, at 36 (AIDS cases doubling every twelve months; no decline expected due to absence of preventive vaccine); Pear, *Tenfold Increase in AIDS Death Toll Is Expected by '91*, N.Y. Times, June 13, 1986, at A1, col. 3 (total number of AIDS cases and deaths will increase tenfold in next five years). Furthermore, in the next five years, AIDS cases will reach a cumulative total of 270,000 with 179,000 deaths. *See* Eckholm, *Broad Alert Over AIDS: Social Battle Is Shifting*, N.Y. Times, June 17, 1986, at C1, col. 1.

203. *See* Eckholm, *Fears on AIDS Termed Largely Without Cause*, N.Y. Times, Sept. 13, 1985, at B3, col. 1. Recent studies indicate that the presence of the virus in saliva not only is rare, but also that its concentration is "ten-thousandfold lower" than that in the blood of the same person. Eckholm, *Saliva Discounted as an AIDS Threat*, N.Y. Times, Dec. 19, 1985, at A19, col. 1. *See* Ho, *Infrequency of Isolation of HTLV-III Virus from Saliva in AIDS*, 313 NEW ENG. J. MED., 1606 (1985). In addition, transmission of the virus has never been documented through either saliva or tears. *See Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 691 (1985) [hereinafter cited as *Prevention of Transmission in the Workplace*]. Nor has it been isolated in perspiration, urine, feces, or vomit. *See* MEDICAL ANSWERS, *supra* note 1, at 5; *see also* District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d. 398, 405, 502 N.Y.S.2d 325, 330 (Sup. Ct. Queens County 1986).

204. HTLV-III may be transmitted by any activity "that involves direct mucous-membrane or bloodstream contact with an infected partner's blood or sperm." MEDICAL ANSWERS, *supra* note 1, at 5; *see infra* notes 205-07 and accompanying text.

205. Almost 75% of all adult AIDS cases are related to sexual transmission. *See* SPECIAL REPORT, *supra* note 1, at 7. Most of these cases arise from homosexual contact. Seventy-three percent of all AIDS victims are homosexual or bisexual men. *See* AIDS INFORMATION BULLETIN, *supra* note 201, at 1. Although it has been well documented that the virus can be transmitted heterosexually, it is unclear how effectively the virus can be transmitted from women to men. *See* Boffey, *AIDS in the Future: Experts Say Deaths Will Climb Sharply*, N.Y. Times, Jan. 14, 1986, at C1, col. 4; *see also Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REP. 561 (1985), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 112. *But see* Altman, *Study Says AIDS in Haiti Spreads Mainly by Heterosexual Activity*, N.Y. Times, June 29, 1986, at A1, col. 1 (heterosexual contact is predominant means of spread of AIDS in Haiti); Altman, *AIDS Study May Show How Women Infect Men*, N.Y. Times, Mar. 7, 1986, at A16, col. 1 (recent evidence suggests that virus present in female genital secretions, supporting thesis that women can transmit virus to men through sexual intercourse).

206. The major means of transmission is through sharing needles among intravenous drug users so that infected blood is injected into the body. *See* SPECIAL

infected mother.[207] As a result, AIDS most frequently strikes two widely-recognized, high-risk categories: (1) homosexual and bisexual men;[208] and (2) intravenous drug users who share needles and syringes.[209] Health experts have consistently asserted that AIDS is not a highly contagious disease,[210] emphasizing that no evidence supports the proposition that HTLV-III can be transmitted by water, air, food, or any other casual contact.[211]

REPORT, *supra* note 1, at 7. Intravenous drug use currently accounts for 17% of all reported AIDS cases. *See* Brody, *Separating the Myths and Fears from the Facts on How AIDS Is and Isn't Transmitted*, N.Y. Times, Feb. 12, 1986, at C6, col. 3. Approximately 0.6% have contracted AIDS through transfusion of blood or blood products, *see id.*, most being hemophiliacs who are dependent on blood clotting Factor VIII. *See id.* This means of contraction now has been "virtually eliminated" as a result of the routine use of a diagnostic test to screen all donated blood. *See* SPECIAL REPORT, *supra* note 1, at 7-8; *see also Changing Patterns of Acquired Immunodeficiency Syndrome in Hemophilia Patients—United States*, 34 MORBIDITY & MORTALITY WEEKLY REP. 241 (1985), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 88 (number of hemophilia-associated AIDS cases stabilizing and/or declining). *But see* Eckholm, *700 Might Have Got AIDS Virus In Transfusions, Blood Bank Says*, N.Y. Times, July 17, 1986, at A1, col. 2 (seven hundred people who received transfusions in New York area may be contaminated with AIDS); Boffey, *Failures Reported in AIDS Blood Tests*, N.Y. Times, July 8, 1986, at C3, col. 5 (screening test in certain cases fails to detect contaminated blood).

207. *See infra* notes 215-16 and accompanying text.

208. *See supra* note 205.

209. *See supra* note 206. The number of intraveneous drug users afflicted with AIDS has risen steadily over the years. *See* Nix, *More and More AIDS Cases Found Among Drug Abusers*, N.Y. Times, Oct. 20, 1985, at 51, col. 1. For example, in New York State, the proportion of AIDS cases contracted through the sharing of needles rose from 18% in 1981 to 33% by 1985. *See id.* Health authorities consider these drug addicts as the major source of transmission of AIDS into the heterosexual population. *See id.*; *Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REPORT 561, *reprinted in* REPORTS ON AIDS, *supra* note 1, at 112. Among children inflicted with AIDS, fifty-four percent contracted the disease from a mother who either was a drug user or had a heterosexual partner who used drugs. *See* Altman, *New Fear on Drug Use and AIDS*, N.Y. Times, Apr. 6, 1986, at 1, col. 2; *id.* at 30, col. 2.

