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THE CONFLICT BETWEEN A DOCTOR'S DUTY TO WARN A PATIENT'S SEXUAL PARTNER THAT THE PATIENT HAS AIDS AND A DOCTOR'S DUTY TO MAINTAIN PATIENT CONFIDENTIALITY

In June 1981 the United States Centers for Disease Control officially reported the first case of Acquired Immune Deficiency Syndrome (AIDS).[1] Since 1981 the number of persons infected with the AIDS virus has increased steadily.[2] At present, no cure for AIDS exists.[3] Unless researchers develop a cure, all AIDS victims eventually will die from the disease.[4] As the number of reported cases of AIDS infection and AIDS-related deaths grows, the public's fear of AIDS also grows creating many difficult ethical and legal issues.[5] One legal issue is whether to impose tort liability on individuals

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1. *See* Comment, *Protecting Confidentiality in the Effort to Control AIDS*, 24 HARV. J. ON LEGIS. 315, 316 (1987)(discussing nature of AIDS crisis).

2. *See* Baruch, *AIDS in the Courts:. Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 TORT & INS. L.J. 165, 169 (1987). Between June 1981 and October 19, 1987, the total number of AIDS cases reported to the Centers for Disease Control rose from 87 to 43,533. CENTERS FOR DISEASE CONTROL, UNITED STATES AIDS PROGRAM, AIDS WEEKLY SURVEILLANCE REPORT at 5 (Oct. 19, 1987). As of January 1986 the time necessary for the total number of reported cases to double was 11 months. *Id.* Although the number of AIDS cases is increasing, the rate of increase is decreasing. Comment, *supra* note 1, at 316 n.3. In 1983 the 2,124 reported cases of AIDS constituted a 184% increase over the number of reported cases for 1982. *Id.* In 1984 the number of reported AIDS cases increased 115% over the number of reported cases for 1983. *Id.* Finally, in 1985, the 8,406 reported cases of AIDS constituted an 84% increase over the number of reported cases for 1984. *Id.* The Centers for Disease Control estimates that by 1991, at least 270,000 American AIDS cases will develop, with 179,000 deaths. Baruch, *supra*, at 168. For the purposes of this article, any reference to infected persons, AIDS patients, carriers, or victims includes individuals who are suffering from any of the AIDS-related conditions discussed in note 18, *supra.*

3. United States Public Health Services, *Facts about AIDS*, in AIDS: LEGAL POLICIES 11, 12 (1985) (discussing nature of AIDS crisis).

4. *See* Baruch, *supra* note 2, at 169 (discussing nature of AIDS crisis). As of June 1986, 55% of known AIDS patients had died, including at least 71% of AIDS patients diagnosed prior to July 1984. *Id.* at 168; *see infra* note 18 (discussing various stages of AIDS infection).

5. *See* Baruch, *supra* note 2, at 165 (discussing AIDS-related legal issues). The issues surrounding AIDS include whether to impose tort liablity on individuals who are responsible for the sexual transmission of the disease. *See generally id.* (discussing tort liability for sexual transmission of AIDS). A person who has contracted the AIDS virus through sexual contact with an AIDS carrier has several theories upon which to base his lawsuit. *Id.* at 173. These theories include negligence, battery, negligent misrepresentation, deceit or fraudulent misrepresentation, and emotional distress. *Id.* at 173, 175-76, 178-79. Under the negligence theory of recovery for the transmission of the AIDS virus, a person would be liable if he failed to use ordinary care to avoid transmitting the AIDS virus to another individual. *Id.* at 174. The requisite elements for a cause of action for battery are intent and offensive physical contact. *Id.* at 176. The offensive contact element exists when the alleged transmission of AIDS occurs through sexual contact. *Id.* To satisfy the offensive contact element, the plaintiff does not

responsible for the transmission of the AIDS virus.[6] Another legal issue that courts soon will face is the liability of physicians and health care workers for failing to provide AIDS-related information to persons who are at risk of contracting the AIDS virus from identified carriers.[7] Public policy, common sense, and court decisions indicate that a physician of a known

