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When You Should Have Known: Rethinking Constructive Knowledge in Tort Liability for Sexual Transmission of HIV

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I. INTRODUCTION

AIDS is a modern epidemic that has grabbed the forefront of this nation's attention like no other disease in the twentieth century. Despite vigorous medical research and experimentation, the disease remains incurable and ultimately fatal. Protecting the health of the citizens has always been a strong policy of the law. Tort liability for the spread of contagious diseases dates back to the early nineteenth century.[1] Tort liability for sexual transmission of AIDS began to appear in the late 1980s, not long after the appearance of the disease.[2] Based as it was on the tort actions arising from other transmittable diseases, tort liability invariably required a showing that the defendant knew that he or she was infected with the disease before the sexual contact took place.

AIDS is unlike other sexually transmitted diseases. It is stealthy, with a lengthy and symptom-free incubation period which may last for a decade or more.[3] During this time, the infected individual could infect any number of persons, limited only by the number of sexual partners the infected party is able to contact. Although having sex with an HIV-infected individual does not guarantee that one will contract the virus,[4] it is certainly a foreseeable consequence of such conduct. Under the current standards of tort liability, HIV-infected individuals will almost always plead a lack of knowledge defense. Unless the standards of when it is reasonable for a person to have constructive knowledge of his or her HIV infection are extended to persons who, for a variety of reasons, should have known that they were HIV-positive or at great risk to be HIV-positive, a plaintiff may not be able to successfully bring an action in tort. Tort law is intended to apportion responsibility to those who have committed a wrong. It goes against the great weight of tort law to allow HIV-infected individuals to escape tort liability due to the particular nature of this contagious disease.

Persons who are infected with HIV or who, because of particular information known to them know that they are at high-risk for being infected with HIV, owe a duty to all future sexual partners to either disclose their serostatus, or to warn of the possible risk. Failing that, these individuals have a duty to abstain from sexual contact with unsuspecting partners until the partners have been informed. After disclosure, if a partner chooses to engage in sexual contact with the infected or at-risk individual, then that person has made an informed choice. If that party at-

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1. *See, e.g.*, The King v. Vantandillo, 105 Eng. Rep. 762 (K.B. 1815).

2. *See, e.g.*, C.A.U. v. R.L., 438 N.W.2d 441 (Minn. Ct. App. 1989). AIDS was first discovered in 1981. *See* GERALD J. STINE, ACQUIRED IMMUNE DEFICIENCY SYNDROME: BIOLOGICAL, MEDICAL, SOCIAL, AND LEGAL ISSUES 6 (2d ed. 1996).

3. *See* STINE, *supra* note 2, at 106 fig. 6-1.

4. *See id.* at 207. HIV or Human Immunodeficiency Virus is the virus that causes AIDS. The estimated risk of HIV infection from one sexual encounter with an HIV infected individual without using condoms is 1 in 500. *See id.*

tempts a tort action later, arising from HIV-infection, then the defendant may raise a comparative or contributory negligence defense, or assumption of risk defense, depending on the jurisdiction.

The risk of HIV infection and the consequences of the spread of this disease are just now becoming apparent eighteen years after the appearance of the disease. In the United States alone, the Center for Disease Control reported that 390,692 persons had died of AIDS as of December 1997.[5] Another 665,397 Americans were living with AIDS as of June 30, 1998.[6] Outside of the United States, the statistics are far worse.[7] By extending tort liability to persons who should know that they are HIV-positive or to those who know that they are at high-risk for HIV infection, two purposes can be met. First, individuals who contract HIV through sexual contact may have legal remedies against the partners who infected them. The liability in these cases will be restricted to persons who had a duty to warn the plaintiff of the risk of HIV infection, but failed to do so. This liability will serve as an incentive to disclose one's conditions and risk factors to one's future sexual partners, thus probably limiting the spread of the disease. Second, extending tort liability will encourage HIV testing; more testing will foster improved treatment of HIV and further limit its spread through sexual transmission.

This Comment focuses on the causes of action arising from the sexual transmission of AIDS. Part II discusses the legal history of tort liability for transmission of diseases in both English and American law, covering both the traditional actions and defenses. Part III proposes a new standard of tort liability in cases of HIV/AIDS transmission through sexual contact, addressing both the policies favoring an extension, and those opposing it. A new legal standard of "high-risk" behavior is proposed. The proposed standard is then applied to three existing cases of HIV transmission through sexual contact, and the results are discussed. This Comment concludes that the standard of reasonableness regarding an individual's constructive knowledge of his or her HIV infection in a tort action arising from the sexual transmission of AIDS should be extended to those who are members of groups who engage in high-risk behavior. In other words, whereas tort liability has previously only attached to individuals who have had a diagnosis of HIV/AIDS, or who have suffered symptoms consistent with a diagnosis of HIV/AIDS, the proposed standard would also encompass individuals who have engaged in high-risk activity: intravenous drug use; homosexual (male to male) intercourse; unprotected sex with multiple partners; prostitution; receiving blood products between the years of 1978 and 1985; and sexual contact with a person known to engage in high-risk activity. This standard would take into account the risk groups recognized by the American Medical Association as being at high-risk for HIV infection,[8] and would serve as an improved legal recognition of the at-risk popu-

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5. *See* National Institute of Allergy and Infectious Diseases, *AIDS Fact Sheet* (visited Aug. 28, 1999) <http://www.niaid.nih.gov/factsheets/aidsstat.htm.>.

6. *See id.*

7. *See id.* Worldwide, as of December 1998, AIDS infections are increasing at an estimated 16,000 infections a day. Ninety-five percent of these infections occur in developing countries. *See id.*

8. *See* The Journal of the American Medical Association, *HIV/AIDS Information Center* (visited Aug. 28, 1999) <http://www.ama-assn.org/special/hiv/treatment/guide/cps/hiv/hiv27.htm>.

lace and their duty to protect their future sexual partners from their infections.

This Author would like to state his personal opinion that every person infected with HIV is a victim. This Comment is not meant to imply in any way that persons living with HIV are guilty of moral or spiritual failings. This Comment deals solely with individuals who know or should know of their HIV infection and who fail to inform their sexual partners of that fact, thus continuing the deadly chain of AIDS. Those individuals unfortunate enough to become infected with HIV have a duty to do their part to stop the further spread of the disease, and to prevent their infection from harming others.

II. DEVELOPMENT OF A CAUSE OF ACTION ARISING FROM TRANSMISSION OF A SEXUALLY TRANSMITTED DISEASE

A. The History of Tort Liability for Transmission of Sexual Diseases

Public health and safety has always been a priority of the law. American courts have imposed liability on individuals who have harmed others through the transmission of sexual diseases since the late nineteenth century.[9] English courts began to find liability for such transmission somewhat earlier.[10] Courts based liability in these cases on common law tort theories of recovery, which were used to punish persons who knowingly exposed others to non-sexual contagious diseases.[11] The purpose of tort law is to address losses arising from socially unreasonable conduct.[12] Because of the very real losses that result from infection with a venereal disease, courts have been receptive to tort actions involving the transmission of such infections. The decisions of these courts have imposed a legal duty upon persons who had knowledge of their contagious infections to use due care to avoid spreading the disease to others.[13]

1. Tort Liability for Transmission of Sexual Diseases in English Law

English courts have found tort liability for the transmission of communicable diseases since the early nineteenth century.[14] Later that century, in *Regina v. Bennett*,[15] the court found a defendant liable for the transmission of a sexual disease. In that case, the defendant was found to have infected his thirteen-year-old niece with gonorrhea.[16] The court found Bennett liable for the tort of "indecent

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9. *See, e.g.*, Bandfield v. Bandfield, 75 N.W. 287 (Mich. 1898) (imposing liability for the transmission of a "venereal disease").

10. *See* Regina v. Bennett, 176 Eng. Rep. 925 (W. Cir. Ct. 1866).

11. *See* Kleigel v. Aitken, 69 N.W. 67 (Wis. 1896) (typhoid fever); Franklin v. Butcher, 129 S.W. 428 (Mo. Ct. App. 1910) (smallpox); Earle v. Kuklo, 98 A.2d 107 (N.J. Super Ct. App. Div. 1953) (tuberculosis). *See also* 39 AM. JUR. 2D *Health* § 99 (1999).

12. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

13. *See, e.g.*, R.A.P. v. B.J.P., 428 N.W.2d 103, 107 (Minn. Ct. App. 1988) (holding that this duty was "based on the simple principle that people who have dangerous contagious diseases have a duty to protect others who might be in danger of infection").

14. *See, e.g.*, The King v. Vantandillo, 105 Eng. Rep. 762 (K.B. 1815) (holding that a mother had committed a tort by carrying her smallpox infected child along a public highway).

15. 176 Eng. Rep. 925 (W. Cir. Ct. 1866).

16. *See id.*

assault."[17] The *Bennett* court found that the mere sexual act was not enough for tort liability; the defendant's knowledge of his infection and failure to warn the plaintiff created the liability.[18]

Notably, the requisite element of knowledge appeared in this first case. According to the court's reasoning, if the defendant had been unaware of his infection with gonorrhea, no tort liability would have applied. Likewise, in the case of *Regina v. Sinclair*,[19] a defendant who had knowledge of his infection with an STD was found liable for the tort of assault for the infection of a twelve-year-old girl with gonorrhea even though the court found that the girl had consented to the act of sexual intercourse.[20] The *Sinclair* court held the girl's consent to be ineffective in nullifying the tort because she was unaware of the defendant's infection.[21] English law required knowledge or notice of the infection before tort liability could apply. Although this area of law was in its infancy, already this element would negate certain defenses, such as consent.

2. *Tort Liability for Transmission of Sexual Diseases in American Law*

American courts adopted tort liability for the transmission of contagious diseases in the latter half of the nineteenth century—one of the earliest cases being *Minor v. Sharon*.[22] In that case, the Massachusetts Supreme Judicial Court held that a landlord was liable for the tort of negligence in allowing tenants to rent a room without warning them that the rooms were infected with smallpox.[23] The court held that the defendant's knowledge of the danger of infection created a duty to either warn the plaintiff of the danger or to refrain from renting the plaintiff a room he knew to be dangerous.[24] That duty, the *Minor* court held, was a "plain duty of humanity."[25]

Tort liability for the transmission of a contagious disease was extended to venereal diseases twenty-five years later in *Bandfield v. Bandfield*.[26] In *Bandfield*, a woman brought suit against her former husband for infecting her with a nameless STD.[27] The *Bandfield* court held that the doctrine of interspousal immunity barred such an action, even though the tortfeasor was determined to have had knowledge

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17. *Id.*

18. *See id.* The court held, "[I]f the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent, which she may have given, would be vitiated, and the prisoner would be guilty of an indecent assault." *Id.*

19. 13 Cox C.C. 28 (London 1867).

20. *See id.* at 29.

21. *See id.* at 28. *But see* The Queen v. Clarence, 22 Q.B.D. 23 (1888) (distinguishing cases of transmission of sexual diseases between married and unmarried partners; implied consent between married partners trumps tort liability normally arising from failure to disclose infection).

22. 112 Mass. 477 (1873).

23. *See id.* at 489. A Canadian citizen and his eight children rented rooms from the landlord, whom the court found to know the room was infected with smallpox. Within three weeks all nine tenants had contracted the disease. *See id.* at 478-80.

24. *See id.* at 487.

25. *Id.*

26. 75 N.W. 287 (Mich. 1898).

27. *See id.* The court never identifies the disease transmitted.

of his infection.[28] However, the bar of interspousal immunity in cases involving the tortious transmission of STDs lasted only twelve years in American law. The holding of *State v. Lankford*[29] would control in all subsequent cases. In *Lankford*, a wife brought suit against her husband for wrongful transmission of syphilis. The Delaware Supreme Court held that the doctrine of barring tort actions between spouses would not apply in cases involving the transmission of venereal diseases if it could be shown that the defendant was aware of his or her infection.[30]

American case law concerning transmission of venereal diseases falls largely into two time periods, cases before the early 1950s and cases after 1980.[31] This trend in the case law mirrors the medical treatment of STDs.[32] With the advent of penicillin in the 1940s, litigation involving venereal disease transmission declined along with incidences of the diseases themselves.[33] However, with the appearance of AIDS[34] and drug-resistant STDs, particularly genital herpes, in the 1980s, tort litigation for the transmission of venereal diseases is on the increase.[35] These recent cases primarily involve wrongful exposure to genital herpes and the Human Immunodeficiency Virus (HIV),[36] the virus that causes AIDS. Both herpes and AIDS are presently incurable, as is the Human Papilloma Virus (HPV), another STD that has been the subject of recent litigation.[37]

3. Tort Liability for Sexual Transmission of HIV

Cases involving tort liability for the transmission of HIV are all relatively recent, due in part to the disease's official discovery in 1981.[38] While most cases

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28. *See id.* at 288.

29. 102 A. 63 (Del. 1917).

30. *See id.* at 64. The court further held that the wife's consent to sexual relations with the defendant was not a defense if defendant's knowledge of the infection could be proven.

> A wife in confiding her person to her husband does not consent to cruel treatment, or to infection with a loathsome disease. A husband, therefore, knowing that he has such a disease, and concealing the fact from his wife, by accepting her consent, and communicating the infection to her, inflicts on her physical abuse, and injury, resulting in great bodily harm; and he becomes, notwithstanding his marital rights, guilty of an assault, and indeed, a completed battery.

Id.

31. *See* Celia M. Fitzwater, Comment, *Tort Liability for Sexual Transmission of Disease: A Legal Attempt to Cure "Bad" Behavior*, 25 WILLAMETTE L. REV. 807, 812-13 (1989).

32. *See id.* at 813.

33. *See id.*

34. AIDS (Acquired Immune Deficiency Syndrome) was first discovered in Los Angeles in 1981. For a comprehensive account of the disease, *see generally* UNITED STATES DEP'T OF HEALTH AND HUMAN SERV., SURGEON GEN.'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (Oct. 1986) [hereinafter SURGEON GENERAL'S REPORT].

35. *See, e.g.*, Doe v. Johnson, 817 F. Supp. 1382 (W.D. Mich. 1993) (HIV); Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Ct. App. 1984) (herpes); Meany v. Meany, 639 So.2d 229 (La. 1994) (herpes and Human Papilloma Virus (HPV)); McPherson v. McPherson, 712 A.2d 1043 (Me. 1998) (HPV); B.N. v. K.K., 538 A.2d 1175 (Md. 1988) (herpes); Stopera v. DiMarco, 554 N.W.2d 379 (Mich. Ct. App. 1996) (HPV); C.A.U. v. R.L., 438 N.W.2d 441 (Mich. Ct. App. 1989) (AIDS).