210. *See supra* note 204 and accompanying text; *see also Prevention of Transmission in the Workplace*, *supra* note 203, at 691-94; Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus, 34 MORBIDITY & MORTALITY WEEKLY REP. 517 [hereinafter cited as *Education and Foster Care of Children*], *reprinted in* REPORTS ON AIDS, *supra* note 1, at 106; Eckholm, *Study of AIDS Victims' Families Doubts Disease Is Transmitted Casually*, N.Y. Times, Feb. 6, 1986, at B7, col. 1. *But see New York Study on AIDS Criticized*, N.Y. Times, July 24, 1986, at A13, col. 3 (study concluding that AIDS cannot be transmitted casually criticized as "premature"). Although some researchers have alleged that African swine fever may be a causal link to AIDS transmission, *see* Nordheimer, *Florida Pig Farm Poses AIDS Riddle*, N.Y. Times, May 26, 1986, at 7, col. 1, the CDC has refuted this contention. *See* Schneider, *No Swine Fever Link to AIDS Seen*, N.Y. Times, Sept. 23, 1986, at C12, col. 5.

211. Empirical studies indicate that AIDS cannot be transmitted even through

2. *AIDS' Most Tragic Victims: Children*

In December of 1982, the CDC first reported cases of infants infected with AIDS.[212] Cases of pediatric AIDS[213] currently number over 200[214] and represent one percent of all reported AIDS cases. Most

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close interpersonal contact. District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 405-08, 502 N.Y.S.2d 325, 330-32 (Sup. Ct. Queens County 1986). For example, in a study of 500 families who lived with persons infected with HTLV-III, not one family member contracted the disease through non-sexual contact. *See id.* at 405-06, 502 N.Y.S.2d at 331. Despite shared beds, food, baby bottles, toothbrushes, and eating utensils, the virus was transmitted only to those family members who were sex partners of infected patients or who had received blood transfusions. *See id.* A more recent and detailed study conducted by Dr. Gerald H. Friedland of the Montefiore Medical Center in the Bronx, New York supported these conclusions. After questioning 101 household members including children, researchers determined that transmission of AIDS through household contact is "virtually non-existent." *See* Friedland, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients With AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 NEW ENG. J. MED. 344 (1986). Use of the same bathtub, toilet, bed, drinking glass, towel, and razor did not provide a means of transmission of HTLV-III. *See id.* at 346-47. Even hugging and kissing on the lips has failed to spread the virus. *See id.*

A study of 1,758 health care workers attending AIDS patients provides further evidence that AIDS cannot be contracted through casual contact. *See District 27*, 130 Misc. 2d at 406-07, 502 N.Y.S.2d at 331. Despite the fact that over 400 workers actually stuck themselves with needles containing infected blood, only twenty-six were found anti-body positive. *See id.* at 406, 502 N.Y.S.2d at 331. Twenty-three of those twenty-six fell within a recognized high risk group. *See id.* For one of those workers, epidemiologic information was not available. *See id.* With regard to the remaining two, no pre-exposure blood sample was taken to verify that infection came from their needle stick injury as opposed to a prior exposure. *See id.*; *see also Update: Prospective Evaluation of Health Care Workers Exposed Via the Parental or Mucous-Membrane Route to Blood or Body Fluids from Patients with Acquired Immunodeficiency Syndrome—United States*, 34 MORBIDITY & MORTALITY WEEKLY REPORT 101 (1985), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 82. *But see* New York Study on AIDS Criticized, N.Y. Times, July 24, 1986, at A13, col. 3 (study concluding that AIDS cannot be transmitted casually criticized as "premature"); Nordheimer, *Florida Pig Farm Poses AIDS Riddle*, N.Y. Times, May 26, 1986, at 7, col. 1 (African swine fever causal link with AIDS).

212. *See Unexplained Immunodeficiency and Opportunistic Infections in Infants—New York, New Jersey, California*, 31 MORBIDITY & MORTALITY WEEKLY REPORT 665 (1982), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 28; *Possible Transfusion—Associated Acquired Immune Deficiency Syndrome (AIDS)—California*, 31 MORBIDITY & MORTALITY WEEKLY REP. 652 (1982), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 26.

213. The CDC defines pediatric AIDS "as a child who has had: (1) [a] reliably diagnosed disease at least moderately indicative of underlying cellular immunodeficiency, and (2) [n]o known cause of underlying cellular immunodeficiency or any other reduced resistance reported to be associated with that disease." *Education and Foster Care of Children*, *supra* note 210, at 106.

214. As of Febuary 17, 1986, the CDC reported 251 pediatric cases of AIDS. *See* CENTER FOR DISEASE CONTROL ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS) WEEKLY SURVEILLANCE REPORT 1 (Feb. 17, 1986).

of these children under the age of thirteen caught the virus in utero from their infected mothers during pregnancy[215] or during labor and delivery.[216] Another eighteen percent have been infected by transfusions of blood or blood products.[217]

The plight of these children first came into the public eye in 1984, when a school district decided to segregate three young AIDS victims from their classmates.[218] Since then, the issue of whether to integrate AIDS-afflicted children into the classroom with healthy children has caught national attention, with at least eight states and the District of Columbia embroiled in the conflict.[219] In some cases, decisions to admit or exclude the student have not settled the controversy, but rather have fueled heated debates and public outrage.[220]

