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## Discretion to Warn: Balancing Privacy Rights with the Need to Warn Unaware Partners of Likely HIV/AIDS Exposure

Jacquelyn Burke

*Boston College Law School*, [jacquelyn.burke@bc.edu](mailto:jacquelyn.burke@bc.edu)

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# DISCRETION TO WARN: BALANCING PRIVACY RIGHTS WITH THE NEED TO WARN UNAWARE PARTNERS OF LIKELY HIV/AIDS EXPOSURE

JACQUELYN BURKE\*

**Abstract:** HIV/AIDS, an epidemic that continues to claim thousands of lives annually, disproportionately affects homosexual males, racial minorities, and low-income individuals. When HIV/AIDS first emerged in the 1980s, the virus was clouded by great fear, misinformation, and stigma. Although stigma persists, research and treatment of HIV have so advanced that the virus may be managed and treated with medicine so long as it is caught early. HIV/AIDS prevention and testing strategies must balance competing concerns of both patients' rights to confidential test results with the public health good of notifying individuals who are unaware of likely HIV exposure. The current HIV law in Massachusetts fails to account for the public health good of notifying individuals who are likely infected and unaware of their status. In response to this public health need, the Massachusetts Legislature should amend its current HIV law to grant physicians discretion to notify partners who have likely been exposed to HIV. Maryland's law on HIV testing and partner notification provides a sound model for the legislature's consideration.

## INTRODUCTION

Jaylah was a beautiful two-day-old newborn lying in a crib at Boston Medical Center and her father, Anthony, could not have loved her more.<sup>1</sup> Anthony and his girlfriend, Elisa, had been anxious about Jaylah's health, but Jaylah was born full-term and by all outward appearances was healthy.<sup>2</sup> While Elisa was still an inpatient on the labor and delivery floor of the hospital, Anthony would go alone to visit Jaylah and check on her.<sup>3</sup> During one of these visits, Anthony watched as a nurse put an intravenous (IV) into Jaylah's arm,

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<sup>1</sup> Interview with Judith Burke, Newborn Intensive Care Unit Nurse, Bos. Med. Ctr., in Hingham, Mass. (Jan. 18, 2013). The names "Anthony" and "Jaylah" are pseudonyms created by the author to protect the identity of the actual individuals.

<sup>2</sup> *Id.* The name "Elisa" is a pseudonym created to protect the identity of the actual mother.

<sup>3</sup> *Id.*

prompting him to ask what medications his daughter was receiving.<sup>4</sup> Rather than answer the question, the nurse said she would go and get the doctor.<sup>5</sup>

Anthony was unaware that under Massachusetts state law, the nurse was legally restricted from disclosing the truth to him: his daughter was receiving azidothymidine (AZT) to treat the Human Immunodeficiency Virus (HIV) that she had been exposed to in utero.<sup>6</sup> Anthony did not know that that Elisa was HIV positive, that his daughter had been exposed, that HIV can be transmitted in utero from mother to baby, or that there was a significant likelihood that he himself could be HIV positive.<sup>7</sup> Because of the current Massachusetts law, however, the nurse was not legally permitted to tell Anthony anything about his daughter's exposure or his girlfriend's diagnosis.<sup>8</sup> The nurse also could not suggest that Anthony be tested or alert him to the likelihood of his own infection.<sup>9</sup> Although a social worker counseled Elisa as to HIV's effect on Jaylah, disclosing the information to Anthony remained solely Elisa's decision.<sup>10</sup>

When the doctor returned, he told Anthony that Jaylah was receiving antibiotics.<sup>11</sup> Taking the doctor's word, Anthony had no reason to question that Jaylah was receiving only antibiotics.<sup>12</sup> Approximately one week later, Anthony left the hospital with Jaylah, unaware that his daughter needed to continue to take AZT via syrup in order to prevent her from becoming HIV positive, and also unaware that he too may be in need of similar medications.<sup>13</sup>

Unfortunately, Anthony's story is not unique.<sup>14</sup> Many individuals in committed relationships trust their partner and assume they have no reason to be tested, all the while being unaware of their partner's HIV status.<sup>15</sup> HIV testing is crucial to executing effective prevention strategies and enabling individ-

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See MASS. GEN. LAWS ch. 111, § 70F (2012) (stating that the results of HIV testing cannot be released to anyone other than the tested person without that person's written permission); Interview with Judith Burke, *supra* note 1. AZT, also known as Zidovudine, is a drug used to prevent mother-child transmission of HIV. *AIDSInfo*, Drug Database (2013), <http://aidsinfo.nih.gov/drugs/4/zidovudine/0/patient> (last updated May 17, 2014).

<sup>7</sup> See ch. 111, § 70F; Interview with Judith Burke, *supra* note 1.

<sup>8</sup> See ch. 111, § 70F; Interview with Judith Burke, *supra* note 1.

<sup>9</sup> See ch. 111, § 70F; Interview with Judith Burke, *supra* note 1.

<sup>10</sup> Interview with Judith Burke, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* AZT via syrup is the liquid form of the standard treatment for newborns who may have been exposed to HIV. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Alison Brock et al., *Patients and Families Living with HIV/AIDS, in* POVERTY, HEALTH AND LAW 437, 446 (Elizabeth Tobin Tyler et al. eds., 2011). Approximately twenty percent of people infected with HIV are unaware of their status. *Id.*

uals to seek proper medical care.<sup>16</sup> Unfortunately, however, the stigma surrounding HIV often causes people to hesitate to disclose their status to their partners or stifles their initiative to seek out testing on their own.<sup>17</sup> State laws, such as the Massachusetts law prohibiting disclosure of HIV test results to a partner, were promulgated at the height of the societal stigma.<sup>18</sup> These laws seek to balance the needs of patient privacy and testing incentives with the public health objective of notifying persons who are likely infected.<sup>19</sup> State approaches to balancing these competing interests vary greatly.<sup>20</sup> The Massachusetts law focuses on patient privacy rights rather than public health concerns.<sup>21</sup>

While many states grant health care providers or public health officials discretion to decide whether to notify individuals other than the patient of potential HIV exposure, Massachusetts strictly protects the confidentiality of an individual's HIV-positive status.<sup>22</sup> Massachusetts law does not grant health care providers any discretion to inform parties that they may be at high risk for infection.<sup>23</sup> Chapter 111, section 70F of the Massachusetts General Laws ("MA HIV Law") governs procedures on HIV testing and the disclosure of test results in the state.<sup>24</sup> According to this statute, physicians and health care providers may not test a patient for HIV without first obtaining verbal informed consent from the patient; nor is it permissible to disclose the results of any test, or even the fact that a patient was tested for HIV, to a person other than the patient without the patient's written informed consent.<sup>25</sup>

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<sup>16</sup> Alison Yager, *HIV Testing and Confidentiality*, in *HIV & AIDS BENCHMARK 21*, 22 (Joshua Bachrach & Cynthia Knox eds., 2012).

<sup>17</sup> *What Is Stigma and Discrimination?*, AVERT, <http://www.avert.org/hiv-aids-stigma-and-discrimination.htm> (last visited Sept. 24, 2014) [hereinafter *Stigma and Discrimination*]. AIDS-related stigma is not static; it is ever-changing in terms of location and severity, but it does persist even today. *See id.*

<sup>18</sup> *See* MASS. GEN. LAWS ch. 111, § 70F (2012). The Massachusetts law governing HIV disclosure was written in 1986, which corresponds to the time when misunderstanding of the modes of transmission of HIV was at its peak. *Id.*; *see Stigma and Discrimination*, *supra* note 17.

<sup>19</sup> *See* Yager, *supra* note 16, at 22.

<sup>20</sup> *See id.* at 25. *Compare* ch. 111, § 70F (upholding strict confidentiality of HIV test results without exception), with N.Y. PUB. HEALTH LAW § 2130 (McKinney 2010) (imposing an affirmative duty on all health care providers to report HIV patient tests results to health commissioner who initiates process of notifying partners).

<sup>21</sup> *See* ch. 111, § 70F.

<sup>22</sup> *See* ARIZ. REV. STAT. ANN. § 36-664 (West 2011); CAL. HEALTH & SAFETY CODE § 121015 (West 2006); ch. 111, § 70F; Yager, *supra* note 16, at 41.

<sup>23</sup> *See* ch. 111, § 70F (stating explicitly that health care providers may only disclose results or test-subject identity with consent from the test subject and not addressing the role of the partners of a test subject).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

The MA HIV Law was enacted in 1986, before the medical and scientific communities understood HIV/AIDS and before there was an approved or effective treatment for the virus.<sup>26</sup> Instead, HIV/AIDS was then surrounded by fear, stigma, apprehension, and misinformation, which influenced the drafting of the statute in both content and perspective.<sup>27</sup> There is an implicit assumption in the MA HIV Law that infected persons will be proactive in notifying potentially affected parties of the risk of infection.<sup>28</sup> This is a poor assumption because it values the privacy of one partner over the life of the other.<sup>29</sup> This Note explores whether the current Massachusetts policy harms the public health by putting third parties at risk, especially in instances of sexual or needle-sharing partners.<sup>30</sup> It argues that the Massachusetts Legislature should amend its statute to grant health care providers discretion to notify partners under certain circumstances.<sup>31</sup>

Part I of this Note provides background for understanding HIV/AIDS, namely its epidemiology, and the subgroups that are most infected in the United States. This part will also examine the stigma associated with HIV/AIDS and its impact on related laws. Part II will provide a survey of various states' HIV/AIDS statutes and the variant amounts of discretion physicians have been granted in notifying third parties of potential infections. Part III examines the Massachusetts HIV statute and explains why it falls short of achieving the public health objective of notifying those who may be infected. Part IV argues that Massachusetts should consider re-filing three bills from last legislative session that seek to grant health care providers discretion in warning third parties of the risk of infection.

