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SLEEPING WITH THE ENEMY: COMBATTING THE SEXUAL SPREAD OF HIV-AIDS THROUGH A HEIGHTENED LEGAL DUTY

INTRODUCTION

Consider the following circumstances: *Z*, a professional athlete,[1] leaves the arena following a game. On the way out numerous fans approach *Z*, and *Z* becomes friendly with *Y*, a fan. *Z* invites *Y* back to *Z*'s hotel where they engage in sexual intercourse, including unprotected anal and oral intercourse. This is a practice *Z* has engaged in with over 1,000 other people. *Y*, a drug addict, shares needles on a nightly basis. Although neither person knows of their HIV status,[2] they both fail to disclose the fact that they previously engaged in activities at high risk for HIV transmission.[3] Hence, they unknowingly expose one another to the potential of HIV-AIDS.[4]

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1. Although this scenario is fictional, it is based on actual interviews where professional athletes commented on their sexual promiscuity. *See* E.M. Swift, *Dangerous Games*, SPORTS ILLUSTRATED, Nov. 18, 1991, at 40. Therein, basketball player Eddie Johnson stated, "[j]ust walk outside the locker room in any arena. The women are all there waiting." *Id.* Baseball player Kevin Elster remarked, "[y]ou can get sex every night. On the road. At home. It doesn't matter." *Id.*

Recent interviews indicate that sexual promiscuity among today's professional athletes is just as rampant as it was five years ago. *See* Greg Cote, *AIDS and the No Fear Factor: Despite Warnings, High Life Goes on for Pro Athletes*, CHI. TRIB., Mar. 31, 1996, Sports, at 7. Professional basketball player Rony Seikaly was quoted as saying, "[i]f [women] want to meet you, they will find a way. . . ." *Id.* Baltimore Orioles pitcher Oscar Munoz concurred, "[women] find ways to make contact. If they want to know how to reach you, they'll know." *Id.*

2. HIV stands for human immunodeficiency virus. THE AMERICAN RED CROSS, WOMEN, SEX, AND HIV (1992). See *infra* notes 4, 32-36 and accompanying text for a discussion of HIV and how it differs from AIDS.

3. See *infra* notes 86-89 and accompanying text for a discussion of the various high risk activities associated with transmitting HIV-AIDS.

4. AIDS is an acronym for Acquired Immune Deficiency Syndrome, a disease which affects the human immune system by way of a virus known as the human immunodeficiency virus (HIV). REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 7 (1988) [hereinafter PRESIDENTIAL COMMISSION REPORT]. Although the term AIDS will be used throughout this Note, "HIV infection" or HIV-AIDS is a more accurate term to define the problem. *Id.* at XVII. The medical community prefers this description because there are growing concerns that focusing primarily on the later stages of AIDS "neglects the significant role of HIV infection as the precursor of AIDS and as a long-term health prob-

The legal questions raised by this hypothetical are numerous. For example, is *Z* under a duty to warn *Y* about past sexual encounters even though *Z* is unaware of *Z*'s HIV status? Similarly, is *Y* under a duty to warn *Z*, based on *Y*'s history of sharing needles, even though *Y* does not know if *Y* is HIV positive? Would either *Y* or *Z* be under a duty to warn if they developed symptoms of AIDS?[5] Would this duty change depending on the sexual activities in which *Y* and *Z* engaged? Should it make a difference if they are going to engage only in oral sex, as opposed to anal or vaginal intercourse? Should this duty to warn change if *Y* or *Z* is a sexually active homosexual or bisexual? What if *Y* or *Z* is a hemophiliac?[6] What if one of *Y* or *Z*'s former sex partners has tested positive for HIV? These questions present numerous problems for a country attempting to deal with an epidemic that has claimed nearly three times as many lives as the Vietnam War.[7]

It has been more than fifteen years since the first cases of AIDS were reported in the United States,[8] and still the HIV-AIDS epidemic continues to devastate our society.[9] Although

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lem of its own. . . ." ROBERT M. JARVIS ET AL., AIDS LAW IN A NUTSHELL 22 (1991). Thus, because a person infected with HIV might be in an asymptomatic state for 10 years before symptoms of full blown AIDS develop, prevention efforts center on an understanding of the "HIV infection." *See* PRESIDENTIAL COMM'N REPORT at 5; CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV INFECTION AND AIDS: ARE YOU AT RISK? (1994) [hereinafter CDC RISK].

5. See *infra* notes 69-76 and accompanying text for a discussion of the classic symptoms associated with AIDS.

6. *See* Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987) (admitting three hemophiliac children, who tested positive for HIV, into normal and integrated school classrooms). Hemophilia is an inherited blood clotting disorder. *Id.* at 1527. Hemophiliacs require the injection of blood products known as Factor VIII. *Id.* Prior to 1985, Factor VIII was not screened for AIDS. *Id.* As a result, hemophiliacs are a group very much at risk of developing AIDS. *See* PRESIDENTIAL COMM'N REPORT, *supra* note 4, at 14.

7. U.S. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., SURGEON GENERAL'S REPORT TO THE AMERICAN PUBLIC ON THE HIV INFECTION AND AIDS 1 (1993) [hereinafter SURGEON GENERAL'S REPORT (1993)].

8. U.S. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 5 (1986) [hereinafter SURGEON GENERAL'S REPORT (1986)].

9. *See* SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 1. As of 1993, it was estimated that 1,000,000 Americans - one in every 250 - were infected with HIV. *Id.* Estimates are that another person becomes infected with HIV about every 13 seconds. Michael L. Closen, *The Arkansas Criminal HIV Exposure Law: Statutory, Issues, Public Policy Concerns, and Constitutional Objections*, 1993 ARK. L. NOTES 47, 47. In 1993, California and New York each reported almost 20,000 new cases of AIDS. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HIV/AIDS SURVEILLANCE REPORT, 7 (1994) [hereinafter CDC SURVEILLANCE REPORT]. More AIDS cases were reported in the United States through December 1994 (441,528), than the number of people living in the cities of Denver, Miami, Atlanta, and Minneapolis, respectively. *Id.*; 1990 CENSUS SNAPSHOT FOR ALL U.S. PLACES (Toucan Valley Publications 1990).

HIV-AIDS is a fatal disease[10] without a cure or vaccine in sight,[11] HIV-AIDS is preventable.[12] Governmental efforts to combat the spread of HIV-AIDS include education,[13] criminalizing and prosecuting HIV exposure[14] and pursuing and imposing civil liability for HIV exposure.[15] However, based on

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10. Tischler v. Dimenna, 609 N.Y.S.2d 1002, 1004 (N.Y. Sup. Ct. 1994).

11. Michael L. Closen, *HIV-AIDS in the 1990s*, 27 J. MARSHALL L. REV. 239, 249 (1994).

12. SURGEON GENERAL'S REPORT (1986), *supra* note 8, at 6. In discussing prevention methods, the report stated: "The most certain way to avoid getting the AIDS virus and to control the AIDS epidemic in the United States is for individuals to avoid promiscuous sexual practices, to maintain mutually faithful monogamous sexual relationships and to avoid injecting illicit drugs." *Id.* at 27.

13. In 1986 the Centers for Disease Control created the National AIDS Hotline which provided telephone callers with general information about the HIV epidemic, answered specific questions, and took requests for AIDS educational publications. Telephone Interview with Centers for Disease Control and Prevention (Sept. 1, 1995). In addition, in 1988 the Surgeon General mailed an informational letter on AIDS to every household in the United States. David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 440 (1990); *but see* JARVIS ET AL., *supra* note 4, at 24-26. (stating that current efforts to educate the public are weak, and arguing AIDS education is needed in all classrooms as well as in places where high risk groups conjugate).

14. *See* ARK. CODE ANN. § 5-14-123(b) (Michie 1994); FLA. STAT. ANN. § 775.0877 (West 1996); GA. CODE ANN. § 16-5-60(c) (Michie 1995); IDAHO CODE § 39-608(1) (Michie 1995); 720 ILCS 5/12-16.2 (West 1995); IND. CODE ANN. § 35-42-1-7 (West 1996); LA. REV. STAT. ANN. 14:43.5 (West 1996); MD. HEALTH-GEN. CODE ANN. § 18-601.1(a) (Michie 1995); MICH. COMP. LAWS ANN. § 333.5210 (West 1996); MO. ANN. STAT. § 191.677 (West 1996); MONT. CODE ANN. § 50-18-101 (1995); NEV. REV. STAT. § 201.205 (1993); N.D. CENT. CODE § 12.1-20-17 (1995); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 1996); S.C. CODE ANN. § 44-29-145 (Law. Co-op. 1993); TENN. CODE ANN. § 39-13-109 (1994). Many commentators have criticized legislation criminalizing HIV-AIDS transmission as being shortsighted. *See generally* Michael L. Closen et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921 (1994); Martha A. Field & Kathleen M. Sullivan, *AIDS and the Criminal Law*, 15 LAW, MED. & HEALTH CARE 46 (1987).

15. See *infra* notes 157-187 and accompanying text for a discussion of Doe v. Johnson, 817 F. Supp. 1382 (W.D. Mich. 1993) and C.A.U. v. R.L., 438 N.W.2d 441 (Minn. Ct. App. 1989). To date, these cases represent the most consequential published opinions regarding tort liability for sexual transmission of AIDS. *See also* Plaza v. Estate of Wisser, 626 N.Y.S.2d 446, 452 (N.Y. App. Div. 1995) (stating that plaintiff's complaint against deceased lover's estate was sufficient to establish cause of action for wrongful transmission of HIV-AIDS). Possible causes of action for transmitting AIDS to a sexual partner include negligent transmission, battery, fraud, and intentional infliction of emotional distress. Robert B. Gainor, Note, *To Have and to Hold: The Tort Liability for the Interspousal Transmission of AIDS*, 23 NEW ENG. L. REV. 887, 894 (1989). *See generally* David J. Brigham, Comment, *You Never Told Me . . . You Never Asked; Tort Liability for the Sexual Transmission of Aids*, 91 DICK. L. REV. 529 (1986); Deane K. Corliss, Comment, *AIDS-Liability for Negligent Sexual Transmission*, 18 CUMB. L. REV. 691 (1988); Richard C. Schoenstein, Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency*

the increase in the number of HIV-AIDS cases reported among certain groups, it is apparent that efforts aimed at halting the growth of this epidemic are failing.[16] This is especially frightening considering that most Americans know how HIV is transmitted.[17] Thus, it is important to consider every possible way to prevent the further spread of this deadly and incurable disease.

Obviously, the most effective way to stop the spread of HIV-AIDS is to develop a vaccine or cure. Vaccines are currently being tested to prevent HIV infection.[18] Unfortunately, these tests are only in their earliest stages and are not very promising for developing a cure.[19] Using condoms is a highly effective method in preventing the sexual transmission of HIV;[20] however, studies indicate condom usage is inconsistent and not fully effective.[21] Educational efforts directed at informing this county's youth about HIV-AIDS are increasing.[22] Nevertheless, for a variety of reasons

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Virus, 18 HOFSTRA L. REV. 37 (1989).

16. CDC SURVEILLANCE REPORT, *supra* note 9, at 5-6. A comparison between the total number of AIDS cases reported in 1994 and prior years indicate that women, African-Americans, Hispanics, children, and persons with heterosexually acquired HIV infections account for dynamic growth in the epidemic. *Id.* *See also* CENTERS FOR DISEASE CONTROL AND PREVENTION, FACTS ABOUT ADOLESCENTS AND HIV/AIDS (1994) [hereinafter CDC ADOLESCENTS]. U.S. teenagers are another group on the rise in the number of AIDS cases reported. *Id.* at 1. Through 1994 the number of cases reported among adolescents was 1,768. *Id.*

17. CDC ADOLESCENTS, *supra* note 16, at 3.

18. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 18. "More than a dozen potential HIV vaccines are in the early stages of human testing . . . " *Id.* "Two ways of using HIV vaccines are [now] being tested." *Id.* One vaccine is used to prevent AIDS in a person not yet infected with HIV. *Id.* The other vaccine being tested is for treatment of people already infected with HIV. *Id.* *But see* Closen, *supra* note 11, at 249 (contending that a cure for AIDS seems almost impossible, that a vaccine or cure would take years to test and approve, and a vaccine would not provide help to the millions of people who already have AIDS).

19. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 18.

20. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, FACTS ABOUT CONDOMS AND THEIR USE IN PREVENTING HIV INFECTION AND OTHER STDS, 1-2 (1995) [hereinafter CDC CONDOMS]. In a two year study among discordant couples (i.e., one who is infected with HIV, and one who is not) who used latex condoms consistently, none of the uninfected persons became infected. *Id.* In contrast, among the couples who used condoms inconsistently, 12% of those uninfected became infected. *Id.*

21. Although recent CDC studies show that 75% of all 12th graders are sexually active, less than half report consistent use of latex condoms. *Id.* CDC ADOLESCENTS, *supra* note 16, at 2. In San Francisco, only six percent of heterosexual males with multiple sex partners reported always using a condom while only 48% of gay and bisexual men reported always using a condom. William L. Roper, *Commentary: Condoms and HIV/STD Prevention - Clarifying the Message*, AM. J. OF PUB. HEALTH, 501 (1993).