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215. Of the reported cases, 76% have as their only known risk factor a mother in a group with increased prevalence of HTLV-III infection. *See Prevention of Perinatal Transmission*, *supra* note 198, at 722. Pregnant women with AIDS run a great risk of transmitting the virus to their unborn child. *See id.* Some experts estimate a rate of transmission to be as high as 65%. *See id.*; *AIDS Risk to Unborn Is Seen*, N.Y. Times, Dec. 7, 1985, at 12, col. 1. Most children born with HTLV-III develop symptoms at five to six months of age and are diagnosed with a life-threatening infection at nine months. *See* SPECIAL REPORT, *supra* note 1, at 18. Their life expectancy rarely exceeds two or three years. *See id.*

216. *See Prevention of Perinatal Transmission*, *supra* note 198, at 722. In addition, one infant may have contracted the virus through ingestion of contaminated breast milk. *See id.*

217. *See id.* The risk factor is missing or incomplete for the remaining six percent. *See id.*

218. *See* Clendinen, *Schools in New York Will Admit An AIDS Pupil but Not 3 Others: "Epidemic of Fear" in U.S.*, N.Y. Times, Sept. 8, 1985, at 1, col. 2. Since the press has published their first names and described them as female triplets entering first grade, the issue of their right to confidentiality is moot. *See id.*

219. Although involving fewer than twenty children, the issue of whether children should attend regular school classes has reached the classrooms in New York, New Jersey, Connecticut, California, Indiana, Massachusetts, Pennsylvania, Wisconsin, and the District of Columbia. *See id.*; *Philadelphia Schools Act*, N.Y. Times, Nov. 22, 1985, at B13, col. 1; *Racine Bars AIDS Pupils*, N.Y. Times, Nov. 22, 1985, at B13, col. 1. The reason for the paucity is that most of these young victims have died or are too ill to attend classes. *See supra* note 215.

220. In Kokomo, Indiana, the decision to exclude a thirteen-year-old hemophiliac afflicted with AIDS from school resulted in a lawsuit to reinstate the boy. *See "Great" Present for AIDS Boy*, N.Y. Times, Nov. 27, 1985, at B7, col. 3; *13-Year-Old AIDS Victim Starts Attending Classes by Telephone*, N.Y. Times, Aug. 27, 1985, at A19, col. 1. After a semester of litigation, a county chief medical officer ruled that the boy posed no health threat to his classmates and should be readmitted to school. *See Indiana School Told to Readmit 14-Year-Old Student With AIDS*, N.Y. Times, Feb. 14, 1986, at A12, col. 2. The child remained in school, however, for only one day. *See* Barron, *AIDS Sufferer's Return To Classes Is Cut Short*, N.Y. Times, Feb. 22, 1986, at 6, col. 1. While students boycotted classes and picketed the school, a group of parents brought the case before the county circuit court and claimed that the boy's attendance at school violated an Indiana law dealing with communicable diseases. *See id.* The circuit court then

Many parents fear that epidemiological studies have not sufficiently documented all means of transmission.[221] In particular, parental concerns focus on the possibilities of transmission through the contact of AIDS-infected blood into an open cut of a healthy child,[222] or

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enjoined the boy from attending classes until a determination of this issue had been made. *See id.* A month and a half later, the circuit court dissolved the injunction. *See Indiana Judge Allows AIDS Victim Back in School*, N.Y. Times, Apr. 11, 1986, at A14, col. 1. The issue of confidentiality is moot due to the broad exposure the media gave to his identity. *See id.*

In addition, a decision to admit an AIDS sufferer in New Jersey sparked protests and class boycotts by irate parents. *See School Boycott Grows Over AIDS Fears*, N.Y. Times, Oct. 26, 1985, at 30, col. 3. Approximately 160 out of 251 enrolled students boycotted classes in Washington Borough, New Jersey. *See id.* In New York, early boycotts kept more than 11,000 elementary and junior high school students out of two Queens school districts. *See* Rohter, *Start of Classes in AIDS Protest*, N.Y. Times, Sept. 10, 1985, at B1, col. 2. A five-week trial contesting the admittance followed. *See* District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. Queens County 1986). The policy of both New Jersey and New York is to maintain the confidentiality of the AIDS child's identity. *See infra* note 244 and accompanying text.

To date, only school systems in New York City, Swansea, Massachusetts and Philadelphia have publicly decided to admit AIDS victims to class. *See* Clendinen, *Schools in New York Will Admit An AIDS Pupil, but Not 3 Others: "Epidemic of Fear" in U.S.*, N.Y. Times, Sept. 8, 1985, at 1, col. 2; *id.* at 22, col. 1; *see also Philadelphia Schools Act*, N.Y. Times, Nov. 22, 1985, at B13, col. 1. Federal and state governments, however, have issued guidelines recommending the admittance of certain AIDS children to school. *See Education and Foster Care of Children*, *supra* note 210, at 107-8; VIRGINIA DEPARTMENT OF HEALTH, RECOMMENDATIONS FOR SCHOOL ATTENDANCE (Nov. 1985); RECOMMENDED GUIDELINES FOR PROVIDING EDUCATION TO STUDENTS WITH AIDS/ARC OR HTLV-III INFECTION [in Texas] (Oct. 31, 1985) [hereinafter cited as TEXAS GUIDELINES]; DEPARTMENT OF EDUCATION AND DEPARTMENT OF HEALTH SERVICES, ADMINISTRATIVE GUIDELINES FOR PROVIDING EDUCATION TO STUDENTS WITH AIDS/ARC (Mar. 1985) [hereinafter cited as CONNECTICUT GUIDELINES]; NEW JERSEY STATE DEPARTMENT OF EDUCATION AND DEPARTMENT OF HEALTH, FACTS ABOUT AIDS AND THE PUBLIC SCHOOLS [hereinafter cited as NEW JERSEY FACTS ABOUT AIDS]; *seel also* STATE OF NEW YORK DEPARTMENT OF HEALTH, MEMORANDUM, SERIES NO. 85-92, GUIDELINES FOR THE EDUCATION AND DAY-CARE OF CHILDREN INFECTED WITH HUMAN T-LYMPHOATROPIC VIRUS TYPE III/LYMPHODENOPATHY-ASSOCIATED VIRUS (HTLV III/LAV) (Sept. 4, 1985) [hereinafter cited as NEW YORK GUIDELINES]; MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, AIDS/ACQUIRED IMMUNE DEFICIENCY SYNDROME SCHOOL ATTENDANCE POLICY (Sept. 1985) [hereinafter cited as MASSACHUSETTS ATTENDANCE POLICY].