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have to prove that the defendant actually intended to spread the virus. *Id.* The plaintiff must show only that the defendant was substantially certain that the spread of the disease would result from his conduct. *Id.* Thus, an AIDS carrier would be subject to liability for battery if he consented to sexual relations with another person, knowing that the person does not realize that the carrier has AIDS. *Id.* Under the negligent misrepresentation theory, an AIDS carrier would be liable to another person if the person could establish that the two elements of the cause of action exist. *Id.* at 177. The first element of a negligent misrepresentation cause of action exists if the carrier intends or reasonably should know that his statement as to his AIDS status will cause his sexual partner to rely on the statement's accuracy. *Id.* The second element exists if the carrier either knows his statement is false or has failed to ascertain whether the statement is true. *Id.* A plaintiff states a cause of action for deceit or fraudulent misrepresentation if he alleges that an AIDS carrier knowingly misrepresented the carrier's AIDS status with the intention of inducing the plaintiff to have sexual relations with the carrier in reliance on the misrepresentation. *Id.* at 178. The plaintiff can recover damages for any injury resulting from his justifiable reliance on the carrier's misrepresentation. *Id.* Finally, under the theory of intentional infliction of emotional distress, a carrier may be liable to a person to whom the carrier has transmitted the AIDS virus. *Id.* at 179. The requisite element for an emotional distress cause of action is outrageous conduct which an AIDS carrier knows or should know is likely to cause actual injury or severe emotional distress to another person. *Id.*

Another AIDS-related issue is how doctors may secure from AIDS patients informed consent in the medical context. *See generally*, Weldon-Linne, Weldon-Linne, & Murphy, *AIDS-Virus Antibody Testing: Issues of Informed Consent and Patient Confidentiality*, 75 ILL. B. J. 206 (1986) (discussing issues of informed consent in AIDS context). The doctrine of informed consent consists of a health care provider's duty to warn patients of the material risks of medical treatment, the possible complications that may develop during the course of medical treatment, the risks and comparative benefits of the alternatives to the proposed treatment, and the effect on the patient of nontreatment. *Id.* at 208. In the context of AIDS testing, the health care provider should describe the test, its limitations, the possible effects of releasing test results, and any exceptions to the guarantee of doctor-patient confidentiality. *Id.* at 209-10. Because of the negative repercussions of a positive AIDS antibody test result, informed consent should be a mandatory requirement whenever a patient undergoes HTLV-III antibody testing. *Id.* at 208; *see supra* note 43 and accompanying text (discussing discrimination against AIDS victims).

Whether to impose criminal liability on an AIDS carrier for intentionally transmitting to another person the AIDS virus is another important AIDS-related issue. *See generally,* Weisenhaus, *AIDS Criminal Laws, Cases Rise*, NAT'L L.J. July 20, 1987, at 3 (discussing criminal liability for transmission of AIDS virus). For example, in Los Angeles, law enforcement officials charged a person with attempted murder for selling his AIDS-contaminated blood. *Id.* at 3. In Minnesota, a federal jury found an AIDS infected prison inmate guilty of assault with a deadly weapon after he bit a prison guard. *Id.*

6. *See generally*, Baruch, *supra* note 2, at 173-80 (discussing tort liability for sexual transmission of AIDS); Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS*, 45 WASH. & LEE L. REV. 185 (1988) (discussing tort liability for transmission of HTLV-III).

7. *See* Hermann, *AIDS: Malpractice and Transmission Liability*, 58 U. COLO. L. REV. 63, 74 (1987) (discussing potential liability of physician for patient's transmitting AIDS virus to third person).

AIDS carrier has a moral and legal duty to warn the carrier's spouse or sexual partner that the carrier is infected with the AIDS virus.[8] A confidential relationship exists, however, between a doctor and his patient.[9] Therefore, in establishing a duty to warn, courts should consider the strong need to protect doctor-patient confidentiality in the AIDS context.[10] As the legal issues surrounding AIDS become more complex, achieving a balance between an AIDS victim's right to privacy and confidentiality and the public's desire to slow the spread of AIDS will become increasingly more important.[11]

AIDS destroys a victim's natural immunity against disease.[12] An AIDS victim is vulnerable to serious, "opportunistic" diseases that do not pose a threat to a person whose immune system is functioning normally.[13] An opportunistic disease attacks an individual after other diseases or drugs have lowered the individual's resistance to infection.[14] The human T-lymphotropic virus type III (HTLV-III) causes AIDS.[15] Medical personnel use the AIDS antibody test to detect an individual's exposure to the AIDS virus.[16] A

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8. *See infra* notes 117-43 and accompanying text (discussing physician's duty to warn sexual partner of patient that patient has AIDS).