## I. HISTORY OF HIV/AIDS AND VARIOUS PARTNER NOTIFICATION APPROACHES

As of 2011, Acquired Immunodeficiency Syndrome (AIDS) has been the cause of death of approximately 500,000 total individuals in the United States alone.<sup>32</sup> AIDS is caused by the Human Immunodeficiency Virus (HIV), a virus

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<sup>26</sup> *Id.*; see Bernard Friedland, *HIV Confidentiality and the Right to Warn—the Health Care Provider's Dilemma*, 80 MASS. L. REV. 3, 13 (1995).

<sup>27</sup> See ch. 111, § 70F; Friedland, *supra* note 26.

<sup>28</sup> See ch. 111, § 70F.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*; Leah H. Wissow, Comment, *Public Health vs. Privacy: Rebalancing the Government Interest in Involuntary Partner-Notification Following Advancements in HIV Treatment*, 21 AM. U. J. GENDER SOC. POL'Y & L. 481, 486 (2012).

<sup>32</sup> David Holtgrave et al., *Public Health Basics*, in HIV & AIDS BENCHMARK, *supra* note 16, at 2.

that weakens the immune system.<sup>33</sup> Although anyone can contract HIV, the rates of infection are not equally spread across all groups or population subsets.<sup>34</sup> Today, homosexual men of all races are the most infected group in the United States.<sup>35</sup> Additionally, HIV disproportionately affects certain racial minorities, specifically blacks and Hispanics, at greater percentages than whites.<sup>36</sup> Given the physical impact and stigmatized nature of the disease, a diagnosis of HIV has a lasting impact on an individual's life.<sup>37</sup> HIV testing is the requisite first step to receiving medical treatment for the disease, but the stigmatized nature of HIV makes many people reluctant to be tested for fear that their test results will not remain confidential.<sup>38</sup> There are circumstances, however, in which the public health objective of alerting potentially infected parties of their status arguably outweighs an individual's right to private test results despite the stigma surrounding HIV/AIDS.<sup>39</sup>

### A. What Is HIV/AIDS?

HIV is a virus that attacks the immune system and, if left untreated, leads to AIDS.<sup>40</sup> HIV is not synonymous with AIDS; an AIDS diagnosis is based on the progression of the virus to a specific stage of severity, common at the end stage of HIV infection.<sup>41</sup> HIV is found in bodily fluids, such as blood and semen, and has several different modes of transmission, including through sexual contact, pregnancy, childbirth, breastfeeding, injection drug use, occupational exposure, blood transfusions, and organ transplants.<sup>42</sup> Not all of an infected person's bodily fluids contain equal amounts of HIV.<sup>43</sup> Blood contains high levels of HIV, but saliva, sweat, and tears typically do not contain sufficient levels of the virus to infect another person.<sup>44</sup>

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<sup>33</sup> *About HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/whatishiv.html> (last updated Feb. 12, 2014).

<sup>34</sup> See Brock et al., *supra* note 15, at 437.

<sup>35</sup> *About HIV/AIDS*, *supra* note 33.

<sup>36</sup> *Id.*

<sup>37</sup> See Brock et al., *supra* note 15, at 447; Holtgrave et al., *supra* note 32, at 3.

<sup>38</sup> See Brock et al., *supra* note 15, at 447; Yager, *supra* note 16.

<sup>39</sup> See Brock et al., *supra* note 15. Organ donation, blood transfers, work exposure, sexual assault, and newborns whose mothers' HIV status is unknown are circumstances that have been recognized as reasons to make exceptions to the general confidentiality rules. *Id.*

<sup>40</sup> *About HIV/AIDS*, *supra* note 33.

<sup>41</sup> See Brock et al., *supra* note 15, at 438, 444 (explaining the scientific qualification of AIDS).

<sup>42</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., *How Do You Get HIV or AIDS?*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/> (last revised June 16, 2014).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

HIV transmission occurs when the fluids of an infected person enter an open site of another person, such as through an open cut.<sup>45</sup> HIV cannot be contracted merely from casual physical contact such as hugging or shaking an infected individual's hand.<sup>46</sup> HIV is a relatively weak virus that does not survive long enough outside of the body for someone to contract it from the air or from an object's surface, such as a toilet seat.<sup>47</sup>

Once a person is infected with HIV, the virus begins to attack the immune system.<sup>48</sup> HIV specifically invades T-cells, in particular helper T-cells called CD4 cells, which are essential to the body's ability to fight against intracellular viruses.<sup>49</sup> HIV's attack method and its ability to weaken the body's defense mechanisms are enhanced by the fact that the virus is able to resist antibodies.<sup>50</sup> Once inside the CD4 cells, HIV mutates and replicates, killing the original CD4 cells in the process.<sup>51</sup> As these cycles continue over time, the body's production of CD4 cells is unable to keep pace with the virus, and the immune system is persistently weakened.<sup>52</sup> An HIV diagnosis is marked by a drop in the number of CD4 cells.<sup>53</sup> When a person's CD4 counts drop low enough, he or she becomes prone to opportunistic infections, and an AIDS diagnosis is made.<sup>54</sup> If HIV is left untreated, the period between contracting an initial HIV infection and developing AIDS is estimated to be about ten years.<sup>55</sup>

In the initial stages of HIV, infected individuals typically experience flu-like symptoms.<sup>56</sup> Without treatment, the virus continues to replicate and individuals may experience fever-like illness, fatigue, pain, headaches, and night

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/transmission.html> (last updated Sept. 23, 2014), [hereinafter *HIV Transmission*]; *How Do You Get HIV or AIDS?*, *supra* note 43.

<sup>48</sup> Brock et al., *supra* note 15, at 442.

<sup>49</sup> *Id.* T-cells direct the immune system and the body's response to viruses. *Id.* HIV attacks CD4 cells, a subset of T-cells that are particularly central in the body's coordinated defense against intracellular invaders such as HIV and other viruses. *Id.*

<sup>50</sup> *Id.* Antibodies are proteins produced by the immune system that assist the body in eliminating invaders such as HIV. *Id.* Antibodies cannot destroy HIV because HIV mutates as it replicates and therefore evades antibodies' attacks. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 444.

<sup>53</sup> *Id.* at 443.

<sup>54</sup> *Id.* Opportunistic infections are caused by organisms that can cause severe illness and even death in end-stage AIDS cases. *Id.* The organisms that cause these infections generally are not life-threatening in people with normal immune systems. *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Holtgrave et al., *supra* note 32, at 4.

sweats, and may develop ulcers.<sup>57</sup> An untreated HIV diagnosis will almost certainly lead to AIDS.<sup>58</sup>

Beyond the physical impact of the disease on the body, receiving a diagnosis of HIV today still carries with it a negative stigma and has a significant impact on both the HIV-positive person and on those closest to him or her.<sup>59</sup> Despite decades of education and awareness campaigns, as of 2007, almost forty percent of Americans wrongly believe that HIV can be transmitted through ordinary household contact, and over seventy percent of those surveyed reported some unease with having an HIV-positive roommate.<sup>60</sup> This pervasive level of misinformation and stigma can take a heavy emotional toll on infected individuals.<sup>61</sup> For example, a New York HIV/AIDS legal advocate said that she most often hears her clients speak of the pains and traumas that cannot be prevented by law.<sup>62</sup> This legal advocate said HIV-positive clients spoke of the trauma of family members cutting ties, slurs, gossip, victim blaming and being shunned from social circles.<sup>63</sup>

Although there is no cure for HIV, the disease can now be managed so that those who are diagnosed and receive treatment early on can have life expectancies that are nearly as long as those without the disease.<sup>64</sup> Antiretroviral (ARV) drugs can attack the virus at each stage of its development and can greatly extend the period between HIV infection and an AIDS diagnosis, thereby extending life expectancies.<sup>65</sup> Although older versions of ARVs had insufferable side effects and involved multiple doses of pills in one day, newer ARVs tend to have fewer side effects and can be taken once or twice daily.<sup>66</sup> If left untreated, however, HIV is almost certainly fatal once it develops into AIDS.<sup>67</sup> During 2011, an estimated 13,834 people with AIDS diagnoses died in the United States.<sup>68</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> See Brock et al., *supra* note 15, at 444.

<sup>59</sup> See *id.* at 447. As reported in 2011, almost half of Americans wrongly believed that HIV can be picked up through casual contact or kissing. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> *About HIV/AIDS*, *supra* note 33.

<sup>65</sup> Brock et al., *supra* note 15, at 444.

<sup>66</sup> *Id.*

<sup>67</sup> See Holtgrave et al., *supra* note 32, at 3, 5. AIDS weakens the immune system and lacks consistent symptoms, but it can be diagnosed by CD4 lymphocyte cell counts. *Id.* at 2. An AIDS diagnosis may refer to any of twenty-six diseases and symptoms. *Id.* Untreated AIDS patients have a life expectancy of one to three years after diagnosis. *Id.* at 5. When a patient has been diagnosed with AIDS, the virus reproduces rapidly, leads to severe immune system deficiencies, and is fatal. *Id.*

<sup>68</sup> *HIV in the United States: At a Glance*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/statistics/basics/atagance.html> (last updated Nov. 25 2014).



### B. Which Populations Are Most Affected by HIV/AIDS?

Despite the fact that anyone can contract HIV/AIDS, the rates of infection are disproportionately spread across certain subsets of populations.<sup>69</sup> In the United States, the incidence of HIV/AIDS is relatively low when compared to its global impact, but minority group infection rates in the United States are on par with those documented in Sub-Saharan Africa.<sup>70</sup> Former World Health Organization official Jonathan Mann observed that those infected with HIV are more likely to be marginalized, and individuals who are marginalized are more likely to contract the virus.<sup>71</sup> Mann went on to posit that HIV/AIDS “may be illustrative of a more general phenomenon in which individual and population vulnerability to disease, disability and premature death is linked to the status of respect for human rights and dignity.”<sup>72</sup>

HIV disproportionately affects low-income individuals.<sup>73</sup> A 2010 study by the Centers for Disease Control and Prevention (CDC) found that HIV was four times more prevalent in the United States’ poorest urban neighborhoods than the national average.<sup>74</sup> There is evidence linking poor social conditions, including where people are born, work, and live, with groups that have a disproportionately high number of HIV infections and greater mortality rates than average.<sup>75</sup> Paul Farmer is a medical anthropologist who has worked extensively to combat HIV/AIDS in Haiti.<sup>76</sup> Farmer observed that the HIV/AIDS epidemic is a “biosocial phenomenon.”<sup>77</sup> All persons with HIV/AIDS need access to treatment, but poor, marginalized populations, who are likely to simultaneously encounter issues with general access to health care and public benefits, also require the attention of legal advocates.<sup>78</sup>

<sup>69</sup> See Brock et al., *supra* note 15, at 437.