36. *See* Fitzwater, *supra* note 31, at 813. *See also* Bonnie E. Elber, Note, *Negligence as a Cause of Action for Sexual Transmission of AIDS*, 19 U. TOL. L. REV. 923, 929-32 (1988) (discussing the history of tort litigation arising from negligent transmission of AIDS).

37. *See* SEXUALLY TRANSMITTED DISEASES: EPIDEMIOLOGY, PATHOLOGY, AND TREATMENT, 272 (Kenneth A. Borchardt et al. eds., 1997).

38. *See* SURGEON GENERAL'S REPORT, *supra* note 34.

of wrongful transmission of HIV have been criminal in nature,[39] civil litigation has primarily used the same causes of action and theories of recovery used in tort cases involving other STDs.[40]

Cases concerning the transmission of the HIV virus, however, pose particular problems in determining the liability of the defendant. Unlike other STDs, AIDS, which is caused by HIV, is invariably fatal.[41] Furthermore, the HIV infection is itself generally symptom-free[42] and can be spread before any symptoms consistent with AIDS develop.[43] The traditional causes of action arising from the transmission of STDs have been battery, misrepresentation, intentional infliction of emotional distress, and negligence.[44] The long, largely symptom-free early stages of HIV may make it more difficult to establish knowledge of the infection on the defendant's part. Battery, misrepresentation, and intentional infliction of emotional distress are all intentional torts, requiring the defendant's knowledge of the risk of transmission. A cause of negligence also requires that the defendant be aware of his or her infection in order for a duty to be imposed.[45] Lastly, the long incubation period for HIV, which can be up to ten years or more, allows it to be transmitted over a long period of time before the carrier is made aware of his or her infection, possibly to many partners.[46]

In one of the first litigated cases involving HIV, *C.A.U. v. R.L.*,[47] the plaintiff appealed a Minnesota district court's finding that her former fiancé was not liable for transmitting HIV to her.[48] Although the defendant suffered from physical symptoms consistent with AIDS, the Minnesota Court of Appeals affirmed the lower court's decision, reasoning that at the time the defendant suffered the symptoms (1985), the defendant could not reasonably have known that his symptoms were consistent with AIDS.[49]

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39. *See, e.g.*, Sharlene A. McEvoy, *When You Have No Right to Remain Silent, Tort Liability for Sexually Transmitted Diseases*, 23-SUM BRIEF 14, 39 (A.B.A. 1994).

40. *See* Fitzwater, *supra* note 31, at 813.

41. The fact that AIDS is caused by HIV, and is a fatal, incurable viral infection which weakens and ultimately destroys the body's immune system, is now generally taken under judicial notice. *See, e.g.*, Brzoska v. Olson, 668 A.2d 1355, 1357 n.1 (Del. 1995); People v. Gilson, 630 N.E.2d 794, 795 (Ill. 1994).

42. *See* Gerald Friedland, *The Acquired Immune Deficiency Syndrome: General Overview*, 32 INT'L J. NEUROSCIENCE 677, 680 (1987). *See also* Nancy Mueller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 LAW, MED. & HEALTH CARE 250 (1986) (giving a detailed overview of HIV transmission and effects on the body).

43. *See* SURGEON GENERAL'S REPORT, *supra* note 34, at 11. Generally, the HIV virus does not itself cause symptoms. The opportunistic infections that take advantage of the victim's immunocompromised system cause noticeable symptoms.

44. *See, e.g.*, Deane Kentworthy Corliss, Comment, *AIDS-Liability for Negligent Sexual Transmission*, 18 CUMB. L. REV. 691 (1988) (discussing the causes of action, particularly negligence, arising from the transmission of AIDS). *See also* discussion *infra* Part II.B.

45. *See* discussion *infra* Part II.B.4.

46. *See* CDC (Center for Disease Control and Prevention) *HIV/AIDS Fact Sheets* (Visited Aug. 28, 1999) <http://www.cdc.gov/nchstp/hiv_aids/pubs/facts.html>. About one-half of all people infected with HIV develop AIDS within 10 years after becoming infected; however, some people who test positive for HIV never develop AIDS (or at least have not yet developed AIDS), yet may infect sexual partners with the virus. *See id.*

47. 438 N.W.2d 441 (Minn. Ct. App. 1989).

48. *See id.* at 442.

49. *See id.* at 444. The court noted that the defendant suffered from headaches, spots on his legs, weakness, fatigue, abdominal pain, and pneumocystis pneumonia. *See id.* at 442.

C.A.U. was remarkable in that the defendant's symptoms were not considered to constitute "constructive knowledge" of his infection.[50] The court did not give any examples of how the plaintiff could have proved constructive knowledge on the defendant's part, short of a medical diagnosis. It is difficult to reconcile the court's reasoning in *C.A.U.* with its holding made two years later in *M.M.D. v. B.L.G.*,[51] where it found constructive knowledge on the part of the defendant in a case involving genital herpes where the defendant exhibited the symptoms of herpes but failed to obtain a medical diagnosis.[52] The high standard of knowledge required by the *C.A.U.* court does not appear to be the controlling standard. Most civil cases involving the transmission of HIV follow the reasoning of *Doe v. Johnson*.[53] That case, involving sports figure Earvin Johnson, Jr., held that tort actions concerning HIV are held to the standard of actual or reasonable knowledge of infection, such as experiencing symptoms consistent with infection with HIV.[54]

B. Causes of Action Arising from the Transmission of a Sexually Transmitted Disease

For more than one hundred years, courts have imposed tort liability for the sexual transmission of diseases, citing as their policy the reduction of communicable disease.[55] American courts addressing the issue have historically recognized three causes of action arising from transmission of a venereal disease: battery, negligence, and fraud or misrepresentation.[56] In 1920, in the case of *Crowell v. Crowell*,[57] a wife's action against her husband for the tort of assault in connection with the transmission of an STD was recognized, and the court went on to say

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50. *Id.* at 444.

51. 467 N.W.2d 645 (Minn. Ct. App. 1991).

52. *See id.* at 647. In finding the defendant possessed constructive knowledge of his infection, the court stated:

> [A] legal duty to use reasonable care to avoid infecting others with herpes may arise even where a person does not have medical confirmation that the disease has been contracted.
>
> The transmission of the herpes virus was a reasonably foreseeable consequence of B.L.G.'s acts of sexual intercourse with M.M.D. A reasonable person with recurring sores on the genitals . . . should know there is a reasonable possibility that herpes has been contracted. In addition, a reasonable person should know an acne-type condition on the genitals could be communicated to others through sexual contact.

Id.

53. 817 F. Supp. 1382 (W.D. Mich. 1993).

54. *See id.* at 1393. The court held:

> [A] defendant owes a plaintiff a legal duty to, at the very least, disclose the fact that s/he may have the HIV virus, if: (1) the defendant has actual knowledge that s/he has the HIV virus; (2) the defendant has experienced symptoms associated with the HIV virus; or (3) the defendant has actual knowledge that a prior sex partner has been diagnosed as having the HIV virus.

Id.

55. *See* Fitzwater, *supra* note 31, at 810-11.

56. *See* Robert G. Spector, *Tort Liability for Transmission of a Venereal Disease*, 14 No. 1 FAIR SHARE 23 (1994).

57. 105 S.E. 206 (N.C. 1920). The STD in this case is never identified beyond a "venereal disease of a foul and loathsome character, and of a highly infectious and malignant nature." *Id.* at 207.

that North Carolina's Married Women's Act gave her "the right of recovery of damages for any personal injury or other tort sustained by her."[58] The *Crowell* ruling acknowledged that other causes of action were available in a claim arising from the wrongful transmission of a venereal disease. Although battery, negligence, and fraud or misrepresentation are the most common theories of relief, infliction of emotional distress and seduction are also sometimes alleged. Infliction of emotional distress is a relatively new cause of action in this area of tort law.[59] Conversely, the cause of action for seduction is increasingly falling out of use, and has even been eliminated in several states.[60]

1. Battery

The tort of battery is defined as a harmful or offensive intentional contact with the person of another.[61] Where purposeful sexual contact has taken place, intent is easily found.[62] Courts have determined that when an individual knows or should know that he or she is infected with an STD, the intent to communicate the disease to his or her partner can be inferred from the partner's subsequent infection with the disease.[63] Even if the individual consents to the sexual contact, the consent is vitiated by the infected partner's non-disclosure of his or her infection.[64] Thus, the requisite intent necessary for a cause of action for battery is often found despite the consensual nature of the sexual contact that led to the transmission of the disease. Courts have consistently distinguished between consent to sexual intercourse, and consent to be exposed to a venereal disease.[65] A battery action involving wrongful transmission of HIV may encounter difficulties in proving intent where the defendant claims a lack of knowledge of the infection. Because of the disease's lack of symptoms,[66] where the plaintiff cannot prove a medical diagnosis of HIV prior to the defendant's actions, he or she must prove that the defendant had knowl-

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58. *Id.* at 209.

59. *See* Daniel M. Oyler, Note, *Interspousal Tort Liability for Infliction of a Sexually Transmitted Disease*, 29 J. FAM. L. 519, 531 (1990-1991).

60. *See id.* at 533.

61. *See* RESTATEMENT (SECOND) OF TORTS § 18 (1965).

62. *See* Fitzwater, *supra* note 31, at 823.

63. *See, e.g.*, G.L. v. M.L., 550 A.2d 525, 527 (N.J. Super. Ct. Ch. Div. 1988) ("[T]he intentional act was not that of knowingly transmitting herpes to the plaintiff but, rather, it was the act of sexual intercourse with plaintiff after sexual relations with someone else . . . .").

64. *See* RESTATEMENT (SECOND) OF TORTS § 892B(2) (1979). Section 892B provides:

> If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.

Id. By way of illustration, the *Restatement* provides, "A consents to sexual intercourse with B, who knows that A is ignorant of the fact that B has a venereal disease. B is subject to liability to A for battery." *Id.* at § 892B cmt. e, illus. 5.

65. *See, e.g.*, Crowell v. Crowell, 105 S.E. 206 (N.C. 1920) (holding that plaintiff had not consented to sexual intercourse with her husband with knowledge that he was infected with a venereal disease). *See also* Mark Wilkerson, Note, *Tort Law:* Long v. Adams, *The Dirt on the Clean Hands Doctrine*, 56 U.M.K.C. L. REV. 791, 792 (1988) (discussing the issue of consent in battery cases arising from transmission of STDs).

66. *See* Friedland, *supra* note 42, at 680.

edge of the infection.[67] If the plaintiff is unable to meet this burden, an action for battery arising from the transmission of HIV may not be maintained.[68]

2. *Fraud or Misrepresentation*

Although fraud is normally confined to commercial transactions,[69] courts have recognized a cause of action for fraud in cases involving the transmission of venereal diseases.[70] An action for fraud is maintainable if the following elements are satisfied: 1) there was a false representation; 2) of a material fact; 3) made with knowledge of its falsity, or in reckless disregard of its veracity; 4) made for the purpose of inducing another to act upon it; and 5) there was justifiable and detrimental reliance on the statement by the plaintiff.[71] In an action for fraud or misrepresentation arising from the transmission of an STD, such as AIDS, it must be established that the defendant knew he or she had the disease, and either fraudulently concealed the infection's existence, or actively misrepresented to their partner that he or she was disease-free.

Kathleen K. v. Robert B.[72] is the leading case of an action for fraud arising from the transmission of an STD. In that case, the plaintiff stated a claim against the defendant when she alleged that her injuries were caused by her partner's failure to inform her that he was infected with genital herpes.[73] In recognizing a cause of action for fraud in such cases, courts have held that a person's knowledge that he or she is infected with an STD is a material fact that must be disclosed to protect the sexual partner from injury, and a failure to disclose this fact amounts to a representation that no disease exists.[74] Because this is an affirmative duty, silence on the part of a defendant who knows he is infected is construed as a false representation. This duty to disclose the existence of a venereal disease to one's sexual partners does not exist solely in a marital relationship; it has been extended to unmarried sexual partners as well.[75]

A plaintiff in an action for fraud in a case involving the transmission of HIV faces the predictable problem of proving the defendant had knowledge of his or her infection. In the case of *Delay v. Delay*,[76] a woman's action for misrepresentation against her former husband failed due to the absence of evidence that he was HIV-positive prior to having intercourse with her.[77] Knowledge of infection is the material fact required to maintain an action for fraud.

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67. *See, e.g.*, Doe v. Johnson, 817 F. Supp. 1382, 1393 (W.D. Mich. 1993).

68. *See id.*

69. *See* PROSSER & KEETON ON TORTS, *supra* note 12, at 726.

70. *See, e.g.*, Hogan v. Tavzel, 660 So.2d 350, 351 (Fla. Dist. Ct. App. 1995) (allowing claim of fraudulent concealment where defendant misrepresented his health to his wife by failing to disclose his infection with genital warts).

71. *See* RESTATEMENT (SECOND) OF TORTS § 525-26 (1981).

72. 198 Cal. Rptr. 273 (Ct. App. 1984).

73. *See id.* at 274-76.

74. *See, e.g.*, R.A.P. v. B.J.P., 428 N.W.2d 103, 109 (Minn. Ct. App. 1988) (holding that the defendant had a duty to disclose that she had genital herpes to her husband).

75. *See* B.N. v. K.K., 538 A.2d 1175, 1184 (Md. 1988).

76. 707 So.2d 400 (Fla. Dist. Ct. App. 1998).

77. *See id.* at 402. The court held: "Absent evidence which could create a disputed issue of fact concerning whether the defendant knew or had good reason to know that he or she had a sexually transmissable [sic] disease, we think this . . . tort has not been established." *Id.* As

3. Intentional Infliction of Emotional Distress

Although relatively new, another recognized cause of action for the transmission of a sexual disease is that of intentional infliction of emotional distress.[78] The elements of such a claim are: 1) the defendant either intentionally or recklessly inflicted severe emotional distress, or the defendant's conduct was substantially certain to inflict severe emotional distress; 2) the defendant's conduct "was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community'";[79] 3) the defendant's conduct caused the plaintiff's emotional distress; and 4) the emotional distress was so severe that an ordinary person could not reasonably be expected to endure it.[80]

Infection with a sexually transmitted disease can cause emotional distress.[81] It is easily foreseeable that infection, or even exposure to HIV would engender serious emotional distress.[82] Many courts have held that when a person who has

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discussed in Part III, *infra*, the *Delay* case is a good model for a test of extended liability. The *Delay* court notes that the defendant had "various minor health problems prior to the parties' marriage and thereafter, that indicate[d] he was then HIV-positive . . . ." *Id.* at 401. Furthermore, the court notes that defendant's HIV-positive status was uncovered when he was "arrested for lewd and lascivious conduct and was required to be tested for AIDS." *Id.*

78. *See* B.N. v. K.K., 538 A.2d at 1180 (holding that the "transmission of genital herpes is substantially certain to produce severe emotional distress").

79. Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

80. *See* Colford v. Chubb Life Ins. Co. of Am., 687 A.2d 609, 616 (Me. 1996) (quoting Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979)). *See also* Reagan v. Rider, 521 A.2d 1246, 1251 (Md. Ct. Spec. App. 1986) (finding liability for infliction of emotional distress where "the acts of the defendant are so horrible, so atrocious and so barbaric that no civilized person could be expected to endure them without suffering mental distress").

81. *See* John Leo, *The New Scarlet Letter*, TIME, Aug. 2, 1982, at 62. The author, discussing the emotional effects of becoming infected with genital herpes, writes:

> Many people who contract herpes go through stages similar to those of mourning for the death of a loved one: shock, emotional numbing, isolation and loneliness, sometimes serious depression and impotence. Often there is a frantic search for a doctor who will give a different diagnosis, or a kind of magical bargaining with the disease ("Maybe if I don't have sex for a while, it will go away"). Almost always there is rage—at the carrier, the opposite sex in general and the medical profession.
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> . . . .
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> . . . "As time goes on there is a 'leper' effect, and some patients describe convictions of their own ugliness, contamination or even dangerousness. . . ."
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> . . . .
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> . . . Part of the pain for herpes patients is the conviction of being damaged goods.

Id. at 64.

82. An extensive body of case law has developed surrounding "AIDS-phobia" cases, where plaintiffs allege intentional infliction of emotional distress resulting from discovering a partner's infection with AIDS, exposure to a vector for the HIV virus, or even discovering that a sexual partner has engaged in high-risk activity (such as a homosexual affair). Typically, unless the plaintiff actually contracts HIV, courts have refused to recognize such causes of action in the absence of an actual injury. *See* Doe v. Doe, 519 N.Y.S.2d 595, 598 (Sup. Ct. 1987) (holding that a wife may not sue her husband for intentional infliction of emotional distress where he engaged in a homosexual affair, but tested negative for HIV). *See also* Russaw v. Martin, 472 S.E.2d 508, 512 (Ga. Ct. App. 1996) (holding that "[t]o allow recovery for emotional injuries and mental anguish, without any proof whatsoever that [plaintiff] was actually exposed to HIV . . . is per se unreasonable").

knowledge of an infection with an STD engages in sexual intercourse with another without warning their partner of the disease, such conduct is construed as intentional and outrageous.[83]

In the case of *B.N. v. K.K.*,[84] a physician infected with genital herpes was sued for infliction of emotional distress when he infected his girlfriend with the disease.[85] The *B.N.* court held that even where it is not proven that the defendant intended to cause the plaintiff emotional distress, liability could be found because of the reasonable foreseeability that emotional distress would occur once the plaintiff discovered that he or she was infected with an STD.[86] The defendant's liability hinged on his knowledge of the infection.[87] In an action for infliction of emotional distress arising from the transmission of a sexual disease, the first element is met when it is proved that the defendant knew of his or her infection. If this element cannot be proved, the action may not be sustained. Without knowledge of infection, it cannot be shown that the defendant's conduct was substantially certain to inflict severe emotional distress.

4. Negligence

A cause of action for negligence may be brought against a person who has wrongfully transmitted a sexual disease.[88] Negligence is defined in the *Restatement of Torts* as behavior established by law that falls below the standard insisted upon by society.[89] Unlike the intentional torts, negligence deals with the defendant's conduct rather than his or her state of mind.[90] The elements of negligence vary slightly from state to state, but typically follow the *Restatement of Torts* in that a plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the plaintiff suffered an injury as a result of that breach.[91] The case of *Brown v. Kendall*[92] set forth the standard of care still fol-

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Curiously, this standard does not seem to apply in cases involving "AIDS-phobia" where sexual transmission is not an issue. *See* Hartwig v. Oregon Trail Eye Clinic, 580 N.W.2d 86, 90 (Neb. 1998) (holding that a cleaning worker stuck by a used hypodermic needle while cleaning a medical clinic's waste did not have to prove physical harm from AIDS or HIV infection; the damages from the emotional distress could attach to the physical harm of the needle stick as "parasitic damages"); Dollar Inn, Inc. v. Slone, 695 N.E.2d 185, 189 (Ind. Ct. App. 1998) (holding that a woman stuck by a used hypodermic needle in a hotel room did not have to prove exposure to the HIV virus; the "direct impact" of the needle stick alone is sufficient for an action of negligent infliction of emotional distress).

83. *See, e.g.*, B.N. v. K.K., 538 A.2d at 1181-82.

84. 538 A.2d 1175 (Md. 1988).

85. *See id.* at 1177.

86. *See id.* at 1180 (holding that defendant could have foreseen that infection with genital herpes would cause the plaintiff emotional distress).

87. *See id.* at 1179.

88. *See id.* (holding that the plaintiff's claim of negligent transmission of genital herpes was a valid cause of action). *See also* Berner v. Caldwell, 543 So.2d 686 (Ala. 1989); Hogan v. Tavzel, 660 So.2d 350 (Fla. Dist. Ct. App. 1995); Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Ct. App. 1984); Long v. Adams, 333 S.E.2d 852 (Ga. Ct. App. 1985); Stopera v. DiMarco, 554 N.W.2d 379 (Mich. Ct. App. 1996); M.M.D. v. B.L.G., 467 N.W.2d 645 (Minn. Ct. App. 1991); Mussivand v. David, 544 N.E.2d 265 (Ohio 1989).

89. *See* RESTATEMENT (SECOND) OF TORTS § 282 (1965).

90. *See* PROSSER & KEETON ON TORTS, *supra* note 12, at 169.

91. *See, e.g.*, Parker v. Harriman, 516 A.2d 549, 550 (Me. 1986).

92. 60 Mass. (6 Cush) 292 (1850).

lowed today in determining whether or not to extend liability to a defendant's conduct: "[T]hat kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."[93]

The first step in proving negligence is to ascertain whether or not a duty exists. The existence of a duty is a question of law.[94] Courts nationwide have imposed a duty upon persons infected with STDs to use reasonable care to avoid transmitting their diseases to others.[95] In *Mussivand v. David*,[96] the Ohio Supreme Court held that, "[i]t long has been held that one who has a contagious disease must take the necessary steps to prevent the spread of the disease."[97] The duty to prevent the spread of contagious diseases then, is an affirmative one. Because AIDS is an ultimately fatal disease with no present cure, a duty certainly exists to warn any sexual partners when one knows or has reason to know of his or her own infection with the HIV virus. In fact, liability has even been extended to third parties who have knowledge of the infection, but fail to warn *potential* partners.[98] Because negligence is not an intentional tort, proof of the defendant's actual knowledge of infection is not required. Because the tort of negligence is concerned with conduct, liability may be imposed when a defendant had reason to know of a risk of transmitting AIDS to a partner.

To establish whether or not a duty has been breached, the foreseeability of actual harm must be determined.[99] Foreseeability is generally not a problem in cases involving the transmission of a sexual disease. If a disease is spread sexually, courts have held that it is easily foreseeable that the disease could be spread to sexual partners.[100] Such an analysis presupposes that the defendant is aware of

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93. *Id.* at 296.

94. *See* Joy v. Eastern Maine Med. Ctr., 529 A.2d 1364, 1365 (Me. 1987).

95. *See* B.N. v. K.K., 538 A.2d 1175, 1184 (Md. Ct. App. 1988) (holding that defendant had "a general tort duty, at the least, to disclose his condition before engaging in intercourse"). *See also* M.M.D. v. B.L.G., 467 N.W.2d 645, 647 (Minn. Ct. App. 1991) (holding that symptoms of an STD are enough to impose duty to warn); Howell v. Spokane & Inland Empire Blood Bank, 818 P.2d 1056, 1059 (Wash. 1991) (holding that if blood donor had notice of his HIV-positive status, he had a duty to warn the blood bank before donating blood).

96. 544 N.E.2d 265 (Ohio 1989).

97. *Id.* at 269.

98. *See id.* The *Mussivand* court held that the plaintiff had a valid cause of action against his wife's lover on grounds that the defendant could have reasonably foreseen that the wife would engage in sexual relations with her husband, thereby passing the defendant's STD to the plaintiff. *See id.* at 272.

99. *See* Cameron v. Pepin, 610 A.2d 279 (Me. 1992). In *Cameron*, the court quoted from the California Supreme Court's decision in *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989). "Because a general duty exists to avoid causing foreseeable injury to another, the concept of 'foreseeability' enters into both the willingness of the court to recognize the existence of a duty . . . and into a determination by a trier of fact whether the specific injury in issue was foreseeable." *Id.* at 819 n.3. The *Thing* court further noted:

> [A] court's task—in determining "duty"—is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.

Id. at 820 n.3 (quoting Ballard v. Uribe, 715 P.2d 624, 628 n.6 (Cal. 1986)).

100. *See* B.N. v. K.K., 538 A.2d at 1179.

his own infection. As previously discussed, even in cases where the defendant has not obtained a medical diagnosis, courts have held that the foreseeability of harm to one's sexual partners may be inferred from the existence of symptoms associated with venereal disease.[101]

The problems with ascertaining foreseeability in cases involving the transmission of HIV arise from the insidious nature of the disease. Without knowledge of infection, there can be no duty, and therefore no breach arising from sexual contact which spreads the disease.[102] This standard is perhaps best articulated in *Berner v. Caldwell*,[103] an Alabama case involving negligent transmission of genital herpes, "[O]ne who knows, or should know, that he or she is infected with [a venereal disease] is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection . . . ."[104] Due to the deadliness of AIDS, a defendant should face a heightened degree of diligence. As the court in *Earle v. Kuklo*,[105] a case involving the transmission of tuberculosis, noted, "[t]he degree of diligence required to prevent exposing another to a contagious or infectious disease depends upon the character of the disease and the danger of communicating it to others."[106]

The final element in a cause of action for negligence is loss or damage. The plaintiff must prove that actual harm has resulted from the conduct of the defendant.[107] This requirement is easily met if the plaintiff can prove infection with an STD, which can cause pain, suffering, emotional trauma, long-term health effects, and death.[108] In a case of infection with AIDS, actual physical impairment would not be necessary. Infection with an incurable disease most certainly constitutes an actual harm.

C. Defenses to Liability Arising from the Transmission of a Sexually Transmitted Disease

Four defenses will be discussed in this Comment: lack of knowledge, lack of duty, right to privacy, and interspousal immunity. This list only represents the four most commonly used defenses, and is not meant to be exhaustive.[109] The defense

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101. *See, e.g.*, M.M.D. v. B.L.G., 467 N.W.2d 645, 647 (Minn. Ct. App. 1991) (holding that symptoms of herpes enough to impose duty). *But see* C.A.U. v. R.L., 438 N.W.2d 441, 444 (Minn. Ct. App. 1989) (holding that defendant's observance of symptoms consistent with AIDS not enough to impose a duty to warn his partner in the era before widespread knowledge of AIDS).

102. *See* 39 AM. JUR. 2D *Health* § 99 (1999). Section 99 provides:

> The general principle is established that a person who negligently exposes another to an infectious or contagious disease, which such other thereby contracts, is liable in damages. . . . The degree of diligence required to prevent such exposure depends on the character of the disease and the danger of communicating it to others.

Id.

103. 543 So.2d 686 (Ala. 1989).

104. *Id.* at 689.

105. 98 A.2d 107 (N.J. Super. Ct. App. Div. 1953).

106. *Id.* at 109 (citing 25 AM. JUR. *Health* § 45).

107. *See* PROSSER & KEETON ON TORTS, *supra* note 12, at 164-65.

108. *See generally* SEXUALLY TRANSMITTED DISEASES, EPIDEMIOLOGY, PATHOLOGY, AND TREATMENT (Kenneth A. Borchardt et al. eds., 1997).

109. *See* Wilkerson, *supra* note 65, at 795 & n.40 (discussing the historical defenses to tort actions arising from the transmission of sexual diseases).

of consent, discussed earlier in regard to the cause of action for battery, will not be discussed here. Although it is a tenet of tort law that consent negates the tort,[110] when a person consents to sexual intercourse without knowledge that their partner is infected with an STD, and the partner has that knowledge but withholds or misrepresents it, the consent is vitiated.[111] Certainly, a person who engages in sexual intercourse with full knowledge that their partner is infected with an STD would be hard pressed to then bring a cause of action against that partner in light of the theories of assumption of risk and contributory (or comparative) negligence.[112]

1. Lack of Knowledge

The defendant's assertion of a lack of knowledge is perhaps the most effective defense to tort actions arising from the transmission of a venereal disease. Knowledge is the requisite element needed to maintain such an action. In raising a lack of knowledge defense, however, a defendant may not rely solely on the fact that he or she never obtained a medical diagnosis of an STD.[113] Courts have shown a willingness to find constructive knowledge on the part of the defendant due to symptoms of the disease, or knowledge that a previous sexual partner has an STD.[114]

Predictably, STDs that lack symptoms have proved problematic for the courts when the defendant uses lack of knowledge as a defense. In *McPherson v. McPherson*,[115] the court upheld the defense on grounds that the plaintiff could not prove the defendant had knowledge of his infection with HPV.[116] In cases involving HIV and AIDS, the issue is equally disquieting. Although a tort action may not

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110. *See* RESTATEMENT (SECOND) OF TORTS § 892A (1979). This concept reflects the maxim "*volenti non fit injuria*" (no wrong is done to one who consents to the act). *See id.* at cmt. a. *See also* Robert B. Gainor, *To Have and to Hold: The Tort Liability for the Interspousal Transmission of AIDS*, 23 NEW ENG. L. REV. 887, 908 (1988) (discussing the defense of consent).

111. *See* RESTATEMENT (SECOND) OF TORTS § 892B (1979).

112. *See* Richard Carl Schoenstein, Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 HOFSTRA L. REV. 37, 77-80 (1989) (discussing the defenses of assumption of risk, contributory negligence, and comparative negligence).

113. *See* Meany v. Meany, 639 So.2d 229, 235 (La. 1994).

114. *See id.* at 234 (holding that the presence of "open, oozing genital sores" constitutes constructive knowledge of infection with an STD); Mussivand v. David, 544 N.E.2d 265, 272 (Ohio 1989) (holding that a husband may sue his wife's lover for negligent transmission of an STD on the grounds that the defendant could reasonably anticipate that a husband and a wife will engage in sexual relations); M.M.D. v. B.L.G., 467 N.W.2d 645, 647 (Minn. Ct. App. 1991) (holding that "[a] reasonable person with recurring sores on the genitals, who also has been told by a physician that a herpes culture may be advisable, should know there is a reasonable possibility that herpes has been contracted"). *See also* Stopera v. DiMarco, 554 N.W.2d 379, 382 (Mich. Ct. App. 1996). In *Stopera*, a case where a woman brought a tort action against her married lover who infected her with HPV, the dissent stated:

> Because I take judicial notice that the transmission of sexual diseases is an extremely well-understood risk of engaging in sexual intercourse, especially sexual intercourse outside the marital relationship, I believe that plaintiff should have been aware of this risk. The risk involved was an entirely foreseeable one. It is inconceivable to me that any adult of reasonable intelligence and awareness . . . could in August 1992 not have been utterly certain that such a risk attended the act of sexual intercourse.