9. *See infra* notes 25-33 and accompanying text (discussing confidential relationship between doctor and patient).

10. *See infra* notes 39-45 and accompanying text (discussing need for confidentiality in AIDS context).

11. *See generally* Comment, *supra* note 1, at 315 (discussing merits of protecting confidentiality of AIDS test results in effort to control AIDS); *infra* notes 39-51 and accompanying text (discussing need for doctor-patient confidentiality in AIDS context).

12. United States Public Health Services, *supra* note 3, at 11.

13. *See id.* (discussing diseases that afflict AIDS victims). The most common opportunistic infections associated with AIDS are *Pneumocystis carinii pneumonia* (PCP) and *Kaposi's Sarcoma* (KS). *See* Comment, *You Never Told Me . . . You Never Asked; Tort Liability for the Sexual Transmission of AIDS*, 91 DICK. L. REV. 529, 531 (1986) (discussing diseases that afflict AIDS victims). PCP is a parasitic infection of the lungs. *See* United States Public Health Services, *supra* note 3, at 12 (describing diseases that afflict AIDS victims). Patients suffering from PCP may be only slightly feverish, but are likely to be extremely weak, suffer from shortness of breath, and have dark bluish skin coloration because of a deficiency of oxygen in the blood. STEDMAN'S MEDICAL DICTIONARY 435, 349, 1109 (5th unabridged lawyer's ed. 1982). KS is a malignant type of cancer that usually occurs on the surface of the skin or in the mouth. *See* United States Public Health Service, *supra*, note 3, at 12. In its early stages, KS may look like a bruise or a violet-blue spot. *Id.* The spot persists, however, and may grow larger. *Id.* Additionally, KS spreads to other organs in the body. *Id.*

14. *See* United States Public Health Services, *supra* note 3, at 11 (discussing opportunistic diseases associated with AIDS); STEDMAN'S MEDICAL DICTIONARY 990 (5th unabridged lawyer's ed. 1982) (defining opportunistic disease).

15. *See* Comment, *supra* note 1, at 316 (discussing causes of AIDS). The three names for the AIDS virus are human T-lymphotropic virus type III (HTLV-III), the lymphadenopathy associated virus (LAV), and the human immuno-deficiency virus (HIV). *Id.*

16. *See id.* at 167 (discussing detection of AIDS virus). Medical personnel detect exposure to HTLV-III by using the enzyme-linked immunosorbent assay (ELISA). *See* Henry, *AIDS in the Workplace*, in AIDS AND THE LAW 31, 34-35 (1987) (discussing detection of AIDS virus). The ELISA test does not detect the presence of the virus in the body but, instead, detects the presence of HTLV-III antibodies. *Id.*

The ELISA test begins with a plastic sheet covered with a thin layer of the AIDS virus

positive antibody test result does not indicate whether a person carries the AIDS virus,[17] nor whether the person has full-blown AIDS or will develop the disease in the future.[18] A doctor diagnoses a person as having full-blown AIDS only when an opportunistic infection has afflicted the person and the doctor can detect no other cause of the infection.[19] Approximately twenty-five to fifty percent of those persons who test positive for the AIDS antibodies will develop full-blown AIDS within five to ten years from the date of exposure to the virus.[20]

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proteins. *See* Hermann, *supra* note 7, at 64 n.7 (describing ELISA test). A laboratory technician then adds serum from the tested person, followed by chemicals to produce a color reaction. *Id.* The technician then uses a spectrophotometer to read the color changes and detect the presence of antibodies. *Id.* Finally, the technician grades the presence of antibodies to indicate the strength of any positive result. *Id.*