<sup>70</sup> *Id.* at 439.

<sup>71</sup> *Id.* at 437. The relationship between marginalization and HIV infection is a cyclical one. See *id.*

<sup>72</sup> Jonathan M. Mann et al., *Health and Human Rights*, 1 HEALTH & HUM. RTS. 6, 21 (1994); see Brock et al., *supra* note 15, at 437. Mann wrote these words in 1999 but over ten years later they remain true and continue to inspire doctors and lawyers to work to alleviate these disparities. See Brock et al., *supra* note 15, at 437.

<sup>73</sup> *HIV & AIDS in USA*, AVERT, <http://www.avert.org/hiv-aids-usa.htm> (last updated June 17, 2014).

<sup>74</sup> *Id.*

<sup>75</sup> Brock et al., *supra* note 15, at 453.

<sup>76</sup> See *id.* at 454. Farmer has researched and written extensively on health, human rights, and social inequality. *Our Founders*, PARTNERS IN HEALTH <http://www.pih.org/pages/our-founders> (last visited Jan. 21, 2015). Specifically, Farmer is the chief strategist and co-founder of Partners in Health, which works to provide quality health care in impoverished areas and seeks to reduce the spread of HIV. *Our History*, PARTNERS IN HEALTH <http://www.pih.org/pages/our-history> (last visited Jan. 21, 2015).

<sup>77</sup> See Brock et al., *supra* note 15, at 454.

<sup>78</sup> See *id.* at 439.

In addition to low-income individuals, several other groups are disproportionately infected with HIV/AIDS in the United States.<sup>79</sup> HIV disproportionately affects certain racial minorities, specifically blacks and Hispanics, at greater percentages than whites.<sup>80</sup> According to the CDC, in 2010, blacks made up only 12% of the American population but accounted for 44% of all new HIV infections.<sup>81</sup> Similarly, in 2010 Hispanics made up 21% of all new HIV infections but represented only 17% of the general population.<sup>82</sup> Homosexual males are also disproportionately infected with HIV/AIDS in the United States, as are individuals aged thirteen to twenty-four.<sup>83</sup>

Infections among racial minorities in Massachusetts align with national statistics.<sup>84</sup> In Massachusetts, minorities have disproportionate rates of infection compared to the general population.<sup>85</sup> At the end of 2012, a total of 31,384 individuals in Massachusetts had been diagnosed with an HIV infection.<sup>86</sup> Of those who were living with HIV/AIDS in Massachusetts in 2012, 43% were white, 30% were black, 24% were Hispanic, 2% were Pacific Islander, and less than 1% were an undetermined race.<sup>87</sup> This indicates a disproportionately high number of infected black and Hispanic individuals, who made up 6% and 10% of the total Massachusetts population, respectively.<sup>88</sup> Blacks and Hispanics are affected by HIV/AIDS at levels of ten and seven times, respectively, that of the white population of Massachusetts.<sup>89</sup>

Racial minorities are not only more likely to be HIV positive, they also have poorer clinical outcomes than the general population.<sup>90</sup> In fact, unequal HIV infection and mortality rates are two of the most significant factors con-

<sup>79</sup> See *Basic Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/statistics.html> (last updated Feb. 12, 2014), [hereinafter *Basic Statistics*].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Basic Statistics*, *supra* note 79. In 2010, thirty-one percent of new infections were found in white people. *Id.*

<sup>83</sup> *Id.* In 2010, approximately 11,200 white homosexual males became infected with HIV, while black homosexual males accounted for approximately 10,600 of newly infected HIV patients. *Id.* The CDC reports that Hispanic/Latino homosexual males were ranked third among the populations with the highest number of new incidents of HIV infection, reporting approximately 6,700 new infections in 2010. *Id.* Young people between the ages of thirteen and twenty-four constitute sixteen percent of the U.S. population, but accounted for twenty-six percent of new HIV infections in 2010. *Id.*

<sup>84</sup> See *id.*; *Massachusetts HIV/AIDS Data Fact Sheet: Epidemic at a Glance*, MASS. DEP'T OF PUB. HEALTH OFFICE OF HIV/AIDS, <http://www.mass.gov/eohhs/docs/dph/aids/2013-profiles/epidemic-glance.pdf> (last visited Jan. 21, 2015) [hereinafter *MA HIV/AIDS Data Fact Sheet*].

<sup>85</sup> *Basic Statistics*, *supra* note 79; *MA HIV/AIDS Data Fact Sheet*, *supra* note 84, at 1.

<sup>86</sup> *MA HIV/AIDS Data Fact Sheet*, *supra* note 84, at 1.

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* at 2.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> See Brock et al., *supra* note 15, at 455.

tributing to the different life expectancies between blacks and whites in the United States.<sup>91</sup> This disparity is partially attributable to minorities' lack of access to primary care, a crucial first step in preventing, diagnosing, and treating HIV.<sup>92</sup>

In order for individuals with HIV to have relatively normal life expectancies, it is imperative that they be treated and diagnosed as early as possible, a concern that underscores the importance of raising awareness through testing.<sup>93</sup> Because HIV can be asymptomatic for upwards of ten years, early testing and subsequent access to treatment are even more crucial in managing the disease.<sup>94</sup> The Massachusetts Department of Health and Human Services estimates there are about 29,000 additional individuals currently living with HIV/AIDS in Massachusetts that have not been reported, including those who do not know their status, those who have not reported their diagnosis, and those who were first reported in another state.<sup>95</sup> Until individuals who are unaware of their status seek testing and present themselves to a physician for treatment, their HIV will remain unaccounted for and untreated.<sup>96</sup>

### *C. Early Epidemiology: A Time of Uncertainty and Fear*

In the early 1980s, the medical community first became aware of what would later be identified as AIDS through a surge of cases in the homosexual and intravenous (IV) drug user communities.<sup>97</sup> The reported infections were diagnosed as *Pneumocystis carinii pneumonia* (PCP).<sup>98</sup> Five formerly healthy homosexual males in Los Angeles all had PCP as well as other abnormal infections.<sup>99</sup> The report of these men's infections marked the beginning of what became known as the AIDS epidemic.<sup>100</sup> By the end of 1981, there were 270 cases of serious immune deficiencies in homosexual men, which resulted in 121

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* A key aspect of the disparate rates of death and poorer clinical outcomes for minorities is that minorities tend to have delayed access to highly active retroviral therapy. *Id.* This delay in access is linked to a lack of general access to health care. *See id.*

<sup>93</sup> *See About HIV/AIDS, supra* note 33.

<sup>94</sup> *See Yager, supra* note 16; *About HIV/AIDS, supra* note 33.

<sup>95</sup> *See MA HIV/AIDS Data Fact, supra* note 84, at 1.

<sup>96</sup> *See Brock et al., supra* note 15, at 457. An estimated eighteen percent of people living with HIV in the United States are unaware of their positive status. *Id.*

<sup>97</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., *A Timeline of AIDS*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/> (last visited Jan. 21, 2015) [hereinafter *A Timeline of AIDS*]. In 1981, the CDC first published a report of five cases of a rare lung infection in otherwise young, healthy, gay men whose immune systems were not working properly. *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

deaths.<sup>101</sup> In 1982, the CDC first began referring to the syndrome as AIDS and released the first provisional definition of AIDS.<sup>102</sup> The following year, the CDC had identified all major modes of transmission.<sup>103</sup>

Although the modes of transmission were identified as early as 1983, the HIV-positive and AIDS communities have been riddled by stigma and persecution since the first outbreak of infections.<sup>104</sup> In the early years of the disease, very little was known about it, which generated great fear and anxiety.<sup>105</sup> As one individual who thought he might be infected told the *New York Times* in 1982, “It’s basically frightening because no one knows what’s causing it.”<sup>106</sup> The fear and uncertainty about how HIV was transmitted and what caused the disease created a great deal of stigma around those infected, especially infected homosexuals.<sup>107</sup> As a result, homosexuals often received the brunt of the discrimination against people with AIDS.<sup>108</sup> The stigma manifested itself with health care centers rejecting patients, schools banning children with AIDS from classrooms, and businesses firing employees presumed to have AIDS.<sup>109</sup>

Even decades later, the stigmatized nature of HIV makes many individuals reluctant to be tested for fear that their test results will not remain confidential.<sup>110</sup> Former UN Secretary-General Ban Ki-moon once commented that, “[s]tigma remains the single most important barrier to public action. It is the main reason too many people are afraid to see a doctor to determine whether they have the disease, or to seek treatment if so.”<sup>111</sup> Despite the need to keep test results confidential in order to help overcome the stigma, there are circumstances in which the public health objective of making potentially infected par-

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* The CDC defined AIDS as “a disease at least moderately predictive of a defect in cell-mediated immunity, occurring in a person with no known case for diminished resistance to that disease.” *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Brock et al., *supra* note 15, at 437; see *A Timeline of AIDS*, *supra* note 97.

<sup>105</sup> See Brock et al., *supra* note 15, at 437.

<sup>106</sup> Robin Herman, *A Disease’s Spread Provokes Anxiety*, N.Y. TIMES, Aug. 8, 1982, at 2, available at <http://www.nytimes.com/1982/08/08/nyregion/a-disease-s-spread-provokes-anxiety.html>.

<sup>107</sup> See Talea Miller, *AIDS at 30: In Early Years, Uncertainty Fueled Fear and Confusion*, PBS NEWSHOUR (June 6, 2011, 3:09 PM), [http://www.pbs.org/newshour/updates/health/jan-june11/aidsat30\\_06-06.html](http://www.pbs.org/newshour/updates/health/jan-june11/aidsat30_06-06.html).