Id. at 382 (Markman, J., dissenting).

115. 1998 ME 141, 712 A.2d 1043.

116. *See id.* ¶ 11, 712 A.2d at 1046.

be maintained without knowledge of the infection, the long symptom-free latency period of HIV allows for a scenario where an infected person could infect a potentially large number of partners, but then escape liability on grounds of lack of knowledge. In the interest of justice, courts should find liability where the defendant experiences physical symptoms related to AIDS or has knowledge of a previous partner who is infected with HIV or AIDS. However, as discussed previously, in the remarkable case of *C.A.U. v. R.L.*, the Minnesota Court of Appeals held just the opposite.[117] Other cases involving transmission of AIDS and the valid lack of knowledge defense, such as *Doe v. Johnson*,[118] are much more in line with the policy of finding liability where the defendant exhibits symptoms or has knowledge of a previous partner's infection.[119]

2. *Lack of Duty*

Although less commonly raised, a lack of duty defense cuts to the core of the tort action. Even when the defendant's knowledge of infection may be imputed, if the defendant can successfully argue that no duty existed to disclose his or her condition, then no liability can attach. In cases involving the transmission of STDs, defendants have occasionally maintained that absent a confidential relationship, there is no duty to disclose.[120] However, due to the severity of STDs, and the public policy to prevent their spread, most courts now find the duty to speak arising in purely personal relationships.[121] In cases involving HIV and AIDS, which are incurable and ultimately fatal, it is highly unlikely that a court will find that an infected defendant had no duty to warn a partner of the infection. In the case of *People v. Jensen*,[122] a criminal case involving the transmission of HIV, the court, in discussing the requisite intent in Michigan's partner-notification law, found that the deadly nature of HIV creates an affirmative duty to warn:

> What does nondisclosure achieve? Only further dissemination of a lethal, incurable disease in order to gratify the sexual or other physical pleasures of the already infected individual. Disclosure would permit the other person to either refuse sexual contact or consent with knowledge of the risks that are being taken. . . . Failure to disclose not only places the unwitting participant but also that participant's other sexual partners at serious risk of premature death. Indeed, the probable results accompanying nondisclosure are fairly predictable: death to innocent third parties.[123]

It is difficult to imagine an argument whereby an HIV-positive individual would not have the duty to reveal the existence of his or her infection to a partner.[124]

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117. *See* C.A.U. v. R.L., 438 N.W.2d 441, 444 (Minn. Ct. App. 1989).

118. 817 F. Supp. 1382 (W.D. Mich. 1993).

119. *See id.* at 1390 (discussing the idea that the defendant's "perception, memory and experience" are to be considered in imputing knowledge).

120. *See* B.N. v. K.K., 538 A.2d 1175, 1177 (Md. 1988).

121. *See id.* at 1183-84 (holding that "an ongoing 'intimate boyfriend-girlfriend relationship' may give rise to a duty to speak," and that the defendant had a duty, "at the least, to disclose his condition before engaging in intercourse with [the plaintiff]").

122. 586 N.W.2d 748 (Mich. Ct. App. 1998).

123. *Id.* at 754-55.

124. Certainly, the defendant's argument that she did not want to "kill the relationship" was unpersuasive in *Jensen*. *Id.* at 752.

3. Right of Privacy

Closely related to the lack of duty defense, the privacy defense is based on the proposition that the American legal system has long recognized an individual's right to privacy in affairs relating to marriage, family, and sex.[125] However, in this context, the right to privacy does not trump the state's police power, and the right to privacy is subordinate to the state's interest in preventing the spread of infectious diseases.[126] As the court in *Kathleen K. v. Robert B.* held, "[t]he right of privacy is not absolute, and in some cases is subordinate to the state's fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender's right of privacy."[127] In the *Jensen* case, the Court of Appeals of Michigan held:

> We believe that defendant's ostensible right to withhold disclosure of her HIV status from her sexual partners is not an absolute right when balanced against the state's "unqualified interest" in preserving human life.... Despite the guarantee of personal privacy extended to procreation... we disagree that defendant's asserted right to privacy falls within [this category].... Rather, defendant's actions merely involve one individual's decision to have unfettered or unencumbered sexual relations with others.[128]

Accordingly, due to the deadly nature of AIDS and the compelling state interest in preventing its spread, the right to privacy defense should not succeed in negating tort actions involving the transmission of AIDS.

4. Interspousal Immunity

Under common law, the institution of marriage created one legal entity, with the wife's legal identity merged into that of her husband's.[129] Because husband and wife were legally considered one entity, tort actions between spouses were effectively barred.[130] In regard to cases involving the transmission of STDs, early decisions, such as *The Queen v. Clarence*,[131] held that a wife's consent to the tort was assumed. The *Clarence* court held a wife's duty to submit to her husband, particularly in the marital bedroom, precluded her from bringing a tort action against him.[132]

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125. *See, e.g.*, Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 275 (Ct. App. 1984) (holding that courts "have frowned upon unwarranted governmental intrusion into matters affecting the individual's right of privacy"); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding that the "privacy right," founded in the Fourteenth Amendment, has been extended to activities relating to marriage, procreation, contraception, and family relationships).

126. *See* Kathleen K. v. Robert B., 198 Cal. Rptr. at 275.

127. *Id.* (citing Barbara A. v. John G., 193 Cal. Rptr. 422, 430 (Ct. App. 1983)). In *Barbara A.*, a woman suffering from an ectopic pregnancy was forced to undergo surgery to save her life. The surgery rendered her sterile. The woman then brought an action against the man (her former attorney) who had impregnated her, alleging that his false representation that he was sterile supported an action for battery and deceit. The *Barbara A.* court held that the right of privacy "does not insulate a person from all judicial inquiry into his or her sexual relations." *Id.* at 431.

128. People v. Jensen, 586 N.W.2d at 756 (citations omitted).

129. *See* PROSSER & KEETON ON TORTS, *supra* note 12, at 901.

130. *See id.*

131. 22 Q.B.D. 23 (1888).

132. *See id.* at 37. Justice Smith, in his concurrence, held:

> At marriage the wife consents to her husband exercising the marital [privilege].... The utmost the crown can say is that the wife would have withdrawn her consent if she had known what her husband knew, or, in other words, that the husband is guilty

In the mid-nineteenth century, states began to pass the Married Women's Property Acts, which gave wives a separate legal identity and granted both spouses the right to sue one another.[133] A majority of states now permit personal tort actions between spouses.[134] However, interspousal torts often raise many of the same issues appearing in the right of privacy defense, namely, that the courts should not interfere in the privacy of the marriage. As a result of this unwillingness to intrude upon private matters, among other reasons, a distinct minority of states have retained the doctrine, although most have limited its use to negligent torts.[135] Therefore, a plaintiff bringing a cause of action for the transmission of a sexual disease against his or her spouse in one of these states may be barred from recovery altogether or may be forced to bring a cause of action for an intentional tort.[136]

A good example of how states grapple with the decision of which principle to uphold—public safety or family privacy—occurs in the case of *S.A.V. v. K.G.V.*[137] The trial court in *S.A.V.* held that a wife's action against her husband for negligent transmission of genital herpes was barred by the doctrine of interspousal immunity.[138] Noting that "the bar to interspousal tort suits has been curtailed in a variety of cases in Missouri during the last fifty years with no apparent ill effect," the Supreme Court of Missouri held that the bar of interspousal immunity should be removed for both intentional and negligent torts.[139]

III. RECONSIDERING THE REQUISITE ELEMENT OF KNOWLEDGE IN TORT LIABILITY CASES INVOLVING THE SEXUAL TRANSMISSION OF HIV

As previously noted, the element of knowledge is required in all tort actions arising from the transmission of a venereal disease. If the defendant's knowledge of his or her infection cannot be proven, the action may not be maintained. The policy behind this theory is not only geared to stopping the spread of diseases, but also to limiting liability to those persons who have committed an identifiable wrong. The case law is nearly unanimous in holding that liability will only be extended to

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> of a crime, viz., an assault, because he did not inform the wife of what he then knew. In my judgment in this case, the consent given at marriage still existing and unrevoked, the prisoner has not assaulted his wife.

Id.

133. *See* Gainor, *supra* note 110, at 910. *See also* Crowell v. Crowell, 105 S.E. 206, 210 (N.C. 1920). The Supreme Court of North Carolina held:

> It must be remembered that there is not, and never has been, any statute in England or this state declaring that "husband and wife are one, and he is that one." It was an inference drawn by courts in a barbarous age, based on the wife being a chattel and therefore without any right to property or person. It has always been disregarded by courts of equity, and public opinion and the sentiment of the age, as expressed by all laws and constitutional provisions since, have been against it.... Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to "love, cherish, and protect" her. We have progressed that far in civilization and justice.

Id.

134. *See* Gainor, *supra* note 110, at 910-11 (discussing the history of interspousal immunity).

135. *See id.*

136. *See* Fitzwater, *supra* note 31, at 825.

137. 708 S.W.2d 651 (Mo. 1986) (en banc).

138. *See id.* at 652.

139. *Id.* at 653.

those persons who knew they were infected with an STD, or those persons who should have known.

Cases involving HIV and AIDS pose particular problems when this theory is applied. AIDS is a disease which can infect a person for years without exhibiting symptoms, and it is ultimately fatal. Because of its nature, it is very likely that a defendant may not receive a medical diagnosis of his or her condition until years after infection, thereby raising a plaintiff's burden of proof in showing that the defendant should have known of the infection. Because of both judicial impracticality and the possibility of compromising an individual's right of privacy and bodily integrity, liability should only be extended to persons who have obtained a medical diagnosis revealing that they are HIV-positive, or who have specific knowledge which a reasonable person would believe creates a risk of transmission to sexual partners. However, in the interest of stopping a disease which has gripped the modern world as no other affliction has, courts should be willing to inquire into whether or not a defendant had reason to know that he or she was infected in tort actions involving the sexual transmission of HIV.

A. The Legal Policy of Limiting Tort Liability

In an exercise of the police power necessary to the health and safety of the public, many states have passed legislation either criminalizing intentional exposure to HIV/AIDS or forbidding knowingly transmitting a sexual disease. These statutes indicate a willingness on the part of the states to penalize those who would endanger others through the transmission of STDs. It also indicates a new awareness in this era of AIDS that the transmission of HIV can be a life-threatening event. Much like the tort actions allowed within states' borders, however, liability arising from the violation of these statutes depends on proving what the defendant knew. While policies of judicial economy and equity dictate that liability must be strictly limited, the new and changing nature of STDs at the turn of the twenty-first century creates an argument for extending liability, and heightening an individual's duty to warn others.

1. Statutes Forbidding Knowingly Transmitting a Sexual Disease

Many states have enacted legislation making it a crime to knowingly transmit a sexual disease.[140] While most use broad language to encompass all sexually transmitted diseases, a few specifically mention HIV and AIDS.[141] Criminalizing

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140. *See* ALA. CODE § 22-11A-21(c) (1997); FLA. STAT. ANN. § 384.24 (West 1998); KAN. STAT. ANN. § 21-3435 (1995); MINN. STAT. ANN. § 609.2241 (West 1998); MONT. CODE ANN. § 50-18-112 (1997); R.I. GEN. LAWS § 23-11-1 (1998); S.C. CODE ANN. § 44-29-60 (Law Co-op. 1998); VT. STAT. ANN. tit. 18, § 1106 (1998).

141. *See, e.g.*, MICH. COMP. LAWS § 333.5210(1) (1992). *But see* VT. STAT. ANN. tit. 18, § 1106 (1998) (limiting criminal liability to cases involving gonorrhea and syphilis). In the recent case of *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998), the Court of Appeals of Michigan notes, "[f]ewer than half the states have criminal statutes penalizing the exposure of others to HIV . . . ." *Id.* at 752. The Michigan statute is quite explicit:

> A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.

MICH. COMP. LAWS § 333.5210(1).

the intentional spread of infectious diseases is within the police power of the state.[142] While several of these laws have been challenged on constitutional issues—typically those arising from the Fourteenth Amendment—these laws have been upheld as serving a compelling governmental interest.[143] As a means of combating the spread of HIV infection, the governmental interest is indeed compelling; however, these statutes create no new avenue of relief for persons infected. Although these statutes give a state's stamp of condemnation to the practice of knowingly exposing other persons to venereal diseases, their level of culpability is in fact stricter than the tort case law that preceded such legislation.

While constructive knowledge on the part of the defendant has been construed in cases such as *Meany v. Meany*,[144] where the defendant's genital sores were found to be sufficient for a court to determine that a reasonable person should warn his or her partner,[145] statutes forbidding knowingly transmitting an STD often require a diagnosis of the disease before culpability can be found. Indeed, many of these laws, particularly those that contain an explicit *mens rea* requirement, require such a finding in order to establish intent.[146] In *Louisiana v. Gamberella*,[147] the defendant fought strenuously to suppress the admission of medical tests proving that he tested positive for HIV.[148] After his motion was denied, his constitutional argument failed in the face of the state's compelling interests in preventing the spread of HIV.[149]

In some cases, existing criminal statutes have been found to encompass the transmission of an STD. In the California case of *People v. Johnson*,[150] the defendant was charged with kidnapping, rape, oral copulation by force, robbery, and false imprisonment.[151] The defendant was further charged with inflicting "great bodily injury" on the victim on the basis that he had infected her with genital herpes.[152] The *Johnson* court affirmed the enhanced sentence of the defendant, holding that a finding that great bodily injury could be inflicted by the transmis-

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142. *See* Moore v. Lumpkin, 630 N.E.2d 982, 993 (Ill. Ct. App. 1994) (holding that "governmental action to restrict and suppress the spread of contagious diseases falls within the scope of a State's police powers").

143. *See* People v. Jensen, 586 N.W.2d at 758-59. Upholding the constitutionality of Michigan's "HIV notice statute," the court notes:

> It is evident that the Legislature enacted the statute to stop the spread of AIDS and HIV by punishing the carriers of these illnesses who, with their silence, spread an incurable disease. Considering the ease of transmitting AIDS and HIV through sexual penetration and the absence of any "cure," the state's interest in protecting the public health, safety, and general welfare of its citizenry becomes extremely significant. Although the statute may significantly infringe defendant's individual interests in remaining silent, the state's interest to compel her to disclose that she is HIV infected before engaging in sexual penetration is undeniably overwhelming.