22. *See* Eugene C. Bjorklun, *Condom Distribution in the Public Schools*, 91 ED. LAW. REP. 568, 569 (1994) (noting that 33 states now mandate HIV-AIDS educa-

these methods lack the effectiveness needed to fight an epidemic such as HIV-AIDS.[23] Moreover, legislation has also failed to keep the HIV-AIDS epidemic under control.[24]

Sexual contact accounts for the majority of reported AIDS cases.[25] Accordingly, this Note focuses on when a duty should arise for individuals to warn their sexual partners about the possible transmission of HIV-AIDS.[26] With an epidemic as catastrophic as HIV-AIDS, it is imperative that individuals engaging in "high risk" activity give a more detailed and specific warning to their sexual partners or refrain from sexual intercourse. Although this implicates one's privacy rights,[27] those rights are outweighed by the important public policy of protecting the health, welfare, and safety of the population through HIV-AIDS prevention.[28] By enforcing a heightened standard of conduct for persons

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tion and citing a recent study where 80% of all public schools offered HIV-AIDS education). *See also* CDC ADOLESCENTS, *supra* note 16, at 3 (reporting that in 1988 only 17 states required HIV-AIDS education, but by 1992, 34 states required HIV/AIDS education).

23. *See* Closen, *supra* note 11, at 244 (arguing that HIV-AIDS educational programs are nothing more than empty rhetoric and have failed to stop the spread of the virus).

24. *Id.*

25. CDC SURVEILLANCE REPORT, *supra* note 9, at 22. *See also* SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 25 (explaining that the fastest growing groups of persons reported with AIDS in the U.S. have been women and men who acquired HIV through heterosexual contact); Isabelle De Vincenzi, *A Longitudinal Study of Human Immunodeficiency Virus Transmission By Heterosexual Partners*, 331 NEW ENG. J. MED. 341, 341 (1994) (reporting that worldwide, the predominant mode of HIV transmission is heterosexual intercourse).

26. The focus of this Note is very similar to the issue addressed in *Doe v. Johnson*, where Judge Enslen phrased the issue as follows: "[A]t what level of knowledge of the HIV virus should a [person] foresee potential harm to [his sexual partner] such that [he] acquires a duty to act as a 'reasonably prudent person,' as well as to disclose [his] knowledge of the HIV virus to [his sexual partner]?" 817 F. Supp. 1382, 1388 (W.D. Mich 1993). However, The *Johnson* case only dealt with an individual classified as "high risk" solely based on his promiscuous nature. *Id.* at 1387. This Note, however, addresses when the duty should arise with respect to all persons who engage in high risk activity.

27. The Fourth Amendment of the Constitution protects the right of the people to be free from unreasonable searches and seizures by the government. U.S. CONST. amend. IV. *See* Lasher v. Kleinberg, 164 Cal. Rptr. 618, 620-21. (Cal. Ct. App. 1980) (dismissing an action for fraudulent misrepresentation wherein the court stated promises made between two consenting adults relating to birth control are protected by one's right to privacy); *but see* Barbara A. v. John G., 193 Cal. Rptr. 422, 430 (Cal. Ct. App. 1983) (holding the right of privacy does not insulate a person from all liability where his intentional conduct causes injury).

28. *See* Skillings v. Allen, 173 N.W. 663, 664 (Minn. 1919). While imposing liability for failure to diagnose scarlet fever, Judge Lees explained the importance of controlling communicable diseases:

> [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

who present an increased risk of HIV transmission, the HIV-AIDS crisis is susceptible to a significant degree of containment.

This Note focuses on this country's failure to effectively deal with sexually transmitted HIV-AIDS.[29] Part I discusses the medical background relating to the sexual transmission of HIV-AIDS. Specifically, Part I discusses modes of transmission, symptoms associated with HIV-AIDS, current testing methods, and "high risk" activities. Part II explains the concept of a legal duty and focuses on foreseeability, a crucial element in determining the existence of a legal duty. Part III provides an overview of the law surrounding the transmission of communicable and sexually transmitted diseases. Moreover, Part III examines the statutes and case law regarding sexual transmission of HIV-AIDS, including the case of *Doe v. Johnson*,[30] in which the court refused to impose a duty to warn upon a sexually promiscuous person.[31] Finally, Part IV provides a framework for curbing the spread of sexually transmitted HIV-AIDS by clarifying those obvious circumstances in which persons with actual knowledge of HIV-AIDS should have an absolute duty of abstinence or disclosure. Furthermore, Part IV defines when persons with constructive knowledge of HIV-AIDS should have a duty to get tested for HIV-AIDS, abstain from sexual intercourse, or warn their sexual partners regarding their potential HIV status.

I. MEDICAL BACKGROUND ON HIV-AIDS

AIDS[32] is the name of a disease that affects the human immune system by way of a virus known as the human immunodeficiency virus, or HIV.[33] When HIV enters the blood stream, it

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more valuable than health. The laws of the state have been framed to protect the people, collectively and individually, from the spread of communicable diseases.

Id.

29. See *supra* notes 18-24 for a discussion of the preventive measures that have failed.

30. *Johnson*, 817 F. Supp. at 1382 (W.D. Mich. 1993).

31. *Id.* at 1392.

32. AIDS is the affliction which occurs only after a person's immune system becomes gravely impaired by HIV. Faya v. Almaraz, 620 A.2d 327, 329 (Md. 1993). AIDS is "the acute clinical phase of immune dysfunction." *Id.* Medical research demonstrates that most carriers of the HIV virus will eventually progress to AIDS. *Id.* As previously mentioned, AIDS is always fatal. *Id. See* Closen et al., *supra* note 14, at 921 n.1 (describing the full medical name for AIDS and explaining the significant distinction between AIDS and HIV).

33. SURGEON GENERAL'S REPORT (1986), *supra* note 8, at 9. Scientists also refer to the AIDS virus as the Human T-Lymphotrophic Virus Type III (HTLV-III), and Lymphadenopathy Associated Virus (LAV). *Id.* n.1. Medical scientists first isolated and identified HIV in 1983. *Faya*, 620 A.2d at 328. HIV is an absolute precursor to developing full blown AIDS. *Id.* at 331. The nature of the virus is such that it can

gradually weakens a person's immune system by attacking the body's white blood cells.[34] Without a functioning immune system, a person infected with HIV becomes susceptible to infection from bacteria, germs and other viruses.[35] Thus, infections that are normally fought off by the body's immune system become deadly for those people who are HIV positive.[36]

A. Modes of Transmission

To determine when a person should have an obligation to provide some type of HIV-AIDS warning to his or her sexual partner, it is important to understand the various modes of HIV-AIDS transmission. HIV can be isolated in the blood, semen, vaginal secretions, and other bodily fluids of an infected person.[37] There are a small number of ways to transmit HIV.[38] However, this Note only addresses those modes relevant to sexually transmitted HIV-AIDS. The most common way of transmitting HIV is through unprotected[39] sexual intercourse.[40] Types of sexual conduct in which HIV passes from one person to another include anal, vaginal, and oral intercourse.[41]

Anal intercourse with an infected person is probably the most frequent mode of sexually transmitted HIV.[42] Receptive anal in-

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remain dormant in the body for up to 10 years, during which time the carrier might develop no symptoms of any illness. *Id.* at 329.

34. SURGEON GENERAL'S REPORT (1986), *supra* note 8, at 10. The white blood cells are known as T-Lymphocytes and are a crucial part of the body's immune system. *Id.* A damaged immune system allows other diseases to successfully attack the body and prevents the body from fighting off diseases. *Id.*

35. *Id.* at 10. A person with HIV becomes vulnerable to germs (bacteria, protozoa, fungi, and other viruses) and cancers that would usually be warded off by the immune system. *Id.* These germs and cancers then cause "opportunistic diseases" - diseases which take advantage of one's lowered resistance to infect and harm an individual. *Id.* Common examples of opportunistic diseases include pneumonia, tuberculosis, meningitis, and some forms of cancer. *Id.*

36. *Id.*

37. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 6. In order for HIV to be transmitted, it must reach the bloodstream of the transmittee. *Faya*, 620 A.2d at 332. In other words, the bodily fluid of the carrier has had to "pass through the same channel to the transferee's blood stream." *Id.*

38. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 6. The two most common ways to transmit HIV are by having sex and sharing contaminated needles. *Id.* Other methods of HIV transmission include blood transfusions and the passing of the virus from the mother to the child during pregnancy or birth. *Id.*

39. The surgeon general classifies unprotected sex as sex without a latex condom. *Id.*

40. CDC SURVEILLANCE REPORT, *supra* note 9, at 22. Through December 1994, over 50% of all AIDS cases reported were of men having sex with other men and over seven percent of all AIDS cases occurred through heterosexual contact. *Id.*

41. CDC RISK, *supra* note 4, at 4-5.

42. Phillip Elmer-Dewitt, *How Safe is Sex?* TIME, Nov. 25, 1991, at 74. Howev-

tercourse presents the highest risk activity for sexual transmission of HIV because the force of anal intercourse can easily tear the lining of the rectum, which allows blood or semen to pass into the system of the receptive partner.[43]

Although not as hazardous as receptive anal intercourse, receptive vaginal intercourse is also an unsafe activity for HIV transmission.[44] During vaginal intercourse, a woman is more likely to contract HIV from an infected man than a man is to contract HIV from an infected woman.[45] This is because the tissues in the vagina, although stronger than those in the rectum, are liable to tear during intercourse.[46] Additionally, infected semen can remain in the vagina and uterus for days, whereas a man is usually exposed to vaginal secretions only during the sexual act itself.[47] Thus, unless a man has genital ulcers, a cut on his penis, or is uncircumcised, his chances of contracting HIV as a result of vaginal intercourse are minimal.[48]

Acquiring HIV through oral intercourse is not as likely as through anal or vaginal intercourse, but there is still a risk.[49] The person performing oral sex is at greater risk of contracting HIV because that person could get semen, blood, or vaginal secretions in his or her mouth.[50] This risk is compounded if the one performing oral sex has cuts or sores in his or her mouth.[51]

The more sex partners one has, the greater the chances of becoming infected with HIV.[52] Statistically, having sex with multiple partners increases the odds that one of those partners is infected with HIV.[53] In essence, having sex with various partners makes one susceptible to HIV-AIDS because it exposes one to all the people with whom his or her partner had sex.[54] Also, HIV can pass from male to male,[55] female to female,[56] male to fe-

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er, the Centers for Disease Control and Prevention does not break down by percentage each mode of sexually transmitted HIV. *Id.*

43. ROBERT JARVIS, ET AL., AIDS LAW IN A NUTSHELL 8-9 (2d ed. 1996).

44. *Id.*

45. Cote, *supra* note 1, at 7. Elmer-Dewitt, *supra* note 42, at 74.

46. Elmer-Dewitt, *supra* note 42, at 74.

47. *Id.*

48. *Id.*

49. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 6.

50. CDC RISK, *supra* note 4, at 5.

51. *Id.* at 4.

52. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 6.

53. *Id.*

54. *Id.*

55. See *supra* note 40 for a discussion of the percentage of HIV-AIDS cases reported by men having sex with other men.

56. There is a slight chance that a woman having sex with a woman can transmit HIV, although only four known cases of female to female transmission have been reported in medical literature. SURGEON GENERAL'S REPORT (1993), *supra*

male, and female to male during all forms of sexual intercourse.[57]

The other primary way of contracting HIV is by sharing intravenous drug needles[58] or syringes with an infected person.[59] Sharing needles is certainly one of the riskiest[60] ways to transmit HIV because blood may remain on the used syringe and be injected directly into the bloodstream of the next user.[61] HIV transmission through drug injection accounts for almost half of all AIDS cases among females.[62] Although this mode of transmission does not involve sexual contact, it is significant because those who share needles pose a threat to their sexual partners for the possible transmission of HIV-AIDS.[63] These are the primary modes of HIV transmission, but there are a few other modes of HIV transmission which comprise a small percentage of cases.

HIV can also be transmitted from infected women to their newborn babies.[64] A final, but less common way of acquiring HIV is through blood transfusions.[65] Although both of these methods pose significant medical problems for society, their significance in

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note 7, at 2.

57. CDC RISK, *supra* note 4, at 4.

58. *Id.* at 5. Although needles are commonly used for drug injections, sharing needles for other purposes such as steroids and vitamins can also transmit HIV. *Id.* at 6.