221. *See* Barron, *AIDS Sufferer's Return To Classes Is Cut Short*, N.Y. Times, Feb. 22, 1986, at 6, col. 1; McFadden, *Schools in New York Will Admit An AIDS Pupil but Not 3 Others: Case Believed in Remission*, N.Y. Times, Sept. 8, 1985, at 1, col. 1; *id.* at 22, col. 6; *see, e.g.*, Fried, *2 Local Boards Call for a Delay on AIDS Pupils*, N.Y. Times, Sept. 5, 1985, at B5, col. 1. *See generally* District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. Queens County 1986).

222. *See* Purnick, *Panel to Decide AIDS School Cases*, N.Y. Times, Aug. 31, 1985, at 26, col. 1. At the Queens trial, the City of New York presented much testimony rebutting the theory of HTLV-III transmission through a bleeding injury.

through a bite inflicted by the AIDS victim on a classmate or teacher.[223] Many parents and school officials, therefore, advocate the exclusion of these AIDS children from normal classroom instruction.[224] Failing such an exclusion, parents request that the identities of these AIDS victims be disclosed to key school officials.[225]

B. Defining Parameters of a Constitutional Right of Confidentiality for Schoolchildren Afflicted with AIDS

1. Information in Medical Records as a Constitutionally Protected Privacy Interest

Medical records inherently contain highly personal information about an individual. Disclosure of their contents could cause embarrassment and humiliation, loss of employment, and difficulties in maximizing future financial, educational, and social opportunities.[226] The potentially adverse effects of disclosure create a privacy interest in medical information which has long been recognized and endorsed by the medical profession in its own code of ethics.[227]

See Brief of Respondents, *supra* note 10, at 12-15; SPECIAL REPORT, *supra* note 1 at 9-10; *see also* CONNECTICUT GUIDELINES, *supra* note 220, at 5-9; STATE OF NEW YORK DEPARTMENT OF HEALTH, ACQUIRED IMMUNE DEFICIENCY SYNDROME: 100 QUESTIONS & ANSWERS 10-12 (Oct. 24, 1985) [hereinafter cited as 100 QUESTIONS].

223. *See* Purnick, *Panel to Decide AIDS School Cases*, N.Y. Times, Aug. 31, 1985, at 26, col. 1; SPECIAL REPORT, *supra* note 1, at 9-10; *see also* Brief of Respondents, *supra* note 10, at 15-17; 100 QUESTIONS, *supra* note 222, at 12. In fact, this fear has been partially realized. In California, an AIDS-infected four-year-old bit a classmate. *See Panel Suggests Test for Boy With AIDS Who Bit Another*, N.Y. Times, Sept. 14, 1986, at 37, col. 6. Fortunately, the boy did not break the skin of his classmate. *See id.*

224. *See supra* note 220; *see also Special School Planned to Avoid AIDS Victim*, N.Y. Times, Apr. 20, 1986, at 24, col. 6 (alternative school established to avoid presence of AIDS student in public school).

225. *See* Perlez, *6 AIDS Children to Attend Schools, City Officials Say*, N.Y. Times, Aug. 26, 1986, at B1, col. 5; *id.* at B3, col. 1; Rohter, *Hearing Begins on AIDS Child in Public School*, N.Y. Times, Sept. 13, 1985, at B3, col. 6; *see also* Brief of Petitioners, *supra* note 9, at 48-60.

226. *See* Note, *Privacy Rights in Medical Records*, 13 FORDHAM URB. L.J. 165 (1985); *cf.* Hammond v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (patients often disclose "embarrassing, disgraceful, or incriminating" information to their physicians).

227. The Hippocratic Oath reads "[W]hatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." The Hippocratic Oath, *reprinted in* C. MCFADDEN, MEDICAL ETHICS 431-32 (1961).

The Florence Nightingale Pledge for Nurses reads: "I will do all in my power to elevate the standard of my profession, and will hold in confidence all personal

In recent years, legislatures[228] and the courts[229] have addressed the pressing need to protect personal information in medical records. In fact, even without conclusive direction from the Supreme Court,[230] dicta from the *Whalen* opinion acknowledge that disclosure of medical information can abridge constitutional privacy rights. For example, the *Whalen* Court recognized that "a host of . . . unpleasant invasions of privacy . . . are associated with many facets of health care."[231] Furthermore, in its conclusion, the *Whalen* Court characterized "the supervision of public health"[232] as an area which, if publicly disseminated, could threaten privacy interests.[233] Hence, *Whalen* supports the proposition that disclosure of the identity of an AIDS victim jeopardizes a privacy interest protected by the Constitution.

