SOLVING THE HIV TESTING PROBLEM: AN ANALYSIS OF NEW YORK'S NEW LEGISLATION

Lauren E. Palmer[*]

[*] The author received a B.A. from Pace University where she was a Pforzheimer Honors Scholar in International Business Management, and a J.D. from Albany Law School where she served as student editor for the New York State Bar Association's *Elder Law Attorney* (Elder Law Section's newsletter) and was an article editor for the *Albany Law Government Law Review*. She is a Law Clerk at Cioffi, Slezak, Wildgrube, PC and will be an Associate Attorney there upon admittance to the New York State Bar.

INTRODUCTION

> *"The story of HIV testing, screening, and confidentiality in the USA is like the blind men and the elephant: what one sees depends on one's perspective and prior experience."*[1]

Now, think of the human immunodeficiency virus (HIV) as the elephant in a room filled with civil liberties lawyers, medical care providers, and public health specialists: each person's perspectives and prior experiences enables them to view the HIV testing, screening, and confidentiality problem in a different light. Balancing these extremely different viewpoints is a daunting task and is one which the New York State Legislature has attempted to address.

In 2010, the New York State Legislature attempted to balance patient rights, public health safety, and the prevention of HIV with new legislation.[2] As a result, Chapter 308 of the Laws of New York, amending the Public Health Law, was signed in to law by Governor David Paterson.[3] This law implements a mandatory offering of HIV testing in hospitals, emergency rooms, and health care clinics.[4] The main purpose of this law was to revise the informed consent requirements of HIV/AIDS testing while maintaining adequate patient protections.[5] The law also requires that counseling information is tailored based on HIV test results and updates current testing requirements to reflect medical advances.[6] Finally, Chapter 308 authorizes testing of certain occupational exposures to HIV infections.[7]

While New York's new legislation is an improvement over the old legislation,[8] more is needed to address the continuing spread

---

[1] Edward P. Richards III, *HIV Testing, Screening, and Confidentiality: An American Perspective*, *in* HIV AND AIDS: TESTING, SCREENING, AND CONFIDENTIALITY 75 (Rebecca Bennett & Charles A. Erin eds., 2001) [hereinafter HIV AND AIDS].

[2] *See* 2010 N.Y. Sess. Laws 1045–49 (McKinney); *see* N.Y. PUB. HEALTH LAW §§ 2130, 2135, 2780, 2781, 2781-a, 2782, 2786 (McKinney 2010).

[3] 2010 N.Y. Sess. Laws 1045.

[4] *Id.*; N.Y. PUB. HEALTH LAW § 2781-a.

[5] *See* Sponsor's Memorandum from Thomas Duane, N.Y. State Sen., in Support of S. 8227, 2010 Leg., 234th Reg. Sess. (2010).

[6] *Id.*

[7] *Id.*

[8] The New York Public Health Law relating to HIV testing was added in 1988. *See* 1988 N.Y Laws 2903–04. It was subsequently amended in 1996 and 2005. *See* 1996 N.Y. Laws 2250–51; 2005 N.Y. Laws 3168.

of the HIV infection in New York State. The following is an examination of Chapter 308, legislative history, and jurisprudence on HIV testing, as well as other various states' provisions on HIV testing.

I. THE HIV-TESTING PROBLEM

Since first identified approximately thirty years ago,[9] HIV (the infection that causes AIDS) has become one of the most serious infectious disease epidemics of modern times.[10] As of 2007, the cumulative worldwide number of HIV infections reached 33.2 million and with no cure, there is no end in sight.[11] According to the Center for Disease Control and Prevention (CDC), at the end of 2006, an estimated 1,106,400 persons (diagnosed and undiagnosed) in the United States alone were living with HIV.[12] In New York State, the Department of Health (DOH) estimated that 46,040 persons were living with HIV (not AIDS) as of June 2007.[13] DOH estimates that in December 2007, approximately 180,674 New Yorkers had been diagnosed with AIDS—less than half of those persons with are still living.[14]

[9] HIV was first discovered in 1983 by researchers in Paris, France. Gerald Corbit, *HIV Testing and Screening: Current Practicalities and Future Possibilities*, *in* HIV AND AIDS, *supra* note 1, at 21.

[10] N.Y. PUB. HEALTH LAW § 2780(2) (McKinney 2010) (HIV infection is an "infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS."); Jeffrey A. Kelly, *Advances in HIV/AIDS Education and Prevention*, 44 FAMILY RELATIONS 345, 345 (1995); *see* Mary Carmicheal, *How it Began: HIV Before the Age of AIDS*, PBS.ORG (May 30, 2006), http://www.pbs.org/wgbh/pages/frontline/aids/virus/origins.html; Dennis H. Osmond, *Epidemiology of HIV/AIDS in the United States*, HIV INSITE KNOWLEDGE BASE CHAPTER (Mar. 2003), http://www.hivinsite.ucsf.edu/InSite?page=kb-01-03#S1X.

[11] U.N. PROGRAMME ON HIV/AIDS & WORLD HEALTH ORG., AIDS EPIDEMIC UPDATE 3 (DEC. 2007), *available at* http://data.unaids.org/pub/epislides/2007/2007_epiupdate_en.pdf.

[12] *HIV Testing,* U.S. DEP'T OF HEALTH & HUMAN SERVS.–CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/topics/testing/ (last updated Oct. 27, 2009) [hereinafter *HIV Testing*].

[13] Of the persons living with HIV in New York State: forty-four percent African American; twenty nine percent Hispanic; twenty-four percent white; thirty-three percent women; eight percent under the age of twenty-five; twenty-six percent over the age of fifty; and seventy-seven percent of people living with HIV were living in New York City when they were diagnosed. *Id.*

[14] Today, it is estimated that 73,889 of the 180, 674 persons with AIDS are still living. *Basic Information and Incidence/Trends*, N.Y. STATE DEP'T OF HEALTH, http://www.health.state.ny.us/diseases/aids/facts/questions/basicinformation.htm (last visited May 15, 2011).