59. *Id.* at 5.

60. *See* CDC SURVEILLANCE REPORT, *supra* note 9, at 22. Through December 1994, the number of AIDS cases where the single mode of HIV transmission was drug injection was 90,644. *Id.* Over 20% of all HIV transmissions occur as a result of drug injections. *Id.*

61. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 7.

62. CDC SURVEILLANCE REPORT, *supra* note 9, at 12. Forty-eight percent of all AIDS cases reported among female adult/adolescents occurs through drug injections. *Id. See* JARVIS ET AL., *supra* note 43, at 7 (describing how the number of HIV infected women is increasing at a surprising speed).

63. SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 10. In 1994, over 25% of the people infected with AIDS were exposed by injecting drugs. *Id.* Therefore, because people who share needles are more likely to contract HIV-AIDS, they pose a substantial threat to their sexual partners even before they have the disease. *Id.*

64. Doe v. Borough of Barrington, 729 F. Supp. 376, 380 (D.N.J. 1990); SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 7. About 25% of all babies born to infected women will have HIV. *Id.* HIV is usually passed from a mother to her child before the baby is born or during birth. *Id.* However, a baby can also become infected by breast-feeding from an infected woman. *Id.* A child who is born to a women infected with HIV will test positive for HIV when born, regardless of whether or not the baby is actually infected. *Id.* It takes about 18 months for a baby who is not infected with HIV to have his or her test turn up negative. *Id.*

65. *Id.* at 9. Today there is very little chance of getting HIV from a blood transfusion because all donated blood is tested, and people at an increased risk of being infected are not allowed to donate blood. *Id.* Almost all of the people who acquired AIDS through a blood transfusion did so prior to 1985; the year donated blood testing began. *Id.*

the context of sexually transmitted HIV-AIDS is collateral.[66] Moreover, because HIV-AIDS is not transmitted through casual contact such as kissing,[67] hugging, and shaking hands,[68] there is no need to warn another person before engaging in these actions.

B. Symptoms of HIV-AIDS

In order to consider a policy of disclosure about HIV-AIDS between sexual partners, it is crucial to understand the medical symptoms associated with HIV-AIDS. Unlike other diseases,[69] when a person becomes infected with HIV, that person remains in an asymptomatic state which can last as long as ten years.[70] Thus, although a person infected with HIV might look and feel fine, that person carries a fatal condition.[71] Eventually, after a person passes through this asymptomatic state,[72] he or she typically develops one or more of the classic symptoms associated with full blown AIDS.[73] Some of these symptoms include: substantial

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66. Because a newborn baby with HIV-AIDS will probably not live to an age where he or she can engage in sexual intercourse, this mode of transmission has no relevance for purposes of this Note. Moreover, those who contract HIV from blood transfusions make up such a small segment of the HIV-AIDS population, that they pose no real significant threat to the sexual spread of HIV-AIDS.

67. CDC RISK, *supra* note 4, at 9. Most scientists state HIV transmission may be possible through open mouthed and prolonged kissing, but they also agree such transmission is highly unlikely. *Id.* at 9. *Cf.* Jim Loney, *Florida Man, 91, Contracts AIDS Virus From Being Bitten*, CHI. SUN-TIMES, Oct. 28, 1995, at 18 (discussing an incident whereby a prostitute transmitted HIV to a man through a human bite).

68. SURGEON GENERAL'S REPORT (1986), *supra* note 8, at 21. *See also* Doe v. Borough of Barrington, 729 F. Supp. 376, 381 (D.N.J. 1990) (taking judicial notice of the fact that HIV-AIDS is not spread by casual contact); Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701, 706 (9th Cir. 1988) (noting the Surgeon General's report that HIV-AIDS cannot be transmitted through casual contact). AIDS is not transmitted through the use of phones, toilet seats, utensils, or other objects used by infected persons. CDC RISK, *supra* note 4, at 8.

69. See *infra* notes 130-33 and accompanying text for a discussion of the other sexually transmitted diseases.

70. Closen et al., *supra* note 14, at 921 n.1.

71. A person in an asymptomatic state will actually begin to have minor and generalized symptoms associated with AIDS; however, these symptoms are usually not recognized as HIV infection and get passed off as a simple cold or flu. JARVIS ET AL., *supra* note 4, at 14-15.

72. At the beginning of the AIDS epidemic, the initial symptoms one experienced after progressing through the asymptomatic state, were referred to as AIDS Related Complex (ARC). SURGEON GENERAL'S REPORT (1986), *supra* note 8, at 11. However, now this terminology seems to be falling into disfavor. Closen et al., *supra* note 14, at 921 n.1.

73. JARVIS ET AL., *supra* note 4, at 15. It is important to realize that all HIV infected persons do not develop every symptom associated with AIDS. *Id.* In addition, although a person might have one or two symptoms, it should not be regarded as AIDS unless those symptoms are serious and long-term. *Id.*

weight loss, profound fatigue, persistent fever, protracted diarrhea, permanently enlarged lymph glands, and oral thrush characterized by permanent white spots in the mouth or throat.[74] Because a person can be in an asymptomatic state for up to ten years, an individual might carry the virus for a substantial period of years and be infectious for the entire time without even knowing it.[75] Tragically, this results in the unintentional transmission of HIV-AIDS to a myriad of people.[76] When considering a disclosure policy between sexual partners for HIV-AIDS, this factor weighs heavily in favor of heightened disclosure.

C. HIV-AIDS Testing

There is only one way to determine if a person is infected with HIV: a serologic test.[77] There are two types of tests currently used in HIV-AIDS testing.[78] The first test in the two-step process is known as the ELISA test.[79] If the ELISA test is repeatedly positive, it is confirmed through the use of a second, more sophisticated test, known as the Western blot.[80] Although the Western blot takes longer to perform than the ELISA test and is much more expensive, when used together correctly, the two tests are more than ninety-nine percent accurate.[81] If the Western blot test result is positive, the person is infected with HIV.[82]

Most importantly, a negative test result does not signify a person is necessarily free from risk of HIV infection.[83] Rather, it reveals that no HIV antibodies were found in the blood at the time of the blood draw.[84] Because a window period exists be-

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74. Closen et al., *supra* note 9, at 56 n.15.

75. Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701, 706 (9th Cir. 1988); JARVIS ET AL., *supra* note 4, at 23.

76. JARVIS ET AL., *supra* note 4, at 23.

77. The test itself does not actually test for AIDS or the presence of the virus, but rather it tests for HIV antibodies in the blood. CENTER FOR DISEASE AND CONTROL, VOLUNTARY HIV COUNSELING AND TESTING: FACTS, ISSUES, AND ANSWERS 6, 18 (1994) [hereinafter CDC TESTING]. When a virus enters the body, the immune system makes proteins called antibodies, and the test detects whether there are HIV antibodies in the blood. *Id.* at 5-6. The test itself involves drawing a small amount of blood from the patient, and waiting a few days to a few weeks for the results. *Id. But See* Faya v. Almaraz, 620 A.2d 327, 332 n.4 (Md. 1993) (observing that there have been misgivings about the accuracy of the blood tests).

78. CDC TESTING, *supra* note 77, at 18.

79. ELISA is the abbreviation for the Enzyme-Linked Immunosorbent Assay test. *Id.* This test is very quick, and if the results are positive, the blood is tested again. *Id.*

80. *Id.*

81. *Id.*; Kozup v. Georgetown Univ., 663 F. Supp. 1048, 1052-53 (D.D.C. 1987).

82. CDC TESTING, *supra* note 77, at 18.

83. *Id.* at 18-19.

84. After a person tests negative for HIV, his/her condition is referred to as

tween the time of infection and the time that one develops the HIV antibodies, which are detected in HIV-AIDS testing, a person who tests negative during this window period can still be infectious.[85] This suggests that even those who are willing to take the HIV test, and test negative, may still need to give their sexual partners an HIV warning. The window period also implicates the need for re-testing by those who are HIV negative to determine if their status changed.

D. High Risk Circumstances

High risk activity is certain behavior which places a person at a significantly increased risk of contracting HIV.[86] Today, high risk activity encompasses a number of different activities.[87] Most importantly, high risk activity includes unprotected sexual intercourse involving sexually active persons who are unaware of their HIV-AIDS status, and the sharing of needles and syringes for drug injection.[88] Regarding possible sexual transmission, receptive anal intercourse is the highest risk activity, followed by receptive vaginal intercourse, then by insertive anal and vaginal intercourse, and finally by oral sex, which has the least risk of HIV transmission.[89]

In order to control sexually transmitted HIV-AIDS, it is essential to have a working definition of high risk activity, and to consider a standard of disclosure between sexual partners who engage in high risk activity. Such measures are necessary because those who engage in high risk activity, by definition, are more likely to transmit HIV.

II. LEGAL DUTY AS DEFINED BY THE COURTS

It is fundamental tort law that a defendant must owe a legal duty to a plaintiff before liability can be imposed upon the defendant for acting in a negligent[90] manner.[91] A duty[92] is an

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seronegative. *Id.* at 18.

85. *Id.* at 19.

86. *See* SURGEON GENERAL'S REPORT (1993), *supra* note 7, at 10 (discussing who is at risk for HIV).

87. The surgeon general classifies high risk activity as unprotected sex with a man or woman who: is infected with HIV, injects or has injected drugs, shared needles or syringes with someone who was infected, has sex with someone who shared needles and had multiple sex partners. *Id.* In addition, high risk activity also includes: using needles or syringes that were previously used, giving or receiving sex for drugs or money, receiving treatment for hemophilia between 1978 and 1985 and having a blood transfusion or organ transplant between 1978 and 1985. *Id.*

88. *Id.*

89. Elmer-Dewitt, *supra* note 42, at 74.

90. Negligence is "conduct which falls below the standard established by law for

obligation recognized by law, requiring persons to comply with particular standards of conduct for the protection of others.[93] The existence of a duty requires examining "whether the defendant and plaintiff stood in such a relationship to one another, that the law imposed upon [the] defendant, an obligation of reasonable [care] toward the plaintiff."[94] The court determines the existence of a duty as a matter of law.[95]

The determination of whether a duty is owed by the defendant depends on a variety of factors.[96] However, the element of

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the protection of others against unreasonable risk of harm." RESTATEMENT (SECOND) OF TORTS § 282 (1964). In order to establish a cause of action based on negligence, a plaintiff must establish four fundamental elements: the existence of a duty owed by defendant to plaintiff; a breach of that duty; a causal connection between the conduct and the resulting injury; and actual damages. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

91. Ward v. K Mart Corp., 554 N.E.2d 223, 226 (Ill. 1990); Boyd v. Racine Currency Exchange, Inc., 306 N.E.2d 39, 40 (Ill. 1973); Petersen v. United States Reduction, Co., 641 N.E.2d 845, 848 (Ill. App. Ct. 1994); Illinois Hous. Dev. Auth. v. Sjostrom & Sons, Inc., 433 N.E.2d 1350, 1359 (Ill. App. Ct. 1982). *See generally* KEETON ET AL., *supra* note 90, Ch. 5.

92. According to a few courts and commentators, the concept of duty in negligence cases is very difficult to grasp. *See* Mieher v. Brown, 301 N.E.2d 307, 310 (Ill. 1973) (acknowledging that the concept of duty in negligence cases is very involved, complex and nebulous); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953) (complaining the term duty is so obscure that "there is a duty if the court says there is a duty").

93. Samson v. Saginaw Prof. Bldg., Inc., 205 N.W.2d 833, 835 (Mich. Ct. App. 1973); *see also* Ono v. Chicago Park Dist., 601 N.E.2d 1172, 1175 (Ill. App. Ct. 1992) (defining a duty as "a legal obligation to conform one's conduct to a certain standard for the benefit or protection of another."). *E.g.*, KEETON ET AL., *supra* note 90, § 30 at 164.

94. *See Mieher*, 301 N.E.2d at 308, 310 (holding that a defendant was not in such a position with deceased so as to warrant designing a truck which would prevent injuries in freakish accidents).

95. *See* Wimmer v. Koeningseder 484 N.E.2d 1088, 1091 (Ill. 1985) (stating that whether a Wisconsin tavern owner owed a duty to an Illinois patron was a matter of law for court to decide); Curtis v. County of Cook, 456 N.E.2d 116, 119 (Ill. 1983); *Ono*, 601 N.E.2d at 1175; *see also* Karrar v. Board of Rd. Comm'r, 339 N.W.2d 653, 657 (Mich. Ct. App. 1983); Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985).

96. One court examined the following elements when determining the existence of a duty:

> (1) foreseeability; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant's conduct and injury suffered; (4) moral blame attached to defendant's conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) availability, cost, and prevalence of insurance for the risk involved.