The antibody test itself does not determine whether an individual has AIDS. Weldon-Linne, *supra* note 5, at 207. Instead, a positive test result simply indicates that the person tested may have been exposed to the HTLV-III virus and has developed antibodies. Baruch, *supra* note 2, at 167. Although the antibody test is relatively reliable, it sometimes yields false positive results. Weldon-Linne, *supra* note 5, at 207. Initially, researchers developed the ELISA test to screen blood donors for exposure to the AIDS virus. Henry, *supra*, at 35. The ELISA test is approximately 99.8% accurate. *See* Weldon-Linne, *supra* note 5, at 207. In other words, out of every 1,000 persons tested, two persons who have not been exposed to the virus and have not developed antibodies will have positive test results. *Id.* The imperfect accuracy is significant in the testing of low risk populations because, with low risk groups, most positive antibody test results will be false positives. *Id.*; *see infra* note 24 and accompanying text (discussing groups of persons who are at high risk of contracting AIDS virus). For example, if a population of 100,000 people with an incidence of HTLV-III infection of 0.1% underwent AIDS antibody tests, approximately 300 persons would have positive test results. *See* Weldon-Linne *supra* note 5, at 207. Two hundred of the 300 individuals with positive test results would have false positive results. *Id.* Only 100 (33%) actually would be infected with the AIDS virus. *Id.* Medical personnel may use the Western Blot, a more accurate antibody test, to confirm the ELISA test result. Henry, *supra* at 35. The Western Blot, however, also is not 100% accurate. *Id.*

17. *See* United States Public Health Services, *supra* note 3, at 12 (describing significance of positive AIDS test result).

18. *See* Baruch, *supra* note 2, at 167 (discussing significance of positive AIDS test result). The general public uses the term "AIDS" to refer to all HTLV-III-related conditions. Henry, *supra* note 16, at 34 (discussing various categories of AIDS infection). The broad use of the term "AIDS" is technically incorrect. *Id.* Three basic conditions associated with HTLV-III infection exist. *Id.* The first condition is antibody seropositivity, or a positive test result. *Id.* Individuals who have been exposed to the virus and have developed antibodies, but have no symptoms of AIDS fall into the category of antibody seropositivity. *Id.* A great majority of persons exposed to the AIDS virus are part of this group. *Id.* The second condition associated with HTLV-III infection is AIDS-related complex (ARC). *Id.* ARC is a nonfatal condition and is significantly less severe than full-blown AIDS. *Id.* Symptoms of ARC include fever, fatigue, weight loss, swollen lymph glands, night sweats, and diarrhea. *Id.* Of those individuals with ARC, from 5% to 20% eventually will develop AIDS. *Id.*

Full-blown AIDS is the third HTLV-III related condition. *Id.* Only this condition is medically classified as AIDS. *Id.* The presence of opportunistic diseases indicates that a person has full-blown AIDS. *Id.* The opportunistic diseases are fatal to the AIDS victim. *Id.*

19. *See* Wolfe, *Legal Aspects of AIDS*, 8 WHITTIER L. REV. 503, 506 (1986) (describing opportunistic diseases that afflict AIDS victims). Chemotherapy also causes immune deficiency and vulnerability to opportunistic infections. *Id.*

20. *See* Baruch, *supra* note 2, at 168 (discussing nature of AIDS infection).

An AIDS victim carries HTLV-III in his blood and semen.[21] The carrier transfers the AIDS virus to another person through sexual contact, shared hypodermic needles, and blood transfusions.[22] Although researchers and medical professionals are uncertain of when a carrier's infection with the AIDS virus is contagious, the United States Public Health Service assumes that persons who repeatedly test positive for the virus can transmit the virus to other people.[23]

As more people become infected with HTLV-III, courts increasingly will have to resolve issues surrounding the rights of AIDS victims. For example, courts will have to determine the rights and duties of an AIDS patient and his doctor in the context of the doctor-patient relationship.[24] Physicians, the public, legislatures, and the courts long have recognized that a confidential relationship exists between a doctor and his patient.[25] A physician's legal duty of confidentiality has evolved over time.[26] The phy-

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21. *See* Brigham, *supra* note 13, at 532 (discussing transmission of AIDS virus). In addition to finding HTLV-III in the blood and semen of AIDS carriers, researchers have isolated trace amounts of the virus in tears and saliva. *Id.* Studies have shown, however, that AIDS is not spread through the air and a person cannot contract the virus through casual contact with an infected person. *Id.*

22. *See* United States Public Health Services, *supra* note 3, at 12 (discussing transmission of AIDS virus).