Id. at 759.

144. 639 So.2d 229 (La. 1994).

145. *See id.* at 234.

146. *See* People v. Jensen, 586 N.W.2d at 752.

147. 633 So.2d 595 (La. Ct. App. 1993).

148. *See id.* at 600-01.

149. *See id.* at 601-04.

150. 225 Cal. Rptr. 251 (Ct. App. 1986).

151. *See id.* at 252.

152. *Id.* at 253.

sion of herpes was not improper as a matter of law.[153] Other such cases include charging assault with a deadly weapon in cases where HIV-positive persons have exposed others to HIV.[154]

Statutes criminalizing the intentional spread of sexual diseases reflect both a growing awareness of the nature of STDs at the cusp of the twenty-first century, as well as a legislative willingness to punish those who engage in such behavior. The rise of AIDS has no doubt put sexually transmitted diseases on the national forefront of social and legal agendas, and it is not at all unlikely that AIDS was the instigation for many of the newer intentional transmission statutes. Such statutes are a positive step in eliminating, or at least slowing down, the rate of STD infection in the United States. Criminal laws, by definition, limit liability. The interest of judicial economy also serves to limit the number of claims. It simply is not feasible to prosecute every case where AIDS has been transmitted through sexual contact. Statutes forbidding the sexual spread of HIV limit the number of criminal cases by allowing claims only in those cases which are the most egregious—cases

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153. *See id.* Under California law at the time of the Johnson opinion, great bodily injury was defined as that resulting in a "serious impairment of physical condition," or a "protracted impairment of function of any portion of [the] body." *Id.* (quoting People v. Caudillo, 580 P.2d 274, 290 (Cal. 1978)). *Caudillo* was later overturned by *People v. Escobar*, 837 P.2d 1100 (Cal. 1992), which held that the legal standard for a finding of great bodily injury was no longer limited by the "protracted" requirement of *Caudillo*, but would now cover "significant or substantial" physical injuries. *Id.* at 1103.

In its review of the facts, the *Johnson* court found the following:

> [T]he herpes simplex II virus cannot be cured by known means, so that the victim would most likely carry it for the rest of her life. When active, the virus manifests itself in the form of vesicles or tiny blisters in the vaginal area. The principle symptom is intense itching and/or pain, but various complications may arise. These include possible blindness if the virus is accidently transmitted to the eye and if it gets into the bloodstream, a potential for serious infection involving meningitis, which could result in death.

People v. Johnson, 225 Cal. Rptr. at 253. As infliction with genital herpes constituted great bodily injury under the higher standard of *Johnson*, it is likely that the transmission of HIV, which is far deadlier than herpes, would also qualify as a great bodily injury. However, in *Guevara v. People*, 73 Cal. Rptr. 2d 421 (Ct. App. 1998), the defendant twice had unprotected sex with his minor girlfriend with full knowledge of his infection with HIV. *See id.* at 423. The defendant was charged with aggravated assault, and the California Court of Appeals for the Sixth District held that there was no "rational basis" that the defendant's bodily fluids "were likely to infect the minor with HIV" and, therefore, were not "likely to produce great bodily injury." *Id.* at 425. Oddly, although to its credit, the same court later noted that HIV and AIDS are not similarly situated with other debilitating diseases such as hepatitis, polio, and herpes. *See id.* at 426. After holding that the defendant could not be charged under the California penal code which enhances the punishment for certain sex crimes when the perpetrator knew he or she was HIV-positive at the time of the crime, the court, rather curiously, went on to note:

> Polio, herpes, hepatitis and other communicable diseases are either curable with treatment, not sexually transmitted or not inevitably deadly. Penal Code section 12022.85 is aimed solely at enhancing the punishment for a sex crime where the perpetrator has knowingly exposed the victim to transmission of an inevitably deadly disease. *No other communicable diseases pose this same threat to sex crime victims. . . .* The public health threat posed by AIDS is, at this time, far more serious and widespread than the threat posed by any other sexually transmitted disease.

Id. (emphasis added).

154. *See* STINE, *supra* note 2, at 462-64 (citing Bernard M. Dickens, *Legal Rights and Duties in the AIDS Epidemic*, SCIENCE, Feb. 5, 1988, at 580-85).

involving the transmission of HIV where the infected party knew of the infection but either withheld the condition from the victim or recklessly exposed them to the virus.

2. *The Individual's Right to Privacy*

The fundamental right to privacy is another concern to be considered when discussing liability. Any extension of liability must be balanced against the individual's right to privacy. The United States Supreme Court has held that a fundamental right of privacy in intimate relations exists, protected by the Fourth Amendment.[155] In holding a person liable for the spread of STDs, a court must make a choice between protecting the public welfare and protecting the individual's right to privacy. However, as discussed earlier, the right to privacy is not absolute and may be subject to the state's police power.[156] As the court in *Barbara A. v. John G.*[157] noted, the right to privacy does not insulate a person from all judicial inquiry into his or her sexual relations, especially where one sexual partner, who by intentionally tortious conduct, causes physical injury to the other.[158] Furthermore, courts have found liability in cases in which an individual has brought a tort action against a sexual partner and the partner has caused the individual harm.[159] Therefore, in cases involving the tortious spread of AIDS, the right of privacy should not trump the ability of the state to protect its citizens from disease.

Eighteen years since the discovery of AIDS in this country, and eleven years since the court in *C.A.U. v. R.L.*[160] held that public knowledge of AIDS was insufficient to warrant reasonable knowledge of its symptoms,[161] AIDS is now an issue of literally epidemic proportions. From the sheer number of courts now taking judicial notice of both the disease and its effects, one may infer that the AIDS-awareness is widespread.[162]

This is not to say that there are not serious privacy concerns involved in the limitation of liability, however. Any extension of liability must be carefully crafted so as to prevent an impermissible infringement on the right of privacy. HIV infection involves not only biological issues, but socio-political ones as well. In the case of *Doe v. The City of New York*,[163] the United States Court of Appeals for the Second Circuit held, "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition."[164] The court, in deciding an employment discrimination suit arising from the New York City

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155. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

156. *See* Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Ct. App. 1984).

157. 193 Cal. Rptr. 422 (Ct. App. 1983).

158. *See id.* at 431. *But see* Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620 (Ct. App. 1980) (holding that finding a woman liable for lying to a partner about the use of birth control would be an invasion of the individual's right of privacy).

159. *See, e.g.*, State v. Lankford, 102 A.63, 64 (Del. 1917) (holding that a husband may inflict an assault and battery on his wife through sexual intercourse).

160. 438 N.W.2d 441 (Minn. Ct. App. 1989).

161. *See id.* at 444.

162. *See, e.g.*, People v. Juan R., 589 N.Y.S.2d 256 (Sup. Ct. 1992).

163. 15 F.3d 264 (2d Cir. 1994).

164. *Id.* at 267.

Commission on Human Rights' public release of plaintiff's HIV-positive status, went on to note:

> [T]here are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over. Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease.[165]

Because the right of privacy encompasses the right to confidentiality concerning an individual's HIV serostatus, any extension of liability to those persons who courts hold should have constructive knowledge is limited. It would be unreasonable, for example, for all U.S. citizens to be tested for HIV, or even to mandate that members of high-risk groups be tested. As discussed in the next section, the individual's right to bodily integrity would prevent such a rule. Considerations of the constitutional right to privacy also arise when courts consider compulsory testing after a suit is brought. For example, in the case of *Maharam v. Maharam*,[166] the New York Supreme Court, Appellate Division, compelled the defendant to disclose the results of a test conducted to determine whether or not he was infected with genital herpes.[167] Courts have been less willing to order blood tests, such as those required to detect HIV antibodies.[168] Lastly, HIV test results are confidential by nature, and pose evidentiary concerns.[169] When considering which individuals should have known, one cannot rely strictly on a medical diagnosis.

Furthermore, the right of privacy encompasses some kinds of behavior that the Surgeon General has categorized as "high-risk behavior."[170] For example, there exists neither a duty to remain sexually faithful to one's spouse,[171] nor to disclose an extramarital affair to one's spouse.[172] Despite the fact that marriage, as a legal status, creates a confidential relationship[173] which gives rise to a duty to speak,[174] a duty to reveal that one spouse has engaged in high-risk activity[175] is subordinate to the fundamental right of privacy. "High-risk behavior" is defined

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165. *Id.*

166. 510 N.Y.S.2d 104 (App. Div. 1986).

167. *See id.* at 107.

168. *See* Barlow v. Superior Court, 236 Cal. Rptr. 134 (Ct. App. 1987) (holding that a defendant charged with biting arresting officers could not be forced to submit to a blood test despite evidence that he subsequently told officers that he was HIV-positive).

169. *See* STINE, *supra* note 2, at 350-51.

170. SURGEON GENERAL'S REPORT, *supra* note 34.

171. *See* MacPherson v. MacPherson, 1998 ME 141, ¶ 9, 712 A.2d 1043.

172. *See In re* Marriage of J.T., 891 P.2d 729, 732 (Wash. Ct. App. 1995) (holding that husband had no duty to disclose affair to wife). The plaintiff in *J.T.* claimed the full gamut of tort actions arising from her fear of contracting HIV: assault, negligent infliction of emotional harm, fraud, and negligence. The plaintiff could provide neither evidence that her husband had contracted HIV, nor that she herself had been exposed to HIV. *See id.* at 730.

173. *See* United States v. Byrd, 750 F.2d 585, 592-3 (7th Cir. 1985) (holding that communications between husband and wife are privileged due to the confidential relationship).

174. *See* B.N. v. K.K., 538 A.2d 1175, 1183 (Md. 1988).

175. High-risk activity, such as unprotected sex, has received judicial notice as a means of contracting STDs. *See, e.g.*, Stopera v. DiMarco, 554 N.W.2d 379, 381 (Mich. Ct. App. 1996).

as behavior that increases the risk of exposure to and infection with HIV.[176] The American Medical Association recognizes five high-risk groups: men who have had sex with men after 1975; past or present intravenous drug users; persons who exchange sex for money or drugs and their sexual partners; persons whose past or present sexual partners were or are HIV-positive, bisexual, or intravenous drug users; and persons with a history of blood transfusions between 1978 and 1985.[177] In constructing a balanced test of when persons should be held to have constructive knowledge of HIV infection, if the defendant belongs to one of these high-risk groups, courts must resolve whether or not the defendant's right of privacy trumps a duty to disclose. As a United States district court held in *Doe v. Johnson*:[178]

> [A] defendant owes a plaintiff a legal duty to, at the very least, disclose the fact that s/he may have the HIV virus, if: (1) the defendant has actual knowledge that s/he has the HIV virus; (2) the defendant has experienced symptoms associated with the HIV virus; or (3) the defendant has actual knowledge that a prior sex partner has been diagnosed as having the HIV virus.[179]

The question remains whether this duty to disclose would apply if the defendant was a member of any of the specified high-risk groups. Is a person entitled to know if their sexual partner is a former intravenous drug user? Or a bisexual? Or if their partner's former partners were prostitutes? It would seem that the right of privacy might encompass one's right to refrain from such a disclosure. Yet, if the purpose of tort law is to apportion responsibility to those who have committed a wrong, it would seem that a person who knows that he or she is at risk for HIV/AIDS should have a duty to warn future partners of that risk. As of 1997, twenty-six states had enacted statutes creating duties or privileges for health care workers treating HIV-positive individuals to warn their patient's sexual partners or needle-sharing contacts of their risk of exposure to HIV.[180] Clearly, if such a duty extends to third party healthcare workers, it must also extend to individuals in a position to

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176. The Journal of the American Medical Association, *HIV/AIDS Information Center* (visited Aug. 28, 1999) <http://www.ama-assn.org/aids>.

177. *See id.*

178. 817 F. Supp. 1382 (W.D. Mich. 1993).

179. *Id.* at 1393.

180. *See* CAL. HEALTH & SAFETY CODE § 121015(a), (c) (West 1996); CONN. GEN. STAT. ANN. § 19a-584(b) (West 1997); FLA. STAT. ANN. § 455.2416 (West 1991); GA. CODE ANN. § 24-9-47(g) (1995); HAW. REV. STAT. § 325-101(a)(4)-(5) (1993); IDAHO CODE § 39-610(2)-(3) (Michie 1998); 40 ILL. COMP. STAT. ANN. 305/9-9(a) (West 1997); IND. CODE ANN. § 16-41-7-3(b)(2) (Michie 1993); IOWA CODE ANN. § 141.6(3)(b) (West Supp. 1999); KAN. STAT. ANN. § 65-6004(b) (Supp. 1998); KY. REV. STAT. ANN. § 311-282(1) (Michie 1995); LA. REV. STAT. ANN. § 40:1300.14E(1) (West 1992); MD. CODE ANN., HEALTH-GEN. I § 18-337(b) (1994 & Supp. 1997); MO. ANN. STAT. § 191.656.2(1)(d), (2) (West 1996 & Supp. 1999); MONT. CODE ANN. §§ 50-16-529(9), 50-16-1009(3); N.Y. PUB. HEALTH LAW § 2782.4 (McKinney 1993); OHIO REV. CODE ANN. § 701.243(B)(1)(a) (West 1994); 35 PA. CONS. STAT. ANN. § 7609(a) (West 1993); R.I. GEN. LAWS § 23-6-17.2(v) (1996); S.C. CODE ANN. §§ 44-29-90, 44-29-146 (Law. Co-op. 1985 & Supp. 1997); TENN. CODE ANN. § 68-10-115 (1996); TEX. HEALTH & SAFETY CODE ANN. § 81.103(b)(7) (West 1992); VA. CODE ANN. § 32.1-36.1(A)(11), (D) (Michie 1997); WASH. REV. CODE ANN. § 70.24.105(2)(g) (West 1992); W. VA. CODE § 16-3C-3(d)-(e) (1998); WIS. STAT. ANN. § 252.15(5)(a)(14) (West 1991 & Supp. 1997); *see also* Lawrence O. Gostin & James G. Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 47-50 (1998) (collecting statutes).

know that they are either infected with the HIV virus or are at risk to be infected. Although no duty exists to reveal an extramarital affair to one's spouse, it is not unreasonable to impose a duty recognizing that such behavior creates a risk of infection, particularly when courts are taking judicial notice of that very fact.[181]

3. The Individual's Right to Bodily Integrity

There is a fundamental right to bodily integrity.[182] This right has been described as the right to be left alone.[183] In *Union Pacific R.R. Co. v. Botsford*,[184] the Supreme Court held that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[185] This right includes the right to refuse to be tested for HIV under current testing procedures.[186] In the case of *Barlow v. Superior Court*,[187] the defendant was charged with criminal battery for biting two police officers.[188] The defendant then told the officers, "You better take it that I've got AIDS."[189] The defendant was then taken to the police station where, over his objections, blood samples were drawn.[190] The California Court of Appeals for the Fourth District held that "the taking of the blood," or "disclosure of results of tests of blood for AIDS antibodies is flatly prohibited by law."[191] In the *Barlow* case, the state argued strenuously that California statutes intended to protect the integrity and privacy of its citizens regarding HIV testing, "did not intend to shield those who harbor the AIDS virus from . . . liability for intentionally exposing another to the virus for the purpose of infliction of great bodily harm or to cause such person to die of a disease made rampant by suppression of the

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181. *See* Stopera v. DiMarco, 554 N.W.2d 379 (Mich. Ct. App. 1996). The *Stopera* Court noted that "the transmission of sexual diseases is an extremely well-understood risk of engaging in sexual intercourse, especially sexual intercourse outside the marital relationship." *Id.* at 382 (Markman, J., dissenting).