<sup>108</sup> *See id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Brock et al., *supra* note 15, at 447.

<sup>111</sup> Ban Ki-moon, Op-Ed., *The Stigma Factor*, WASH. TIMES, Aug. 6, 2008, available at <http://www.washingtontimes.com/news/2008/aug/06/the-stigma-factor/>; see *Stigma and Discrimination*, *supra* note 17.

ties aware of their status arguably outweighs the individual's right to private test results.<sup>112</sup>

## II. PARTNER NOTIFICATION LAWS AND THE SPECTRUM OF STATES' APPROACHES

There is no federal legislation that covers the process of testing for the Human Immunodeficiency Virus (HIV); instead, there are statutes in each state addressing this issue.<sup>113</sup> Each of these state statutes balances the tension between the rights of individuals to privacy and the necessity of public health objectives.<sup>114</sup> The manner in which confidentiality and notification laws achieve that balance varies across the states.<sup>115</sup> Most states allow physicians or state health departments to directly notify known needle or sexual partners of infected patients.<sup>116</sup>

### A. Legal Background of State Laws

State laws and the overarching requirements of the federal Health Insurance Portability and Accountability Act (HIPAA) govern the disclosure of HIV test results.<sup>117</sup> Since there is no federal legislation that dictates the requirements surrounding HIV testing, the regulation of testing methods and patient confidentiality differs from state to state.<sup>118</sup> There is great variety amongst states as to how to recognize the competing interests of protecting HIV confidentiality and promoting HIV testing and partner notification.<sup>119</sup> The variation in each state's HIV testing laws reflects the ongoing tension between the rights of individuals to privacy and the necessity of public health objectives.<sup>120</sup>

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<sup>112</sup> See Brock et al., *supra* note 15. Organ donation, blood transfers, work exposure, sexual assault, and newborns whose mothers' HIV status is unknown are circumstances that have been recognized as reasons to make exceptions to general confidentiality rules. *Id.*

<sup>113</sup> See Yager, *supra* note 16, at 25.

<sup>114</sup> See *id.* at 22.

<sup>115</sup> *Id.*

<sup>116</sup> See, e.g., ALA. CODE § 22-11A-38(a)–(e) (2013); CAL. HEALTH & SAFETY CODE § 121015 (West 2012); CONN. GEN. STAT. § 19a-584(b) (2013) (permitting notification only if the patient and his partner are both under the physician's care); 410 ILL. COMP. STAT. 305/9(a) (2012); KAN. STAT. ANN. § 65-6004(b) (2011); VA. CODE ANN. §§ 32.1–36.1 (West 2013).

<sup>117</sup> See 29 U.S.C. § 1181; Yager, *supra* note 16, at 27.

<sup>118</sup> Yager, *supra* note 16, at 25.

<sup>119</sup> *Id.* Compare MASS. GEN. LAWS ch. 111, § 70F (2012) (prohibiting any discretion in notifying partners), with N.Y. PUB. HEALTH LAW § 2130 (McKinney 2010) (imposing an affirmative duty on health care providers to initiate a notification process, which ultimately results in partner notification).

<sup>120</sup> See Yager, *supra* note 16.

As with any other medical procedure, informed consent is required to conduct an HIV test.<sup>121</sup> As a result of the early and continued stigma surrounding HIV, some state laws emphasize maintaining confidentiality in order to encourage people to get tested.<sup>122</sup> The rationale behind these states' HIV statutes appears to be grounded in encouraging people to be tested so that once aware of their status, they can take action to get treatment, thereby reducing the risk of transmitting the disease to others.<sup>123</sup> Encouraging infected persons to be aware of their status without any further requirements puts the ability of their partners to learn of possible exposure squarely on one person's shoulders.<sup>124</sup> Approximately twenty percent of people with HIV are unaware of their status.<sup>125</sup> In recognition of this high number of unaware, infected persons, states such as Pennsylvania and Kansas have granted health care providers the discretion to decide whether to notify likely infected individuals.<sup>126</sup>

Breaking confidentiality in order to notify a third party of harm is not unprecedented.<sup>127</sup> *Tarasoff v. Regents of California* was a landmark case in which the California Supreme Court imposed a duty on therapists to warn third parties when a patient is reasonably believed to be a threat to an identifiable third party.<sup>128</sup> Since *Tarasoff*, courts have used this logic to impose expanding duties on doctors to warn of the spread of infectious diseases.<sup>129</sup>

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<sup>121</sup> Brock et al., *supra* note 15; *see, e.g.*, *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972) (holding that informed consent requires physicians to inform patients of what a reasonable patient would wish to know to make a relevant treatment decision); *Truman v. Thomas*, 611 P.2d 902, 906–07 (Cal. 1980) (holding that a patient must be apprised of the risks of choosing to forgo treatment, even if he or she has refused treatment).

<sup>122</sup> *See, e.g.*, ch. 111, § 70F (addressing confidentiality by prohibiting partner notification without permission); *see also* Lawrence Gostin, *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 (1998) (providing some of the distinctions between different state laws and noting which states have no pertinent HIV laws, such as Maine and Minnesota); Friedland, *supra* note 26, at 11.

<sup>123</sup> Friedland, *supra* note 26, at 11.

<sup>124</sup> *See id.*

<sup>125</sup> Brock et al., *supra* note 15, at 446.

<sup>126</sup> *Id.*; *see* KAN. STAT. ANN. § 65-6004 (2011) (stating that physicians may disclose the status of infectious diseases of patients to health care providers, corrections officers, or law enforcement employees as necessary, as well as to the spouse or partner of a patient with HIV if the health care provider suspects the person may be at risk of exposure and is unaware of that possibility); 35 PA. CONS. STAT. § 7609 (2014) (stating that physicians may disclose HIV-related information if certain conditions are met: the disclosure must be made to an identified contact of the subject, the physician must reasonably believe there is a significant risk of future infection to the contact, the physician has counseled the patient on the need to notify partners and believes the patient will not notify partners, and the physician has notified the patient of his or her intent to tell the partner).

<sup>127</sup> *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976).

<sup>128</sup> *See id.* In this case, a patient confided his intention to kill his girlfriend to his psychologist, and subsequently carried out the murder. *Id.* at 339. While the psychologist notified police of the threat, no one warned the girlfriend. *Id.* at 340. The court weighed the dual public interests of support-

### B. HIV Statutes on Testing and Partner Notification

The laws on partner notification of HIV-infected patients' sexual or needle-sharing partners vary greatly by state.<sup>130</sup> On one end of the spectrum, New York's law emphasizes public health and imposes an affirmative duty on health care providers to report to a health commissioner all HIV-positive patients.<sup>131</sup> The health commissioner then has a duty to make a good faith effort to notify all partners of the HIV-positive patient.<sup>132</sup> On the other end of the spectrum, Massachusetts prioritizes patient confidentiality and completely prohibits partner notification by the appropriate health authorities.<sup>133</sup> The most common state approach to partner notification is to grant health care providers the discretion to determine whether partners should be notified.<sup>134</sup> In most states that allow for direct notification to third parties, those states also require that health care providers inform patients about their intent to notify third parties before actually doing so.<sup>135</sup> Statutes in California, Connecticut, and Pennsylvania all require the physician to forewarn the patient of the third party disclosure.<sup>136</sup>

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ing effective treatment of mental health issues and protecting patients' rights to privacy with the public interest of preventing attacks. *Id.* at 346. The court found that the psychologist breached his duty to protect the girlfriend from risk and that the social interest is insufficient to conceal those risks from the third party girlfriend. *Id.* at 347.

<sup>129</sup> See *Gammill v. United States*, 727 F.2d 950, 954 (10th Cir. 1984) (holding that a doctor may be liable for failure to warn third parties who were likely to come into contact with a patient or that patient's disease); *DiMarco v. Lynch Homes-Chester Cnty., Inc.*, 583 A.2d 422 (Pa. 1990) (holding physicians have a duty to advise patients to take measures to curb the spread of communicable diseases, and if a third party's health is threatened by the patient or if erroneous health care was given by the doctor to the patient, then the third party has a cause of action against the doctor); Christine E. Stenger, Note and Comment, *Taking Tarasoff Where No One Has Gone Before: Looking at "Duty to Warn" Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. REV. 471, 487-89 (1996) (noting that physicians have a duty to warn third parties of their exposure to communicable diseases).

<sup>130</sup> See Brock et al., *supra* note 15, at 448; see also ARIZ. REV. STAT. ANN. § 36-664 (West 2011); KAN. STAT. ANN. § 65-6004 (2011); MASS. GEN. LAWS ch. 111, § 70F (2012); 35 PA. CONS. STAT. § 7609 (2014).

<sup>131</sup> N.Y. PUB. HEALTH LAW § 2130 (McKinney 2010).

<sup>132</sup> *Id.*

<sup>133</sup> Compare *id.*, with ch. 111, § 70F.

<sup>134</sup> See, e.g., ARIZ. REV. STAT. ANN. § 36-664 (West 2011); KAN. STAT. ANN. § 65-6004(b) (2011); 35 PA. CONS. STAT. § 7609 (2014).

<sup>135</sup> See CAL. HEALTH & SAFETY CODE § 121015(b) (West 2012); CONN. GEN. STAT. § 19a-584(b)(2) (2013); PA. CONS. STAT. § 7609(a)(3); Benjamin F. Neidl, *The Lesser of Two Evils: New York's New HIV/AIDS Partner Notification Law and Why the Right of Privacy Must Yield to Public Health*, 73 ST. JOHN'S L. REV. 1191, 1207-08 (1999) (explicitly pointing out requirements and implications of state statutes).

<sup>136</sup> CAL. HEALTH § 121015(b); CONN. GEN. STAT. § 19a-584(b)(2) (2013); PA. CONS. STAT. § 7609(a)(3).

