Moral Particularism and the Justifiability of Mandatory HIV/AIDS Testing

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Introduction

This paper discusses the possibility of a mandatory HIV/AIDS testing in countries gravely stricken by the HIV/AIDS epidemic. By 'gravely stricken by the HIV/AIDS epidemic,' I imagine a scenario where the number of infected people has increased exponentially so that the threat it poses to the non-infected is imminent and seems unavoidable. There is a rapid proliferation of the disease so that the country haunted and petrified by it declares a state of emergency. The international community, on humanitarian grounds, has the moral duty to help the country in deep crisis to find an immediate and effective solution. For this reason, policy makers may propose that slight infringements on human rights are necessary to stop the onslaught of the disease for reasons of protecting public health and social justice. Arguably, this despicable scenario is not far from real. Many sub-Saharan African countries closely resemble this gloomy picture. Hence, I will entertain and consider it a hypothetical case. My purpose is, aside from knowing the moral justifiability of mandatory HIV/AIDS testing, to test the plausibility and applicability of moral particularism.

The reason why I tinker with the idea of a mandatory HIV/AIDS testing is that until now, the spread of the disease has not stopped and it is continuously escalating. Despite international efforts to address and solve the problem, HIV/AIDS, especially in sub-Saharan Africa, has not abated. Statistics show that more and more people, including women, children and adolescents, are fatally infected by it.[1] In fact, UNAIDS and WHO have acknowledged that HIV/AIDS problem has become a global epidemic or a 'pandemic.' Time will come when arguably all possible means of employing rights-based approaches in arresting the spread of the disease, either through prevention, treatment and care, will seem fruitless that some international and local policy makers might be tempted, in a desperate effort to save human lives, to adopt mandatory

HIV/AIDS testing.[2] If a country or group of countries is in a state of emergency due to the devastation brought by the epidemic, and there is no sufficient time to engage in prolonged debate whether a particular solution to the malady is human-rights based or not, prudence dictates that recourse to the most urgent and effective solutions should be taken. Mandatory testing could be identified as one of these solutions. So, proponents can argue, for example, that though mandatory testing deprives a person of his right to full informed consent, and thus violates his human dignity and autonomy, it would perhaps be a greater violation of the same dignity and autonomy if mandatory testing is not resorted to and allowed. If the continuous spread of the disease is not curtailed, people's capacity for autonomy would be undermined because they would no longer be able to determine freely the kind of life they want to live. The dreaded disease poses a limit to what they can and must do in life. Ineptness to immediately relieve people of their terrible pain and safeguarding those whose health are in imminent danger, also constitute grave violations of human dignity. Health care is a basic human necessity and without it, one could not live a healthy, normal, and dignified life. Thus, mandatory testing may not only be morally justifiable; it could also be taken as a moral imperative.

Viability of a Mandatory HIV/AIDS Testing

HIV/AIDS is a deadly disease. It deprives people of living a healthy and productive life.[3] The disease remains incurable in spite of the development of new drugs that reduce its corrosive effects on the person. Prevention is still the best remedy to the problem, and for it to take effect in countries strongly and tragically stricken by the disease, massive scaling up of mandatory testing for all the citizens could be the most viable alternative. Mandatory testing identifies those who are HIV positive. For it to succeed, testing must begin with high-risk groups and then proceed to those who are less likely infected. Once those who are positive are identified, they can be immediately quarantined from those who are not infected in the most efficient and humane manner. Quarantine for AIDS patients will be made for a limited period of time where proper treatment, care, and counseling are administered to them.[4] Special consideration should be given to pregnant women and children in order to ensure their safety and protection. As much as possible, there should be reduced contact between persons who are infected with the virus and those of their family members and friends who are negative. To accomplish this, sound policies must be made in order not to sever family relationships and deprive the victims, as well as their kin, of the human need for communication and contact. Mandatory testing should be done on a regular basis until there is sufficient reason to believe that the dreadful disease has been contained. It cannot go on indefinitely due to human rights considerations.