HIV continues to spread despite new and widely available scientific knowledge of the disease and its devastating effect on several societies around the world.[15] The early public health response to the HIV/AIDS epidemic looked to the limited scientific evidence on the origin of the disease, on epidemiological factors influencing incidence, and on treatment and prevention choices along with their relative effectiveness.[16] Modernly, the public health response depends on a variety of factors outside the purely scientific realm and the state of medical knowledge, such as the sociological ramifications.[17] This is because HIV issues are highly complex and pose many moral dilemmas when it comes to making public policy decisions.

II. HIV TESTING

Currently, an HIV test is the only way to find out if you have HIV.[18] HIV testing is an important tool for early detection and preventing the spread of HIV. Like many fatal medical conditions, early referral to medical care could reduce a person's risk for HIV illness and death.[19] People with HIV may have no symptoms for ten or more years and may not know they are infected during that time period, yet they may pass the virus to others during that time.[20]

Despite the government's push for increases in testing throughout the United States, HIV remains a problem.[21] While nearly half the adults in the U.S. have been tested already,[22] and each year sixteen to twenty-two million persons in the U.S. are

[15] John Richens et al., *Human Immunodeficiency Virus Risk: Is it Possible to Dissuade People from Having Unsafe Sex?*, 166 J. ROYAL STAT. SOC'Y 207, 213 (2003).

[16] MARTIN A. LEVIN & MARY BYRNA SANGER, AFTER THE CURE: MANAGING AIDS AND OTHER PUBLIC HEALTH CRISES 119 (2000).

[17] *Id.*

[18] *Id.*

[19] *See, e.g.*, Susan L. Coyle et al., *Outreach-Based HIV Prevention for Injecting Drug Users: A Review of Published Outcome Data*, 113 PUB. HEALTH REPORTS 19, 20 (1998) ("With no vaccine yet available to avert new infections, the key to prevention remains the same as in the earliest years: getting people to eliminate or reduce their risky behaviors.").

[20] *HIV/AIDS*, N.Y. STATE DEP'T OF HEALTH, http://www.health.state.ny.us/diseases/aids/ (last revised Mar. 2010).

[21] *See* Steve Sternberg, *Government Push Only Moderately Testing Numbers*, USA TODAY, Dec. 1, 2010, *available at* http://www.usatoday.com/yourlife/sex-relationships/2010-11-30-aids-testing_N.htm.

[22] *HIV Testing, supra* note 12.

tested for HIV,[23] the CDC estimates that by 2006, approximately 232,700 (twenty-one percent) of persons living with HIV infection in the United States had not been diagnosed.[24]

The CDC provides recommendations for HIV testing of adults, adolescents, and pregnant women in health-care settings. As a starting point, the CDC says that everyone should be tested for HIV.[25] Of those persons who are at high-risk for infection, they recommend HIV testing at least annually.[26] The most recent CDC published recommendations were released in September 2006, replacing their 1993 recommendations, for HIV testing services for inpatients and outpatients in acute-care hospital settings.[27] According to the CDC:

> People who are infected with HIV but not aware of it are not able to take advantage of the therapies that can keep them healthy and extend their lives, nor do they have the knowledge to protect their sex or drug-use partners from becoming infected. Knowing whether one is positive or negative for HIV confers great benefits in healthy decision making.[28]

The effectiveness of HIV testing as a preventative measure remains a matter of controversy.[29] While it is generally acknowledged that HIV testing helps infected people prevent or delay the onset of certain life-threatening diseases by accessing early medical attention, it is yet unclear whether or not such testing decreases potentially infective behavior or if is worth the significant increase in costs of HIV testing on the public resources.[30]

Several studies demonstrate that once infected persons are aware of their HIV positive status, they decrease behaviors which facilitate the transmission of the infection.[31] It is reasonable to

---

[23] *HIV Testing, supra* note 12. By 2002, an estimated thirty-eight to forty-four percent of all adults had been tested. *Id*.

[24] U.S. Dep't of Health & Human Servs.–Ctr. for Disease Control & Prevention, *HIV Prevalence Estimates–United States, 2006*, MMWR WEEKLY, Oct. 3, 2008, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5739a2.htm.

[25] *Importance of HIV Testing: CDC Vital Signs Report*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/Features/VitalSigns/HIVTesting/ (last modified Nov. 30, 2010).

[26] High risk groups include gay and bisexual men, injection drug users, or people with multiple sexual partners. *Id.*

[27] *HIV Testing, supra* note 12.

[28] *Id.*

[29] Sankar Sen, *The Behavioral Consequences of HIV Testing: An Experimental Investigation*, 23 J. PUB. POL'Y & MARKETING 28, 28 (2004).

[30] *Id.* at 28, 30.

[31] *See, e.g.*, Lance S.Weinhardt et al., *Effects of HIV Counseling and Testing*

conclude from these studies that HIV-infected persons who are unaware of their infection do not reduce risk behaviors and that testing is an effective means to reduce those behaviors and the subsequent spread of HIV.