Some states permit partner notification through a court-order system.<sup>137</sup> States that have adopted these partner notification laws often give standards and guidance as to how courts should consider whether to disclose someone's status.<sup>138</sup> Disclosure of a person's HIV/AIDS status is permitted if the petitioner has presented a "compelling need" for the information.<sup>139</sup> This form of permissible discretion, used in states such as Ohio and West Virginia, balances the privacy interests of the individual against the public interests that may be harmed by disclosure.<sup>140</sup> For example, petitioners in West Virginia must demonstrate to the court that their need for the test results could not be accommodated by any other means.<sup>141</sup>

Nevertheless, most states do not use the judicial system and instead allow for direct notification by physicians or state health departments.<sup>142</sup> In these states, doctors are allowed to notify drug needle-sharing or sexual partners of the infected individuals of their risks of infection—the disclosure of information flows directly from the doctor to the third party and the courts are completely uninvolved.<sup>143</sup>

There are various approaches that states have taken regarding whether and when direct physician-to-partner notification is appropriate.<sup>144</sup> Some states, including California, Kansas, and Virginia, permit disclosure of HIV status based on a person's relationship to the infected individual.<sup>145</sup> In California, for example, physicians are shielded from liability for disclosing to "a person reasonably believed to be the spouse, or to a person reasonably believed to be a sexual partner or a person with whom the patient has shared the use of hypodermic needles . . ." that the individual has tested positive for HIV.<sup>146</sup> In Kansas, physicians may disclose a patient's HIV status if the physician has

<sup>137</sup> Neidl, *supra* note 135, at 1201; *see* OHIO REV. CODE ANN. § 3701.243 (West 2012); PA. CONS. STAT. § 7609; W. VA. CODE § 16-3C-3(a)(11)(i) (2011).

<sup>138</sup> OHIO REV. § 3701.243; W. VA. § 16-3C-3(a)(11)(i).

<sup>139</sup> *See* OHIO REV. § 3701.243 (requiring that a court consider whether the third party has a compelling need for the information); W. VA. § 16-3C-3(a)(11)(i) (dictating that court orders for test results are required for disclosure, and that court orders may only be granted once the court has weighed the compelling need of the public versus private interests).

<sup>140</sup> *See* OHIO REV. § 3701.243; W. VA. § 16-3C-3(a)(11)(i).

<sup>141</sup> W. VA. § 16-3C-3(a)(11)(i).

<sup>142</sup> *See, e.g.*, ALA. CODE § 22-11A-38(a)–(e) (2013); CAL. HEALTH & SAFETY CODE § 121015 (West 2012); CONN. GEN. STAT. § 19a-584(b) (2013) (permitting notification only if the patient and his partner are both under the physician's care); 410 ILL. COMP. STAT. 305/9(a) (2012); KAN. STAT. ANN. § 65-6004(b) (2011); VA. CODE ANN. §§ 32.1–36.1 (West 2013).

<sup>143</sup> *See, e.g.*, ALA. CODE § 22-11A-38(a)–(e); CAL. HEALTH § 121015; CONN. GEN. § 19a-584(b); ILL. COMP. STAT. 305/9(a); KAN. STAT. 65-6004(b); VA. CODE § 32.1–36.1.

<sup>144</sup> *See, e.g.*, ALA. CODE § 22-11A-38(a)–(e); CAL. HEALTH § 121015; CONN. GEN. § 19a-584(b); ILL. COMP. STAT. 305/9(a); KAN. STAT. 65-6004(b); VA. CODE § 32.1–36.1.

<sup>145</sup> CAL. HEALTH § 121015; KAN. STAT. 65-6004(b); VA. CODE § 32.1–36.1.

<sup>146</sup> CAL. HEALTH § 121015(a).



“reason to believe that the spouse or partner of a person who has had laboratory confirmation of HIV infection or who has AIDS may have been exposed to HIV and is unaware of such exposure . . . .”<sup>147</sup> Even more broadly, Virginia delineates a list of persons who may have access to HIV test results.<sup>148</sup> One of the listed parties with a right to access HIV test results is the patient’s spouse.<sup>149</sup>

Most states that permit direct partner notification do so without regard to the partner’s relationship to the infected patient.<sup>150</sup> Several of those states’ standards focus on the perceived threat from the physician’s perspective.<sup>151</sup> For example, Alabama allows a physician to disclose a patient’s HIV status to a third party “where there is a foreseeable, real or probable risk of transmission of the disease.”<sup>152</sup> In Tennessee, a physician may disclose a patient’s HIV status if the physician has a “reasonable belief that a person has knowingly exposed another to HIV . . . .”<sup>153</sup>

Granting even more latitude to physicians to protect public health, Florida’s HIV disclosure statute is based on the behavior of the infected patient.<sup>154</sup> Under the statute, physicians may notify sexual and needle-sharing partners of the patient about the patient’s HIV status if the patient refuses to refrain from behaviors that would likely transmit the virus.<sup>155</sup> Likewise, in Maryland, if an HIV-positive patient refuses to notify his or her sexual and needle-sharing partners, the patient’s physician may report the individual’s identity and circumstances giving rise to the notification to the local health officer, who will inform the sexual and needle-sharing partners of the patient.<sup>156</sup> The statute re-

<sup>147</sup> KAN. STAT. ANN. § 65-6004(b) (2011).

<sup>148</sup> VA. CODE ANN. §§ 32.1–36.1 (West 2013).

<sup>149</sup> *Id.* §§ 32.1–36.1(11).

<sup>150</sup> *See, e.g.*, ALA. CODE § 22-11A-38 (2013); PA. CONS. STAT. § 7609 (2014); TENN. CODE ANN. § 68-10-115 (West 2010); W. VA. CODE § 16-3C (2011).

<sup>151</sup> *See, e.g.*, ALA. CODE § 22-11A-38; TENN. CODE § 68-10-115.

<sup>152</sup> ALA. CODE § 22-11A-38(d).

<sup>153</sup> TENN. CODE § 68-10-115.

<sup>154</sup> FLA. STAT. § 456.061 (2014). A practitioner is not liable for disclosure of otherwise confidential information to a sexual or needle-sharing partner if the following conditions are met: a patient of the practitioner who has tested positive for human immunodeficiency virus discloses to the practitioner the identify of a sexual partner or a needle-sharing partner, the patient refuses to notify the partner after the practitioner’s recommendation to so do, and the practitioner has informed the patient of his or her intent to disclose to the third party. *Id.* The practitioner must notify the partner in a manner in which the practitioner “reasonably and in good faith advises the sexual partner or the needle-sharing partner of the patient of the positive test and facts concerning the transmission of the virus.” *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> MD. CODE ANN., HEALTH-GEN. § 18-337 (2010). If an HIV-positive individual refuses “to notify the individual’s sexual and needle-sharing partners, the individual’s physician may inform the local health officer and/or the individual’s sexual and needle-sharing partner of: (1) The individual’s identity; and (2) The circumstances giving rise to the notification.” *Id.*

quires that physicians act in good faith when deciding whether to disclose the patient's HIV status.<sup>157</sup>

On a spectrum that puts individual patient confidentiality on one end and public health protection on the other, New York may have one of the most aggressive statutes to protect the public.<sup>158</sup> The statute imposes an affirmative duty on every physician or person authorized to diagnose HIV/AIDS to report the positive status of individuals to the state health commissioner along with the names of any identified spouse, sex partner, or needle-sharing partner.<sup>159</sup> Once the report is received, the names are then referred to the local health authority so that listed partners may be notified.<sup>160</sup> The purpose of New York's law is to protect the sexual and needle-sharing partners of the HIV-positive individual by notifying them of their risk and recommending that they be tested.<sup>161</sup> New York's HIV law stands in stark opposition to the Massachusetts HIV law, which does not permit health care providers to notify any third parties regarding a patient's HIV status.<sup>162</sup>

### III. MASSACHUSETTS: NO DISCRETION TO WARN

Massachusetts strictly protects the confidentiality of those who test positive for the Human Immunodeficiency Virus (HIV) and does not grant health care providers any discretion to inform parties about their high risk of infection.<sup>163</sup> In fact, the Massachusetts General Laws chapter 111, section 70F ("MA HIV Law") explicitly *prohibits* health care professionals from disclosing the HIV-positive status of patients.<sup>164</sup> The Massachusetts Congress passed that statute in 1986 when there was no approved or effective treatment for HIV/AIDS, but only a great deal of fear, stigma, and misinformation.<sup>165</sup> The current Massachusetts statute, updated in 2012, still does not address the public health good of notifying third parties with a high risk of exposure, which is particularly problematic in instances of sexual or needle-sharing partners.<sup>166</sup> Three bills were introduced in the 188th legislative session, however, that collectively argued for certain exceptions that would allow public officials and

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<sup>157</sup> *Id.*

<sup>158</sup> See N.Y. PUB. HEALTH LAW § 2780 (McKinney 2010).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*; Neidl, *supra* note 135, at 1212.

<sup>162</sup> Compare MASS. GEN. LAWS ch. 111, § 70F (2012) (prohibiting any discretion in notifying partners), with N.Y. PUB. HEALTH LAW § 2130 (imposing an affirmative duty on health care providers to initiate notification process).

<sup>163</sup> See ch. 111, § 70F.

<sup>164</sup> See *id.*

<sup>165</sup> *Id.*; see Brock et al., *supra* note 15, at 437 (noting that HIV has always been stigmatized).

<sup>166</sup> See ch. 111, § 70F.

medical workers obtain and share results of HIV/AIDS tests to protect the public health.<sup>167</sup>

### A. Current Status of the Law in Massachusetts

Unlike other states that permit health care providers to exercise discretion with partner notification, Massachusetts strictly protects the confidentiality of an HIV-positive person's status.<sup>168</sup> According to the MA HIV Law, physicians and other health care providers must obtain a patient's verbal informed consent before testing for HIV.<sup>169</sup> After the test, health care providers may not disclose the results of any test to a person other than the subject without the subject's written informed consent; nor may they disclose even the fact that subject underwent such tests to any person without the subject's written informed consent.<sup>170</sup> Health care providers or institutions may report information to the Massachusetts Department of Public Health but there is no statutory duty to do so.<sup>171</sup> There is no civil or criminal liability for health care providers or institutions that choose to report test results.<sup>172</sup> The MA HIV Law has one stated exception to the need for informed consent: a patient may be tested without consent either premortem or postmortem to ensure organ and other donations are HIV-free.<sup>173</sup>

The Massachusetts House of Representatives should re-file three proposed bills introduced in the 188th session that, if passed, could change the HIV/AIDS landscape regarding disclosure in Massachusetts.<sup>174</sup> Massachusetts's original HIV/AIDS statute required written informed consent prior to testing, but was amended in 2012 to require only verbal informed consent.<sup>175</sup>

<sup>167</sup> Ch. 111, § 70F; H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>168</sup> Compare MASS. GEN. LAWS ch. 111, § 70F (2012), with FLA. STAT. § 456.061 (2014) and MD. CODE ANN., HEALTH-GEN. § 18-337 (2010).