Aside from the main reason that mandatory testing helps contain the spread of the disease, there are also other advantages. Timely and appropriate diagnosis does not only help stop the proliferation of the virus but it also occasions the administration of immediate treatment to the victims.[5] Once a person is identified as positive, he or she should immediately be given appropriate treatment and care. Life-prolonging therapies are already widely available and accessible. Pregnant mothers who are tested positive, for example, will be given AZT (zidovudine) and/or nevirapine to prevent their unborn children from getting the virus. Early detection of the disease in prenatal pregnancy and immediate treatment thereafter decrease the chances of vertical transmission. Of course, treatment does not stop in the pre-natal stage. It continues even after delivery and the feeding stage.

Mandatory testing also reduces horizontal transmission, especially resulting from sexual relations among adults, if their HIV/AIDS positive status is known. This is so because those who are tested positive will be given counseling so as to avoid transmission of their disease to others. And for those who are negative, their knowledge of their HIV status in a state of emergency somehow also warns them to engage in safe sexual relations and avoid a promiscuous lifestyle.

Testing is not all there is to successful prevention. Effective prevention also includes education and active information campaign that motivate people towards behavioral change. Prevention works well if it does not exclude treatment, care and other such support structures as psychological counseling and protection from discrimination and stigma that help alleviate the degrading impact of the disease on the victim's life. So, substantial efforts and resources should be invested in prevention, particularly in the area of mandatory testing, without also compromising such ways of addressing the problem as education and information campaign, treatment and care, infrastructure support, counseling, etc. Mandatory testing can be justified in emergency situations on account of the weakness and impotence of applying the usual methods like voluntary counseling and testing (VCT) and the routine opt-out method as currently practiced.[6] Though this is debatable, there are indications that these methods are insufficient and ineffective. The fact that mandatory testing is proposed by many concerned individuals, including policy makers, may indicate that the usual ways of testing are inefficient and that this causes for great alarm as well as calls for drastic ways to curb the epidemic.

Mandatory testing is already required of certain groups of people in Africa. Examples are: pre-employment screening, including for people entering some religious orders and armed services, screening for insurance purposes or securing bank loans, visa applications for prospective immigrants,[7] for

scholarship and fellowship applications, sex workers who practiced in regulated industries, and as a requirement for military deployment in international peace keeping missions.[8] Proposals were also forwarded to apply compulsory testing to pregnant women, drug-abuse dependents, prisoners and health care workers who are always in contact with HIV/AIDS patients, children in government care-houses, and victims of rape and sexual assault. Certainly the mandatory testing required of or proposed to the groups of people above are not for the interest of the individuals alone but also for the interest of public health. If mandatory testing can be or will be applied to these people, then it should also be applied to people who are most vulnerable to HIV/AIDS infection. The toughest reason against mandatory testing is the claim that a human being must be respected in his dignity and autonomy. Now if there is a way to skirt it a little without avoiding its valid concerns, then perhaps proponents to rights-based approached to HIV/AIDS testing would be willing to concede.

Mandatory testing per se is not morally justifiable. The context where it is to be applied must also be examined. What I would like to propose is that mandatory testing may be morally justifiable in emergency cases when all possible human-rights based approaches to the epidemic are already exhausted and the problem still persists. Although this a hypothetical case, I would like to see if the theory on moral particularism can be applied to this imaginary (or might be also be described as exceptional) situation by considering that there are interestingly some countries in Africa that closely resemble the situation. I will try to see if the situation where HIV/AIDS has become so prevalent warrants an exception to the general moral belief of respecting human rights.