2. *Balancing the State Interest in Disclosure with the Child's Right of Confidentiality*

Although the Constitution safeguards the interest of AIDS victims in controlling disclosure of their medical condition,[234] this consti-

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matters committed to my keeping, and all family affairs coming to my knowledge in the practice of my calling." Pledge of Florence Nightingale, *reprinted in* C. MCFADDEN, MEDICAL ETHICS 432 (1961).

228. Stating that the right to privacy is "personal and fundamental," Congress enacted the Privacy Act in 1974. *See* Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (codified as amended at 5 U.S.C. § 552a (1982)). The Privacy Act forbids government agencies and employers from disclosing an individual's records except in certain situations. *See* 5 U.S.C. § 552a(b) (1982). The Privacy Act specifically includes an individual's medical history as part of his records. *See* 5 U.S.C. § 552a(a)(4) (1982).

In New York, medical reports to the State and City Departments of Health are confidential pursuant to the Public Health Law, and disclosure is limited to specified uses: "[s]uch [medical] information when received by the commissioner [of Health], or his authorized representatives, shall be kept confidential and shall be used solely for the purposes of medical or scientific research or the improvement of the quality of medical care through the conduction of medical audits." N.Y. PUB. HEALTH LAW § 206(1)(j) (McKinney 1971).

229. *See* Whalen v. Roe, 429 U.S. 589 (1977) (evaluating constitutionality of statute mandating recordation of persons using certain prescriptive drugs); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (1980) (determining constitutionality of subpoena directing employer to produce medical records of employees).

230. *See supra* notes 56-86 and accompanying text.

231. *Whalen*, 429 U.S. at 602. In fact, in a footnote, the Court mentioned various medical disclosure laws that constitute possible invasions of privacy. *See id.* at 602 n.29.

232. *Id.* at 605.

233. *See id.* The Third Circuit has stated that "[t]here can be no question that [a person's] medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (footnote omitted).

234. *See supra* notes 232-33 and accompanying text.

tutional protection is not absolute[235] and must be scrutinized against any competing state interest in disclosure.[236] In its duty to safeguard the health and welfare of the community, the state may require disclosure of certain medical conditions to the state.[237] Hence, statutory reporting requirements of AIDS-related cases do not infringe a constitutionally protected privacy interest under all circumstances.[238] One important purpose of such a law is to facilitate and gather scientific research on the causes of AIDS.[239] Thus, the issue presented here does not concern the permissibility of governmental collection of AIDS-related data, but rather, the constitutionality of governmental dissemination of this information.[240]

C. Divergent Statutory Policies Limiting the Scope of Disclosure

In its advisory guidelines[241] on the education of children infected with AIDS, the CDC emphasized the importance of maintaining confidentiality:

> Persons involved in the care and education of HTLV-III/LAV-infected children should respect the child's right to privacy, including maintaining confidential records. The number of personnel who are aware of the child's condition should be *kept at a minimum* needed to assure proper care of the child and to detect situations where the potential for transmission may increase (e.g., bleeding injury).[242]

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235. In *Whalen*, the Supreme Court explicitly recognized that many disclosures of private medical information to doctors, hospital personnel, insurance companies, and public health agencies are an "essential part of modern medical practice." 429 U.S. at 602.

236. See *supra* notes 136-42 and accompanying text for a discussion of the balancing test. See *infra* notes 237, 239 and accompanying text for a discussion of the state interests.

237. *See supra* note 235.

238. See *supra* note 23 for the Supreme Court's discussion of areas in which compulsory reporting is constitutionally permissible.

239. *See, e.g.*, N.Y. PUB. HEALTH LAW § 206(1)(j) (McKinney 1971) ("[t]he Commissioner shall . . . cause to be made such scientific studies and research which have for their purpose the reduction of morbidity and mortality. . . .").

240. *See supra* note 235 and accompanying text.

241. *See Education and Foster Care of Children*, *supra* note 210, at 107-08. The guidelines of the CDC are only recommendations furnished to assist state and local health departments in promulgating their own laws and policies. *See* District 27 Community School Bd. v. Board of Educ., No. 14940/85, slip op. at 17 (Sup. Ct. Queens County 1986) (other portions published at 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986)); *see also supra* note 4.

242. *Education and Foster Care of Children*, *supra* note 210, at 108 (emphasis added). The CDC also warned parents against the "potential for social isolation should [their] child's condition become known to others in the care or educational setting." *Id.* at 107.

The precise meaning of this "minimum" disclosure recommendation, however, is unclear and subject to varying interpretations.[243] For example, while some states maintain strict confidentiality of the identities of these children,[244] others permit disclosure to a teacher, an administrator, or a nurse.[245]

Nonetheless, despite bona fide efforts to respect and maintain the child's right to confidentiality, even limited disclosure to select school personnel can abridge a constitutionally protected privacy interest.[246] Unless the state can show a prevailing public interest, these disclosures impermissibly invade the child's constitutional right of privacy.[247]

D. The Parameters of the Right of Confidentiality for a Child with AIDS

To ensure a proper balancing between an individual's privacy and the state's interests, all criteria delineated by the Third Circuit[248] should be considered. The first three factors assess the type of record disclosed, its content, and its potential harm in subsequent non-consensual disclosure. As previously indicated, revealing the medical condition of these children is likely to result in ostracism and social isolation.[249] Such stigmatization would have psychological repercus-

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243. *See* Brief of Respondents, *supra* note 10, at 67. The recommendations suggest neither the particular person nor numbers of persons within the school system who should be informed of the identity of the AIDS child. *See infra* notes 244-45 and accompanying text.