<sup>169</sup> Ch. 111, § 70F. "A facility, as defined in 70E, physician or health care provider shall not . . . test any person for the presence of the HIV antibody or antigen without first obtaining that person's verbal informed consent . . . ." *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* "It shall not be a violation of this section for any physician, health care provider, health care institution or laboratory to report information to the department of public health under chapter 111 or chapter 111D and regulations promulgated thereunder." *Id.*

<sup>172</sup> MASS. GEN. LAWS ch. 111, § 70F (2012). "No physician, health care provider, health care institution or laboratory required to report shall be liable in any civil or criminal action by reason of any such report." *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>175</sup> Brock et al., *supra* note 15, at 437. Compare ch. 111, § 70F ("A facility, as defined in 70E, physician or health care provider shall not . . . test any person for the presence of the HIV antibody or antigen without first obtaining that person's verbal informed consent . . . ."), with MASS. GEN. LAWS

There have been no other reported or proposed amendments to the current statute.<sup>176</sup> The previously filed House bills would provide an exception to the strict confidentiality standard.<sup>177</sup> Two of the bills would create an exception to strict confidentiality for public officials such as law enforcement or medical personnel who may have been exposed to HIV during the course of their official duties by someone who is subject to a criminal investigation.<sup>178</sup> The third bill would allow for any person, regardless of occupation, to obtain HIV test results of a person who has had possible transmission to them of HIV through blood.<sup>179</sup>

Although the MA HIV Law has been on the books for decades, it has not been heavily litigated.<sup>180</sup> There is, however, limited case law exploring the scope and applicability of its provisions.<sup>181</sup> In *Commonwealth v. Smith*, the defendant brought a motion to withdraw his guilty plea of assault with intent to commit murder based on ineffective counsel.<sup>182</sup> In prior hearings, the defendant stipulated that he was HIV positive, which was the basis of his ineffective counsel argument.<sup>183</sup> During the hearing, the grand jury heard evidence that the defendant shouted at correction officers, “I’m HIV positive . . . I’m gonna kill you all . . . You’re all gonna die . . . I have AIDS,” during a physical struggle.<sup>184</sup> At the prosecutor’s invitation, the grand jurors obtained a court order requiring the defendant to submit to a blood test for HIV to see if he in fact had potential to transmit the virus to the officers.<sup>185</sup> The Superior Court judge granted the request and ordered a blood test to be completed at the state crime

ch. 111 § 70F (1986) (“No health care facility, as defined in section seventy E, and no physician or health care provider shall (1) test any person for the presence of the HLTV-III antibody or antigen without first obtaining his written informed consent . . .”).

<sup>176</sup> See MASS. GEN. LAWS ch. 111, § 70F (2012); H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>177</sup> See H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>178</sup> See H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>179</sup> See H.B. 1934 188th Gen. Ct. (Mass. 2013). This bill focused on the mode of transmission rather than when or how the person potentially infected the other. *Id.*

<sup>180</sup> See ch. 111, § 70F; *Commonwealth v. Smith*, 790 N.E.2d 708, 758 (Mass. App. Ct. 2003); *In re Grand Jury Investigation*, 692 N.E.2d 56, 58 (Mass. 1998).

<sup>181</sup> See ch. 111, § 70F; *Smith*, 790 N.E.2d at 708–09. Defendant appealed from the district court’s denial of his motion to withdraw his guilty plea on the charge of assault with intent to commit murder. *Smith*, 790 N.E.2d at 709. While in a struggle with police, defendant allegedly shouted that he was HIV positive and that the corrections officers would die as a result. *Id.* at 710.

<sup>182</sup> *Smith*, 790 N.E.2d at 709.

<sup>183</sup> *Id.* Defendant argued that his counsel was ineffective because counsel should have prohibited the court from granting the jury’s request for an HIV test. *Id.* at 711.

<sup>184</sup> *Id.* at 710.

<sup>185</sup> See *id.* This grant of this test was the basis for the defendant’s ineffective counsel argument. *Id.*

laboratory.<sup>186</sup> Defense counsel moved to vacate the order and argued that the MA HIV Law showed a legislative intent to keep HIV test results confidential, that the test would not produce relevant evidence, and there were less intrusive means of gaining the relevant information.<sup>187</sup> On appeal, the Massachusetts Appeals Court found that the defendant had not proved his counsel was ineffective, but it left open the question of whether the defendant was correct regarding the necessity of his informed consent.<sup>188</sup> The district court's order to deny the defendant's motion to withdraw his guilty plea was affirmed.<sup>189</sup>

It is well-established in Massachusetts that, at the request of a grand jury, a court may order a suspect to give a blood sample if the test would produce relevant evidence regarding the suspect's guilt.<sup>190</sup> Whether or not that test may be used for HIV testing, however, remains an unanswered question.<sup>191</sup> The defendant in *Smith* based his argument on *Commonwealth v. Ortiz*, in which a Massachusetts Superior Court judge ruled that the MA HIV Law was an absolute bar to obtaining or disclosing HIV test results without the individual's informed consent.<sup>192</sup> The Supreme Judicial Court (SJC) of Massachusetts, however, interpreted the statute in a narrower fashion than the defendant in *Smith* believed appropriate based on the complete bar in *Ortiz*.<sup>193</sup> In *Smith*, the SJC ultimately held that the statute's application was restricted by its own plain language.<sup>194</sup> It reasoned that because the statute only explicitly applied to health care providers and health care facilities, state crime laboratories and law enforcement agencies were not so restricted by the statute.<sup>195</sup>

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (refusing to acknowledge whether the defendant's argument was correct, but instead only determining that the defendant's counsel was not ineffective).

<sup>189</sup> *Id.* at 712.

<sup>190</sup> See *In re Grand Jury Investigation*, 692 N.E.2d at 58 (noting that "the police may seek blood samples, either before or after criminal charges have been brought, without violating any constitutional prohibition"); see also *In re Lavigne*, 641 N.E.2d 1328, 1330 (Mass. 1994) (denying the defendant's motion to refuse a search warrant which required that the defendant submit to a blood test); *Commonwealth v. Downey*, 553 N.E.2d 1303, 1306-07 (Mass. 1990) (ordering a defendant to provide blood samples as requested by the grand jury).

<sup>191</sup> See *In re Grand Jury Investigation*, 692 N.E.2d at 56 (explicitly refusing to answer the question of whether a court can compel an HIV test).

<sup>192</sup> *Commonwealth v. Smith*, 790 N.E.2d 708, 711 (Mass. App. Ct. 2003); *Commonwealth v. Ortiz*, No. SJ-2001-0055, 2001 WL 34129741, at \*3 (Mass. Feb. 15, 2001) (holding that the legislature clearly stated that the Massachusetts HIV statute favors complete confidentiality on the part of the tested person and therefore creates an absolute bar to disclosing test results without the patient's consent).

<sup>193</sup> *Smith*, 790 N.E.2d at 710.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

*B. Competing Ethical Principles: Individual Confidentiality  
and Public Health Concerns*

When health care providers treat an HIV-positive patient, they often face a conflict between the duty to protect the confidentiality of the individual and the public health good of warning third parties of the danger of infection.<sup>196</sup> One argument contends that the right of a third party to maintain as healthy a life as possible supersedes the individual's right to demand that his or her HIV status remain absolutely confidential.<sup>197</sup> On the other hand, civil liberties and gay rights advocacy groups have argued that if confidentiality is not protected, the effect of notifying third parties may be counterproductive as a public health initiative because it will discourage all individuals from seeking HIV testing and treatment.<sup>198</sup>

The current MA HIV Law seems to focus on encouraging individuals to seek treatment in the face of pervasive stigma around HIV.<sup>199</sup> In *Alberts v. Devine*, the SJC upheld the general precept of protecting confidentiality in order to encourage people to seek treatment with a notable exception regarding the physician's duty to warn identifiable third parties of serious danger.<sup>200</sup> In *Alberts*, a minister sued his psychiatrist for disclosing confidential information.<sup>201</sup> The court held that absent the patient's consent or the psychiatrist's belief that there exists a serious danger to the patient or others, a physician owes a duty to his or her patient not to disclose confidential medical information obtained through the physician-patient relationship.<sup>202</sup> The court noted, however, that in certain instances there is an exception to the general rule when not disclosing a patient's HIV status would pose a serious danger to others.<sup>203</sup> Some health care providers have argued that this reasoning should justify abridging confidentiality to notify partners of HIV-positive patients.<sup>204</sup>

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<sup>196</sup> Guion L. Johnstone, Note, *A Social Worker's Dilemma When a Client Has a Sexually Transmitted Disease: The Conflict Between the Duty of Confidentiality and the Duty to Warn Sexual Partners*, 49 U. LOUISVILLE L. REV. 111, 123 (2010).

<sup>197</sup> See *id.* at 124.

<sup>198</sup> See *id.* at 125. These civil liberties and gay liberties groups have argued that imposing a duty to warn third parties who may be at risk would have a net effect of deterring individuals from seeking HIV testing and treatment, and, therefore, would have an overall negative effect on the containment of the virus. *Id.*

<sup>199</sup> See MASS. GEN. LAWS ch. 111, § 70F (2012); Friedland, *supra* note 26, at 11 (noting that the HIV statute is a public health statute which encourages people to be tested).