23. *See* Baruch, *supra* note 2, at 171 (citing United States Public Health Service recommendations for avoiding transmission of AIDS virus). The medical community considers at risk for transmitting the AIDS virus all persons who are antibody seropositive and suggests that infected persons take certain precautions to prevent exposure to uninfected persons. *Id.* An infected person may take precautions that include not donating blood or body organs, using condoms during sexual activity, and not sharing hypodermic needles with other persons. *See* United States Public Health Services, *supra* note 3, at 12 (discussing measures that AIDS infected persons may take to prevent transmission of AIDS virus). Studies show that, although approximately 80% to 95% of the individuals who test positive for the AIDS antibody do not develop full-blown AIDS within the first few years after exposure to the HTLV-III, they are capable of transmitting the virus to other people. *See* Henry, *supra* note 16, at 35 (discussing transmission of AIDS virus).

Ninety-four percent of all AIDS cases have occurred in six high risk groups. *See* Baruch, *supra* note 2, at 168. Sixty-five percent of the people who are at risk of developing AIDS are homosexual and bisexual men who do not use intravenous drugs. *Id.* Seventeen percent of the people who are at risk are heterosexual intravenous drug users. *Id.* Homosexual and bisexual men who use intravenous drugs account for 8% of the people who are at risk of developing AIDS, and recipients of blood or blood products account for 2%. *Id.* Both heterosexual partners of AIDS victims and hemophiliacs account for 1% of the people who are likely to develop AIDS. *Id.* at 169.

24. *See supra* notes 6-7 and accompanying text (discussing liability of doctors and patients in AIDS context).

25. *See infra* notes 26-33 and accompanying text (discussing common law and statutory recognition of right to doctor-patient confidentiality).

26. *See* Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793, 796 (N.D. Ohio 1965) (recognizing physician's moral and legal duty to maintain doctor-patient confidentiality). A doctor's moral duty not to disclose information that he obtains from a patient during the course of medical treatment has existed for centuries. *Id.* The Hippocratic Oath supports the doctor's duty of confidentiality, stating: "[a]ll that may come to my knowledge in the exercise

sician's duty arose out of the recognition that a promise of confidentiality is necessary to encourage patients fully to disclose all information relevant to effective medical treatment.[27] A patient's right to confidentiality is part of the right to privacy, which the United States Constitution implicitly guarantees to all persons.[28] The right to privacy protects an individual from the unlimited disclosure of certain types of personal information.[29] For example, the Supreme Court of the United States has held that a person's medical records fall within the constitutional zone of privacy.[30] In most jurisdictions, a patient may recover from a physician for wrongful disclosure of confidential information.[31] Courts have entertained several theories of recovery for a physician's breach of confidence, including invasion of privacy, statutory violations, breach of implied contract, and tortious violation of the duty to protect confidentiality.[32] Every state, to some extent,

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of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal." STEDMAN'S MEDICAL DICTIONARY 650 (5th unabridged lawyer's ed. 1982). Historians attribute the Hippocratic Oath, an ethical code, to the ancient Greek physician, Hippocrates. 5 THE NEW ENCYCLOPEDIA BRITANNICA 939 (15th ed. 1985).

27. Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793, 801-02. In *Hammonds* the United States District Court for the Northern District of Ohio stated that the honesty which the promise of confidentiality elicits from a patient is necessary for effective medical treatment. *Id.* at 801. A patient should not be hesitant, reserved, or reluctant to discusss his problems with his doctor. *Id.* The patient certainly intends that the doctor will keep the patient's disclosure private. *Id.* If a doctor were to reveal any of the patient's confidences, the doctor would invade the privacy of his patient. *Id.*; *see infra* notes 28-30 and accompanying text (discussing doctor's invasion of patient's right to privacy).

28. *See* Weldon-Linne, *supra* note 5, at 210 (discussing constitutional right to privacy in doctor-patient context).