244. Such states include New York, New Jersey, and California. *See, e.g.*, NEW YORK GUIDELINES, *supra* note 220; NEW JERSEY FACTS ABOUT AIDS, *supra* note 220; Telephone interview with William Burson, Education Department of California (Mar. 11, 1986) (to date, California has not published state guidelines for the care of school-age AIDS victims).

245. *See, e.g.*, MASSACHUSETTS ATTENDANCE POLICY, *supra* note 220, at 2; TEXAS GUIDELINES, *supra* note 220, at 2; CONNECTICUT GUIDELINES, *supra* note 220, at 1.

246. The question, therefore, becomes whether this infringement is constitutionally permissible. *See supra* notes 234-40 and accompanying text.

247. *See supra* notes 234-40 and accompanying text.

248. *See supra* note 116 and accompanying text.

249. *See supra* note 226 and accompanying text. The return of a 14-year-old hemophiliac to school marked a day of protests and boycotts. *See* Barron, *AIDS Sufferer's Return To Classes Is Cut Short*, N.Y. Times, Feb. 22, 1986, at 6, col. 1. While some students picketed in front of the school protesting the boy's admittance, 43% of the student body failed to attend classes that day. *See id.* Although few protests occurred the following school year, students expressed apprehension about the boy's presence, warning "[a]s long as he keeps his distance, he's o.k.," and "[j]ust as long as I don't sit by him." *AIDS Victim Starts School After 2 Years*, N.Y. Times, Aug. 26, 1986, at A15, col. 3. In New York City, one AIDS-infected child was physically and emotionally capable of attending school, but as a result of a breach of confidentiality, health and school authorities recommended

sions and discourage the child from attending school.[250]

The fourth criterion considers the potential harm to the confidential relationship which generated the information.[251] A breach of strict confidentiality could discourage not only physicians from reporting the disease, but also potential victims from seeking treatment.[252] Inadequate safeguards to prevent unauthorized disclosure compound this problem. For example, by releasing this information to school personnel, the state essentially loses the abililty to control its dissemination to third persons. In addition, if a large number of school personnel have access to this private information, the risk of public disclosure throughout the school system substantially increases.[253]

The last two criteria employed by the Third Circuit evaluate the need for disclosure and how it would advance public policy.[254] The

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alternative education. *See* District 27 Community School Bd. v. Board of Educ., No. 14940/85, slip op. at 21 (Sup. Ct. Queens County Feb. 11, 1986) (other portions published at 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986)). At the Queens trial, counsel for petitioners offered to stipulate that the AIDS child would face ostracism if confidentiality was breached. *See* Brief of Respondents, *supra* note 10, at 64; *see also infra* note 269 and accompanying text.

250. One educational expert has testified that "the social pressure from other students, teachers, adults, parents would be so great that there is a high degree of liklihood [sic] that the child wouldn't be able to attend school." Brief of Respondent-Intervenor, *supra* note 10, at 58-59; *see also supra* note 249. *See generally* Brief of Respondent-Intervenor, *supra* note 10, at 54-60; Brief of Respondents, *supra* note 10, at 61-68.

251. *See supra* note 116 and accompanying text.

252. *Cf.* Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (confidentiality between doctor and patient is necessary to promote full disclosure by patient and to maintain efficient health system); *see also* Brief of Respondents, *supra* note 10, at 65; King, *Doctors Cite Stigma of AIDS In Declining to Report Cases*, N.Y. Times, May 27, 1986, at A1, col. 1 (due to stigma of AIDS, doctors ascribe cause of death of AIDS victims to specific disease rather than to AIDS).

253. The guidelines permitting disclosure to school personnel suggest no mechanism to preserve the child's confidentiality other than limiting it to persons with "a direct need to know." *See, e.g.*, CONNECTICUT GUIDELINES, *supra* note 220, at 1; TEXAS GUIDELINES, *supra* note 220, at 2; *see also* MASSACHUSETTS ATTENDANCE POLICY, *supra* note 220, at 2 (child's identity should be revealed only to people with "an absolute need to know"). Even proponents supporting disclosure implicitly concede that the preservation of confidentiality is premised upon the teacher's ability to maintain this confidentiality. *See* Brief of Petitioners, *supra* note 9, at 53-54. Many experts contend that if school officials or teachers were entrusted with this information, the identity of the AIDS child would invariably become public. *See* Brief of Respondents, *supra* note 10, at 63-64; Brief of Respondent-Intervenor, *supra*, note 10 at 57-58; *see also* Purnick, *Pupils With AIDS a Risk, Koch Says*, N.Y. Times, Sept. 2, 1985, at 25, col. 3 (mayor doubted identity of AIDS student would remain confidential).

Even teachers "with best intentions" inadvertently might have reservations about being near an AIDS child or hesitate attending to incidences involving blood. Brief of Respondents, *supra* note 10, at 58 (Spencer Testimony).

254. *See supra* note 116 and accompanying text. The Third Circuit found that

statutory purpose for disclosure is twofold: (1) to enable the school to protect its students,[255] and (2) to attend to the needs of an AIDS child, particularly in an emergency situation.[256] Yet, all available evidence suggests that since the virus cannot be casually transmitted,[257] disclosure is neither medically necessary nor helpful. Furthermore, routine procedures for attending bites and bleeding injuries are the same in all situations, regardless of the presence of an AIDS victim in the classroom.[258]

Hence, in assessing these factors, the child's right of confidentiality clearly prevails over the competing public need for disclosure. Such disclosure would greatly harm the child as well as ongoing reporting and research efforts.