<sup>200</sup> *Alberts v. Devine*, 479 N.E.2d 113, 124 (Mass. 1985).

<sup>201</sup> *Id.* at 116. The psychiatrist disclosed confidential medical information obtained in a private meeting. *Id.* at 115–17.

<sup>202</sup> *Id.* at 124.

<sup>203</sup> *Id.*

<sup>204</sup> See Interview with Judith Burke, *supra* note 1.

#### IV. DISCRETION FOR HEALTH CARE WORKERS IS OVERDUE AND NEEDED NOW

HIV/AIDS is a deadly disease that has had a devastating impact, yet public health officials consistently treat it differently than other infectious diseases.<sup>205</sup> For example, even though HIV is regularly transmitted through sexual intercourse, it is treated distinctively from many other sexually transmitted diseases (STDs).<sup>206</sup> Most states' laws governing HIV testing and procedures differ from those states' approaches to other STDs or infectious diseases.<sup>207</sup> This inconsistency, however, is highly problematic: because of the deadly impact of HIV/AIDS, notification laws are necessary to prevent its spread and decrease the number of persons who are infected but unaware of their HIV-positive status.<sup>208</sup>

The MA HIV Law specifically does not account for the public health good of notifying individuals who are at a high risk of having or contracting HIV.<sup>209</sup> HIV/AIDS is deadly if left untreated, which justifies granting health care providers some level of discretion to warn likely infected individuals.<sup>210</sup> The Massachusetts Legislature should re-file three bills that carve out narrow exceptions to strict confidentiality.<sup>211</sup> In addition to the bills, Massachusetts should also amend its current law to grant physicians discretion to notify likely infected third parties of their patients, similar to the way in which Maryland formatted its law.<sup>212</sup> Maryland's law provides a model for how to balance patient confidentiality with notifying partners who are likely infected and una-

<sup>205</sup> Paul Farmer & Nicole Gastineau Campos, *Rethinking Medical Ethics: A View from Below*, in *BIOETHICS AND THE LAW* 644, 647 (Janet L. Dolgin & Lois L. Shepherd eds., 2005) (noting that HIV/AIDS is treated differently than other communicable diseases, such as tuberculosis).

<sup>206</sup> See Gostin, *supra* note 122, at 53. In 1990, Congress passed HIV-specific legislation: the Ryan White Comprehensive AIDS Resources Emergency Act of 1990. 42 U.S.C. § 300ff-13 (1990). This act authorized grants to state public health departments for HIV-infected partner notification programs. *Id.* Recent amendments to the act have conditioned federal funding upon good-faith efforts to notify spouses of known persons living with HIV. *Id.*

<sup>207</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 121015(d) (West 2012) (specifically addressing HIV testing, confidentiality, and disclosure); LA. REV. STAT. ANN. § 40:1300.14E(1)(a) (West 2012).

<sup>208</sup> See Neidl *supra* 135, at 1235–37 (arguing that despite the permissive nature of the New York HIV statute, the law does not go far enough to protect public health). Early notification can prolong and potentially save lives if people have access to HIV treatment. *Id.*

<sup>209</sup> See MASS. GEN. LAWS ch. 111, § 70F (2012); Neidl, *supra* note 135, at 1235–37 (arguing that New York's considerably more permissive statute is not effective in protecting the public health).

<sup>210</sup> See ch. 111, § 70F; Neidl, *supra* note 135, at 1236. Early notification can prolong and potentially save lives if people have access to HIV treatment. Neidl, *supra* note 135, at 1236.

<sup>211</sup> See ch. 111, § 70F; H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013); see also Neidl, *supra* note 135, at 1236 (arguing for laws which put the public health above confidentiality).

<sup>212</sup> See ch. 111, § 70F; MD. CODE ANN., HEALTH–GEN. § 18-337 (2010).

ware of their status.<sup>213</sup> If the Massachusetts Legislature were to adopt a law similar to Maryland's, then infected individuals would still have the power to first notify their partners and control how that disclosure is made.<sup>214</sup> If, however, individuals do not notify their partners, then physicians have the option to advance the public good by notifying those who have likely been exposed to or infected by HIV.<sup>215</sup>

### *A. The Medical Community's Unique Treatment of AIDS and Its Deadly Implications*

The AIDS epidemic has been more devastating than other infectious diseases, yet in many ways, public health authorities have treated it differently than other less deadly diseases.<sup>216</sup> Specifically, even though HIV/AIDS has been classified as a sexually transmitted disease since 1988, Congress has treated HIV/AIDS differently than other STDs.<sup>217</sup> While partner notification has been used for decades to prevent sexually transmitted diseases, the stigma that accompanied the AIDS epidemic of the 1980s challenged this public health strategy.<sup>218</sup> As a result of concerns about stigma, ensuring the confidentiality of individuals who test positive has prevailed over public health interests in AIDS prevention strategies.<sup>219</sup> Since the 1980s, however, the federal government has used its spending power to support states' use of partner notification programs.<sup>220</sup> This use of the spending power indicates, at a minimum, congressional acceptance of partner notification programs and recognition of states' needs to change their strategies since the outbreak of the epidemic.<sup>221</sup>

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<sup>213</sup> HEALTH-GEN. § 18-337. The statute prescribes:

If an individual informed of the individual's HIV positive status under § 18-336 of this subtitle refuses to notify the individual's sexual and needle-sharing partners, the individual's physician may inform the local health officer and/or the individual's sexual and needle-sharing partners of: (1) The individual's identity; and (2) The circumstances giving rise to the notification.

*Id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> Farmer, *supra* note 205, at 647.

<sup>217</sup> *See* Gostin, *supra* note 122, at 53.

<sup>218</sup> Friedland, *supra* note 26, at 12.

<sup>219</sup> *Id.*

<sup>220</sup> *See* Gostin, *supra* note 122, at 54; 42 U.S.C. § 300ff-13. The Ryan White Comprehensive AIDS Resources Emergency Act of 1990 authorized grants to state public health departments for HIV-infected partner notification programs. 42 U.S.C. § 300ff-13. Recent amendments to the act have conditioned federal funding upon good-faith efforts to notify spouses of known persons living with HIV. Gostin, *supra* note 122, at 54.

<sup>221</sup> *See* Gostin, *supra* note 122, at 54.



The fatal nature of untreated HIV justifies giving health care providers discretion to warn likely infected individuals so that they may get tested and treat the virus.<sup>222</sup> Unlike other infectious diseases, such as tuberculosis, which uses universal testing to prevent its spread, doctors rely on voluntary testing to prevent transmission of HIV/AIDS.<sup>223</sup> In Massachusetts, the infectious diseases of tuberculosis, syphilis, and hepatitis B are treated differently than HIV/AIDS.<sup>224</sup> For example, pregnant women in Massachusetts are required to undergo syphilis testing.<sup>225</sup> The Massachusetts Bureau of Infectious Diseases further promotes syphilis intervention and prevention through screening and partner notification services.<sup>226</sup> Other states have imposed legal duties on doctors to notify partners of infectious or sexually transmitted diseases in general.<sup>227</sup>

The MA HIV Law's approach and its focus on absolute confidentiality do not recognize the public good of notifying partners.<sup>228</sup> Critics of the MA HIV Law have questioned the validity and justness of HIV's "exceptional[ism]" when it comes to legal protection for public health.<sup>229</sup> When a virus is clouded by secrecy, it is difficult for sexual or needle-sharing partners to be aware of the level of their risk.<sup>230</sup> In assessing how to draw the line between the state's right and duty to protect the public from the spread of HIV and an individual's right to privacy, some have proposed that it is helpful to think of an infected patient as both an individual victim with his or her own rights and as a likely agent of infection that is of concern to the general public.<sup>231</sup>

The Massachusetts Legislature should amend its current law to include the previously proposed occupational exposure bills along with an amendment to give health care workers discretion on whether to warn certain third par-

<sup>222</sup> See Neidl, *supra* note 135, at 1237 (arguing that the potential severity of HIV/AIDS merits laws which permit disclosure to third parties).

<sup>223</sup> See Farmer, *supra* note 205, at 647; Gostin, *supra* note 122, at 54.

<sup>224</sup> MASS. GEN. LAWS ch. 111, § 121A (2012). If a board of health, member of a town, or physician certifies to the commissioner that a person has active tuberculosis, is unable or unwilling to accept treatment, and is a serious danger to the public health, that person may be forced to undergo hospitalization. Ch. 111, § 94(a). Hepatitis B vaccinations are mandatory for all children attending school unless there is a physical condition or religious belief as reason to abstain. Ch. 76, § 15 (2012).

<sup>225</sup> Ch. 111, § 121A.

<sup>226</sup> *Id.*

<sup>227</sup> See, e.g., COLO. REV. STAT. § 25-4-402(3); MD. CODE ANN., HEALTH-GEN. § 18-337(b).

<sup>228</sup> Ch. 111, § 70F; see Gostin, *supra* note 122, at 11 (noting that the current state of laws without sufficient partner notification protections contributes to the secrecy and stigma of HIV).

<sup>229</sup> See Farmer, *supra* note 205.

<sup>230</sup> Gostin, *supra* note 122, at 11.

<sup>231</sup> Charles B. Smith et al., *Are There Characteristics of Infectious Diseases that Raise Special Ethical Issues?*, in *BIOETHICS AND THE LAW*, *supra* note 205, at 618.

ties.<sup>232</sup> The principle of breaking confidentiality norms in order to warn of an imminent danger has been recognized in Massachusetts.<sup>233</sup> The SJC in *Alberts* recognized that in some narrow circumstances, an individual's right to confidentiality should be abridged where there is an imminent threat to another's life.<sup>234</sup> In the case of HIV, the imminent threat results because untreated HIV results in AIDS, which is fatal if left unchecked.<sup>235</sup>

The three previously-introduced House bills would have provided for two narrow yet justified exceptions to the MA HIV Law.<sup>236</sup> The first two bills would create an exception to the statute that would only apply in very narrow circumstances—the “occupational exception”—when a person who is the subject of a criminal complaint has potentially infected a public official such as a law enforcement officer or medical professional who was exposed during the course of his or her official duties.<sup>237</sup> If there is a significant risk of infection, it follows that an individual would need to know whether or not there is in fact a chance of transmission.<sup>238</sup> If an HIV test were taken, the results would be impounded after the public official was informed whether they were at risk of contracting HIV.<sup>239</sup> The third bill would carve out an exception for testing and subsequent notification in the case of possible transmission through blood.<sup>240</sup> These bills presented an opportunity for Massachusetts to better protect the public health of the Commonwealth.<sup>241</sup> By re-filing and passing these bills, Massachusetts would ensure that its primary responders and those who are most at risk for infection are able to have access to information that could save their lives.<sup>242</sup>

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<sup>232</sup> See ch. 111, § 70F; H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013); Gostin, *supra* note 122, at 11.