Vu v. Singer Co., 538 F. Supp. 26, 29 (N.D. Cal. 1981); *see also* Walnut Creek Aggregates Co. v. Testing Eng'rs Inc., 56 Cal. Rptr. 700, 703 (Cal. Ct. App. 1967) (employing almost identical elements); *cf.* Swartz v. Huffmaster Alarms Sys., Inc., 377

foreseeability is the most important consideration in determining if a duty of care exists.[97] The law recognizes a duty if the result of the defendant's conduct is the type of occurrence, which was or should have been reasonably[98] foreseeable by the defendant.[99] Accordingly, there is no duty to warn for things which are unforeseeable.[100] The rationale for narrowing duty to include only those occurrences which are reasonably foreseeable, is to limit liability and encourage defendants to act with greater caution with respect to foreseeable occurrences.[101]

One important factor in determining the element of foreseeability, is whether a genuine relationship of some kind existed between the plaintiff and defendant, as opposed to the absence of a relationship, or perhaps only a distant, minimal relationship.[102] Courts are more willing to find an occurrence foreseeable when there is a special relationship in which one person entrusts himself or herself to the protection of another.[103] Be-

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N.W.2d 393, 395 (Mich. Ct. App. 1985) (refusing to impose a duty on restaurant for injuries sustained by drunk customer in an automobile accident off restaurant's property). The *Swartz* court used the following elements to determine the existence of a duty: "a balancing of the societal interest involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence and the relationship between the parties." *Id.*

97. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976); *see also* Dillon v. Legg, 441 P.2d 912, 919 (Cal. 1968) (noting that "foreseeability of risk is of primary importance in establishing the element of duty"); *but see* Ward v. K Mart Corp., 554 N.E.2d 223, 226 (Ill. 1990) (explaining that the reasonable foreseeability of an injury in determining duty is an important concern, however foreseeability "alone provides an inadequate foundation upon which to base the existence of a legal duty."); Schoondyke v. Heil, Heil, Smart & Golee, Inc., 411 N.E.2d 1168, 1171-72 (Ill. App. Ct. 1980) (observing that although the foreseeability formula is valuable in helping a jury determine if a duty has been violated, "it is altogether inadequate for use by the judge as a basis for determining the duty issue and its scope.")

98. The standard by which foreseeability is judged, "does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts . . . will decide what the ordinary man under such circumstances should reasonably have foreseen." *Dillon*, 441 P.2d at 921; *see generally* RESTATEMENT (SECOND) OF TORTS § 283 (1964); KEETON ET AL., *supra* note 90, § 32 at 173.

99. *E.g.*, Balder v. Haley, 399 N.W.2d 77, 81 (Minn. 1987). This concept is entrenched in the famous statement by Judge Cardozo: "The risk reasonably to be perceived defines the duty to be obeyed. . . ." Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928). *See also* Cunis v. Brennan, 308 N.E.2d 617, 619 (Ill. 1974) (explaining that whether a certain harm is legally foreseeable depends on "what was apparent to the defendant at the time of his now complained conduct, not what may appear through [the] exercise of hindsight.").

100. *Balder*, 399 N.W.2d at 81.

101. *See* Henley v. Prince George's County, 503 A.2d 1333, 1340 (Md. 1986) (explaining policy considerations for imploring a duty).

102. *Dillon*, 441 P.2d at 920.

103. *See* Taco Bell, Inc. v. Lannon, 744 P.2d 43, 48 (Colo. 1987) (holding that the

cause many sexual diseases are often transmitted between strangers who have no special relationship, it is unlikely that courts will impose a duty to warn where two strangers have sexual relations.[104] In fact, one court has already found that no special relationship exists between strangers who have consensual sex.[105]

III. CIVIL AND CRIMINAL LIABILITY FOR THE TRANSMISSION OF DISEASES

Part III examines related precedent to help define when a duty should arise to warn one's sexual partner of possible HIV-AIDS risk. Analyzing both the shortcomings and soundness of related case law and legislation makes it easier to pinpoint when this duty should arise. Section A begins by exploring the case law involving both communicable diseases and sexually transmitted diseases (STDs). Next, Section B addresses those statutes criminalizing HIV-AIDS exposure. Finally, Section C considers recent case law dealing with liability for sexually transmitted HIV-AIDS.

A. Duty To Warn in Communicable Disease and STD Cases

The law on transmission of communicable diseases dates back over 100 years, and includes cases imposing civil liability for transmission of such diseases as smallpox, typhoid fever, tuberculosis, whooping cough, scarlet fever, and even recently, valley fever.[106] The law is clear that one who knowingly exposes another to an infectious disease is liable in damages.[107] To prove such

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owner of a fast food store owed a duty to a customer who was injured during an armed robbery where criminal acts by third persons were foreseeable); *cf.* Williams v. Cunningham Drug Stores, 418 N.W.2d 381, 384 (Mich. 1988) (holding that a merchant's duty of reasonable care did not extend to providing armed, visible security guards to deter criminal acts of third persons).

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

105. *Id.* at 1393.

106. See *infra* notes 107-08 for a discussion of the aforementioned cases.

107. *See* Crim v. International Harvesters Co., 646 F.2d 161, 164 (5th Cir. 1981) (holding an auto manufacturer who brought a Texas car dealer to the Arizona desert to test drive a vehicle had a duty to warn for valley fever); Williams v. Borden, Inc., 637 F.2d 731, 739 (10th Cir. 1980) (holding defendant liable for the transmission of meat wrapper's syndrome); Smith v. Baker, 20 F. 709, 710 (C.C.S.D.N.Y. 1884) (holding defendant liable for negligent transmission of whooping-cough); Gilbert v. Hoffman, 23 N.W. 632, 634 (Iowa 1885) (finding hotel innkeeper negligent for allowing guests to frequent hotel with knowledge of its presence of smallpox); Skillings v. Allen, 173 N.W. 663, 664 (Minn. 1919) (sustaining action for negligent exposure to scarlet fever where physician failed to warn parents of daughter's infectiousness); Hendricks v. Butcher, 129 S.W. 431, 432 (Mo. 1910) (ruling that a person afflicted with smallpox has a duty to act in a manner which will not communicate the disease, and to warn persons of the affliction if

a case, the plaintiff must show that the defendant knew of his or her affliction, and nevertheless disregarded the plaintiff's welfare by exposing him to the disease.[108]

The cases involving negligent transmission of communicable diseases provide little help for determining when a duty should arise for possible HIV-AIDS transmission for a number of reasons. Those cases involved highly infectious diseases, which were transmittable through casual contact.[109] Thus, because those diseases were so contagious, it was obvious that infected persons should either refrain from contact, or have a duty to warn. However, since HIV is not transmitted through casual contact,[110] is passed in specific ways which affect one's privacy, and is often undetected by the carrier,[111] defining the point at which a duty should arise is more difficult.

Another reason those cases provide little guidance is because the carrier had to know he or she was infected.[112] Requiring knowledge poses serious problems in cases involving HIV-AIDS. As previously mentioned, a person with HIV-AIDS can be infected for a period of years without knowing it.[113] Therefore, requiring knowledge would not stop those cases of sexually transmitted HIV where the partners are unaware of their infection. Moreover, requiring knowledge is arguably counterproductive and will discourage HIV testing because a positive test exposes one to potential liability, while offering few countervailing benefits.[114] Thus, although these other cases are comparable because they involve communicable diseases, they provide little direction for the more problematic HIV-AIDS context.

The cases involving transmission of venereal diseases provide a slightly better framework for determining when a duty to warn

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approached); Kliegel v. Aitken, 69 N.W. 67, 68 (Wis. 1896) (affirming an action for negligent transmission of typhoid fever, and declaring that "one who negligently . . . exposes another to an infectious or contagious disease, which such other thereby contracts, is liable in damages."); Sloan v. Canadian Valley Animal Clinic, 719 P.2d 474, 475 (Okla. Ct. App. 1985) (affirming liability for the transmission of brucellosis).

108. Earle v. Kuklo, 98 A.2d 107, 109 (N.J. Super. Ct. App. Div. 1953). The *Earle* court held a landlord was liable for failing to inform new tenants that his family was infected with tuberculosis.

109. See *supra* notes 107-08 and accompanying text for a list of the related cases.

110. See *supra* note 68 and accompanying text for a discussion of the ways HIV-AIDS is not transmitted.

111. See *supra* notes 70-73 and accompanying text for a discussion of how HIV-AIDS can go undetected in a carrier.

112. *See Earle*, 98 A.2d at 109 (holding that the plaintiff must prove the defendant knew of the presence of the disease).

113. See *supra* notes 70-73 and accompanying text for a discussion of how HIV-AIDS can go undetected in a carrier.

114. Closen et al., *supra* note 14, at 933.

for possible HIV-AIDS transmission arises. During the last fifteen years, through a multitude of decisions, courts have unanimously agreed that liability could arise from the transmission of venereal diseases.[115] However, it is equally clear that some courts have done so begrudgingly.[116] The general rule is that one who knows, or should know, that he or she is infected with an STD, has a duty to either abstain from sexual contact with others, or at least to warn a sexual partner of the infection prior to sexual contact.[117] The rationale behind such a duty to warn is that persons who have dangerous and contagious diseases have an obligation to protect others with whom they have an intimate sexual relationship and who would be in danger of infection.[118]

While exploring the question of when to impose a duty to warn one's sexual partner, most courts look to the foreseeability of the harm.[119] For the harm to be foreseeable, the courts usually require the defendant to have either actual[120] or imputed[121]

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115. *See, e.g.*, Berner v. Caldwell, 543 So. 2d 686 (Ala. 1989) (genital herpes); Doe v. Roe, 267 Cal. Rptr. 564 (Cal. Ct. App. 1990) (genital herpes); Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Cal. Ct. App. 1984) (genital herpes); Gabriel v. Tripp, 576 So. 2d 404 (Fla. Dist. Ct. App. 1991) (genital herpes); Long v. Adams, 333 S.E.2d 852 (Ga. Ct. App. 1985) (genital herpes); *In re* Marriage of Foran, 587 N.E.2d 570 (Ill. App. Ct. 1982) (genital warts); Meany v. Meany, 639 So. 2d 229 (La. 1994) (genital herpes and venereal warts); B.N. v. K.K., 538 A.2d 1175 (Md. 1988) (genital herpes); M.M.D. v. B.L.G., 467 N.W.2d 645 (Minn. Ct. App. 1991) (genital herpes); R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988) (genital herpes); S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986) (genital herpes); Crowell v. Crowell, 105 S.E.2d 206 (N.C. 1920) (venereal disease); G.L. v. M.L., 550 A.2d 525 (N.J. Super. Ct. Ch. Div. 1988) (genital herpes); Maharam v. Maharam, 510 N.Y.S.2d 104 (N.Y. App. Div. 1986) (genital herpes); Doe v. Roe, 598 N.Y.S.2d 678 (N.Y.J.C. 1993) (chlamydia); Mussivand v. David, 544 N.E.2d 25 (Ohio 1989) (venereal disease); Stafford v. Stafford, 726 S.W.2d 14 (Tex. 1987).

116. *See Long*, 333 S.E.2d at 855 (recognizing a cause of action for negligent transmission of herpes, but providing this disclaimer: "While we do not here condone the sexual mores of our time, neither can we ignore the realities of present day life, disheartening though they may be.")

117. *Berner*, 543 So. 2d at 689. The *R.A.P.* court recognized the rationale for imposing such a duty court:

> A reasonable person should know that if he/she has a contagious, sexually transmittable disease like genital herpes, the disease is likely to be communicated through sexual contact. Thus, people suffering from genital herpes generally have a duty either to avoid sexual contact with uninfected persons or, at least, to warn potential sex partners that they have herpes before sexual contact occurs.

R.A.P., 428 N.W.2d at 108.

118. *E.g., R.A.P.*, 428 N.W.2d. at 103.

119. *See B.N.*, 538 A.2d at 1179 (holding that a person who has a highly infectious disease can easily foresee that it will pass through contact, and thus has a duty to take precautions to avoid transmitting the disease).

120. See *infra* note 190 and accompanying text for a definition of actual knowledge.

121. See *infra* note 204 and accompanying text for a definition of constructive

knowledge of the disease.[122] All courts agree that if one has actual knowledge of the disease, he or she at the very least has a duty to warn his or her sexual partner.[123] However, when one does not have actual knowledge or confirmation of the disease, the courts differ as to what facts are sufficient to impute knowledge and impose a duty.

Courts will generally impute knowledge of a disease to people with obvious symptoms regardless of medical confirmation.[124] However, one court has required the defendant to possess a significant degree of knowledge about how the disease is transmitted, in addition to knowing that he or she is infected.[125] In contrast, one court imposed liability on a defendant who knew of his disease, but honestly believed it could not be transmitted because he was symptom-free.[126] This case follows the general proposition that people are expected to know those things which are matters of common knowledge.[127] This general proposition is predicated on triggering a duty in people to investigate, and to find answers for those questions which they do not know.[128]

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knowledge.