Moral Particularism

Moral particularism, says Margaret Little, maintains the view "that the moral import of any consideration is irreducibly context dependent, that exceptions can be found to any proffered principles, and that moral wisdom consist in the ability to discern and interpret the shape of situations one encounters, not to subsume them under codified rules."[9] There is no non-moral feature that is always morally relevant in the same way in all situations in judging the morality of an action. There can be other non-moral features in the situation that affects one feature and which shapes that one feature's moral relevance.[10] In other words, there is no universal or general theory that specifies exactly what actions are morally relevant in a particular context, since the morality of an action is shaped by the details of the situation under consideration. Pleasure, for instance, is not always morally relevant in every context. It is a non-moral feature that cannot always be considered as a right-

making feature in all situations. There are occasions when pleasure's positive moral valence (a view adopted by classical utilitarianism) is silenced or reversed by other nonmoral features in a particular situation.

Little's version of moral particularism is here discussed because her version is philosophically appealing. She skillfully explains the role of theory in moral reasoning when applied to particular situations. She does not undermine the importance of moral theories and generalizations. Rather, she considers them as "law-like" paradigmatic statements, "pedagogic devices", or "valuable heuristics" which do not only admit irreducible exceptions but also explain why such exceptions exist.[11] Generalizations are not rigid principles where non-moral features of actions are subsumed in order to deductively infer their moral rightness or wrongness. They are in a way provisionary guidelines or broad claims important to our moral discernment.

Theory, Little says, must be considered as both default and defeasible. It is default in the sense that under 'normal' circumstances, there are actions that possess good-making features and those that possess bad-making features. But their positive or negative moral polarity can be reversed in circumstances when something deviates from a moral paradigm as is shown, for example, in the oft-cited example of a person lying to the Nazis to protect the life of the person in hiding. Little is saying that the nuances and peculiarities of the situation must be given considerable attention so that theory will not obscure the moral relevance of the details and results in an unjust, dogmatic application of the theory to the case in question. This is what makes theory defeasible. It is defeasible in the sense that it is flexible or porous. Theory is capable of being influenced by circumstances that may annul or invalidate its default moral setting. Therefore, the defeasibility of a theory allows for the reversal of the moral polarity of an action when such theory is applied to a particular case.

Little's understanding of theory or generalization is comparable to what Timmons calls the "rules of prima facie relevance" which "only purport to specify those features of actions, persons and their circumstances that are likely to be morally relevant in the sorts of circumstances in which human beings typically find themselves."[12] For her theory is more of an educational tool rather than a decision procedure that helps us find our way in this complex moral world. As she explains, theory helps us gain "mastery of the set of relevant concepts, not just surface competence, and the skill to navigate them when they tangle together in concrete situations."[13]

Little emphasizes that moral theory is necessary for discernment. It helps us in knowing the *why* rather than the *that*. By this she means that moral theory helps us navigate, discern, and interpret the complex moral terrain by viewing generalizations not as stringent rules that must be deductively applied

to actions in all moral circumstances, and thus arrive at moral verdicts that follow necessarily from the said moral rules; but instead, these generalizations must be construed as educational tools or conceptual maps that we can use to teach, convert, and justify moral actions.[14] In other words, moral theory should not only tell us that *that* is the moral rule and therefore it must be applied immediately to all cases of similar actions; but rather, it must also explain to us why there are exceptions to a rule. By understanding the reasons for these exceptions, we grasp better the meaning of the rule.

Application of Little's Moral Particularism to the Hypothetical Case

Mandatory HIV/AIDS testing in ordinary circumstances is a gross violation of a patient's freedom and autonomy. It deprives him of his right to exercise full informed consent, which means the disclosure of relevant information and risks involved to the patient seeking medical treatment. Full informed consent is given legal force in almost all countries in the world. Protecting the person's right to full informed consent is based on the principle that the patient should be allowed to choose whether to undergo medical test or not. He should not be coerced to go through medical procedure against his will because he has the right to determine the course of action he deems necessary for his well-being. Therefore, health care professionals have the moral duty to provide utmost knowledge about the benefits and risks involved of medical treatment to their patients.