However, a study by Thomas J. Philipson and Richard A. Posner suggests that HIV testing actually increases the likelihood of risk behavior, in certain situations, regardless of the test outcome.[32] The rationale behind this study is that before testing, an informed individual has reason to avoid contact with high-risk individuals (drug users, prostitutes, etc.) and engage in safe contact with low-risk individuals.[33] After testing negative, an individual may become less cautious in his or her contact with low-risk individuals, and thereby increase his or her chance of infection.[34]

A follow-up study, however, that tested this theory found some inconsistencies.[35] The study concluded that while risk-seeking, low-risk individuals who test negative are likely to increase their infection risk by testing negative for HIV, the same is not true for those high-risk individuals who test positive (i.e. that testing positive reduces a high-risk person's willingness to engage in risky contact with other high-risk individuals).[36]

Research ultimately shows that a person's decision to engage in risky behaviors is based on risk estimates that are neither precise nor accurate.[37] As Sen reported: "In particular, people are often

on Sexual Risk Behavior: A Meta-Analytic Review of Published Research, *1985–1997*, 89 AM. J. PUB. HEALTH 1397, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1508752/; Linda B. Cottler et. al., *Peer-Delivered Interventions Reduce HIV Risk Behaviors Among Out-of-Treatment Drug Abusers*, 113 PUB. HEALTH REPORTS 31, 40 (1998) (showing that persons in peer-delivered intervention groups were statistically more likely to reduce HIV risk behaviors than those assigned non-peer group interventions); Coyle et al., *supra* note 19, at 19 (suggesting that "outreach-based interventions have been effective in getting drug injectors to change risky behaviors and thereby slow the rate of new infections"); Sen, *supra* note 29, at 28 (highlighting "the belief that HIV-status awareness is a key motivator for the adoption of risk-reduction measures"); *contra* THOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993) (Philipson and Posner construct a theory of contemporary sexual behavior that predicts an increase in risky sexual behavior as a result of widespread HIV testing).

[32] *See* Sen, *supra* note 29, at 30 (citing Philipson and Posner's 1993 study).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 34.

[37] *Id.* at 35 (citing Punam Anand Keller, Isaac M. Lipkus & Barbara K.

prey to an optimistic bias in gauging their own susceptibility to health problems, which makes them more likely to engage in risky behaviors than their actual risk status warrants."[38] More research is needed on the effects of HIV testing in other domains, among other populations, and with measures that extend beyond the limited scope of the experimental context of Philipson and Posner's study.[39] The study does, however, reveal the potential risks associated with increased HIV testing of low-risk individuals.

Many advocate HIV-testing, particularly for high-risk groups. Groups that are at a highest risk for infection in the United States include intravenous drug users, indigenous minorities, migrants from high prevalence countries, and homosexual men.[40] Targeting HIV positive individuals for testing is said to be a more effective means in preventing the spread of the virus.[41] Nevertheless, this strategy is discriminatory and it can only be justified by a substantial interest. HIV testing of a particular group of persons could be justified if it focused on particular populations or settings where transmission of infection is proven to likely to occur. To prevent the risk of discrimination, some suggest widespread, mandatory testing—but testing in low-risk areas is rarely justified as there is no substantial interest inherently in low-risk groups.[42] Moreover, public health authorities do not recommend universal screening in the health care system (i.e. health care workers and patients) or among marriage applicants because the prevalence of HIV among these

Rimer, *Depressive Realism and Health Risk Accuracy: The Negative Consequences of Positive Mood*, 29 J. CONSUMER RES. 57–69 (2002); Mary Frances Luce & Barbara E. Kahn, *Avoidance or Vigilance? The Psychology of False-Positive Test Results*, 26 J. CONSUMER RES. 242 (1999); Geeta Menon et al., *We're at as Much Risk as We Are Led to Believe: Effects of Message Cues on Judgments of Health Risk*, 28 J. CONSUMER RES. 533 (2002).

[38] Sen, *supra* note 29, at 35 (internal citation omitted).

[39] *Id.* at 38.

[40] Richens et al., *supra* note 15, at 210. The State Department of Health keeps track of the "risk factors" identified by people who test positive for HIV. Of the persons currently living with HIV in New York State, thirty-four percent are homosexual men, seventeen percent are heterosexual men, fifteen percent are IV drug users, and another 37,500 to 50,000 New Yorkers are estimated to be infected with HIV but do not know it. *Basic Information and Incidence/Trends*, N.Y. STATE DEP'T OF HEALTH, http://www.health.state.ny.us/diseases/aids/facts/questions/basicinformation.htm (last visited May. 15, 2011).

[41] Richens et al., *supra* note 15, at 210 (internal citations omitted).

[42] LAWRENCE O. GOSTIN, THE AIDS PANDEMIC 144 (2004).

groups is low.[43]

III. NEW LEGISLATION ON HIV TESTING

Over the last decade, there has been an increase in HIV testing legislation both on the state and federal levels. On the federal level, an amendment to the National HIV/AIDS Testing Goal required the Secretary of Health and Human Services to establish a national HIV/AIDS testing goal of 5,000,000 tests for HIV/AIDS annually through federally-supported HIV/AIDs prevention, treatment, and care programs not later than January 1, 2010.[44] On the state level, legislatures have applied their authority over the protection of health and instituted various disease testing programs.[45] By 2002, thirty states had statutory provisions related to HIV testing[46] and eighty percent reported HIV testing results to the CDC.[47]

New York State's Governor Paterson signed Chapter 308 of the Laws of 2010 (the Chapter 308 Amendments) on July 30 2010, amending section 2781 of the Public Health Law, effective September 1, 2010.[48] This law made significant changes to the provisions relating to HIV testing, including consent for such testing, required offering for such testing, confidentiality and disclosure stipulations.[49] The law also tailors counseling information based upon HIV test results; updates current testing requirements to reflect medical advances; and facilitates authorization for testing in the case of certain occupational exposures to HIV infection.[50] The New York State Assembly sites several justifications for the new legislation:

> Significant advances in the medical treatment of and testing for HIV/ AIDS have been made in the last two decades. . . . It is vital to increase HIV/AIDS testing rates so that people with HIV can

[43] *Id.*

[44] 42 U.S.C. § 300ff-87a(a) (2009).

[45] MARGARET C. JASPAR, HEALTHCARE AND YOUR RIGHTS UNDER THE LAW, OCEANA'S LEGAL ALMANAC SERIES 169–72 app. 21 (2002).

[46] *Id.* (internal citation omitted).

[47] U.S. Dep't of Health & Human Servs.–Ctr. for Disease Control & Prevention, *HIV Prevalence Estimates–United States, 2006*, MMWR WEEKLY, Oct. 3, 2008, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5739a2.htm.