<sup>233</sup> See MASS. GEN. LAWS ch. 111, § 70F (2012); *Alberts v. Devine*, 479 N.E.2d 113, 124 (Mass. 1985).

<sup>234</sup> See *Alberts*, 479 N.E.2d at 124.

<sup>235</sup> Holtgrave et al., *supra* note 32, at 2. Untreated AIDS patients have a life expectancy of one to three years after diagnosis. *Id.*

<sup>236</sup> See ch. 111, § 70F; H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>237</sup> See H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>238</sup> See H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>239</sup> H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>240</sup> H.B. 1934 188th Gen. Ct. (Mass. 2013).

<sup>241</sup> See H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013).

<sup>242</sup> See H.B. 1328 188th Gen. Ct. (Mass. 2013); H.B. 1934 188th Gen. Ct. (Mass. 2013); H.B. 2107 188th Gen. Ct. (Mass. 2013); Neidl, *supra* note 135, at 1237 (reiterating the importance of knowing whether one is at risk for contracting HIV in order to be tested and begin treatment as early as possible).

*B. Maryland: A Moderate Model for Reform of the  
Massachusetts HIV Law*

For a host of reasons, it is difficult to notify partners of an HIV-positive test, which results in silence and non-disclosure of the issue.<sup>243</sup> The infected individual faces potential discrimination and loss of personal relationships upon disclosing his or her status.<sup>244</sup> Given the barriers to partners disclosing an HIV-positive status and the number of infected yet unaware persons, permitting state health authorities to notify parties would fill this void of awareness.<sup>245</sup> Maryland's HIV statute provides a model that the Massachusetts Legislature should follow in order to better balance the needs of public health and individual privacy.<sup>246</sup>

Maryland's current approach to HIV prevention recognizes and responds to concerns for both individual confidentiality and partner notification.<sup>247</sup> Under Maryland law, health care providers are not permitted to notify partners unless the infected patient refuses to do so on his or her own accord.<sup>248</sup> The statute puts the power in the hands of the individual to take action and notify at-risk parties.<sup>249</sup> It is only if and when the individual refuses to notify relevant parties that the patient's physician may inform the local health office or the patient's needle or sexual partners of the individual's identity and circumstances giving rise to the notification.<sup>250</sup>

Under Maryland's law, physicians are not automatically shielded from liability but are held to a standard of acting in good faith regarding notifications and disclosures.<sup>251</sup> Rather than give physicians an automatic shield, this good faith standard sets a higher bar for deciding whether or not to notify partners.<sup>252</sup> The law protects both a physician's decision to notify and the choice to not notify if the physician chooses not to do so in a particular instance.<sup>253</sup>

Maryland's HIV law does not affirmatively impose a statutory duty to notify a patient's extended family, nor does it impose a duty to notify where con-

<sup>243</sup> See Neidl, *supra* note 135, at 1233.

<sup>244</sup> *Id.*

<sup>245</sup> See MD. CODE ANN., HEALTH-GEN. § 18-337(b) (2010) (attempting to protect state health officials by allowing notification of those potentially exposed to HIV); Neidl, *supra* note 135, at 1233.

<sup>246</sup> See HEALTH-GEN. § 18-337(b); MASS. GEN. LAWS ch. 111, § 70F (2012).

<sup>247</sup> See HEALTH-GEN. § 18-337(b) (providing protections for those exposed to HIV when the infected person refuses to disclose, which signifies the importance of both individual privacy and public health).

<sup>248</sup> *Id.*

<sup>249</sup> *See id.*

<sup>250</sup> *Id.* The statute permits health care workers to notify partners of how they were exposed to HIV—for example through the transmission of semen in sexual intercourse. *Id.*

<sup>251</sup> MD. CODE ANN., HEALTH-GEN. § 18-337(e)-(f) (2010).

<sup>252</sup> *See id.*

<sup>253</sup> *See id.*

tacts between the patient and relative are casual or of a nature not found to typically transmit HIV.<sup>254</sup> In *Lemon v. Stewart*, relatives of an HIV-positive patient sued the patient's health care provider for not notifying the family of the patient's HIV status.<sup>255</sup> The Maryland Court of Special Appeals held that the relevant health care providers did not have a duty to the patient's relatives and therefore, the relatives did not have a cause of action against the health care providers for breach of their duty to advise the patient about his HIV status.<sup>256</sup> The court explicitly stated that if any of the relatives had been sexual or needle-sharing partners of the patient, then doctors would have had the option but not the obligation to notify them.<sup>257</sup>

As in Massachusetts and the United States as a whole, racial minorities and low-income persons are disproportionately infected with HIV in Maryland.<sup>258</sup> According to the most recent report in 2012, 29% of the population in Maryland identified as non-Hispanic blacks, yet that group comprised 76.4% of those reported as living with HIV in the state.<sup>259</sup> Moreover, 41% of those infected with HIV live in Baltimore City, indicating that low-income urban populations are most at risk.<sup>260</sup>

Maryland's model provides a safe, responsible middle road between the extreme approaches of Massachusetts, which prohibits disclosure, and New York, which requires it.<sup>261</sup> Maryland's approach smartly balances the interests of the individual and the public health by granting individual physicians discretion and protecting those physicians from repercussions for their good faith decisions.<sup>262</sup> Since the enactment of its new law in 2007, the Maryland Department of Health and Mental Hygiene has tracked measures that indicate

<sup>254</sup> *Id.*; *Lemon v. Stewart*, 682 A.2d 1177, 1184 (Md. Ct. Spec. App. 1996) (holding that no duty exists to warn any party, including family members or relatives, who are not the sexual partners of an HIV-infected person).

<sup>255</sup> *Lemon*, 682 A.2d at 1178.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 1184.

<sup>258</sup> CTR. FOR HIV SURVEILLANCE, EPIDEMIOLOGY & EVALUATION INFECTIOUS DISEASE BUREAU, MD. DEP'T OF HEALTH & MENTAL HYGIENE, MARYLAND HIV/AIDS EPIDEMIOLOGICAL PROFILE: FOURTH QUARTER 2012 (2012) [hereinafter MARYLAND HIV/AIDS EPIDEMIOLOGICAL PROFILE], available at <http://phpa.dhmh.maryland.gov/OIDEOR/CHSE/SiteAssets/SitePages/statistics/Maryland%20HIV%20AIDS%20Epidemiological%20Profile%202012-2012.pdf> (last visited Jan. 23, 2015).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Compare MASS. GEN. LAWS ch. 111, § 70F (2012) (prohibiting any discretion for physicians in notifying partners), and N.Y. PUB. HEALTH LAW § 2130 (McKinney 2010). (imposing an affirmative duty on health care providers to initiate notification process), with MD. CODE ANN., HEALTH-GEN. § 18-337(b) (2010) (allowing for physician discretion about whether to inform a patient's partners of the patient's HIV status).

<sup>262</sup> See HEALTH-GEN. § 18-337(b).

success.<sup>263</sup> In 2012, after an early adjustment period, statistics show that a high number of individuals were notified of exposure and received care. Seventy-three percent of the total number of adults and adolescents diagnosed with HIV in 2012 received care within three months of their diagnosis.<sup>264</sup> If Massachusetts were to adopt Maryland's partner notification scheme, it could contribute to the prevention of the spread of HIV/AIDS by encouraging testing, treatment, and conversation about the disease.<sup>265</sup>

### CONCLUSION

HIV/AIDS is an epidemic that claims thousands of lives annually in the United States alone. Anyone can contract HIV, but infection rates are far from equally spread across subpopulations. Vulnerable populations—that is, low-income persons, racial minorities, and homosexuals—have disproportionately high rates of infection. A stigma surrounds the disease for all, but the subgroups that are disproportionately affected are already on the margins of society. The impact of HIV/AIDS can be lessened on these and all subpopulations, and these lives could be saved by strengthening partner notification systems. If HIV-positive individuals are aware of their status and have access to medicine, the virus can be managed such that people may enjoy near normal life expectancies. The first step for getting treatment, however, is for those who are unknowingly infected to become aware of their problem.

The HIV law in Massachusetts neglects the good of notifying third parties who are unwittingly at high risk of exposure. To ensure that people who may be HIV positive become aware of that risk, Massachusetts should re-file and adopt the three HIV-related bills introduced last session and enact a law similar to that which exists in Maryland. Maryland has seen a high number of infected persons access care shortly after being notified; the same can be true for Massachusetts. Modifying the current HIV statute in Massachusetts to include these provisions will legally allow health care providers to warn those they believe are at risk. The goal of these provisions will impact all potentially infected with HIV/AIDS, including already marginalized communities who are disproportionately infected with the virus. It is a public health good to inform those who may be infected, thus protecting an infected patient who is both an individual victim of the disease and a potential agent of infection of concern to the general public.

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<sup>263</sup> *Id.*; MARYLAND HIV/AIDS EPIDEMIOLOGICAL PROFILE, *supra* note 258.

<sup>264</sup> MARYLAND HIV/AIDS EPIDEMIOLOGICAL PROFILE, *supra* note 258. Eighty-one percent had their CD4 count tested within one year of diagnosis. *Id.*

<sup>265</sup> See HEALTH-GEN. § 18-337(b); MASS. GEN. LAWS. ch. 111, § 70F.