Arguments have been put forward to question the practicality of full informed consent. Some people argue that the moral and legal requirements of full informed consent are too ideal that they hinder rather than facilitate better treatment and care. On the part of the health-care professionals, they find it difficult to communicate in a manner understandable to the patient the benefits and risks of medical procedure and treatment. On the part of the patient, there are socio-cultural and psychological factors that reduce full informed consent, like degree of education, emotional maturity, high regard for authority and paternalism, etc. Proponents of the moral necessity of full informed consent would reply to the skepticism sketched above by arguing that empirical studies on the feasibility of obtaining full informed from patients do not count much when moral harm to the patient is in question. And besides, "ought implies can", so that it is absurd to demand moral duty if the obligation in question is impossible to realize. Depriving patients of their right to full informed consent is like manipulating them and treating them as things and not as persons. As Doyal aptly writes,

> in not providing them with information about their proposed care and not obtaining their consent to it, one of the defining characteristics of their humanity will have been ignored. This

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> is because humans have the ability to conceptualise the future and to make choices about it in ways that animals do not. To the degree that medical care ignores rather than nourishes this ability, then it harms through failing to acknowledge the potential that patients have as humans for exercising control over their lives. Thus, if patients are denied the information that they require to consent validly to treatment, they are effectively turned into slaves for medical purposes. The harm that endures may or may not be accompanied by psychological suffering. Its reality takes the form of the objective indignity to which the patients are subjected.[15]

The moral necessity of full informed consent must be upheld. But such necessity has to be put in context. Full informed consent as a moral rule involves intricacies and even dilemmas when applied to concrete situations. Using the hypothetical case as an example, how does one resolve the dilemma of upholding a person's right to full informed consent grounded on the principle of respect for human freedom and dignity, on one hand, and the application of mandatory testing generally perceived as a form of human rights degradation but which is an effective means of minimizing an HIV/AIDS-caused disaster, on other hand? So I will attempt to resolve this dilemma using Little's theory of moral particularism.

Judging from Little's moral particularist perspective, mandatory HIV/AIDS testing can be assumed as a default rule with a negative moral valence or polarity. A default rule, according to Little, only serves as a guideline to our moral reasoning. It does not exactly specify features in the situation that count as morally right or morally wrong. The moral acceptability of mandatory testing, for example, depends not only on a single feature like full informed consent but on the relationship of that feature on other features in situations of very high HIV/AIDS prevalence. Features like the morbidity and unbearable suffering of the victims, the mortality rate, the impact of the epidemic to the economic and social conditions of a country, the imminent threat pose by the disease to those who are not infected, etc. play a relevant role in deciding the moral polarity of mandatory testing. One can also include factors that may influence the consent of a person in this almost desperate situation, an issue raised by proponents who are skeptical about the practicality of full informed consent. For example, one might not be able to give his full consent in times of difficult crisis due to physical suffering, psychological stress and emotional reactions to the crisis. These factors may weaken the consent of the person to mandatory testing. They can be considered as features that are morally

relevant to the default rule which, in this context, is the perceived notion that mandatory testing infringes on a person's right to autonomy.

The time element of the hypothetical case is also an important feature. In a state of emergency, there might not be enough time to secure the informed consent of the people to be tested. Common sense dictates that the most practical way to secure public health, which in this case is mandatory testing, must be sought immediately without delay. Otherwise public health is jeopardized.

So, if the default rule outlined above is to be applied within the context of widespread and overwhelming occurrence of HIV/AIDS disease, it can be seen that it becomes defeasible or voidable. The overwhelming presence of the disease and the scourge it brings to infected and non-infected alike are features that somehow reverse the negative moral polarity of mandatory testing to a positive one. These features make mandatory testing exceptional and privileged. They justify the testing's deviation from the default rule. Hence, mandatory testing in this case is no longer seen as a violation of human freedom and autonomy but one which in fact promotes it. A moral particularist will argue that insisting on the negative moral valence of mandatory testing in circumstances where HIV/AIDS has caused suffering and death to countless people and which has also paralyzed the economic growth of a country is tantamount to violating the same human freedom and dignity. The intolerable and deplorable HIV/AIDS epidemic is the main reason that privileges mandatory testing in situations of severe crisis. It explains why mandatory testing is an exception to the default rule. Hence, from a moral particularist viewpoint, mandatory testing set within the context of the hypothetical case is not only morally justifiable but it is also a moral imperative.