[48] An earlier version of the new law enacted on July 30, 2010 was introduced in 2008 but did not pass. *See* Assem. 11461, 2008 Leg., 232nd Reg. Sess. (N.Y. 2008).

[49] *See* Assem. 11487, 2009 Leg., 233rd Reg. Sess. (N.Y. 2010).

[50] *Id.*

> seek treatment, earlier and reduce transmission to others, and so that people without HIV can learn to stay that way. This bill updates New York's laws to encourage such testing and reflect new medical technologies and advances.[51]

In addition, the legislation has incorporated the new recommendations issued by the Federal Centers for Disease Control and Prevention in 2006, including the targeting of specific ages groups and regular testing for high-risks groups.[52]

The new legislation is not projected to have a measurable fiscal impact on the state.[53] As the New York State Assembly noted: "HIV testing and counseling is already a covered benefit in Medicaid managed care, Family Health Plus and Medicaid fee-for-service. Any additional administrative demands can be accommodated within existing DOH resources."[54]

IV. KEY PROVISIONS NEW YORK'S NEW LEGISLATION

Under New York's new legislation, HIV testing must be offered to all persons between the ages of thirteen and sixty-four receiving hospital or primary care services with only a few exceptions.[55] An HIV test need not be offered if a health care provider of these services reasonably believes that there is a life threatening emergency, the individual has previously been offered the test or was subject to a previous HIV test, or the individuals lacks capacity to consent.[56] While in most cases the offer is mandatory, HIV testing itself is on a volunteer basis.

Generally, informed consent is required prior to HIV testing. The Family Health Care Decisions Act (FHCDA) stipulates who is able to consent for care in a variety of circumstances.[57] The capacity to consent requires an individual to have the ability to

---

[51] *Id.*

[52] *Id.* (such as certain occupational exposures).

[53] *Id.*

[54] *Id.*

[55] N.Y. PUB. HEALTH LAW § 2781-a(1) (McKinney 2010). The offer for testing must be made to inpatients, persons seeking services in emergency departments, persons receiving primary care as an outpatient at a clinic or from a physician, physician assistant, nurse practitioner, or midwife. *Id.*

[56] *Id.*

[57] *See generally* Family Health Care Decision Act, N.Y. PUB. HEALTH LAW §§ 2994-a–2994-u. The FHCDA gives providers the ability to locate someone who has the legal authority to consent to HIV testing before going forward with an anonymous test, as per the amended HIV testing law. *See id.*; N.Y. PUB. HEALTH LAW § 2781(6)(e)(ii)(B).

understand and appreciate the nature and consequences of a proposed health care service, treatment, or procedure, or of a proposed disclosure of confidential HIV testing information and to make an informed decision concerning the service, treatment, procedure or disclosure.[58] Those who are the source of an occupational exposure, deceased, comatose, or persons otherwise incapable of providing consent may now be tested for HIV in certain circumstances without their consent.[59]

Prior to giving consent to HIV testing, the Chapter 308 Amdendments require that seven points of information about HIV must be provided to patients or, if the subject lacks capacity to consent, to a person authorized pursuant to law to consent to health care for the subject.[60] This general information informs the patient, or their authorized representative, that HIV causes AIDS; that there is treatment for HIV; that individuals with HIV or AIDS can adopt safe practices; that testing is voluntary and can be anonymously done; that the law protects confidentiality of the HIV test results; that there is no discrimination based on HIV status; and that their consent is valid until revoked or expired by its terms.[61]

In most cases, consent must be in writing and signed.[62] The Chapter 308 Amendments work to relax existing written consent requirements. The new law provides an option for durable written general consent forms that specifically includes HIV testing, a standardized consent form, or allows for a documented oral consent in certain situations.[63] To facilitate the standardization of written consent forms, DOH has created forms (in English and Spanish) for obtaining written informed consent and for providing disclosure, available on the DOH website.[64]

[58] *Id.* § 2780(5).

[59] *Id.* § 2781(6).

[60] *Id.* § 2781(3)(a)–(g) (anonymous testing does not apply to a health care provider ordering the performance of an HIV related test on an individual proposed for insurance coverage. *Id.* § 2781(4)).

[61] *Id.*

[62] Where authorized by section 2781 of the Public Health Law, informed consent may be given orally from the subject of the test or from a person authorized pursuant to law to consent to health care for such individual. *Id* § 2781(1).

[63] Assem. 11487, 2009 Leg., 233rd Reg. Sess. (N.Y. 2010).

[64] *Model for General Medical Consent that Includes Written Consent for HIV Testing*, N.Y. STATE DEP'T OF HEALTH, http://www.health.state.ny.us/diseases /aids/testing/amended_law/docs/model_for_consent.pdf (last visited May. 15, 2011); *see also* JASPAR, *supra* note 45, at 167–68.

Consent for HIV testing may also be part of a general durable consent to medical care, though specific language that provides for opting out of HIV testing must be included.[65] Additionally, consent for "rapid HIV testing" can be made orally but must be noted in the medical record.[66]

DOH strongly recommends the use of a rapid HIV test, a new advance in technology, because the test results are usually available within thirty minutes of testing.[67] Under the statute, a rapid HIV test means any laboratory screening test approved for detecting antibodies to HIV that produce results in sixty minutes or less.[68] In organizations that are subject to Occupational Safety and Health Administration (OSHA) regulations, "rapid testing is the mandated technology for source patient testing in cases, including occupational exposures."[69] The rules, however, are now different for HIV testing consent in correctional facilities. Under the new legislation, it is not permissible to seek oral informed consent for rapid HIV testing in facilities operated under the New York State Correction Law.[70] Currently, testing in correctional facilities must follow the law for written informed consent regardless of testing technology.

After testing, HIV test providers must arrange an appointment for follow-up medical care for persons confirmed positive.[71] However, the obligation to provide post-test counseling is limited by the requirement that consent to counseling be given by the subject of the test.[72] If the subject refuses to consent to a follow-up appointment, there is currently no means of requiring such counseling.