182. *See* Whalen v. Roe, 429 U.S. 589, 599 (1977). *See also In re* Conroy, 486 A.2d 1209 (N.J. 1985). In *Conroy*, the court held that "[t]he right of a person to control his own body is a basic societal concept, long recognized in the common law." *Id.* at 1221.

183. *See* Whalen v. Roe, 429 U.S. at 599 n.25 (quoting Justice Brandeis's dissent in Olmstead v. United States, 277 U.S. 438, 478 (1928) ("the right to be left alone is the right most valued by civilized men")).

184. 141 U.S. 250 (1891).

185. *Id.* at 251.

186. The current testing procedure is the Western Blot Test, which requires a blood sample. *See* STINE, *supra* note 2, at 335-7.

187. 236 Cal. Rptr. 134 (Ct. App. 1987). The California Supreme Court denied review and ordered that the opinion not be officially published. *See id.*

188. *See id.* at 135.

189. *Id.* at 136.

190. *See id.*

191. *Id.* at 138. The Court was referring to Chapter 1.11 of the Health and Safety Code, CAL. HEALTH & SAFETY CODE § 199.22 (West 1985), which provides:

> No person shall test a person's blood for evidence of antibodies to the probable causative agent of AIDS without the written consent of the subject of the test, and the person giving the test shall have a written statement signed by the subject confirming that he or she obtained the consent from the subject.

Id. at 138-39.

bodily immune system."[192] The court denied such an exception, even though the defendant had mocked the officers about his physical condition.[193]

An argument can be made that the state's interest in preventing the spread of a contagious and deadly disease is superior to the individual's right to bodily integrity. In many of the "Right to Die" cases, courts have held that an individual's right to refuse medical treatment must be balanced against, among other things, the state's interest in preserving life.[194] While the individual's right to refuse invasive treatment is normally paramount, in some circumstances, the state's interest prevails. In the case of *In Re Caulk*,[195] a prisoner on a hunger strike was forcibly fed.[196] The New Hampshire Supreme Court held that Mr. Caulk's attempt at starvation was frustrating the criminal justice system.[197] In cases where the interests of innocent third parties are at stake, courts have found that the state's interests are superior to the individual's right to bodily integrity. In *Application of the President and Directors of Georgetown College*,[198] the District of Columbia Circuit ordered a woman to undergo a blood transfusion against her will, where the state had an interest in preventing the abandonment of her seven-month-old child.[199] Regarding the child, the court noted that, "a life hung in the balance."[200] This interest is not unlimited: the state may not subordinate the rights of one individual for the benefit of another as a matter of course. Thus, while mandatory vaccinations are upheld,[201] bone marrow transplants are not.[202]

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192. *Id.* at 140.

193. *See id.* The court then goes on to wax poetic, stating, "While some cultures require a leper to ring a bell to warn the passerby, our Legislature has not so stigmatized the victims of AIDS. Our skies are not black with the smoke from cities burned to prevent the spread of plague." *Id.* It would be interesting to see if the court's response would be the same if the case were brought before it in 1997 instead of 1987. In any event, the blood samples were returned to Barlow without being tested. *See id.*

194. *See, e.g.*, Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (holding that a state school could withhold chemotherapy from a 67-year-old mentally handicapped man). The *Saikewicz* court held:

> This survey of recent decisions involving the difficult question of the right of an individual to refuse medical intervention or treatment indicates that a relatively concise statement of countervailing State interests may be made. As distilled from these cases, the State has claimed interest in: (1) the preservation of life; (2) the protection of the interests of innocent third parties . . . .
>
> It is clear that the most significant of the asserted State interests is that of the preservation of human life.

Id. at 425.

195. 480 A.2d 93 (N.H. 1984).

196. *See id.* at 95.

197. *See id.* at 96.

198. 331 F.2d 1000 (D.C. Cir. 1964).

199. *See id.* at 1006.

200. *Id.* at 1009-10.

201. *See* Jacobsen v. Massachusetts, 197 U.S. 11, 28 (1905) (upholding the constitutionality of compulsory vaccinations as an exercise of the state's police power). The *Jacobsen* case is interesting to consider from a late 1990s perspective. It concerns state regulations targeting a deadly viral scourge at the beginning of the century—smallpox.

202. *See* McFall v. Shimp, 10 Pa. D. & C.3d 90 (1978). The *McFall* court holds that a man cannot be enjoined to donate bone marrow to his first cousin who suffers from a terminal illness. Despite the fact that the defendant was a compatible donor, and that the plaintiff would die without a transplant, the Court of Common Pleas held:

Any extension of liability must be balanced against the right to bodily integrity. While the logic behind mandatory vaccinations would seem to favor an argument for mandatory HIV testing, the HIV epidemic has ramifications that extend beyond the purely medical issues. HIV is also a social issue. While some states have passed legislation ordering mandatory HIV testing for some individuals, such as convicted prostitutes and sex offenders,[203] no state has passed mandatory HIV testing for a significant portion of its population.[204] Many concerns surround such a hypothetical program: the social stigma of being HIV-positive, the possibility of error arising from such a large number of samples, and the possibility of health care provider shortages in areas with a high prevalence of HIV.[205] Thus, while a mandatory HIV testing program could conceivably lower rates of HIV infection, assuming persons who are made aware of their own HIV-positive status are more likely to take steps to prevent further infections, such a program may not be feasible. Furthermore, HIV tests made *after* the sexual transmission of the disease will not help persons seeking tort claims against the partners who infected them. In the case of *Anne D. v. Raymond D.*,[206] the plaintiff could not force his wife, who had an extramarital affair, to submit to an HIV antibody test.[207] The Supreme Court of Nassau County held that the allegations of extramarital affairs were not sufficient to "subject one's spouse to undergo unnecessary, objectionable and invasive medical procedures. Mere unsubstantiated allegations are not enough. The allegations must be relevant, material and substantiated and the reasons compelling for such an examination and test."[208] Therefore, in construing constructive knowledge of HIV, courts must not use any methods that will invade the bodily integrity of defendants.

B. The Public Policy of Extending Tort Liability

While there are strong arguments made in support of sharply limiting tort liability for the sexual transmission of HIV, similarly strong arguments can be made supporting extending liability not only to those who know of their infection, but also to those who, for various reasons, should know. HIV causes AIDS. AIDS

> For our laws to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. . . . For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from its sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence.

Id. at 91-92. *See also* WILLIAM J. CURRANT ET AL., HEALTH CARE LAW AND ETHICS 753 (5th ed. 1998) (observing "[t]here is no case that has required one person to give up tissue for the benefit of another person over the first person's objection").

203. *See* STINE, *supra* note 2, at 349-50. Note that the federal government has also ordered mandatory HIV testing for blood donors, military and Job Corps personnel, federal prisoners, and people seeking immigration into the United States. *See id.*

204. *See id.*

205. *See id.* at 348.

206. 528 N.Y.S.2d 775 (Sup. Ct. 1988).

207. *See id.* at 776.

208. *Id.* The court goes on to note that blood tests are commonly enforceable in paternity proceedings. *See id.* at 777. Without a showing, or even an allegation, that the defendant exposed the plaintiff to HIV, the court refused to enjoin the wife to submit to an examination. *See id.* at 778.

is, by any standard, a modern epidemic.[209] Furthermore, AIDS is unlike most other venereal diseases. It is not only incurable, but ultimately fatal. Despite promising new therapies emerging at the turn of the twenty-first century, no one has yet been cured of AIDS.[210] While new treatments, such as Highly Active Anti-Retroviral Therapy (HAART) can cause HIV levels within an infected person's body to drop below detectable levels,[211] virus levels return after treatment is discontinued.[212] Worse still, some strains of HIV are now displaying signs of immunity to HAART treatments.[213] Even while an individual is undergoing one of these new therapies, that person is still HIV-positive and could transmit the disease to others.[214] HIV is a stealthy killer. Most persons infected with HIV will not develop AIDS until nine to sixteen years after the initial infection.[215] During that time, the only limit to the number of people the carrier can infect through sexual means is the number of persons the carrier can enter into sexual relations with. As a matter of public policy, AIDS should be treated unlike other STDs. The standards of behavior for protecting other persons from HIV infection should be higher. Individuals who should know of a risk of HIV infection, either from information made known to them, or by engaging in high-risk activity, should have a duty to either be tested for HIV, or should have a duty to warn future sexual partners of the possibility of the risk.

The argument for such a duty is strengthened by the current state of public awareness concerning HIV and AIDS. Information concerning the disease itself, its nature of transmission, and methods of stopping its spread are common knowledge among Americans as of 1999. Courts have taken judicial notice of the disease and its effects.[216] Defendants in tort liability cases concerning the sexual transmission of AIDS may no longer plead ignorance of the disease and its nature, as the defendant did in *C.A.U. v. R.L.* This increased public awareness indicates that the average citizen is aware of HIV and how it is spread, as well as what activities would create a high risk of HIV infection. Tort liability for the sexual transmission of HIV in cases where the defendant should have known of his or her infection should be extended.

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209. *See* STINE, *supra* note 2, at 2-5. To put things into perspective, protease-inhibitor (AIDS cocktail) therapy notwithstanding, as of December 1998, AIDS remains the leading cause of death worldwide among men aged 25 to 44. Among women of the same age group worldwide, it ranks third. *See* Saint-Paul Ramsey County Department of Public Health, *AIDS Facts* (visited Aug. 28, 1999), <http://www.co.ramsey.mn.us/PH/aids_facts.htm>. Worldwide, 1 in every 300 people over the age of 13 is infected with HIV. *See* The Ryan White Foundation, *HIV and AIDS Statistics* (visited Aug. 28, 1999) <http://www.ryanwhite.org/stat.htm>. As of 1994, the Center for Disease Control and Prevention reported that 400,000 Americans had been diagnosed with AIDS, and more than 240,000 had died, a number three times that of U.S. casualties during the Vietnam War. *See* Mark C. Donovan, *The Politics of Deservedness: The Ryan White Act and the Social Constructions of People with AIDS*, *in* AIDS, THE POLITICS AND POLICY OF DISEASE 68 (Stella Z. Theodoulou ed. 1996).

210. *See* STINE, *supra* note 2, at 129.

211. *See* Laurie Garrett, *The Virus at the End of the World*, ESQUIRE, Mar. 1999, at 105-06.

212. *See id.*

213. *See id.* at 106-07.

214. *See* STINE, *supra* note 2, at 165.

215. *See id.* at 129.

216. *See supra* notes 41-46 and accompanying text.

1. AIDS: The Modern Epidemic

HIV is the virus that causes AIDS. HIV is a retrovirus, in that it causes the victim's own DNA-making machinery to replicate itself, inserting new HIV material into the DNA of its host's cells.[217] Several types of human cells can become infected with HIV, the most important of which are the cells of the victim's immune system.[218] HIV specifically infects and kills the body's T4 cells, which are involved in coordinating the body's defense against infection.[219] Killing off the T4 cells leaves the host susceptible to opportunistic infections that the body is unable to fight off.[220] People infected with HIV typically display no symptoms of the disease.[221] There are four recognized stages of HIV infection: acute infection, asymptomatic, chronic or symptomatic, and AIDS.[222] A person infected with HIV can transmit the virus in any of these four stages.[223]

The acute stage typically develops within three to eight weeks after infection.[224] Many individuals in this stage experience slight flu-like symptoms, but largely show no signs of infection.[225] During this stage the HIV virus replicates rapidly, eventually outnumbering and destroying the body's T4 cells.[226]

The asymptomatic stage encompasses the long period of time between the initial infection and development of actual AIDS.[227] This period, which ranges from six months to as long as ten years or more, is free of symptoms.[228] During this period, the HIV is not dormant but continues to replicate, killing T4 cells as it does.[229]

The chronic, or symptomatic stage, occurs when the victim's supply of T4 cells becomes depleted.[230] As the victim's immune system becomes compromised, a variety of symptoms may develop. These include: fever, weight loss, malaise, body aches, fatigue, loss of appetite, diarrhea, night sweats, headaches, and swollen lymph glands.[231] The victim also begins to exhibit signs of opportunistic infections such as thrush at this time.[232]

The final stage of HIV infection, the AIDS stage, occurs when the HIV virus finally overpowers the victim's ability to manufacture T cells.[233] At this point, the victim is simply unable to fight off viral and bacterial infections.[234] Despite prom-

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217. *See* STINE, *supra* note 2, at 39.
218. *See id.* at 55.
219. *See id.* at 60-61.
220. *See id.* at 61. Approximately 88% of deaths related to HIV infections are caused by opportunistic infections, with 7% due to AIDS-related cancers and 5% from other causes. *See id.* at 75.
221. *See* SURGEON GENERAL'S REPORT, *supra* note 34, at 11.
222. *See* STINE, *supra* note 2, at 105.
223. *See id.* at 110.
224. *See id.* at 105.
225. *See id.*
226. *See id.*
227. *See id.* at 106.
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.* at 106, 109.
232. *See id.* at 109.
233. *See id.* at 109-10.
234. *See id.* at 110.

ising drug therapies which have doubled the average AIDS stage survival time,[235] no treatment has yet rid a victim of the HIV virus.[236]

In some cases, victims of HIV may have what is known as AIDS Without Symptoms.[237] Formerly called ARC (AIDS-Related Complex), this condition causes the victim to test positive for HIV, become capable of transmitting the disease, yet not suffer any of the terminal effects associated with AIDS.[238]

Although tests on frozen blood samples have determined that AIDS appears to have occurred in the United States as early as 1952,[239] the AIDS epidemic began with the first report of the disease in 1981.[240] Since then, the number of AIDS and HIV-positive cases has increased exponentially.[241] The extent of the epidemic can be seen in the sheer number of victims. More Americans have died of AIDS in the United States in any two years from 1988 through 1994 than died during the eight years of the Vietnam War.[242] As of 1996, an American died of AIDS every thirteen minutes.[243] Although the new regimen of treatments has slowed this rate,[244] it has not decreased the number of persons living with HIV/AIDS, and without a vaccine, it is unlikely that medical technology will be able to slow the rate of HIV infection.[245]

The demographics have shown AIDS to be a chillingly democratic killer, represented in all ethnic, economic, and age groups.[246] While AIDS was once dismissed as a "gay disease," heterosexuals, particularly heterosexual women, are the largest-growing demographic group of victims.[247] Worldwide, the statistics are

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235. *See id.* at 114.