Some Kantian critics might insist that mandatory testing is morally wrong because full informed consent, which is grounded on the principle of 'man as an end-in-himself', is a direct assault to a person's dignity. A person's autonomy has `unconditional value' and therefore admits no compromise. What is at stake here is the dignity and essence of a person. If his autonomy his violated, he would lose his very humanity.[16] So if the right to full informed consent has unconditional value, then no other considerations can be invoked that can overturn it, like the HIV/AIDS epidemic.

To reply to this Kantian critique from a moral particularist viewpoint requires clarification of the meaning of principle. Are principles to be understood as fundamental and unconditional? And if they are fundamental and unconditional, does it mean that they are moral ideals to be realized no matter what the costs are? Some Kantians will most likely answer these questions in the affirmative. Defining principles in this Kantian manner may not be the best way to define them. Why? This is because "principles need to be

applied to cases, and such application will raise a lot of questions about the content and scope of the principle."[17] However, if cases are to be qualified as either core or marginal, as what Schapiro does, a principle can remain fundamental in the former and flexible in the latter. According to Schapiro, moral principles "constitute the actions they govern and that this constitutive function is corruptible when background conditions are defective."[18] So for him, principles are never deficient. Only circumstances or background conditions can be deficient or defective. He says that

> common sense rules... are to be regarded neither as absolute commands to be followed blindly nor as mere rules to be followed blindly, nor as mere rules of thumb to be valued for their efficacy. Instead they function as constitutive rules of the moral relationship... such rules can be rigid in core cases and flexible in marginal cases. The rigidity comes from the fact that they are constitutive rather than instrumental rules; their role is to construct actions-as-realizations-of-ideals rather than identifying pre-existing actions that serve as means of promoting goals. The flexibility comes from the fact that unlike ideals themselves, actions-as-realizations-of-ideals are vulnerable to corruption.[19]

In Schapiro's version of Kantianism, right to full informed consent therefore is a fundamental moral rule which must be upheld in core cases. This makes mandatory testing a violation of that moral precept. But in marginal cases where the background conditions are deficient, such as the overwhelming prevalence of an HIV/AIDS epidemic, it might be concluded that mandatory testing is not an outright violation of the right to full informed consent. It is difficult to uphold this moral rule in cases where many people are suffering from the destructive effects of AIDS epidemic in terms of their physical, psychological and economic well-being. Thus, it can be argued that departure from the right to informed consent is justifiable if engaging in it is impossible because of deficient background circumstances.

For a moral particularist, however, safeguarding the right to full informed consent as an unconditional principle is an abstraction which does carry weight in moral deliberation. For it to be morally relevant, it must be tested and put into context. Thus, full informed consent can only be better grasped and explained when it is critically adapted to the complexities of moral situations, which in the (hypothetical) case under examination, is the existence of a severe HIV/AIDS pandemic.

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Conclusion

Mandatory HIV/AIDS testing is morally justifiable in situations of very high HIV/AIDS prevalence when viewed from the perspective of moral particularism. It does not really negate the very moral foundations upon which the right to full informed consent rests. If the main argument against mandatory HIV/AIDS testing is that it undermines the principle of respect for human freedom and dignity which constitutes the essence of a being a person, then it can be counter-argued that such mandatory testing is morally acceptable because it seeks to promote the same principle of human freedom and dignity which constitutes the very humanity of the person. Mandatory testing is proposed in order to reduce if not to eradicate the widespread misery that the HIV/AIDS epidemic has engendered. This exceptional but terrible situation is what reverses the default rule that mandatory testing degrades the humanity of a person.

This paper has been prospective. It anticipates the worst in HIV/AIDS pandemic. Although the case presented is hypothetical, it may have some value in preparing ourselves better for a possible engagement with HIV/AIDS crisis. Foresight, the ability to envision future problems, is one of the skills I aimed to emphasize in this philosophical exercise.