One of the most controversial yet progressive provisions added to the new law relates to confidential HIV testing information. Confidential HIV testing information means "any information . . . concerning whether an individual has been the subject of an HIV

[65] N.Y. PUB. HEALTH LAW § 2781(2-a).
[66] *Id.* § 2781(1).
[67] *Frequently Asked Questions Regarding the Amended HIV Testing Law*, N.Y. STATE DEP'T OF HEALTH, http://www.health.state.ny.us/diseases/aids/testing/amended_law/faqs.htm (last updated Dec. 2010). However, it can take six or more months for evidence of infection to appear in a blood test. *See* Lawrence K. Altman, *The Nation; Testing for AIDS: The Questions Go Beyond the Clinical*, N.Y. TIMES, May 5, 1991, at 5.
[68] N.Y. PUB. HEALTH LAW § 2780(4-a).
[69] *Id.*
[70] *Id.* § 2781(2-c).
[71] *Id.* § 2781(5-a).
[72] *Id.*

testing test, or has HIV infection, HIV testing illness or AIDS, or information which identifies or reasonably could identify an individual as having one or more of such conditions, including information pertaining to such individual's contacts."[73] A release of confidential HIV testing information generally requires a specific written authorization for disclosure signed by the protected individual, or a person authorized pursuant to law to consent to health care for the individual.[74] A new provision under the Chapter 308 Amendments allows physicians to report HIV data obtained through laboratory tests in certain situations.[75] The purpose of this provision is to enable DOH to monitor the spread of HIV/AIDS and to target program initiatives.[76] A conflict arises now, however, between individual rights to privacy and the need to increase accessibility of information related to HIV.

Physicians may now report confidential HIV testing information under limited circumstances. Section 2782 of the Public Health Law adds two exceptions to the current list of exceptions to the written disclosure requirement.[77] The first exception, subsection (d), establishes that if a health care provider or health facility with HIV testing information reasonably believes that such knowledge is necessary to provide appropriate care or treatment to the protected individual, a child of the individual, a contact of the protected individual, or a person authorized to consent for health care for such a contact, it may disclose confidential HIV testing information.[78] The second new exception, subsection (i), provides that confidential HIV testing information routinely made to providers for purposes of treatment and to third party payers for reimbursement purposes may be release without a written re-disclosure statement by the patient.[79] The Chapter 308 Amendments also clarify that executors and administrators of an estate shall have access to confidential HIV testing information as needed to fulfill their responsibilities—effectively relaxing the informed consent requirements previously required under New York State law. [80]

[73] *Id.* § 2780(7).
[74] *Id.* § 2781(9).
[75] *Id.* § 2782; Assem. 11487, 2009 Leg., 233rd Reg. Sess. (N.Y. 2010).
[76] Assem. 11487.
[77] *See id.*
[78] N.Y. PUB. HEALTH LAW § 2782(d)(1).
[79] *Id.* § 2782(1)(i).
[80] *Id.* § 2782(q); *see also* Assem. 11487; *Amended HIV Testing Public Health*

Finally, the Chapter 308 Amendments authorize testing of certain occupational exposures to HIV infections. In general, where the source patient of an occupational exposure declines testing, no HIV testing may be conducted (even anonymously).[81] Now, in limited circumstances a test may be conducted. In cases of occupational exposures which create a significant risk of contracting or transmitting HIV infection, an anonymous test may be ordered without consent of the source patient if all of the following conditions are met: (1) the source person is deceased, comatose or is determined by his or her attending professional to lack mental capacity to consent; (2) the source person is not expected to recover in time for the exposed person to receive appropriate medical treatment; (3) there is no person available or reasonably likely to become available who has legal authority to consent in time for the exposed person to receive appropriate medical treatment; and (4) the exposed person will benefit medically by knowing the source person's HIV test results.[82]

If all of the above requirements are met, the law requires that the provider order an anonymous test of the source person with results being provided only to the attending professional of the exposed person solely for assisting the exposed person in making appropriate decisions regarding post-exposure medical treatment.[83] The results of the test cannot be disclosed to the source person or placed in that person's medical record.[84] New York's new legislation now allows for anonymous testing to be ordered by health care providers in very specific situations involving occupational exposures. In almost all other instances, anonymous testing is conducted by staff of state and local health departments.[85]

V. SOLVING THE HIV TESTING PROBLEM—IS MANDATORY TESTING THE SOLUTION?

The HIV testing problem is the conflict between balancing confidentiality, civil rights, and the management of positive test

Law, N.Y. STATE DEP'T OF HEALTH, http://www.health.state.ny.us/diseases/aids/testing/hiv_testing_law.htm (last visited May. 15, 2011).

[81] *See* N.Y. PUB. HEALTH LAW § 2781(6)(e).

[82] *Id.*

[83] *Id.* §§ 2781(6)(e)(ii)(A)–(B).

[84] *Id.* § 2781(6)(e)(ii)(C).

[85] Persons wishing an anonymous test can be referred to a state or local health department by calling 1-800-541-AIDS (2437).

results in an effort to reduce the spread of the HIV infection while protecting the individual rights of those tested. There are two major competing policies concerning HIV testing: (1) protecting the individual privacy rights of the person testing positive for HIV, thus encouraging voluntary testing; and (2) disseminating information concerning HIV/AIDS to the public, thus encouraging mandatory testing.[86]

Legislatures and courts have had to deal with several legal and ethical concerns that surround HIV testing:

> The politics of HIV [testing] are volatile since policymakers are often attracted to the notion that identifying persons living with HIV/AIDS promotes the public's well-being. At the same time, groups that bear the burden of compulsion vigorously insist on maintaining their personal autonomy—a claim that civil liberties organizations strongly support.[87]

As the problem of HIV/AIDS has grown, testing and screening have become major public health policy tools, particularly because of the lack of awareness among persons at risk for HIV.[88] It has been shown that many people "fail to be tested because they misunderstand the risk factors, fear a positive test result, worry about breaches of privacy and discrimination, and lack and expectation of benefit."[89] Some suggest that overcoming these barriers requires such action as increased education and testing, the offering HIV testing as part of standard care, and providing a cheap and convenient test.[90] First, education is already provided to raise awareness of HIV. Second, New York State's new legislation now requires the offering of HIV testing as part of standard care. Finally, advances in technology now provide a cheap and convenient test, the HIV rapid test. The question now becomes: "Can widespread mandatory testing further increase HIV awareness and prevention?"