236. *See* Garrett, *supra* note 211, at 170. The article notes the work of Dr. Robert Siliciano of the John Hopkins School of Medicine in Baltimore:

> [Dr. Siliciano] uses a new tech (considering EEOC guidelines in the Title VII domain)nology for searching for evidence of HIV in seemingly "cured" patients, and his findings consistently point to continued presence of HIV hidden deep in reservoirs in the body. Siliciano searches for the presence of HIV genetic material integrated into the chromosomes of human cells. These seemingly innocuous chunks of DNA can, when stimulated, commandeer the genetic machinery and make millions of copies of themselves that are released into the bloodstream the moment HAART drug levels, for any reason, fall.

Id.

237. *See* STINE, *supra* note 2, at 110-11.

238. *See id.*

239. *See id.* at 269.

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.* at 269-70. Worldwide, this rate is *at least* one person a minute. *See id.* at 270.

244. *See* Garrett, *supra* note 211, at 105. Garrett notes that the number of individuals who died from AIDS in New York City fell from seven thousand in 1994, to five thousand in 1996. She notes that nationally, AIDS deaths fell 47% between 1996 and 1997. *See id.* However, by any standard, the deaths of five thousand people in a single city in a single year from an infectious disease is a tragedy on an almost unimaginable scale.

245. *See* Proclamation No. 7153, 50 Fed. Reg. 66,977 (1998). President Clinton's proclamation noted that, even with new treatments, AIDS remains the leading cause of death for African-American men aged 25-44, and the second-leading cause of death for African-American women in the same age group. *See id.*

246. *See* STINE, *supra* note 2, at 270-74.

247. *See id.* at 276.

even more frightening.[248] As of 1995, seventy-five percent of the world's HIV-positive victims live in developing countries.[249] In addition, it is estimated that eighty-five percent of new HIV infections will occur in developing countries.[250]

AIDS is a modern epidemic. With the possible exception of cancer, no other disease has gripped modern culture with such force. AIDS has refashioned American society. The modern social emergence of homosexuality is a direct consequence of the epidemic, as is the conception of "sexual awareness" classes in American middle schools, both issues being unthinkable in a pre-AIDS era.[251] AIDS is widespread, infectious, and lethal. Its nature is conducive to sexual transmission. AIDS is unlike other sexual diseases; therefore, it should not be treated in the eyes of the law as other STDs. Although it shares some characteristics with other STDs, such as genital herpes, AIDS is fatal. Our society should place a high value on eradicating the disease and, failing that, on preventing the spread of AIDS.

2. *Public Information and Knowledge of HIV and AIDS*

In the early days of the AIDS epidemic, there was a great deal of panic. No one knew what caused the disease or how it was spread.[252] In 1986, the Surgeon General of the United States, C. Everett Koop, released his *Report on the Acquired Immune Deficiency Syndrome*.[253] The release of this report which explicitly stated the methods of transmission and prevention, along with Reagan's *Presidential Commission on the Human Immunodeficiency Virus Epidemic*[254] called for an increase in public education and awareness of the AIDS epidemic.[255] Several states have passed legislation requiring schools to run HIV/AIDS education programs.[256]

AIDS is and has been in the national spotlight since the early 1980s. It has been widely covered in the media. The HIV-positive status of athletic celebrities Arthur Ashe and Earvin "Magic" Johnson Jr. were widely publicized. Mr. Johnson has continued to appear in HIV/AIDS awareness programs. Even major films have addressed the issue of HIV-infection, perhaps most noticeably, the motion picture *Philadelphia*, which featured actor Tom Hanks's Oscar-winning performance as an AIDS victim fighting employment discrimination.

In the case of *C.A.U. v. R.L.*, the Minnesota Court of Appeals was faced with the issue of whether or not a defendant, who transmitted HIV to his former fiancée

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248. *See, e.g.*, Proclamation No. 7056, 62 Fed. Reg. 64,127 (1997). President Clinton's declaration of December 1, 1997 as World AIDS Day noted that 1200 children die worldwide of AIDS each day, and 1600 more become infected with HIV. *See id.*

249. *See* STINE, *supra* note 2, at 309. This percentage is expected to increase. *See id.*

250. *See id.*

251. *See id.* at 402-03.

252. *See id.* at 33. In the 1980s, myths circulated that AIDS was spread not only by casual contact, but also by domestic cats, UFOs, and the CIA. In 1987, the Soviet press agreed to stop publishing reports that AIDS was the result of American biological warfare programs. *See id.*

253. *See* SURGEON GENERAL'S REPORT, *supra* note 34.

254. *See* Exec. Order No. 12601, 52 Fed. Reg. 24,129 (1987).

255. *See id. See also* Proclamation No. 5709, 52 Fed. Reg. 36,889 (1987), where President Reagan, in proclaiming October 1987 as AIDS Awareness and Prevention Month, states, "Education is crucial for awareness and prevention of AIDS." *Id.* President Reagan falls short of creating an AIDS-related curriculum: "Educators can develop and relay accurate health information about AIDS without mandating a specific curriculum on this subject." *Id.*

256. *See* STINE, *supra* note 2, at 403.

through sexual relations in 1985, could be held to have constructive knowledge of his disease.[257] The defendant, who admitted one high-risk homosexual contact, suffered from headaches, spots on his legs, weakness, and fatigue.[258] His fiancée had explicitly asked him if he had AIDS in 1985, to which he responded, "No."[259] The court found that the defendant, who was diagnosed with AIDS in 1985, could not be held liable.[260] The court ruled that, based on the information available to the general public, "it was not reasonable for [Defendant] to have constructive knowledge he might have AIDS, or that he was capable of transmitting the disease to [Plaintiff]."[261] The court based its holding on the findings of fact made by the United States District Court for the District of Columbia in *Kozup v. Georgetown University*.[262] *Kozup* involved the parents of an HIV-positive infant, and their action against the hospital that administered a blood transfusion to their child using HIV-infected blood products. The *Kozup* court held that in 1983, the hospital did not have reasonable notice that the blood products could be HIV-infected.[263] The *C.A.U.* court looked at these facts as well as local newspaper articles in determining whether or not the defendant could have known.[264] The court found:

> Prior to May 1985, the content of the literature appearing in local newspapers was threefold: few persons in Minnesota had contracted AIDS, the disease was associated primarily with homosexuals and intravenous drug users, and there was a belief that AIDS was transmitted through blood or semen. A May 1985 news commentary contained within it a statement that "there is clear evidence that heterosexual intercourse transmits AIDS." . . . In August 1985, a prominent article stated that AIDS was spreading beyond homosexuals and could be transmitted heterosexually.[265]

Despite this evidence of media exposure, as well as the fact that AIDS was considered a "gay disease" in the early 1980s, the *C.A.U.* court held that constructive knowledge of HIV infection on the part of a defendant who had engaged in "high-risk homosexual contact,"[266] was unreasonable.[267]

Due to the mass exposure that the AIDS epidemic has received in the media since 1985, as well as the increase in AIDS-education programs, it is unlikely that a case with facts identical to *C.A.U.* would have the same holding. In 1999, if an individual engages in high-risk sexual activity, exhibits physical symptoms associated with HIV/AIDS, and engages in sexual relations with a fiancé after denying HIV infection, liability should attach. Today, it is simply too well-known a fact that HIV can be spread through unprotected sexual contact, and that some activi-

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257. *See* C.A.U. v. R.L., 438 N.W.2d 441, 443-44 (Minn. Ct. App. 1989).

258. *See id.* at 442.

259. *Id.*

260. *See id.* at 444.

261. *Id.*

262. 663 F. Supp. 1048 (D.C. Cir. 1987).

263. *See id.* at 1056-57. The *Kozup* court noted that the HIV-antibody test did not become available until 1985. *See id.* at 1052.

264. *See* C.A.U. v. R.L., 438 N.W.2d at 443-44.

265. *Id.* at 444 (citations omitted). The court also noted an April 23 *Newsweek* article regarding the transmission of AIDS, as well as the July 1985 media disclosure that actor Rock Hudson had AIDS. *See id.* at 442.

266. *Id.* at 442.

267. *See id.* at 444.

ties create a higher risk of HIV-infection, for a defendant to plead a defense of ignorance. By the same token, courts should not entertain such defenses in this day and age. The consequences of AIDS are far too serious to allow individuals who reasonably have constructive knowledge of HIV infection, or even of a high-risk of HIV transmission to innocent partners, to escape liability on the grounds that they have never had a formal diagnosis.

C. A Higher Standard of Knowledge and Constructive Knowledge Should Be Applied in Tort Actions Involving the Sexual Transmission of HIV

Because of both the serious nature of AIDS and the seriousness of its consequences to American society, the legal standard for determining liability for the sexual transmission of the disease should be expanded to encompass individuals who should know that they either have, or are at a greater risk of contracting, HIV or AIDS. Even if individuals engaging in high-risk activities are not held to have constructive knowledge that they are in fact infected with HIV, the risk of transmitting the disease should create a duty upon those persons to fully inform all future sexual partners of the risk. The risk to human life is simply too great to allow silence, or willful ignorance, on the part of one person to protect them from the possible horrendous repercussions of their actions. It is entirely possible for one individual to create their own epidemic.[268]

The "knowledge" element, required in all tort actions arising from the sexual transmission of AIDS, should be extended to encompass not only those who have had a medical diagnosis of HIV or AIDS, but to those who have knowledge that a former partner has HIV/AIDS, those who experience symptoms consistent with HIV/AIDS, and those individuals who have engaged in activities which create a high-risk for contracting AIDS. If an individual enters into sexual relations with another without informing their partner of any of these factors, and the partner subsequently becomes infected with HIV as a result of this contact, the individual who has the knowledge that their innocent partner lacks should be held liable in tort actions. The result of such an extension of liability may well be an increase in tort actions; however, if this is a "slippery slope," then it is a slippery slope to justice. Finding persons who failed to warn their sexual partners liable will encourage disclosure, lead to an increase in HIV testing, and will help in preventing the spread of HIV.

1. When Is Constructive Knowledge Reasonable?

In the case of *Doe v. Johnson*, the United States District Court discussed the degree of knowledge required to create a duty to disclose the risk of HIV to a partner.[269] The *Doe* court's discussion centered on the plaintiff's cause of action for negligent sexual transmission of AIDS which arose in 1990,[270] but is informative to the extension of liability in all tort actions arising from such a claim. The court stated:

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268. *See* STINE, *supra* note 2, at 323 (regarding "*One Man Starts the Russian AIDS Epidemic*").

269. *See* Doe v. Johnson, 817 F. Supp. 1382, 1388 (W.D. Mich. 1993).

270. *See id.* at 1386.

> [T]he Court believes that the key inquiry . . . is: at what level of knowledge of the HIV virus should a defendant foresee potential harm to a plaintiff such that s/he acquires a duty to act as a "reasonably prudent person," as well as to disclose his/her knowledge of the HIV virus to that plaintiff. Certainly, levels of knowledge of the HIV virus are wide-ranging. For example:
>
> 1) A defendant knows s/he has the HIV virus because s/he has been affirmatively diagnosed by a medical professional as having the disease;
>
> 2) A defendant knows that s/he has the HIV virus because s/he has specific knowledge of any particular fact, such as:
>
> a) The defendant has experienced symptoms related to the HIV virus; or,
>
> b) The defendant has come into contact with an individual, or several individuals who have been diagnosed as having the HIV virus and defendant has engaged in conduct with such persons which results in a likelihood (or even a possibility) that s/he could have the disease because of such conduct;
>
> 3) A defendant has engaged in "high risk" conduct which may result in exposure to the HIV virus, such as a great deal of unprotected sexual contact with multiple partners; unprotected anal intercourse with multiple partners; shared needles with many individuals while using intravenous drugs; or, several blood transfusions.
>
> 4) A defendant has engaged in conduct which may result in exposure to the HIV virus, such as unprotected sexual relations with one partner (who had unprotected sexual relations with at least one other person).[271]

The *Doe* court goes on to hold that a legal duty to disclose that one may have the HIV virus exists *solely* when: 1) a defendant has actual knowledge that s/he has the HIV virus; 2) a defendant has experienced symptoms associated with the HIV virus (the court does not go on to describe what these may be); or 3) a defendant has actual knowledge that a prior sex partner has been diagnosed as having the HIV virus.[272] The court refused to find a duty to disclose "high-risk" behavior, predicting a flood of "AIDS-phobia" cases would ensue from such a finding.[273] In so refusing, the court seemingly failed to recognize that unless actual exposure to HIV can be proven, AIDS-phobia cases arising from sexual transmission are not upheld.[274] Furthermore, if actual exposure exists, remedies other than AIDS-phobia actions may be taken. If a person has actually been exposed to HIV by a person who engaged in high-risk sexual activity, as the *Doe* court defines that activity, it would seem entirely proper that tort liability should be applied.

The *Doe* court seemed very disturbed by the idea of extending liability to persons who have engaged in high-risk activity. After defining high-risk activities in their discussion of HIV knowledge quoted above, the court goes on to define

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271. *Id.* at 1388-89.
272. *See id.* at 1393.
273. *Id.* at 1393-94.
274. *See* cases cited *supra* note 82 and accompanying text.

who high-risk groups are: 1) homosexual and bisexual men; 2) present or past intravenous drug users; 3) persons with clinical or laboratory evidence of infection, such as symptoms of AIDS; 4) persons born in countries where heterosexual intercourse is thought to play a major role in transmission; 5) male or female prostitutes and their sex partners; 6) sex partners of infected persons or persons at increased risk; 7) all persons with hemophilia who have received clotting-factor products; and 8) infants of at-risk mothers.[275] However, in the same opinion, the *Doe* court questions the legal consequences of imposing a duty to disclose one's status as a high-risk:

> [A]s a matter of law, what is "high risk" activity? Who is in this "high risk" group? How should "high risk" be defined? Even if a workable definition of "high risk" were discovered, would a duty be imposed on non-high risk group members to disclose to every potential sex partner all prior sexual contacts with partners who were so-called "high risk" group members? . . . Would the duty require doctors, nurses and other medical health professionals who come into contact with HIV infected patients to disclose this information to sexual partners?[276]

The *Doe* court's musings raise several questions. The court had already defined high-risk groups, one of them being "sex partners of infected persons or persons at increased risk."[277] Therefore, the answer to the court's question of whether or not non-high-risk group members have a duty to disclose to future sex partners that they have had sexual contacts with people in high-risk groups would seem to be absurdly moot. By the court's own definition, such people cannot be non-high-risk group members, but are in fact members of a high-risk group. Furthermore, high-risk activity would seem to be engaging in activity within, or with, members of high-risk groups. Lastly, because doctors and other healthcare professionals are not included within the court's own definition of high-risk groups, nor is working in the health care industry listed in the court's own description of high-risk activity, where does this concern for a "slippery slope" concerning healthcare workers arise?[278]

Ultimately, the *Doe* court held:

> [I]f defendant had no actual knowledge of his own infection, had no symptoms of the HIV virus whatsoever, nor was he aware of any prior sex partner who had been diagnosed as having the HIV virus, [the court finds] that as a matter of law it was not foreseeable that he would pass the HIV virus to Ms. Doe simply because he had unprotected sex with multiple partners prior to his encounter with Ms. Doe.[279]

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275. *See* Doe v. Johnson, 817 F. Supp. at 1391.