Disclosure limited solely to school health personnel, however, could pass constitutional muster. Although danger of breach of confidentiality still exists, it is reduced by restricting disclosure to health officials within the school system who not only have experience in maintaining sensitive confidential information[259] but also have pledged to do so.[260] In addition, school medical personnel have an important

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statutory reporting requirements that "advanced a need to acquire the information to develop treatment programs or control threats to public health" are usually constitutionally permissible. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980).

255. *See supra* notes 222-23 and accompanying text.

256. *See* Brief of Petitioners, *supra* note 9, at 48-50.

257. *See supra* notes 203-11 and accompanying text.

258.

> Because other infections in addition to HTLV-III/LAV can be present in blood or body fluids, all schools and day-care facilities, regardless of whether children with HTLV-III/LAV infection are attending, should adopt routine procedures for handling blood or body fluids. Soiled surfaces should be promptly cleaned with disinfectants . . . . Disposable towels or tissues should be used whenever possible . . . those who are cleaning should avoid exposure to open skin lesions or mucous membranes to the blood or body fluid.

Education and Foster Care of Children, *supra* note 210, at 108. Even states allowing disclosure to school personnel are in agreement: "Routine & standard procedures should be used to clean up after a child has an accident or injury at school. Blood or other body fluids emanating from *any* child, including ones known to have AIDS/ARC should be treated cautiously." CONNECTICUT GUIDELINES, *supra* note 220, at 3 (emphasis in original); TEXAS GUIDELINES, *supra* note 220, at 3.

259. Unlike school teachers and administrators, a medical professional invariably has knowledge and access to confidential information concerning patients. *Cf. In re* Donald Pebsworth, 705 F.2d 261 (7th Cir. 1983) (patient may permit access of confidential information to nurse without waiving privilege of confidentiality). *See generally* C. MCFADDEN, MEDICAL ETHICS 365-81 (1961) (discussion of professional secrecy in medical professions).

260. *See supra* note 227.

function as liaison with the child's physician, family, and the school.[261] Knowing the special needs of an AIDS-infected child, they can administer proper care in a professional manner and alert appropriate medical authorities when necessary.[262] Hence, the reduced risk of public disclosure, coupled with a legitimate policy objective, outweighs the child's privacy interest in absolute confidentiality.

V. Recommendations

The difficulty in establishing the scope of constitutionally protected informational privacy results from the lack of direction provided by the Supreme Court in this area.[263] Borrowing the key tenets of the tort definition for public disclosure of private facts,[264] however, can be instructive in formulating a framework to determine a constitutionally protected privacy interest. Accordingly, this Note proposes a similar test for determining whether a constitutionally protected informational privacy interest is implicated: (1) the disclosure must consist of private facts and not public ones; and (2) the disclosure must be highly offensive and objectionable to a reasonable person of ordinary sensibility.[265] The first requirement is in accord with *Paul* and would exclude personal matters available on public record. The second requirement limits constitutional protection to matters of sufficient severity and import. By applying this standard, courts can reach objective and more consistent results in interpreting the constitutional right of informational privacy.

Hence, under this test, the disclosure of the fact that an individual has contracted AIDS implicates a constitutionally protected privacy interest only if both elements of the test are met.[266] Clearly this

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261. "The school nurse should function as (a) the liaison with the child's physician, (b) the AIDS/ARC child's advocate in the school (i.e. assist in problem resolution, answer questions) and (c) the coordinator of services provided by other staff." CONNECTICUT GUIDELINES, *supra* note 220, at 1; TEXAS GUIDELINES, *supra* note 220, at 2.

262. *See supra* notes 258-61 and accompanying text.

263. *See supra* notes 130-35 and accompanying text.

264. Prosser lists the elements for the tort of public disclosure of private facts: "(1) the disclosure of the private facts must be a public disclosure and not a private one; (2) the facts disclosed to the public must be private facts, and not public ones; and (3) the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities." W. PROSSER & P. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 856-57 (5th ed. 1984).

265. *See id.* Since governmental collection and storage of personal information alone can infringe upon an individual's right to privacy even without public disclosure, the first element of the tort definition does not apply to a constitutional definition of informational privacy. *See supra* notes 21, 264 and accompanying text.

266. *See supra* note 265 and accompanying text.

disclosure meets both requirements. First, it is a private fact, hidden from the general public until the final fatal stages of the disease.[267] Moreover, at that point, the victims are usually too ill to lead a normal public life.[268] Since the child would no longer be able to attend classes, the fact that he had AIDS would not necessarily be discovered. Second, as many AIDS victims are stigmatized and socially isolated,[269] the disclosure of their identities would be highly

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267. The time between actual infection and development of symptoms can be more that five years. *See* MEDICAL ANSWERS, *supra* note 1, at 2. However, most infants who contract the virus in utero develop symptoms immediately. *See supra* note 215 and accompanying text. Nevertheless, it should be emphasized that AIDS affects its victims differently. *See* Kleiman, *Doctors Consider Fears Focused on AIDS Pupil*, N.Y. Times, Sept. 11, 1985, at B3, col. 1.