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ENDNOTES

[1] See UNAIDS "2006 Report on the global AIDS epidemic: Executive Summary." The report says that at the end of 2005, an estimated 38.6 million people worldwide had HIV. Most of these people are living in sub-Saharan African countries. If one reads the summary report, though there have been significant achievements in the fight for AIDS, one could not still heave a sigh of relief because the epidemic still persists and continues to rise in countries greatly affected by it. The report also indicates that the disease is increasing quite rapidly in some countries in Asia and Eastern Europe. So hope for a light at the end of the tunnel seems vague.

[2] De Cock, et al surmise that "Human-rights based approaches to HIV/AIDS prevention might have reduced the role of public health and social justice, which offer a more applied framework for HIV/AIDS prevention and care in Africa's devastating epidemic." De Cock (2002): 67. I share their opinion quoted above and used it to build a case for the moral justifiability of

mandatory HIV/AIDS testing, although the setting and the other issues they raised are different from my hypothetical case.

[3] The UNAIDS "2006 Report" said: "The countries most affected by HIV and AIDS will fail to achieve Millennium Development Goals to reduce poverty, hunger and childhood mortality and countries whose development is already flagging because of HIV and AIDS will continue to weaken, potentially threatening social stability and national security if the response does not increase significantly (ibid., 6)." The report calls for a "substantially stronger, more strategic and better coordinated" response and a policy maker, for instance, might propose mandatory testing as a possible alternative to meet the requirements of the call.

[4] Quarantine for AIDS victims is a very controversial issue, even more controversial than mandatory testing. I admit that this requires moral justification which cannot, at present and regrettably, be thoroughly discussed here in this paper. But I am quite convinced that this is necessary in conjunction with mandatory testing if the AIDS outbreak in a certain country appears to be uncontrollable and the usual more humane approach to containing the disease proves to be ineffective. Perhaps Cuba's response to AIDS could serve as a model when a country is in a state of emergency because of an apparently uncontrollable AIDS outbreak. Cuba has adopted a policy of mandatory testing and "mandatory relative quarantine of all persons testing positive" which turned out to have quite effectively contained the AIDS epidemic in the country. See Perez-Stable (1991) and de Arazosa, et al (2007).

[5] For an enlightening discussion that considers the ethics and equitable access to HIV treatment, see Macklin (2004). Though her paper is set in the background of UNAIDS/WHO "3 by 5" AIDS programme, I find this useful in applying treatment to the victims identified through mandatory testing within the context of the hypothetical case of this paper.

[6] De Cock, et al notes that the present approaches to "HIV testing, counselling and consent" may not be enough to meet UNAIDS/WHO targets outlined in the organization's programs which is to increase antiretroviral therapy and intensify HIV testing in a For an enlightening discussion that considers the ethics and equitable access to HIV treatment, see Macklin (2004). Though her paper is set in the background of UNAIDS/WHO "3 by 5" AIDS programme, I find this useful in applying treatment to the victims identified through mandatory testing within the context of the hypothetical case of this paper. De Cock (2003): 1847.

[7] See for instance Cooker (2004). Cooker's article is cited in many subsequent articles dealing with the same issue.

[8] De Cock, et al (2002): 69.

[9] Little (2001), 32.

[10] Timmons calls it relevance holism. He states this view this way: "RH The relevance (including polarity) of any nonmoral feature in a context can be affected by the other features that are present in that context. Thus, no nonmoral feature possesses relevance atomistically; rather its relevance--whether and how it is relevant--is a holistic matter." Timmons (2002), 253.

[11] Little (2001), 36-39.

[12] Timmons (2002), 255.

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[13] Little (2001), 35.

[14] Ibid., 39.

[15] Doyal (2001), i31. I am mainly indebted to Doyal's paper for this part of my discussion.

[16] Timmons (2002), 156-157.

[17] Verweij (2007), 58.

[18] Schapiro (2006), 34.

[19] Ibid., 57.