276. *Id.* at 1394.

277. *Id.* at 1391.

278. The court equates imposing a duty to disclose on individuals who engage in high-risk activity with imposing a duty on sellers of property to disclose the possibility of termites if the property were in an area at high risk for termite infestation. *See id.* at 1395. Aside from the obvious begging of the question, this hypothetical is especially objectionable in that it equates property rights, or expected property rights, with the right of an individual to avoid becoming infected with an incurable, ultimately fatal disease. With all due respect to the court, this Author notes a sharp distinction between tort actions arising from the sexual transmission of AIDS and tort actions arising from the sale of defective property.

279. *Id.* at 1394.

An argument can be made that having unprotected sex with multiple partners *does* create a foreseeable risk of spreading sexually transmitted diseases, including HIV, to future partners.[280] Furthermore, when the fastest growing at-risk demographic group in the United States currently are heterosexuals,[281] then a high-risk group under *Doe*'s analysis would include "persons born in countries where heterosexual intercourse is thought to play a major role in transmission."[282] Therefore, if heterosexual contact, especially with multiple partners, can be construed as high-risk activity, then it is possible that under the analysis of the *Doe* court Mr. Johnson may have been found liable if the case were tried today.

Ultimately, it may be that the only tort action where the higher standard can be applied consistently is in the nonintentional torts, such as negligence. In negligence actions, the plaintiff must only show that the defendant had a duty, which he or she breached, and that breach caused the plaintiff harm. Because negligence deals with conduct, rather than a state of mind, intent is not an issue. As discussed above, a person who has engaged in high-risk behavior, is in a high-risk group and has a duty to protect future partners from the risk of HIV, whether this is a duty to disclose, or a duty to abstain. While an argument could be raised that persons have a duty to *inquire* whether or not their partners are at risk for HIV, this burden shift is unnecessary. HIV-positive persons do not yet constitute a majority of the population. It is not yet time to impose a legal duty on everyone to assume other persons are HIV-positive without a showing otherwise. At best, a duty to inquire could be a defense on the part of defendants in actions for the sexual transmission of HIV. It remains to be seen how courts would treat such a defense, when the facts support a showing that the defendant either knew or should have known he or she was infected with HIV prior to the sexual contact. As a matter of policy, it would seem that the duty should remain on the person who has the superior knowledge to disclose. As a matter of tort law, which serves to assign responsibility to those who have committed wrongs, liability should attach to those who could have prevented and foreseen the harm, but through inaction, or in the case of sexual transmission through direct action, caused the harm to occur.

The test of when constructive knowledge is reasonable on the part of the defendant should be: 1) defendant has actual notice of his or her HIV infection, such as a diagnosis of HIV/AIDS, or symptoms consonant with HIV/AIDS; 2) defendant has knowledge that a former sexual partner has HIV/AIDS; or 3) defendant has engaged in high-risk activity, such activity being defined as:

a. intravenous drug use;

b. homosexual intercourse, or sexual contact;

c. unprotected sex with multiple partners;

d. engaging in prostitution;

e. receiving blood products in the United States between 1978 and 1985, or receiving blood products outside of the United States;

f. sexual activity with a person who is known to be at high risk.

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280. *See* Stopera v. DiMarco, 554 N.W.2d 379, 382 (Mich. Ct. App. 1996) (Markman, J., dissenting).

281. *See* STINE, *supra* note 2, at 277.

282. Doe v. Johnson, 817 F. Supp. at 1391.

Such a test would encompass all groups currently considered high-risk by the American Medical Association: men who have sex with men after 1975; past or present intravenous drug users; persons who exchange sex for money or drugs and their sex partners; persons whose past or present sexual partners were or are HIV-positive, bisexual, or intravenous drug users; and persons with a history of blood transfusions between 1978 and 1985.[283] The test also acknowledges that heterosexual transmission of AIDS is both a growing concern,[284] and a judicially noticed fact.[285] Finally, the test recognizes that blood supplies outside the United States are still a source of risk.[286]

While the test does recognize unprotected sex with multiple partners as a high-risk activity, there are limits to the tort liability this test would impose. The test would not include a single sexual act between heterosexuals, even if the sex was unprotected. Furthermore, protected sex with multiple partners does not constitute high-risk activity. While both unprotected sex and multiple partners are recognized risks for the contraction of HIV,[287] neither are specifically recognized by the American Medical Association as high-risk activities.[288] Including the composite of the two as a high-risk activity from which constructive knowledge can be construed recognizes both the risks inherent from such activity, as well as the common knowledge that such activity creates a risk of HIV infection.

The test is to be used to determine constructive knowledge of HIV in tort actions where the plaintiff has contracted HIV from the defendant. The test need not be entirely compliant with the American Medical Association, it need only be consistent with a risk identifiable to the defendant. The duty is congruent with the duty of tort actions involving the transmission of sexually transmitted diseases: "[O]ne who knows, or *should know*, that he or she is infected with [a sexually transmitted disease] is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them."[289] As the Supreme Court of Ohio stated in *Mussivand v. David*:[290]

> There is a strong public policy behind imposition of this duty. In general, we are reminded that ". . . [t]he health of the people is an economic asset. The law recognizes its preservation as a matter of importance to the state. To the individual nothing is more important than health. The laws of this state have been framed to protect the people, collectively and individually, from the spread of communicable disease."[291]

Lastly, there should be a limit to liability in this area. Unfortunately, the majority of persons infected with HIV do not know that they are infected.[292] More-

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283. *See* The Journal of American Medical Association, *HIV/AIDS Information Center* (visited Aug. 28, 1999) <http://www.ama-assn.org/aids>.

284. *See* STINE, *supra* note 2, at 276-77.

285. *See* Stopera v. DiMarco, 554 N.W.2d at 382 (Markman, J., dissenting).

286. *See* STINE, *supra* note 2, at 277-78.

287. *See* Doe v. Johnson, 817 F. Supp. at 1390-91; Faya v. Almaraz, 620 A.2d 327, 332 (Md. 1993); Stopera v. DiMarco, 554 N.W.2d at 382 (Markman, J., dissenting).

288. *See* The Journal of American Medical Association, *HIV/AIDS Information Center* (visited Aug. 28, 1999) <http://www.ama-assn.org/aids>.

289. Berner v. Caldwell, 543 So.2d 686, 689 (Ala. 1989) (emphasis added).

290. 544 N.E.2d 265 (Ohio 1989).

291. *Id.* at 270 (quoting Skillins v. Allen, 173 N.W. 663, 664 (Minn. 1919)).

292. *See* STINE, *supra* note 2, at 269. Stine notes that the number of AIDS cases in the United States is underreported by as much as 20%. *See id.*

over, many persons infected with HIV through sexual transmission no doubt acquired the disease from another person who did not know, or did not warn even if they had reason to know. The same chain of sexual partners that enables the HIV epidemic to perpetuate, might also provide a chain of liability if some limits were not applied. Liability should be apportioned to only those who are found, as a matter of fact, to have constructive knowledge due to information known to them and not to their partners.

2. Applying the Higher Standard of Constructive Knowledge

In applying the new standard of constructive knowledge to existing tort cases involving the sexual transmission of HIV, we can see how constructive knowledge can be construed (or not) through actual fact patterns where liability was denied. In *C.A.U. v. R.L.*, the defendant suffered physical symptoms which we now know to be consistent with HIV infection, but the court held the defendant did not have the requisite knowledge.[293] Furthermore, the defendant admitted to having one "high risk homosexual contact."[294] The *C.A.U.* court held that the plaintiff failed to produce a "proper demonstration of evidence that [defendant] had a history of homosexual activity."[295] The court does not explain why the defendant's admission to his doctor was not a "proper demonstration."[296]

If the case were tried today under the proposed test, it is likely that the defendant would be held liable in tort. Defendant exhibited symptoms consistent with HIV/AIDS, and he made admissions which would have put him within the group of a person engaging in high-risk activity (homosexual contact). Under the proposed test, it is foreseeable that defendant will be held to have constructive knowledge of his HIV infection. As discussed earlier, public knowledge of HIV is far more widespread today. Defendant's symptoms, together with his high-risk activity, may well lead to a finding of constructive knowledge.

Doe v. Johnson, presents a very different set of facts. In *Doe*, the defendant was a high-profile celebrity who allegedly refused to wear a condom after his partner asked him to.[297] The defendant did not exhibit any symptoms, but it is alleged that he was "sexually promiscuous," and "engag[ed] in sexual intercourse with multiple partners."[298]

The outcome of this case under the proposed standards would probably remain the same: no liability on the part of the defendant. In this case, no actual notice of HIV is suggested. The plaintiff's action hinges on the argument that defendant's promiscuous, heterosexual lifestyle causes him to be in a group associated with a high risk of contracting HIV. Although defendant did engage in unprotected sex with the plaintiff in *Doe*, a showing that he engaged in unprotected sex with multiple partners, or that a previous partner was known by defendant to be at-risk, would be required to find constructive knowledge under the new standard.

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293. *See* C.A.U. v. R.L., 438 N.W.2d 441, 444 (Minn. Ct. App. 1989).
294. *Id.* at 442.
295. *Id.* at 444.
296. *Id.* at 442.
297. *See* Doe v. Johnson, 817 F. Supp. 1382, 1385 (W.D. Mich. 1993).
298. *Id.*

Delay v. Delay[299] is a recent case where a woman brought a tort action against her husband for wrongful exposure to a sexually transmitted disease. In *Delay*, the plaintiff alleges that her husband misrepresented his health to her when he informed her that he had been tested for STDs and was healthy.[300] The *Delay* court held that the plaintiff was unable to "muster any evidence that [defendant] knew or suspected he was in fact HIV positive . . . ."[301]

Under the proposed standard, it is possible that the *Delay* defendant may be found liable if the case were tried today, although liability would depend on a factual record we do not have. The *Delay* court notes, "[Defendant] did have various minor health problems prior to the parties' marriage and thereafter, that indicate he was then HIV positive."[302] These health problems occurred prior to 1989, and defendant's doctors apparently did not feel that the problems were AIDS-related.[303] During the marriage, the defendant's arrest for lewd and lascivious conduct led to his discovery that he was HIV-positive.[304] If the case were tried today under the proposed standard it is probable that tort liability would be found. As in *C.A.U.*, public knowledge of HIV symptoms and problems related to immune system disorders are more widely known. Because it is probable that the various doctors defendant visited would recognize defendant's condition today, defendant's problems could be enough to constitute constructive knowledge of HIV. Furthermore, the fact that defendant was arrested for lewd and lascivious conduct which required him to be tested for HIV[305] leads one to believe that defendant became involved somehow with prostitutes or prostitution, although the *Delay* court does not say so. Under the proposed standard both prostitutes and customers or other partners of prostitutes would be considered to be engaging in high-risk activity.

Utilizing the proposed standard in existing cases involving the sexual transmission of AIDS demonstrates that the standard does not necessarily lead to a slippery slope of liability. Although *C.A.U.*'s outcome changes as a result of the new standard, it is also possible that the defendant would be liable if the case were tried today under existing standards. Both *Doe* and *Delay*'s outcomes depend largely on the factual circumstances from which the claims arise. Tort liability does not automatically apply in either case because of the proposed standard. The standard would extend liability only to those persons who should know of their HIV infection due to information or circumstances known to them. Persons who engage in high-risk activities, while not required to be tested for HIV, which would be an impermissible invasion of their privacy and bodily integrity, should have a duty to warn all future sexual partners that the risk exists. This extension of liability would only serve to increase disclosure of risk, discourage sexual contact by people who know they are at risk for transmitting HIV, and encourage HIV testing.

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299. 707 So.2d 400 (Fla. Dist. Ct. App. 1998).
300. *See id.* at 401.
301. *Id.* at 402.
302. *Id.* at 401.
303. *See id.*
304. *See id.*
305. *See id.*

IV. CONCLUSION

The standard of when it should be reasonable for an individual to have constructive knowledge of his or her HIV infection should be extended beyond those people who have a medical diagnosis of that fact. The standard should encompass those who have information that they do not share with their partners, such as the knowledge that they have engaged in high-risk behavior in the past, or continue to do so. There exist crucial societal policies for preventing the spread of this stealthy and fatal epidemic. The proposed new standard would encourage disclosure of the risk of HIV infection to unsuspecting partners, and would further encourage HIV testing. It may conceivably limit some high-risk activity. While it is foreseeable that an extension of liability may increase litigation in this area and raise concerns of judicial economy, it should be kept in mind that this proposed standard is a response to an incurable epidemic that is sweeping not only this country but the world. Given the facts that the current HAART treatments only hold off the progress of HIV, they neither prevent HIV nor eradicate it. Moreover, the fact that the HAART treatments are out of the reach of the overwhelming majority of HIV/AIDS victims,[306] it is likely that we have not seen the worst of AIDS yet. Does this single disease merit an extension in tort liability, where other contagious diseases do not? This Comment argues that it does. If another disease appears which creates a potential for such a great number of infections, and which resists all medical attempts to treat, then perhaps that disease may also require an extension in tort liability. This Comment does not address that issue. Individuals in the United States who know or should know of their HIV infection should have a duty to disclose that information to future partners. This responsibility is a "plain duty of humanity."[307] Failing to do so, they should be liable in tort.

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306. As of 1997, the cost of treatment with HAART drugs was between $12,000 and $15,000 a year. *See* The Human Rights Campaign, *State of AIDS* (visited Aug. 28, 1999) <www.hrc.org/issues/aids>. Recall that 95% of all infections worldwide are occurring in developing countries. *See* National Institute of Allergy and Infectious Diseases, *AIDS Fact Sheet* (visited Aug. 28, 1999) <http://www.niaid.nih.gov/factsheets/aidstat.htm>.

307. Minor v. Sharon, 112 Mass. 477, 487 (1873).