Mandatory testing of HIV/AIDS is frequently discussed as a potential option for solving the HIV testing problem and stopping the spread of HIV/AIDS. Several states (including New York

---

[86] The court in *Hillman v. Columbia County* attempted to balance these concerns. 474 N.W.2d 913 (Wis. App. 1991).

[87] GOSTIN, *supra* note 42, at 137.

[88] *Id.*

[89] *Id.* (citing U.S. Dep't of Health & Human Servs.–Ctr. for Disease Control & Prevention, *HIV Prevalence Estimates–United States, 2006*, MMWR WEEKLY, April 18, 2003, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5739a2.htm.

[90] GOSTIN, *supra* note 42, at 134 (citing Sten H. Vermund & Craig M. Wilson, *Barriers to HIV Testing—Where Next?* 360 LANCET 1186, 1186–87 (2002)); *see* JASPAR, *supra* note 45, at 77–84.

State)[91] have already implemented mandatory testing statutes in various limited circumstances in both the criminal and civil setting.[92] These statutes are mostly related to occupational exposure, newborns, and crimes involving sexual penetration.[93] The validity of such testing, or of the statutes authorizing the testing, has frequently been challenged, yet the courts have almost uniformly rejected these challenges, finding that the public health interests tip the balance in favor mandatory testing over privacy interests.[94] For example, in *Adams v. State*, the court held that a statute permitting the victim of a sexual offense or a crime involving significant exposure to the risk of HIV transmission to request that the defendant be tested for HIV did not authorize an unreasonable search or seizure of the defendant or violate the defendant's rights to equal protection or privacy.[95]

[91] For example, all newborns in New York State are tested for HIV antibodies. *See* N.Y. PUB. HEALTH LAW § 2500-f (McKinney 1997). Blood, body parts, and organ donations are also tested for HIV without informed consent. N.Y. PUB. HEALTH LAW § 2781(6)(a) (McKinney 2010). Under certain conditions, inmates in federal prisons may be tested for HIV without their consent and may be required of convicted and indicted sex offenders in certain areas. *See, e.g.*, N.Y. CRIM. PROC. LAW § 390.15 (McKinney 2003).

[92] Robin Cheryl Miller, *Validity, and Propriety under Circumstances, of Court–Ordered HIV Testing*, 87 A.L.R. 5th 631 (2001).

[93] *See*, *e.g.*, DEL. CODE ANN. tit. 16 § 1203 (2006) (prior written informed consent for HIV testing is required except following health care worker exposure or to control sexually transmitted disease); GA. CODE ANN. §§ 31-17A-2, 15-11-66.1, 42-5-52.1, 31-22-9.2, 31-17A-3 (2009); LA. REV. STAT. § 40:1300.13 (2007) (testing without consent if hospital employees exposed to patient's blood or bodily fluids); MD. CODE ANN. HEALTH-GEN. § 18-213.2 (West 2005) (emergency rescue personnel entitled to notification when rescued person subsequently diagnosed as having a contagious disease); NEV. REV. STAT. § 441A.320 (2007) (testing required on perpetrator of crime involving sexual penetration); OR. REV. STAT. § 433.045 (2009) (prior consent unless approval by Commissioner of Health for research with confidentiality provision); WASH. REV. CODE §§ 70.24.330, 70.24.340 (2011) (consent required unless subject convicted of sexual offense, prostitution or related offenses, or IV drug-related offenses, or at request of emergency medical technicians or others substantially exposed to blood or fluids of emergency victim); *see* JASPAR, *supra* note 45, at 169–72.

[94] *State Statutes or Regulations Expressly Governing Disclosure of Fact that Person has Tested Positive for Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS)*, 12 A.L.R. 5th 149 (1993) (internal citations omitted). GOSTIN, *supra* note 42, at 142 ("The judiciary tends to accept government assertions of a strong public health interest without a searching inquiry as to whether the screening will, in fact, achieve those objectives. . . . [B]y focusing on the physical intrusion of the blood test, the courts do not sufficiently weigh the informational privacy interests and social risks entailed in compelled disclosure of sensitive HIV information.").

[95] 498 S.E.2d 268 (Ga. 1998); *contra* People v. Adams, 597 N.E.2d 574 (Ill. 1992) (the Illinois Supreme Court upheld a state law that authorized mandatory

Mandatory HIV/AIDS testing jurisprudence began in the early 1990s when proposals mostly by medical groups and physicians targeting high-risk groups were challenged. Perhaps because of the stigma of AIDS was much greater in the 1990s than it is today,[96] New York State courts historically were reluctant to grant such proposals for mandatory testing in favor of strong individual privacy rights. In 1991, the New York State Court of Appeals, in *New York State Soc. of Surgeons v. Axelrod*, "upheld the state's strict privacy protections for HIV-infected individuals and rejected arguments from New York's leading medical society and others seeking mandatory testing and reporting of the infection."[97] The decision rejected an effort by the Medical Society of the State of New York to compel the State Health Commissioner to declare AIDS a sexually transmissible disease, which would allow doctors to test patients for evidence of HIV infection and require reporting of such cases to a health department.[98]

In 1992, the New York Appellate Division, 4th Department, denied the petitioner's request for mandatory testing of a criminal defendant that was charged with rape and sodomy because of the absence of specific statutory authority that permits HIV testing under such circumstances.[99] After an amendment to New York State's Criminal Procedure Law granted victims of certain sex crimes the right to require the convicted defendant to submit to HIV testing in 1995,[100] a defendant convicted of attempted first-degree sexual abuse in Nassau County was required to submit to HIV testing.[101] In making this determination, the court noted the proper inquiry is not whether HIV testing places a burden on the convicted criminal defendant, but rather whether it "makes more burdensome the punishment for his crime."[102]

HIV testing of persons convicted of prostitution).