29. *See* Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987). In *Tarrant County* the defendant sought a writ of mandamus to compel a trial judge to rescind his order that required the defendant hospital to produce certain documents identifying blood donors. *Id.* at 676. Although it recognized that the United States Constitution protects the confidentiality of medical records, the Texas Court of Appeals held that the trial court's order did not violate the blood donors' right to privacy. *Id.* at ____. The appeals court explained that the trial court's order did not violate the donors' rights to privacy because the donors' need for anonymity was no greater than the plaintiff's need to know the identities of the donors to prove her claim against the defendant. *Id.* The court further explained that the order itself protected the donors' privacy. *Id.* The order directed the plaintiff not to contact any of the donors or disclose the names of the donors to third parties. *Id.*

30. Whalen v. Roe, 429 U.S. 589, 601 (1977). In *Whalen* the United States Supreme Court implicitly held that, although the United States Constitution protects the confidentiality of medical records, a statute requiring physicians to report to the state the names of patients who obtain certain classes of drugs does not violate the patients' rights to privacy. *Id.*

31. *See* Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (stating that doctor warrants that doctor will not release, without patient's consent, any confidential information that the doctor gains through relationship with patient); Horne v. Patton, 291 Ala. 701, ____, 287 So. 2d 824, 829-30 (1974) (stating that confidential relationship between doctor and patient imposes on doctor duty not to disclose information which doctor obtains during patient's treatment); Alberts v. Devine, 395 Mass. 59, ____, 479 N.E. 2d 113, 119 (1985) (stating that physician owes patient duty not to disclose medical information which doctor gains in course of doctor-patient relationship), *cert. denied*, 474 U.S. 1013 (1985).

32. *See generally*, Note, *Duty to Warn Versus Duty to Maintain Confidentiality: Con-*

statutorily protects the confidentiality of medical records.[33]

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flicting Demands on Mental Health Professionals, 20 SUFFOLK U. L. REV. 579, 595-604 (1986) (discussing various theories of recovery for doctor's breach of confidence).

33. *See* COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 1984-85 2 (R. Smith ed. 1984) (discussing state statutes protecting confidentiality of medical records). Many state statutes provide for a doctor-patient privilege that gives a patient the right to exclude from evidence in civil, criminal, or administrative proceedings any communications made between the patient and his doctor during the course of medical treatment. *See* KAN. STAT. ANN. § 60-427 (1983) (stating that patient has privilege to refuse to disclose or prevent witness from disclosing in civil action any communication made between patient and physician during patient's treatment); LA. REV. STAT. ANN. § 13:3734 (Supp. 1987) (same); N.J. STAT. ANN. § 2A:84A-22.2 (West 1976) (same); OR. REV. STAT. § 40.235 (1987) (same); FLA. STAT. ANN. § 90.503 (1979) (stating that patient has privilege to refuse to disclose or prevent witness from disclosing in evidence communications made between patient and psychotherapist during patient's treatment for mental condition); KY. REV. STAT. ANN. § 421.215 (Baldwin 1972) (same); MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1984) (same); N.M. STAT. ANN. § 11-504 (1978) (same); TENN. CODE ANN. § 24-1-207 (Supp. 1987) (same); ARK. R. EVID. 503 (1979) (stating that patient has privilege to refuse to disclose or prevent witness from disclosing in evidence communications made between patient and physician or psychotherapist relating to treatment of patient's physical, mental, or emotional condition); NEB. REV. STAT. § 27-504 (1985) (same); NEV. REV. STAT. § 49.225 (1957) (same); OKLA. STAT. ANN. tit. 12, § 2503 (Supp. 1988) (same); S.D. CODIFIED LAWS ANN. § 19-13-7 (1979) (same); VT. R. EVID. 503 (1983) (same); WIS. STAT. ANN. § 905.04 (West Supp. 1987) (same). Other states do not require a patient to assert the doctor-patient privilege, but instead prohibit a doctor from testifying without the patient's consent. *See* GA. CODE ANN. § 24-9-21 (1982) (excluding from evidence communications made between psychiatrist and patient unless patient consents); MISS. CODE ANN. § 13-1-21 (Supp. 1987) (prohibiting health care professional from testifying without patient's consent about communications made between patient and professional during patient's medical treatment); N.Y. CIV. PRAC. L. & R. § 4504 (McKinney Supp. 1987) (same); VA. CODE ANN. § 8.01-399 (1984) (same); ARIZ. REV. STAT. ANN. § 12-2235 (1956) (prohibiting physician from testifying without patient's consent about communications made between patient and physician during patient's treatment); GA. CODE ANN. § 24-9-40 (1982) (same); HAW. R. EVID. 504 (1985) (same); IDAHO CODE § 9-203(4) (1979) (same); ILL. ANN. STAT. ch. 110, para. 8-802 (Smith-Hurd 1984) (same); IOWA CODE ANN. § 140.3 (West 1972) (same); MICH. COMP. LAWS ANN. § 600.2157 (West 1986) (same); MINN. STAT. ANN. § 595-.02(d) (West Supp. 1988) (same); MONT. CODE ANN. § 26-1-805 (1985) (same); N.H. REV. STAT. ANN. § 329:26 (Supp. 1987) (same); N.C. GEN. STAT. § 8-53 (1943) (same); OHIO REV. CODE ANN. § 2317.02(B) (Baldwin 1984) (same); 28 PA. CONS. STAT. ANN. 42 § 5929 (Purdon 1982) (same); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1987) (same); WYO. STAT. § 1-12-101 (1987) (same); IND. CODE ANN. § 34-1-14-5 (Burns 1986) (declaring that physician is incompetent to testify about communications made between physician and patient during patient's medical treatment); MO. ANN. STAT. § 491.060 (Vernon 1949) (same); N.D. R. EVID. 503 (same); R.I. GEN. LAWS § 9-17-24 (Supp. 1987) (same); UTAH CODE ANN. § 78-24-8 (1987) (same). Some states have statutes that require confidentiality of mental health records. *See* CONN. GEN. STAT. ANN. § 52-146h (West Supp. 1987) (requiring that mental health records which mental health facility issues to commissioner of mental health contain no identifying data); D.C. CODE ANN. § 21-562 (Supp. 1987) (requiring that administrator of public hospital keep confidential records of patient's treatment for mental illness); ME. REV. STAT. ANN. tit. 34A, § 3003 (Supp. 1986) (requiring that department of mental health keep confidential all records pertaining to patient's treatment); ALASKA STAT. § 47.30.845 (1984) (declaring that mental health records are confidential); W. VA. CODE § 27-3-1 (1986) (same). Additionally, a few states have statutes protecting the confidentiality of venereal disease records. *See* ALA. CODE § 22-11A-22 (Supp. 1987) (stating that all information and reports concerning persons infected with sexually transmitted diseases