122. Meany v. Meany, 639 So. 2d 229, 234 (La. 1994).

123. See *supra* note 115 for a list of cases stating this general principle.

124. *See Meany*, 639 So. 2d at 235-36 (imputing knowledge and imposing a duty to warn on a husband who experienced a problem with "drippage" and sought out medical advice, but still engaged in sexual intercourse with his wife); M.M.D. v. B.L.G., 467 N.W.2d 645, 647 (Minn. Ct. App. 1991) (holding the transmission of herpes was a reasonably foreseeable consequence of defendant's sexual intercourse with plaintiff when he had recurring sores on his penis and was told by his physician a herpes test was advisable).

125. *See Gabriel v. Tripp*, 576 So. 2d 404 (Fla. Dist. Ct. App. 1991). The court explains the elements for a cause of action as follows:

> [I]n order to state a cognizable cause of action for negligent transmission of a sexually transmissible disease, a plaintiff must allege that the defendant knew he or she was infected with [a sexually transmissible disease], that the defendant had been informed that [the disease] could be communicated through sexual intercourse, and that the defendant had sexual intercourse with the plaintiff without informing the plaintiff of the presence of the disease and without securing the plaintiff's consent to sexual intercourse under such circumstances.

Id. at 405.

126. In *Doe v. Roe*, the defendant presented the argument that he owed no duty to his sexual partner because he believed he could not transmit herpes when in an asymptomatic state. 267 Cal. Rptr. 564, 566 (Cal. Ct. App. 1990). However, the court noted the policy of preventing the spread of venereal disease is great, and therefore, only a slight degree of foreseeability was needed to impose a duty. *Id.* at 567. Thus, the risk of harm was foreseeable. *Id.*

127. RESTATEMENT (SECOND) OF TORTS § 290 (1964).

128. *See Doe*, 267 Cal. Rptr. at 567. The court specifically stated although that the defendant had no idea his disease was sexually transmittable while in an asymptomatic state, he failed to exercise due care when he chose not to educate himself about the disease or find out about its contagiousness. *Id.* In contrast, however, a person has no duty to know his or her HIV status.

The cases involving sexually transmitted diseases may seem comparable to situations of sexually transmitted HIV-AIDS because they possess certain similarities. For example, both diseases are obviously sexually transmitted. Also, both diseases are associated with unpopular groups.[129] However, despite these basic similarities, HIV-AIDS and STDs are really quite different.

Diseases such as chlamydia,[130] gonorrhea,[131] herpes,[132] and syphilis[133] usually carry symptoms which promptly notify a person that he or she is infected, or at least has a discoverable medical problem. Thus, requiring a duty to either abstain from sex, or to warn one's sexual partner in these situations is rather obvious. Conversely, with HIV-AIDS, the situation is not as easy. A person with HIV may be asymptomatic for a period of several years and may not begin to develop recognizable symptoms until he or she has full-blown AIDS.[134] Thus, applying the 'duty to warn' rule[135] might work in those clear-cut situations where a person knows he or she has HIV-AIDS because of a positive HIV test, or a doctor diagnosis of symptoms of HIV-AIDS. However, it will not have any application in those circumstances where one partner is HIV positive, but is unaware of the infection because he or she is in an asymptomatic state. Therefore, it is necessary in some situations to impose a duty to warn before one is even aware of his or her HIV status.

Another distinction is that HIV-AIDS is both incurable and fatal, whereas most STDs, although sometimes painful and uncomfortable, are not fatal.[136] Moreover, most STDs are cur-

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129. *See* Michael Closen, *Mandatory Premarital HIV Testing: Political Exploitation of the AIDS Epidemic*, 69 TUL. L. REV. 71, 83 (1994) (discussing how HIV-AIDS is associated with gay men and drug users). Diseases such as syphilis are associated with promiscuous persons. *Id.*

130. Chlamydia is the most common sexually transmitted disease in the U.S. . THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 270 (Charles B. Clayman, ed. 1989) [hereinafter ENCYCLOPEDIA OF MEDICINE]. Symptoms in men include a discharge from the penis and a swelling of the testes. *Id.* In women, symptoms can include a vaginal discharge or a pain in passing urine. *Id.*

131. Gonorrhea is the second most common sexually transmitted disease. *Id.* at 495. Symptoms in men usually include a urethral discharge and pain during urination. *Id.* In women, symptoms are less frequent, but may include a vaginal discharge or a burning sensation when urinating. *Id.*

132. Symptoms of genital herpes usually include itching, burning, soreness and small blisters in the genital area. *Id.* at 536.

133. Syphilis has symptoms which include sores that usually appear around the genitals, and recurring skin rashes. *Id.* at 961.

134. See *supra* notes 70-73 and accompanying text for a more detailed discussion of the asymptomatic state.

135. See *supra* note 115 and accompanying text for the cases applying the duty to warn rule.

136. See ENCYCLOPEDIA OF MEDICINE, *supra* notes 130-32 for brief descriptions of various sexually transmitted diseases.

able.[137] Therefore, controlling sexually transmitted HIV-AIDS presents a greater sense of urgency than controlling various STDs. Because the public policy reasons for preventing the sexual spread of this incurable disease are so strong, only a slight degree of foreseeability should be required to impose a duty to warn on persons who do not actually know their HIV status, but who certainly know they are at risk for HIV.

B. Duty as Defined by the Legislature

In addition to attaching common law civil liability, many states have responded to the problems caused by the spread of communicable and venereal diseases through the enactment of statutes.[138] These statutes typically make it a criminal offense for a person to knowingly transmit either type of disease.[139] Recently, a number of states have enacted statutes criminalizing conduct likely to result in the exposure to HIV.[140] This of the Note centers on those statutes which relate to sexual transmission of HIV.

The main policies behind criminalizing HIV transmission are to punish people for engaging in reckless conduct and to stop the spread of HIV-AIDS.[141] When a disease such as HIV-AIDS threatens the well-being of society, the legislature has the power to enact laws to protect the public health and welfare.[142] Thus,

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137. *Id.*

138. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 120600 (West 1996); FLA. STAT. ANN. § 384.24 (West 1996); NEV. REV. STAT. § 441A.180 (1993); N.Y. PUBLIC HEALTH LAW § 2307 (McKinney 1995).

139. For example, the New York statute provides: "Any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor." N.Y. PUBLIC HEALTH LAW § 2307. *But see* Plaza v. Estate of Wisser, 626 N.Y.S.2d 446, 452 (N.Y. App. Div. 1995) (rejecting the argument that HIV infection should be included in the term venereal disease).

140. See *supra* note 14 for a list of the statutes criminalizing the transmission of HIV.

141. United States v. Morris, 30 M.J. 1221, 1228 (A.C.M.R. 1990). Another reason advanced for criminally prosecuting those engaging in activity that risks HIV transmission is that the public will be better educated about how the virus is spread. JARVIS ET AL., *supra* note 43, at 184. *But see*, J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 440 (1994) (questioning the reputed purposes of HIV criminalization); Stefanie S. Wepner, Note, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941, 945 (1993) (arguing that traditional reasons for criminalizing antisocial behavior such as deterrence, rehabilitation, and retribution, are not served by criminalizing intentional HIV-AIDS exposure). *See generally*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 25 (2d ed. 1986) (discussing the purposes of criminal law and theories of punishment).

142. *See* People v. Adams, 597 N.E.2d 574, 579 (Ill. 1992) (holding HIV testing

because the statutes criminalizing HIV transmission were enacted for the good of the public, they are helpful, to an extent, in defining when one is under a duty to warn his or her sexual partner about the possibility of HIV-AIDS.

While each statute differs in form, most make it a criminal offense for a person who knows he or she is HIV positive, to engage in sexual activity which will expose another to, or transmit, HIV.[143] South Carolina provides a typical example of such a statute. South Carolina imposes criminal liability on a person who knows he or she is infected with HIV, yet still engages in vaginal, anal, or oral intercourse without first warning his or her sexual partner of the infection.[144] Although this statute, and others like it, are important in deterring people who know they have HIV-AIDS from engaging in sexual conduct which may transmit HIV, they really do nothing significant in the way of controlling the spread of sexually transmitted HIV-AIDS.[145]

One reason the South Carolina statute, and others like it, are not effective in stopping sexually transmitted HIV is because the disease is primarily spread by people who are unaware of their infection.[146] Thus, by making it a criminal offense for people who know they are infected, to engage in sexual conduct likely to transmit HIV, the legislature is preventing a mode of HIV transmission which only occurs in the rarest of circumstances.[147]

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statute constitutional because it was a public health measure, and governmental actions designed to control the spread of diseases fall within the state's police power).

143. Strader, *supra* note 141, at 438.

144. S.C. CODE ANN. § 44-29-145 (Law. Co-op. 1993). The statute reads: "It is unlawful for a person who knows that he is infected with Human Immunodeficiency Virus (HIV) to: (1) knowingly engage in sexual intercourse, vaginal, anal or oral, with another person without first informing that person of his HIV infection. . . ." *Id. Cf.* 720 ILCS 5/12-16.2 (West 1996) ("[a] person commits criminal transmission of HIV when . . . knowing [he] is infected with HIV engages in intimate contact with another. . . ."); MICH. COMP. LAWS ANN. § 333.5210 (West 1996) ("[a] person who knows . . . that he or she is HIV infected, and who engages in sexual penetration . . . without [telling] the other person . . . is guilty of a felony.").

145. For example, Illinois has had a statute criminalizing the transmission of HIV since 1989. *See* 720 ILCS 5/12-16.2 (West 1996). However, the number of AIDS cases in Illinois actually rose from 1993 to 1994, almost five years after the statute had been in existence. CDC SURVEILLANCE REPORT, *supra* note 9, at 7.

146. See *supra* notes 75-76 and accompanying text for a discussion of the window period.

147. There are very few published opinions involving intentional sexual transmission of HIV-AIDS. *See* United States v. Bygrave, 40 M.J. 839, 842 (N.M.C.M.R. 1994) (upholding conviction of assault likely to produce death or grievous bodily harm even though defendant informed his sexual partner he had HIV); People v. Dempsey, 610 N.E.2d 208, 223 (Ill. App. Ct. 1993) (affirming conviction for criminal transmission of HIV where defendant, knowing he was infected with HIV, placed his penis in the mouth of a young boy); State v. Hinkhouse, 912 P.2d 921, 925 (Or. Ct. App. 1996) (finding the defendant, who actively concealed and lied

Moreover, these statutes do not address the dilemma created by the "window period" of HIV-AIDS.[148] The statutes do nothing to prevent people who are unaware they have the disease from infecting others through sexual contact. Finally, by requiring knowledge, these "statutes may encourage individuals to avoid testing in order to prevent establishment of a basis for subsequent criminal liability."[149] For obvious reasons, any statute which dissuades people from getting tested should be carefully examined.

Criminalizing sexual conduct by one who knows he or she is infected with HIV, yet who fails to warn his or her sexual partner, only establishes the obvious: the need for infected persons to abstain altogether or warn their sexual partners of an infection before engaging in *any* form of sexual intercourse. Although important, this is a rule which the courts have recognized for years.[150] Thus, in order to control sexually transmitted HIV-AIDS, it is imperative to impose a heavier burden and establish a greater duty on those who might be infected with HIV-AIDS based on their past conduct.

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about his HIV status to women with whom he had sexual relations, evinced the intent necessary to sustain a conviction for attempted murder); Zule v. State, 802 S.W.2d 28, 35 (Tex. Ct. App. 1990) (holding that evidence was sufficient to find that defendant intentionally transmitted HIV to victim through anal intercourse); State v. Stark, 832 P.2d 109, 114 (Wash. Ct. App. 1992) (sustaining conviction for intentional exposure to HIV where defendant purportedly stated, "I don't care. If I'm going to die, everybody's going to die."); *Man Convicted in AIDS Killing*, CHI. DAILY L. BULL., Jan. 30, 1991, at 1 (woman allegedly said to her partner after having sex, "[w]elcome to the world of AIDS," which thereupon caused the man to go into a fit of rage and kill her). *Cf.* Smallwood v. State, No. 122, 1996 WL 428978, at *6 (Md., Aug. 1, 1996) (reversing conviction for attempted murder where defendant raped three women while aware of his HIV positive status, but failed to demonstrate any intent to kill).