[96] *See* LEVIN & SANGER, *supra* note 16, at 119–22 (commenting on the early public perception of the AIDS epidemic and its victims).

[97] *Id.* (referring to New York State Soc. of Surgeons v. Axelrod, 572 N.E.2d 605 (N.Y. 1991)).

[98] New York State Soc. of Surgeons v. Axelrod, 555 N.Y.S.2d 911 (App. Div. 1990) *aff'd* New York State Soc. of Surgeons v. Axelrod, 572 N.E.2d at 605.

[99] Doe v. Connell, 583 N.Y.S.2d 707 (App. Div. 1992).

[100] *See* N.Y. CRIM. PROC. LAW § 390.15(1)(a) (McKinney 2010).

[101] People v. Doe, 642 N.Y.S.2d 996, 997 (Nassau County Ct. 1996).

[102] *Id.* at 1002; *but see* Donald P. v. Palmieri, 668 N.Y.S.2d 218 (App. Div. 1998) (the Second Department held that the Nassau County trial court lacked authority to compel HIV testing of the defendant convicted of attempted first

During the mid-1990s, transmission concerns in the health care setting incited proponents of testing to point to the significant risks of patients infecting health-care workers, supported by several documented cases of such transmission.[103] Those arguing against mandatory AIDS screening included "a wide variety of leading medical, public health, AIDS activist[s] and civil liberties groups."[104] Many believe the costs of mandatory HIV testing for patients and doctors would far outweigh any benefits.[105]

In 1995, a mandatory HIV testing policy of health care workers with needle stick injuries was challenged in New York.[106] *Brown v. New York City Health & Hospital Corp.* held that a hospital could not compel a nurse to undergo a blood test to determine if she got AIDS from a deep needle puncture wound after the nurse brought an "AIDS Phobia" case against the hospital for mental distress and anguish.[107] Over a decade later, it was held that a nurse exposed to HIV was not absolutely foreclosed from emotional distress damages extending beyond six months after exposure if she could prove that taking the test would be emotionally harmful.[108]

Mandatory testing proposals created a concern over the disclosure of private medical records. The extent to which such records can be disclosed varies among states.[109] Confidentiality of patients with HIV in New York State was addressed in *People v. Pedro M.*, where the prosecution was entitled to protective order conditionally granting the right to redact any references to victim's HIV status from all discoverable materials.[110] The court noted that the legislative intent in creating Article 27-F of the

degree sexual assault, noting that the legislature did not intend to mandate HIV testing based on the conviction of any felony in Article 130 of the New York State Penal Law, as that would encompass defendants convicted of acts which carry no risk of HIV transmission).

[103] *Id.*

[104] *Id.*

[105] *Id.* Advances in new technologies have made HIV testing significantly less expensive and less invasive than in years past. Sen, *supra* note 29, at 28.

[106] Brown v. N.Y. City Health & Hosp. Corp., 624 N.Y.S.2d 768 (Sup. Ct. 1995) (needle stick injuries are accidental needle sticks that can lead to HIV or hepatitis C virus infection).

[107] *Id.* ("AIDS Phobia" or "fear of having contracted HIV/AIDS," is based on a specific exposure to HIV infection but where the transmission of infection did not, in fact, occur).

[108] Ornstein v. N.Y. City Health & Hosp. Corp., 881 N.E.2d 1187 (N.Y. 2008)

[109] JASPAR, *supra* note 45, at 79.

[110] People v. Pedro M., 630 N.Y.S.2d 208, 214 (Crim. Ct. Kings County 1995).

Public Health Law was to encourage people to take an HIV test without concerns of discrimination and to protect a person's privacy rights.[111]

While some argue that HIV testing should be mandatory for everyone, "these attempts have been met with strong opposition."[112] Opponents of mandatory testing have made a number of arguments against mandatory testing, including the belief that testing does not change behavior and cannot stop the spread of disease; that testing may force people to avoid seeking health care; that testing on a mass scale will increase the possibility of false test results which would lead to unnecessary suffering and limited value; and that confidentiality of testing results would be compromised and open to abuse of discretion.[113]

In general, ethical codes and federal and state regulations favor voluntary rather than coercive testing but both recognize a narrow range of circumstances under which testing may be imposed on individuals without their consent.[114] This is consistent with the traditional medical practice of requiring informed consent before a patient undergoes diagnostic testing.[115] According to the American Medical Association Code of Medical Ethics:

> Human Immunodeficiency Virus (HIV) testing is appropriate and should be encouraged for diagnosis and treatment of HIV infection or of medical conditions that may be affected by HIV . . . . The physician should secure the patient's informed consent specific for HIV testing before testing is performed. . . . [One exception involves reducing the risk of transmission to physicians.] . . . [P]hysicians should encourage voluntary testing of patients at risk for infection.[116]

Concerns about widespread testing and mandatory testing of particular groups seem to stem from the possible discrimination in the treatment of members of high-risk groups and the risk of reduced privacy protections. While mandatory testing raises significant questions of civil rights, privacy, fairness, necessity, and confidentiality, it seems clear that mandatory testing is an

---

[111] *Id.* at 212.

[112] JASPAR, *supra* note 45, at 77.

[113] *Id.*; *see* GOSTIN, *supra* note 42, at 135.

[114] BARUCH A. BRODY, ET AL., MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, AND STATEMENTS 384–85 (2001).

[115] *Id.* at 384.

[116] *Id.* at 385 (internal citation omitted).

accepted practice under certain circumstances.[117] Resolving these conflicting interests is a difficult task and unfortunately, there may be no simple solution.