Despite the constitutional right to privacy, a patient's right to confidentiality in the doctor-patient relationship is not absolute.[34] Various exceptions to the general rule of privacy exist under the common law.[35] For example, a physician must not disclose any information a patient supplies to the physician during the course of medical treatment unless statutory law requires disclosure or disclosure is necessary to protect the welfare of the patient or public.[36] Out of the public welfare exception to a doctor's duty of confidentiality, more specific exceptions have developed.[37] The exceptions include the duty to warn third parties who are likely to have contact with a patient whom a doctor has diagnosed as having a contagious disease and the duty to warn individuals to whom a doctor believes a dangerous patient poses a threat.[38]

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are confidential); COLO. REV. STAT. § 25-4-402 (1973) (requiring doctor who treats case of venereal disease to file with health authorities reports containing name and address of infected person only when doctor believes person is menace to another individual's health); DEL. CODE ANN. tit. 16, § 702 (1983) (requiring physician, hospital and laboratory to file with board of health confidential reports of venereal disease cases); 28 PA. CODE § 27.92 (1987) (requiring confidentiality of premarital syphilis test results); S.C. CODE ANN. § 44-29-135 (Law. Co-op. 1976) (requiring department of health to keep confidential names of known or suspected venereal disease carriers). Finally, some states have statutes generally ensuring the confidentiality of medical records. *See* CAL. CIV. CODE § 56.10 (Supp. 1987) (prohibiting health care provider's disclosure to third person of any medical information regarding patient without patient's consent); MASS. GEN. LAWS ANN. ch. 111, § 70E (West Supp. 1987) (containing patient's bill of rights providing right to confidentiality of all medical records and communications to extent law allows); MINN. STAT. ANN. § 144.651 (West Supp. 1987) (declaring that medical case discussion, consultation, examination, and treatment are confidential); R.I. GEN. LAWS § 5-37.3-4 (1987) (requiring organizations that keep medical information to adopt policies to insure confidentiality of records); TENN. CODE ANN. § 10-7-504 (Supp. 1987) (requiring that state facilities keep confidential patient's medical records); TEX. REV. CIV. STAT. ANN. art. 4447(d) (Vernon 1976) (requiring state department of health to keep confidential all medical information that identifies individuals).