However, there are a number of cases involving criminal transmission of HIV which do not involve sexual activity. *See* Scroggins v. State, 401 S.E.2d 13, 23 (Ga. Ct. App. 1990) (finding the evidence supported conviction for aggravated assault with intent to murder, where defendant brutally bit a police officer while knowing he was HIV positive); State v. Hanes, 545 N.E.2d 834, 841 (Ind. Ct. App. 1989) (upholding attempted murder conviction where defendant, knowing he was HIV positive, spit, bit, scratched and threw blood at officer); State v. Caine, 652 So.2d 611, 616 (La. Ct. App. 1995) (sustaining conviction for attempted murder where defendant, prior to stabbing the victim with a syringe exclaimed, "I'll give you AIDS."); Commonwealth v. Brown, 605 A.2d 429, 431 (Pa. Super. Ct. 1992) (finding evidence supported conviction of intent to inflict bodily harm where HIV infected defendant threw his feces at guard); Weeks v. State, 834 S.W.2d 559, 565 (Tex. Ct. App. 1992) (upholding conviction of attempted murder where inmate, knowing he was infected with HIV, allegedly said, "he was going to take somebody with him" and then spit on the prison guard).

148. See *supra* notes 75-76 and accompanying text for a discussion of the window period.

149. JARVIS ET AL., *supra* note 4, at 187.

150. See *supra* notes 107, 115 for a list of cases recognizing the legal principle attaching liability to people who knowingly expose others to infectious diseases.

C. Common Law Duty in Cases Involving Sexually Transmitted HIV-AIDS

The earliest and most publicized case involving sexual transmission of HIV, was an action brought by Rock Hudson's lover, Marc Christian.[151] That case involved an intentional misrepresentation and an emotional distress claim[152] that sought damages for Hudson's failure to tell Christian that the former had AIDS while the two had sexual relations.[153] The jury found Hudson's conduct to be "outrageous," and awarded Christian millions in damages.[154]

The Hudson verdict sent a message that people who know they have HIV-AIDS are under a duty to warn their sexual partners, or at least refrain from sexual intercourse.[155] This principle was already established in prior case law dealing with both communicable diseases and venereal diseases.[156] However, the

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151. Christian v. Sheft, No. C 57 4153 (Cal. Super. Ct. Feb. 17, 1989).

152. To state a cause of action for intentional infliction of emotional distress, one must prove: the conduct was intentional or reckless, the conduct was extreme and outrageous, there was a causal connection between the wrongful conduct and the emotional distress, and the emotional distress was severe. Ford v. Revlon, Inc., 734 P.2d 580, 585 (Ariz. 1987); Harris v. Jones, 380 A.2d 611, 614 (Md. 1977); Buckley v. Trenton Sav. Fund Soc'y, 544 A.2d 857, 863 (N.J. 1988); Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974); RESTATEMENT (SECOND) OF TORTS § 46 (1965); KEETON ET AL., *supra* note 90, § 12 at 56.

153. Aetna Casualty & Surety Co. v. Sheft, 756 F. Supp. 449, 450 (C.D. Cal. 1990).

154. Aetna Casualty & Surety Co. v. Sheft, 989 F.2d 1105, 1106 (9th Cir. 1993). On February 15, 1989, the jury awarded Christian $14.5 million in compensatory damages. *Id.* The jury found Hudson's conduct to be outrageous because he deliberately hid his AIDS diagnosis from Christian while they continued to have sexual relations. *Rock's Lover Gets $7 Million More,* L.A. TIMES, February 17, 1989 at A1. However, the Judge in the *Hudson* case eventually cut the initial jury award because felt the jury members allowed their feelings about Hudson's conduct color their thinking in determining damages. *Judge Slashes Award in Hudson AIDS Case,* L.A. TIMES, Apr. 22, 1989, at A2.

155. During final arguments, Christian's lawyer urged the jury to send a "signal to society that AIDS victims have a duty to warn their sexual partners." *Jury Asked To Double Award in Hudson Case*, L.A. TIMES, Feb. 17, 1989, at A2. After the trial, Christian said he filed suit against Hudson's estate because he believed people have a duty to tell their sexual partners if they have AIDS. Hector Tobar, *Marc Christian Says Revenge Was A Motive*, L.A. TIMES, Feb. 19, 1989, at A2.

The District Court of New Jersey appears to have adopted the findings of the Hudson jury by way of the following language:

> There can be little doubt that a person who knows that he or she has AIDS and misrepresents or conceals that knowledge from a sexual partner who then contracts AIDS as the result of unprotected sex, should be liable for the injuries sustained by that partner. A person who knowingly has AIDS, has a duty to disclose it and take the steps necessary to protect against its transmission to others.

J.B. v. Bohonovsky, 835 F. Supp. 796, 797 (D.N.J. 1993).

156. See *supra* notes 107-15 and accompanying text for a discussion of case law

court in Hudson case did not address the question of what duty people have to their sexual partners when they do not know their HIV status. This question has been recently answered in part, but only in a small number of published opinions.

One such case involved a woman who sued her former fiance for negligent transmission of HIV-AIDS.[157] The transmission occurred between 1984 and 1985.[158] The woman argued that the defendant's AIDS-related symptoms and prior homosexual activity,[159] when taken in conjunction with the information available to the defendant about HIV-AIDS at the time, should have put the defendant on notice that he was a likely carrier of HIV-AIDS, and that their sexual relationship would likely result in HIV transmission.[160] On this basis, the Plaintiff contended that he owed a duty to warn her.[161]

In determining whether the defendant was under a duty to give some kind of warning, the court looked to his knowledge of AIDS, the symptoms associated with the disease, and how the disease might be transmitted.[162] The court explained that a person's "perception, experience and memory" will determine whether he is imputed to have knowledge.[163] Moreover, the court stressed that one is not expected to perceive things which are not apparent.[164] Rather, a person's perception only has to be reasonable under the circumstances.[165] The court held that it was not reasonably foreseeable for the defendant to have constructive knowledge of the disease and that he could transmit it through sexual contact.[166] The court based its ruling on the scant amount of information generally available about HIV-AIDS at the time the parties were engaging in sexual relations. Furthermore, the court emphasized that HIV testing facilities were not yet available.[167] Therefore, the court held that the defendant owed no duty to warn the plaintiff.[168]

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involving communicable diseases and venereal diseases.

157. C.A.U. v. R.L., 438 N.W.2d 441, 442 (Minn. Ct. App. 1989).

158. *Id.*

159. After dating the plaintiff for almost a year, in March 1985 the defendant went to see a doctor because he was suffering from recurring headaches, spots on his legs, weakness and fatigue. *Id.*

160. *Id.* at 443.

161. *Id.*

162. *Id.* at 443.

163. *Id.*

164. *Id.*

165. *Id.* Here, the court stated that the defendant's "knowledge only consisted of what he perceived at the time of their relationship, coupled with his memory and experience, concerning the transmission of AIDS." *Id.*

166. *Id.* at 444.

167. *Id.* at 444.

168. *Id.*

An interesting question is whether the decision would have been the same had those events occurred today. It seems clear that the *C.A.U.* court did not impose a duty to warn on the defendant because the public's awareness about HIV-AIDS, especially sexually transmitted HIV-AIDS, was still in its infancy.[169] Today however, HIV-AIDS awareness is at heightened levels.[170] Thus, someone who experiences symptoms commonly associated with HIV-AIDS, and who has previously engaged in high risk activity should be imputed to have knowledge of the disease. It follows that a person with this knowledge must then warn his or her sexual partner of the potential for HIV-AIDS, or abstain from sexual activity until a person's HIV status has been confirmed through testing. A third alternative course of conduct might be the wearing of a condom.[171]

A recent, and more troubling case dealing with HIV-AIDS transmission involved basketball superstar Earvin "Magic" Johnson.[172] The plaintiff sued Johnson alleging wrongful transmission of HIV, and claimed Johnson "knew or should have known that he had a high risk of becoming infected with the HIV virus because of his sexually active, [and] promiscuous lifestyle."[173] Accordingly, the plaintiff argued that Johnson had a legal duty to refrain from unprotected sex, or to at least warn her of the possibility that he may have had HIV based upon his active sexual lifestyle.[174] Magic Johnson has freely admitted that he engaged in unprotected sex with multitudes of women.[175] Even so, Johnson argued he did not owe a duty to the plaintiff because he did

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169. *Id.*

170. Bjorklun, *supra* note 22, at 569.

171. See *infra* notes 200-02 and accompanying text for a discussion on the inadequacies of relying on condoms to avoid transmission.

172. Doe v. Johnson, 817 F. Supp. 1382 (W.D. Mich. 1993).

173. *Id.* at 1385.

174. *Id.* at 1388. Generally, the court phrased the plaintiff's argument as to why Johnson owed her a legal duty as follows:

> [The] plaintiffs argue that the level of knowledge required in order to have a legal duty to another person is quite low — if one engages in "high risk" behavior, such as engaging in a great deal of unprotected sex with multiple partners, then that individual has sufficient knowledge that s/he may have the HIV virus. Accordingly . . . plaintiffs argue that the potential tortfeasor has a duty under the law of negligence to act as a "reasonably prudent person under the circumstances" and presumably to not engage in unprotected sexual relations, or at least warn a potential partner of the possibility that s/he may have [HIV].

Id.

175. In an interview after learning of his HIV status, Johnson discussed his promiscuity: "[A]s I traveled around the NBA cities, I was never at a loss for female companionship. . . . [A]fter I arrived in L.A., in 1979, I did my best to accommodate as many women as I could — most of them through unprotected sex." Magic Johnson, *I'll Deal With It*, SPORTS ILLUSTRATED, Nov. 18, 1991, at 16.

not know of his HIV infection; nor did he have any symptoms associated with HIV-AIDS.[176]

The key factor in deciding whether Johnson owed a legal duty to the plaintiff was his level of knowledge concerning HIV.[177] The issue was whether his knowledge was sufficient to require him to foresee potential harm to the plaintiff and thus invoke a duty to warn the plaintiff.[178] Accordingly, foreseeability was a crucial element.[179] However, the court also balanced additional factors to decide when a legal duty should arise to warn for the possibility of HIV-AIDS. Those factors included the societal interest,[180] the severity of the risk,[181] the burden on the defendant,[182] the likelihood of transmission,[183] and the relationship between the parties.[184]

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176. *Johnson*, 817 F. Supp. at 1387. Actually, the only reason Johnson discovered he was infected with HIV was because he inquired as to why he had been rejected for a life insurance policy. Johnson, *supra* note 175, at 16.

177. *Johnson*, 817 F. Supp. at 1388.

178. *Id.* For an exact wording of the issue as phrased by the court, see *supra* note 26.

179. *Johnson*, 817 F. Supp. at 1388. According to the court, "the most difficult issue . . . for purposes of this [case] is foreseeability of harm to [the] plaintiff. That is: (1) did defendant foresee the harm [to plaintiff]; (2) could the defendant foresee the harm; (3) should the defendant have foreseen the harm to plaintiff; (4) what should defendant be required to have foreseen?" *Id.*

180. In examining this factor, the court balanced two competing societal interests. *Johnson*, 817 F. Supp. at 1391. The first interest was a person's constitutionally protected right to privacy. *Id.* The court noted that imposing a duty to warn might infringe on one's right to privacy. *Id.* However, the court held that one's privacy rights cannot shield a person from judicial inquiry into his or her sexual relations, when those sexual relations cause intentional harm to another. *Id.* (citing Barbara A. v. John G., 193 Cal. Rptr. 422, 431 (Cal. Ct. App. 1983)). The second societal interest at stake was preventing the transmission of an infectious and incurable disease. *Id.* The court stressed that society's interest in preventing the spread of HIV-AIDS was especially important, and should be given weighty consideration in its decision. *Id.* at 1392.

181. The court emphasized that the risk associated with HIV-AIDS transmission is extremely high because the result of contracting HIV-AIDS is generally death. *Id.* at 1388.

182. The court pointed out that the burden on the defendant in imposing a duty is not very high. *Id.* at 1392. It was the court's position that having the defendant say he "may have the HIV virus" or "I have the HIV virus" was not very cumbersome in light of the risk associated with the disease. *Id.* However, the court did acknowledge the confidentiality issues which this might raise. *Id.*

183. Using studies by the World Health Organization, and other sources, the court concluded the likelihood of HIV-AIDS transmission is quite low. *Id.* One of the cited statistics estimated the probability of HIV-AIDS transmission after one incident of sexual intercourse at one in 300 to 500. *Id.* at 1393. However, the court did admit that the chances of HIV transmission "vary according the context of the sexual encounter." *Id.*

184. The court deemphasized the relationship between the parties because this case involved a sexual relationship between two consenting adults, and it was not a situation where one party entrusted himself or herself to the protection of anoth-

After balancing the aforementioned elements, the court held that a defendant owes a legal duty to disclose the fact that he or she may have HIV in three instances: (1) if he or she has actual knowledge of infection with HIV; (2) if he or she has experienced symptoms associated with HIV; or, (3) if he or she has actual knowledge that a prior sex partner has been diagnosed with HIV.[185] However, the court refused to extend liability to claims for wrongful transmission of HIV solely on the basis that a defendant has engaged in a high volume of sexual activity.[186] Thus, the court held that "a defendant who has had unprotected sexual encounters with multiple partners does not have a legal duty to inform a plaintiff of his or her past sexual activity."[187]

The *Johnson* Court had the potential to make significant strides in broadening the circumstances of when a person should be under a duty to warn his or her partner about possible HIV-AIDS infection. However, it failed to do so. The court in *Johnson* took a step backward by not broadening the legal duty to encompass those people who know they are at high risk for HIV-AIDS based on their complete history. Accordingly, Part IV will offer an alternative proposal for curbing the spread of sexually transmitted HIV-AIDS by describing a realistic legal policy mandating an HIV-AIDS warning between sexual partners.