The above analysis indicates that widespread mandatory testing is not a possible solution for solving the HIV testing problem at large. Contrarily, mandatory testing should be used in a select group of circumstances outlined by the legislature and judiciary. The new legislation in New York State and the recent advances in technology all seem to move towards increased HIV testing while attempting to preserve patient confidentiality.

CONCLUSION

Managing a large-scale public health initiative such as HIV testing is very challenging because of the complex issues surrounding the matter. Developing strategies to prevent the spread of HIV requires careful planning because there are multiple factors to consider, including politics, scientific controversy, the public perception of HIV, public health policies, and the commitment of economic and managerial resources.[118]

In New York, public health policymakers must carefully consider HIV testing solutions for the citizens of New York. These policymakers look to organizations like the Federal Center for Disease Control and the New York State Department of Health's recommendations on how to properly deal with the HIV epidemic. Whether testing of a specific, high risk population or mandating widespread testing is proper, any solution must balance the public health and individual rights while promoting the least restrictive alternatives. Fair programs distribute the benefits and burdens equally and provide sufficiently sound reasons for testing.[119]

The recent passage of the Chapter 308 Amendments made significant changes to the existing HIV testing law. Yet, there is more to be done. Merely requiring an offering of a test is a great start but more legislation is needed to assure those who test

[117] Lawrence K. Altman, *The Nation; Testing for AIDS: The Questions Go Beyond the Clinical*, N.Y. TIMES, May 5, 1991, at 5. GOSTIN, *supra* note 42, at 140 (citations omitted) ("The primary constitutional impediment to testing is the Fourth Amendment's right of people to be 'secure in their persons' and not be subjected to 'unreasonable searches and seizures.'").

[117] 498 S.E.2d 268 (Ga. 1998).

[118] LEVIN & SANGER, *supra* note 16, at 5.

[119] GOSTIN, *supra* note 42, at 147.

positive have full access to treatment and counseling services.[120] Notably, "[p]ost-test counseling is absolutely essential in order to ensure that the recipient of the test result can fully consider the implications for himself of either a positive or, just as importantly, a negative result."[121] Some states currently require such counseling, other states prevent insurance companies from denying coverage for HIV/AIDS patients, but no state effectively solves the HIV problem in its entirety yet.

Pending legislation in New York State shows a move towards extending the limited circumstances of mandatory testing and the requirement of informed consent.[122] New York's 234th Legislative Session saw the introduction of a bill on January 21, 2011 that would provide for "HIV testing without consent of the subject or another authorized to give consent where health care or other worker is potentially endangered; authorizes disclosure of confidential HIV testing information by a health care facility to a physician and by a physician to an endangered worker in such cases."[123] On February 15, 2011, another bill was introduced by the New York State Assembly that would enact the Volunteer Firefighter and Ambulance Worker Protection and Incentive Act of 2011.[124] This act would amend subdivision one of section 2781 of the Public Health Law and eliminate the requirement of informed consent before an HIV test is ordered whenever a health care provider or first responder experiences an exposure to a patient's blood or bodily fluids during the course of rendering health care or occupational services.[125]

In New York, the mandatory offering of testing should be expanded to include the assurance of health care treatment and counseling for at least those who test positive for HIV. The Affordable Healthcare Act has enabled those with pre-existing conditions to receive quality healthcare, but remains effective only until 2014. In addition, the current mandatory offering of

[120] The current Public Health Law requires a follow-up appointment only where a test-taker has given informed consent prior to testing for such an appointment. N.Y. PUB. HEALTH LAW § 2781(5-a) (McKinney 2010).

[121] Gerald Corbit, *HIV Testing and Screening: Current Practicalities and Future Possibilities*, *in* HIV AND AIDS, *supra* note 1, at 33–34; *see* Sara E. Yeatman, *Ethical and Public Health Considerations in HIV Counseling and Testing: Policy Implications*, 38 STUDIES IN FAMILY PLANNING 271, 271 (2008).

[122] *See* Assem. 3006, 2011 Leg., Reg. Sess. 234rd (N.Y. 2011).

[123] *Id.*

[124] *Id.*

[125] *Id.*

HIV testing should be made available to a more focused population, such as in areas of high risk groups. Such testing could serve as a pathway for treatment for those in high risk settings instead of limiting it to hospitals, emergency rooms, or health care clinics. In this way, the fears of finding out one's HIV status could be quelled by the prospect of receiving quality treatment for HIV; awareness of the risk behaviors for HIV may rise; and more people would seek out HIV testing if it were made available in high-risk locations.

Lastly, New York policymakers should develop the use of incentives, one of the simplest and most reliable approaches in changing human behavior, as a means to prevent the spread of the HIV infection.[126] The use of incentives has proven successful in such schemes as for safe driving[127] and occupational safety.[128] The suggestion of a voluntary scheme which rewards individuals for staying HIV negative certainly merits at least some consideration.

[126] Richens et al., *supra* note 15, at 211 (citing Good, C. M., *Incentives Can Lower the Incidence of HIV/AIDS in Africa*, 40 SOC. SCI. MED. 419, 419–424 (1995)); *see*, *e.g.*, Rebecca L. Thornton, *The Demand for, and Impact of, Learning HIV Status*, 98 AM. ECON. REV. 1829, 1829 (2008) (evaluating an experiment in which individuals were randomly assigned monetary incentives to learn their HIV results after being tested. Without any incentive, thirty-four percent of the participants learned their HIV results—but even the smallest incentive doubled that share).

[127] R. M. HARANO & D. E. HUBERT, CAL. DIV. OF HIGHWAYS-SACRAMENTO, AN EVALUATION OF CALIFORNIA'S 'GOOD DRIVER' INCENTIVE PROGRAM, REPORT 6 (1974).

[128] R.B. McAfee & A. R. Winn, *The Use of Incentives/Feedback to Enhance Work Safety: A Critique of the Literature*, 20 J. SAFETY RES. 7, 7–19 (1989).