Symptoms include exhaustion, fever, weight loss, swollen glands, discolored growths on the skin or mucous membrane, diarrhea, unexplained bleeding, and progressive shortness of breath. *See* 100 QUESTIONS, *supra* note 222, at 9. Symptoms of pediatric AIDS victims usually range from recurrent, unexplained fevers and diarrhea to pneumocystis, a serious lung infection common to AIDS victims in its final stages. *See* Kleiman, *Doctors Consider Fears Focused on AIDS Pupil*, N.Y. Times, Sept. 11, 1985, at B3, col. 1. In addition, infants born infected with AIDS usually manifest facial malformations such as box-like foreheads, abnormally flat nasal bridges, oblique, wide-spaced eyes, flat noses, and unusually full lips and head circumferences. *See AIDS Infants Malformed*, N.Y. Times, Aug. 13, 1986, at C5, col. 1. Many also failed to grow. *See id.* For a detailed discussion describing the symptoms of AIDS, see MEDICAL ANSWERS, *supra* note 1, at 15-17.

268. *See supra* note 215. Children with AIDS may suffer from a range of viral, fungal, and parasitic diseases. *See Update: Acquired Immunodeficiency Syndrome—United States*, 34 MORBIDITY & MORTALITY REP. 245 (1985), *reprinted in* REPORTS ON AIDS, *supra* note 1, at 90. Most contact pneumocystis carninii, but very few suffer from Kapsosi's Sarcoma. *See id*; FACTS ABOUT PEDIATRIC AIDS (Sept. 1985) (available in AIDS packet compiled by the CDC).

269. The frightening symptoms and assured fatality of the AIDS disease has created unprecedented anxiety among the general populace. Fearful of transmission, Americans are altering their habits to avoid contact with potential AIDS transmitters. This fear has at times reached the absurd: in New York City a subway seat painted with the message "Did an AIDS patient sit here last?" remained empty despite crowded rush-hour conditions. *See* Rimer, *Fear of AIDS Grows Among Heterosexuals*, N.Y. Times, Aug. 30, 1985, at A1, col. 2; *id.*, at B2, col. 5. In California, political candidates are advocating: (1) mandatory testing of all Americans to detect HTLV-III carriers; and (2) quarantining all persons exposed to the AIDS virus. *See* Cummings, *LaRouche Backer's Bid for House Spurs Dismay in California*, N.Y. Times, Apr. 6, 1986, at 26, col. 1. In fact, the quarantine proposal is on the November, 1986 ballot. *See* Kirp, *LaRouche Turns To AIDS Politics*, N.Y. Times, Sept. 11, 1986, at A27, col. 1.

In addition, a recent poll indicates that as a result of the AIDS epidemic, 37% of American adults are less favorably disposed toward homosexuals. *See 37% in Poll Say AIDS Altered Their Attitude to Homosexuals*, N.Y. Times, Dec. 15, 1985, at 41, col. 1. Another poll reported that as a result of AIDS, most Americans favor some sort of legal discrimination against homosexuals. *See* Shipp, *Physical Suffering Is Not the Only Pain That AIDS Can Inflict*, N.Y. Times, Feb. 17, 1986, at A8, col. 1. For instance, 51% of those polled favored quarantines for people with AIDS and 45% favored screening all new employees for AIDS. *See*

offensive and objectionable to a reasonable person of ordinary sensibility.[270] Therefore, since both elements are met, this personal information is constitutionally protected.

VI. Conclusion

Subject to a multitude of physical ailments, AIDS victims also suffer from social isolation and ostracism. Although the physical effects of AIDS are frightening and uncontrollable, the negative social effects need not be. Since all persons, including children, have a constitutional right to informational privacy, the Constitution protects AIDS children who wish to keep their identities secret. Any statute authorizing the collection or dissemination of their names must be carefully scrutinized and balanced against the state's interest in this information. While the state as the guardian of public welfare has a strong interest in gathering all available medical data concerning AIDS, its need to disclose this information to the public is much weaker.

In the school setting, the state has a substantial interest in disclosing the identities of children infected with AIDS to school medical personnel. Such a disclosure requirement would advance public policy in ensuring the health and welfare of both healthy and AIDS-afflicted children at a minimal risk of widespread public disclosure. These state interests outweigh the privacy interests of the AIDS-afflicted children and, therefore, a statute requiring such disclosure would be constitutionally permissible. The state interest in disclosure to school administrators and teachers, however, would not effectively

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id. at A8, col. 2. State and city commissions on human rights have received a sharp increase in the number of complaints of discrimination based on AIDS and sexual orientation. *See id.* at A8, cols. 1-5; *see, e.g.*, McQuiston, *City Finds Rise in Complaints of Bias Against Homosexuals*, N.Y. Times, Mar. 8, 1986, at C7, col. 1 (as a result of AIDS, complaints of violence and discrimination against homosexuals more than doubled in past year in New York City); *see also supra* notes 218-20 and accompanying text (adverse public reaction as a result of decision to admit AIDS victims to schools).

Even the federal government has shown a half-hearted commitment to fight discrimination against AIDS victims. In June, 1986, the Justice Department announced that if employers fear contagion of AIDS, they may discriminate against employees infected with AIDS. *See* Pear, *Rights Laws Offer Only Limited Help on AIDS, U.S. Rules*, N.Y. Times, June 23, 1986, at A1, col. 2; *see also* Pear, *A.M.A. Assails Decision of Justice Dept. on AIDS*, N.Y. Times, July 12, 1986, at 15, col. 5. *But see* Pear, *States' AIDS Discrimination Laws Reject Justice Department's Stand*, N.Y. Times, Sept. 17, 1986, at A20, col. 1 (majority of states have rejected Justice Department's AIDS policy).

270. *See supra* note 269 and accompanying text.

advance the state interests and would greatly increase the risk of widespread disclosure. In this case children's constitutional right to safeguard their identities outweighs that of the public's right to know.

Gretta J. Heaney