IV. PROPOSAL

The final Part of this Note suggests that all persons should take increased responsibility for their conduct as a way to curb the sexual spread of the incurable and fatal HIV-AIDS disease.

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er. *Id.*

185. *Johnson*, 817 F. Supp. at 1392.

186. *Id.* One passage demonstrates how troubled the court was on the issue of whether it should impose a duty to disclose one's high risk status:

> [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 were discovered, would a duty be imposed on non-high risk group members to disclose to every potential sexual partner all prior sexual contacts with partners who were so-called "high risk" group members? Would this duty of disclosure encompass prior sexual contacts with others known to be "promiscuous" or "sexually active?" What are the equal protection implications of imposing such a standard on a class of people? What are the privacy implications of imposing such a standard on a class of people? Would the duty eventually extend to everyone who has had any sexual contact outside of a monogamous relationship? What type of theoretical exposure to the HIV virus, if any, would create a legal duty to be tested for the virus? Would the duty require doctors, nurses and other medical health professionals who come in contact with HIV infected patients to disclose this information to [a] sexual partner?

Id. at 1394.

187. *Id.* at 1393.

Part IV begins by identifying those obvious circumstances that warrant an absolute duty of abstinence or disclosure. Part IV concludes by delineating a proposal to help control sexually transmitted HIV-AIDS in those circumstances where people are unaware of their HIV-AIDS status.

A. Actual Knowledge of HIV-AIDS

It is black letter law that a person who knows he or she has HIV-AIDS owes a duty of care to his or her sexual partner.[188] State legislatures and courts have firmly established this rule.[189] Clearly, common sense and morality dictate that there be such a duty. However, neither the legislatures nor the courts have really ever defined what constitutes actual knowledge. Nevertheless, this will define actual knowledge in the context of HIV-AIDS.

Actual knowledge is defined as positive knowledge of a fact.[190] For purposes of putting one on notice, actual knowledge "embraces those things of which the one sought to be charged has express information."[191] Using this definition, actual knowledge of HIV-AIDS would consist of either an HIV positive test result or a diagnosis of HIV-AIDS from a medical doctor.

The rationale for allowing a test result or a diagnosis to operate as actual knowledge is that each provides a solid basis in medical and scientific fact. This is not to suggest that these methods present no chance for human error.[192] However, the likelihood for error is so minute, and the probability for accuracy so great,[193] that these two standards deserve more deference than those supported by mere conjecture. Moreover, imposing a duty on the basis of a medical diagnosis of HIV-AIDS discourages people from shutting their eyes to a very real HIV-AIDS infection, signified by such profound clinical symptoms that a doctor is willing to diagnose HIV-AIDS even without a HIV test result. For example, even if a person sees a doctor and learns he or she might have HIV-AIDS based on the doctor's analysis of symptoms, under most criminal HIV-AIDS statutes it appears that such an individual can escape liability by not getting tested.[194] However, courts

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188. *Id.* at 1392; *See* J.B. v. Bohonovsky, 835 F. Supp. 796, 797 (D.N.J. 1993).

189. See *supra* notes 144, 188 and corresponding text for cases and statutes citing this general proposition.

190. BLACK'S LAW DICTIONARY 873 (6th ed. 1990).

191. *Id.*

192. JARVIS ET. AL., *supra* note 4, at 17. With HIV testing there are chances that the blood sample may be labeled improperly or that the test results may be recorded incorrectly. *Id.* Also, the test may be administered erroneously. *Id.*

193. See *supra* notes 77-82 and accompanying text for an explanation of the testing process and the chances for error.

194. Most HIV-AIDS criminal statutes impose a duty only after a person knows

should effectively foreclose this potentially hazardous conduct by imposing a duty where a doctor has made a medical diagnosis of HIV-AIDS infection.[195]

Another question which has not been clearly answered is the standard of conduct sufficient to meet this duty once a person has actual knowledge of HIV-AIDS. There are two alternative standards of conduct which should satisfy a duty of due care when one knows he or she is infected with HIV-AIDS.

Arguably, the standard of conduct most sufficient to satisfy a duty of due care is complete abstinence from sexual intercourse. Some would contend that abstinence from sexual intercourse is the only choice for one who has HIV-AIDS.[196] However, following this method seems unrealistic and unlikely. Human nature is such that rationality and common sense often dissipate when sex is involved.[197] Moreover, courts are usually reluctant to prohibit sexual conduct, so as not to infringe on one's privacy rights.[198]

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he or she has tested positive for HIV-AIDS. For example, the Arkansas statute provides an example and reads in pertinent part: "A person commits the offense of exposing another to [the] human immunodeficiency virus if the person knows he or she has tested positive for [the] human immunodeficiency virus. . . ." ARK. CODE ANN. § 5-14-123(b) (Michie 1994). The Nevada statute provides more detail, and an even bigger loophole.

> Any person who, after testing positive in a test approved by the state board of health for exposure to the human immunodeficiency virus and receiving actual notice of that fact, intentionally, knowingly or willingly engages in conduct in a manner that is intended or likely to transmit the disease to another person is guilty of a felony . . .

NEV. REV. STAT. ANN. § 201.205 (Michie 1993). Thus, according to this statute, if a person found out he had HIV from a test not approved by the state board of health, he would be under no duty to refrain from intentional HIV-AIDS transmission.

195. Arguments can be made that this suggestion encourages the use of false names in seeking out medical care, or that it discourages people from going to the doctor. However, if a person intentionally refuses to see a doctor, or deliberately falsifies his or her name for fear of receiving an HIV-AIDS related diagnosis, he or she may have enough knowledge to know something is wrong. In that circumstance, as the final subsection suggests, a duty should be imposed because this is constructive knowledge.

196. *See* United States v. Morris, 30 M.J. 1221, 1228 (A.C.M.R. 1990). In *Morris*, the victim consented to unprotected sexual intercourse with the defendant even though she was aware that the defendant had tested positive for the disease and that HIV-AIDS was fatal and could be transmitted through sexual intercourse. *Id.* The court concluded that the combined societal interests of deterring this type of reckless behavior and stopping the spread of such a deadly disease were enough to outweigh the fact that the victim consented. *Id.* Thus, the court was really mandating a standard of abstinence for HIV infected persons.

197. *See* Baker v. Wade, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) (describing that "sex, next to hunger and thirst, is the most powerful drive that human beings experience"), *rev'd*, 769 F.2d 289, (5th Cir. 1985), *cert.denied*, 478 U.S. 1022 (1986).

198. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that a statute making possession of obscene material in the privacy of one's home was unconstitutional); Griswold v. State of Conn., 381 U.S. 479, 485 (1965) (holding that a Con-

Therefore, a more reasonable alternative standard is necessary.

A more plausible approach should set a lesser burden on the HIV-AIDS carrier and be more realistic in its effectiveness. A simple warning satisfies both these needs. Before engaging in any type of sexual intercourse, it would therefore be sufficient to say to one's sexual partner, "I have HIV-AIDS." A non-infected partner would then be free to engage in sexual intercourse at his or her own risk.[199]

The use of condoms is another alternative to warning one's sexual partner. Although condoms offer a method for safer sex, they do not guarantee the prevention of HIV-AIDS transmission.[200] Rather, condoms are susceptible to breakage, spillage, seepage, defective workmanship, and improper usage.[201] Therefore, the use of condoms without any prior HIV-AIDS warning should not satisfy the duty requirement.[202]

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necticut statute forbidding the use of contraceptives unconstitutionally intruded upon the right to marital privacy); C.A.M. v R.A.W., 568 A.2d 556, 561 (N.J. Super. Ct. App. Div. 1990) (declaring that public policy precluded recovery in tort, where cause of action was based on misrepresentations made between consenting adults concerning birth control); Lasher v. Kleinberg, 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980) (refusing to impose tortious liability for a woman's misrepresentation relating to birth control, because doing so would encourage governmental intrusion into matters affecting one's right to privacy). *But see* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (reversing an appellate court ruling which held a person's fundamental right to privacy allowed one to engage in homosexual sodomy); Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Cal. Ct. App. 1984) (deciding that the state has a right to enact laws for the protection of the public health even though those laws may invade an offender's right of privacy); Barbara A. v. John G., 193 Cal. Rptr. 422, 431 (Cal. Ct. App. 1983) (holding that the right of privacy does not shield one sexual partner from liability where his conduct causes injury to his partner).

199. However, in *Morris*, the military court held that a person's consent to unprotected sex with a carrier of HIV-AIDS will not shield the carrier from accountability for a court-martial offense. *Morris*, 30 M.J. at 1228. In strong language, the court stressed, "society has an interest in preventing such conduct . . . whether the [partner] consents or not." *Id.* Although the court's ruling sends out a strong message that HIV-AIDS must be controlled, particularly in the context of the military, the enforceability of this rule is questionable.

200. See CDC CONDOMS, *supra* note 20, at 1-2.

201. United States v. Joseph, 37 M.J. 392, 396 (C.M.A. 1993).

202. One military court has already found that the use of a condom by a person infected with HIV is not a defense to a court-martial for aggravated assault arising out of otherwise consensual sexual intercourse. *Id.* at 397. The *Joseph* court refused to hold as a matter of law, in cases involving HIV-AIDS, that the use of a condom provides a complete bar to a military court-martial for aggravated assault. *Id.* The court stated that although the chances of HIV transmission are low when a condom is used, condoms do not provide an absolute guarantee against transmission of AIDS. *Id.*

B. Constructive Knowledge of HIV-AIDS

This Section addresses those circumstances where a person does not have actual knowledge of an HIV-AIDS infection.[203] More specifically, this Section focuses on those instances where a duty should be imposed because a person has constructive knowledge of HIV-AIDS. A person is deemed to have constructive knowledge of a fact, if by the exercise of reasonable care, he or she would have known such a fact.[204] By imputing constructive knowledge of HIV-AIDS to persons who fall within carefully defined criteria, sexually transmitted HIV-AIDS is subject to a greater degree of control than under the status quo. The initial Subsection deals with those cases where a person has HIV-AIDS related symptoms, but as a medical fact does not know if he or she has HIV-AIDS. The second Subsection focusses on situations where a person has had sexual relations with someone, and then later discovers that person has tested positive for HIV-AIDS.

1. Defining the Duty When One Has Symptoms of HIV-AIDS

One case recognizes that people who have symptoms associated with HIV-AIDS possess, at the very least, a legal duty to warn their sexual partners.[205] However, this rule is not specific enough because the symptoms associated with HIV-AIDS can be very generalized and common.[206] Therefore, the nature of the symptoms should determine the duty to be followed.

a. Obvious HIV-AIDS Symptoms

When a person has symptoms which make it probable that he or she has HIV-AIDS, and the person has previously engaged in conduct which heightens the possibility of HIV exposure or transmission, he or she should be held to a heightened standard of care. In these situations, imputing constructive knowledge of the disease is not unreasonable considering the current levels of HIV-AIDS awareness.[207] Furthermore, a person is expected to know

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203. In these circumstances it would be foolish to allow a person to escape liability because he does not officially know if he has HIV-AIDS. Therefore, knowledge of the disease can be imputed to him under the theory of constructive knowledge. See BLACK'S LAW DICTIONARY 314 (6th ed. 1990), for a definition of constructive knowledge.

204. *See* Attoe v. State Farm Mutual Auto. Ins. Co., 153 N.W.2d 575, 579 (Wis. 1967) (defining constructive knowledge as "that which one who has the opportunity, by the exercise of ordinary care, to possess").

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

206. Some of the more common symptoms associated with HIV-AIDS are substantial weight loss, fatigue, fevers, night sweats, persistent diarrhea and enlarged lymph glands. Closen, *supra* note 9, at 56 n.15.

207. Evidence of the increased HIV-AIDS awareness occurred after Magic John-

certain things of common knowledge.[208] Profound or serious symptoms of HIV-AIDS should fall within this category and require a heightened legal duty. For example, a person with recognizable lesions or a host of common symptoms associated with HIV-AIDS which are serious[209] or long-term in nature, should have constructive knowledge imputed to them and therefore should have a heightened legal duty. Furthermore, the greater the risk that a person's conduct may transmit HIV,[210] the greater the legal duty must be when one begins to experience serious associated symptoms.[211] Out of fairness, before applying a higher legal duty to warn based on symptoms alone, there should be no other apparent medical explanations for the symptoms.

Once a person begins to experience symptoms commonly associated with HIV-AIDS, that person should be required to immediately get tested for HIV, and to abstain from sexual intercourse or warn of possible HIV infection while awaiting the test results. However, even if the HIV test is negative, the individual should refrain from sexual intercourse or warn of possible HIV infection until he or she can be retested in three to six months. This precautionary measure is justified in the unlikely event the person taking the test has not yet developed the HIV antibodies, and hence falls within the window period.[212]

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son announced he was HIV positive. Ventura County operators in California reported a 600% increase in calls to the county-operated HIV-AIDS hotline the two days after Johnson announced he was HIV positive. Mack Reed, *Hot Line Overrun by Calls on AIDS Health*, L.A. TIMES, Nov. 9, 1991, at B1.

However, it appears the initial impact of Magic Johnson's announcement has diminished, at least among pro athletes. *See* Cote, *supra* note 1, at 7. Rony Seikaly conceded that, "[a]s the years wore off, you saw the effect of the announcement wear off too. All of a sudden, it's the promiscuous lifestyle again the NBA. Players are still going out and chasing women." *Id.*

208. *See* RESTATEMENT (SECOND) OF TORTS § 290 (1964). In determining if someone should recognize whether his conduct involves a risk of harm, the law generally requires a person to know:

> (a) the qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community; and (b) the common law, legislative enactments, and general customs in so far as they are likely to affect the conduct of the other or third persons.

Id.

209. A symptom might be regarded as serious if it lasts for a period of months beyond that medically expected for such a symptom.

210. See *supra* notes 39-63 and accompanying text for a discussion of how the risk for contracting HIV varies depending upon the activity in which a person engages.

211. For example, if a person begins to experience night sweats and profound fatigue and has engaged in unprotected anal intercourse with multiple partners, his legal duty should be greater than the person with similar symptoms, but who has had unprotected sex with only one or two people.

212. See CDC TESTING, *supra* note 77 at 19, for an explanation of the window

If for some reason a person refuses to take the test, he or she must refrain from any sexual intercourse, or at the very least, give his or her partner a warning. The warning should be a statement explaining that he or she is experiencing symptoms possibly associated with HIV-AIDS. The use of a condom in this circumstance is not satisfactory for reasons previously mentioned.[213]

b. Obscure HIV-AIDS Symptoms

A more difficult situation arises where someone has only one or two symptoms associated with HIV-AIDS, and those symptoms are common to a number of other medical ailments. For example, with symptoms such as profound fatigue or substantial weight loss,[214] the law should trigger a different type of duty: a duty to investigate.

Common sense and legal responsibility dictate that if something is medically wrong with a person's health, he or she should uncover the problem before engaging in sexual intercourse which could possibly transmit the health condition. Even if a person does not care about his or her own health, a duty to investigate is necessary because that person's health might pose a risk of harm to others. The duty to investigate entails going to the doctor or undergoing an HIV test.[215] It could also mean abstinence or warning partners. However, because these types of symptoms are more obscure, it makes sense to impose a duty to investigate only when an individual has previously engaged in activities that carry a high rate of HIV transmission.[216] When weighed against the potential harm of transmitting HIV-AIDS, the burden of taking steps to investigate one's health is eminently fair and reasonable.

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period.

213. See *supra* notes 200-02 for a discussion of the reasons condoms are not the most preferred method for preventing the spread of sexually transmitted HIV-AIDS. *But see* CDC CONDOMS, *supra* note 20 (demonstrating that condoms are an effective method for HIV-AIDS prevention, and dispelling certain myths about condom effectiveness).

214. These are only two of the common symptoms associated with HIV-AIDS. See *supra* note 74 and accompanying text for the entire list.

215. It would be unreasonable to require an HIV-AIDS test every time a person has a persistent fever. Similarly, it would be foolish to require abstinence every time someone has diarrhea. However, if such ailments continue for a period of time beyond that medically expected, the law should require that person to make reasonable efforts to discover the problem, whether it be by taking an HIV test, or seeking medical assistance.

216. See *supra* notes 86-89 and accompanying text for a discussion of the activities which pose a high risk for transmitting HIV.

2. Defining the Duty for those with Knowledge of a Prior Partner's HIV-AIDS Infection

Doe v. Johnson requires a person to warn for the possibility of HIV-AIDS when he or she knows that a "prior sex partner has been diagnosed as having the HIV virus."[217] Not only does this rule lack clarity, but it fails to set standards for fulfilling this duty.[218] Is "prior sex partner" only limited to those HIV infected people with whom a person has had vaginal intercourse? Or, does it include those HIV positive people with whom he or she has had oral and/or anal intercourse? To control a disease as devastating as HIV-AIDS, such language must be clear. Thus, a more appropriate rule: when a person discovers that a sexual partner with whom he or she has engaged in oral, anal, or vaginal intercourse, has been diagnosed with HIV-AIDS, that person acquires a legal duty.

Broadening this rule to encompass all types of sexual intercourse forecloses every possible route of sexual transmission. Although the probability of transmitting HIV-AIDS differs depending on the sexual act,[219] the ultimate consequence of HIV entering the body is death.[220] Therefore, the gravity of the potential harm requires such a broad rule.

The extent of the duty in this instance should require the person to test for HIV-AIDS.[221] After such person submits to a test, he or she should have a legal obligation to abstain from sex, or warn his or her sexual partner until a retest fully determines that individual's HIV negative status.

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217. Doe v. Johnson, 817 F. Supp. 1382, 1393 (W.D. Mich. 1993).

218. The *Johnson* court actually set a minimum standard of conduct for this rule, although that minimum standard lacked specificity. The rule required the defendant to, "at the very least, disclose the fact [that the defendant] may have the HIV virus." *Id.*

219. See *supra* notes 41-51 and accompanying text for an illustration of the how the chances of contracting HIV-AIDS vary with the sexual act.

220. Tischler v. Dimenna, 609 N.Y.S.2d 1002, 1004 (N.Y. Sup. Ct. 1994).

221. A rule requiring mandatory testing of HIV-AIDS in certain situations has been met with both approval and opposition. *See* Steven Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 341-43 (1991) (arguing that mandatory testing for status defined groups and individuals who have exposed their bodily fluids to others does not constitute a rational public health policy); Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 33, 63 (1990)(contending that mandatory testing of the general population nor specific subgroups is necessary to control the HIV-AIDS epidemic). *But see* Susan J. Levy, Comment, *The Constitutional Implication of Mandatory Testing for Acquired Immunodeficiency Syndrome - AIDS*, 37 EMORY L.J. 217, 245 (1988) (arguing that mandatory testing programs are acceptable so long as the government overcomes the constitutional constraints on the infringement of privacy rights).

3. Defining the Duty for those at Risk of Sexually Transmitting HIV-AIDS

The last Section of this Note addresses those circumstances in which a person does not know his or her HIV-AIDS status and has no medical reason to suspect infection.[222] Currently, a person who engages in high risk activity has no duty to disclose his or her past history even though that history might increase one's chance of becoming infected with, and eventually transmitting, HIV-AIDS.[223] However, this Note concludes by proposing that those people who present a significant risk for sexually transmitting HIV-AIDS do owe a legal duty to their sexual partners.

To control sexually transmitted HIV-AIDS, there must be a duty of disclosure which is broad in its construction, and preventative in its objective. Therefore, two factors determine whether persons at a high risk for HIV transmission owe a legal duty to their sexual partners: first, the person's past conduct; and second, the conduct in which he or she is about to engage.

A person's past conduct is the first factor in determining if he or she has a duty to investigate, abstain from sexual conduct, or warn for possible HIV-AIDS transmission. When one's past conduct, being examined in its entirety, reaches such an appreciable level of risk[224] for contracting HIV-AIDS, that a reasonable person would recognize the possibility of having HIV-AIDS, that person satisfies the first part of the test.[225] Conduct capable of reaching this level includes the introductory hypothetical.[226] However, this is only the first part of the test. Before one owes a duty, a person must also fulfill the second part of the test.

Once the first step in the test is met, one looks to the conduct in which a person is about to participate, and weighs its potential for HIV-AIDS transmission. If the risk posed by that sexual activity, when taken in conjunction with a person's past history, poses

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222. This section assumes that a person does not know of a prior partner's HIV infection, or whether that partner was tested, medically diagnosed or suffered symptoms of an HIV infection.

223. Doe v. Johnson, 817 F. Supp. 1382, 1393 (W.D. Mich. 1993).

224. For example, if one person has had unprotected vaginal or anal intercourse with over 25 partners in six months, that person's conduct has reached an appreciable level of risk. Appreciable is defined as "[c]apable of being noticed, estimated, perceptible, or apprehended mentally". WEBSTER'S II NEW RIVERSIDE DICTIONARY 36 (1984).

225. The standard of conduct which reaches an 'appreciable level of risk,' is a question of law for the court to determine. For example, Magic Johnson's conduct in *Doe v. Johnson*, 817 F. Supp. 1382, would have satisfied the 'appreciable level of risk test', because a reasonable person standing in Magic Johnson's shoes would have recognized the possibility of having HIV-AIDS based on his past conduct.

226. See *supra* notes 1-4, 225 and accompanying text for an example of such conduct.

a significant threat for potentially transmitting HIV-AIDS,[227] then that person should owe a legal duty to his or her sexual partner.[228] Measures such as abstinence, HIV testing, and warning will satisfy this legal obligation.

One of the arguments against imposing this duty is that the harm is not foreseeable. This assumes that the harm is foreseeable only when you have actual knowledge of it.[229] However, many courts have imposed a legal duty on someone without actual knowledge of a disease.[230] Moreover, this proposal does not require one to foresee actually having the disease. Rather, it suggests that one should foresee the possibility of having the disease, and therefore take the proper precautions. Additionally, because the public policy reasons for preventing the sexual spread of HIV-AIDS are so strong, only a slight degree of foreseeability should be required to impose a legal duty on those who know they are at risk for HIV-AIDS.

Furthermore, courts are more willing to find an occurrence foreseeable if a prior or special relationship exists between the parties.[231] Because sexual intercourse is such an intimate act, involving close physical contact, the absence of a prior or special relationship must not forestall a court from finding that HIV-AIDS transmission is foreseeable. Rather, the nature of the physical act should impute a special relationship whether or not one exists, and thus require only a slight degree of foreseeability.[232]

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227. Whether the sexual activity, when examined in conjunction with a person's past history, poses a 'significant threat' for the potential of HIV-AIDS transmission is a question of law for the court to decide. When applying the 'significant factor' test, the court conducts a probability test by examining a person's sexual activity and past history to determine the risk of HIV-AIDS transmission.

Applying the 'significant factor' test to *Doe v. Johnson*, the test clearly imposes a legal duty upon Magic Johnson to either warn, or refrain from sex with the plaintiff. This is due to the fact that his act of unprotected vaginal intercourse, when combined with his notoriously promiscuous life style, created a significant threat for transmitting HIV.

228. For example, a bisexual male with a long history of sharing needles for drug use, who is about to engage in unprotected vaginal intercourse, would be under a legal duty to warn his partner. However, a person who had been fairly monogamous in his or her sexual relations would not be under a duty if he or she were having anal intercourse with a new partner.

229. Many courts have stressed in order to have a duty to warn, one must first possess knowledge. *See* Hammond v. Matthes, 311 N.W.2d 357, 359 (Mich. Ct. App. 1981) (holding that "[o]bviously, there is no duty to disclose what is not known."); Williams v. Benson, 141 N.W.2d 650, 656 (Mich. Ct. App. 1966) (explaining that liability cannot be imposed where no knowledge ever existed).

230. See *supra* note 124 for a discussion of the applicable cases.

231. Doe v. Johnson, 817 F. Supp 1382, 1393 (W.D. Mich. 1993).

232. Other traditional factors used in determining the existence of a duty weigh heavily in favor of imposing one. The societal interest in preventing the spread of HIV-AIDS, an incurable and fatal disease, cannot be refuted. When balanced

V. CONCLUSION

This Note has suggested imposing a heightened legal duty as a means to help curb the spread of sexually transmitted HIV-AIDS. It would be foolish to suggest that adoption of the proposal set forth in this Note will end all sexual transmission of HIV-AIDS, for that can only be accomplished through a miracle of modern medicine. However, if this Note helps to prevent even one transmission of HIV-AIDS by encouraging meaningful HIV disclosure, it will have accomplished its purpose.

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against the discomfort one might feel in saying, "I may have AIDS based on my past conduct," the societal interest substantially outweighs the slight burden of saying these simple words.