34. *See* Weldon-Linne, *supra* note 5, at 210 (discussing exceptions to patient's right to doctor-patient confidentiality). A doctor's duty to preserve the public health qualifies a patient's right to confidentiality. *Id.* In some circumstances the doctor's duty to prevent the spread of disease or protect third persons from harm supersedes the patient's right to confidentiality. *See infra* notes 35-38 and accompanying text (discussing limits of patient's right to confidentiality).

35. *See infra* notes 36-38 and accompanying text (discussing common law exceptions to rule of doctor-patient confidentiality).

36. *See* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 441-42, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976) (citing from PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION § 9 (1957)). The *Tarasoff* court explained that the American Medical Association has recognized an exception to a doctor's duty of confidentiality. *Id.* (citing PRINCIPLES OF MEDICAL ETHICS). The exception arises when a doctor reasonably determines that disclosure to a third person is necessary to protect the patient or the public welfare. *Id.* (citing PRINCIPLES OF MEDICAL ETHICS).

37. *See infra* notes 53-111 and accompanying text (discussing common law exceptions to doctor's duty of doctor-patient confidentiality).

38. *See id.* (discussing doctor's duty to warn in contagious disease and psychotherapy cases).

In deciding whether similar exceptions to the duty of confidentiality apply in the AIDS context, courts should acknowledge that maintaining doctor-patient confidentiality in the AIDS context is extremely important.[39] Control of the AIDS epidemic depends upon voluntary testing of persons who are at a high risk of contracting AIDS or who believe that an AIDS carrier has exposed them to HTLV-III.[40] The most important sources of AIDS-related information are reports of positive antibody test results and diagnosed cases of full-blown AIDS.[41] If the public health community is to obtain AIDS-related information as quickly as possible, potentially infected individuals must take part in voluntary AIDS testing and research.[42] Because of the discrimination and ostracism that AIDS victims face, the fear that a physician will disclose to the public the results of the AIDS antibody test may discourage potentially infected persons from volunteering for testing.[43]

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39. *See* Weldon-Linne, *supra* note 5, at 211 (discussing need for confidentiality in AIDS context). The AIDS Interdisciplinary Advisory Committee has stated that maintaining confidentiality is essential to protect the privacy and dignity of the patient and achieve public health objectives. *Id.* at 211 n.40. The Committee has recommended that health care providers make every effort to prevent disclosure of the identities of AIDS victims and persons infected with HTLV-III. *Id.* A doctor's unwarranted disclosure of information about an AIDS victim can cause serious negative repercussions in the victim's life. *See infra* note 43 (discussing discrimination against AIDS victims).

40. *See* Gostin & Curran, *The Limits of Compulsion in Controlling AIDS*, in AIDS: THE LEGAL COMPLEXITIES OF A NATIONAL CRISIS 44, 45-46 (1987) (discussing need for voluntary AIDS testing). Existing public health policy encourages individuals at a high risk of contracting AIDS to volunteer for testing. *Id.* The testing is necessary to determine whether the person tested has been exposed to HTLV-III. *Id.* Public health policy also encourages high risk individuals to have their test results reported to the public health department and then to change their sexual behavior. *Id.* Cooperation between public health officials and individuals who have a high risk of contracting the AIDS virus is essential to achieving the public health objective of preventing the spread of AIDS. *Id.*

41. *See* Comment, *supra* note 1, at 315 (discussing sources of AIDS-related information). AIDS-related information is necessary for the treatment of AIDS patients, research to find a cure, and attempts to inform the public about the nature of the disease. *Id.*

42. *See id.* (discussing need for potentially infected persons to volunteer for AIDS testing).

43. *Id.* at 319. The public's misperception of AIDS and its risks has created exaggerated fear and behavior. *Id.* at 321. The unnecessary fear of contracting the virus through casual contact has led many people to fear association with AIDS victims. *Id.* Public disclosure by a doctor or laboratory of a positive antibody test result could have a serious impact on an infected person's employment, insurability, reputation in the community, and personal relationships. *See* Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131, 161 (1986) (discussing discrimination against AIDS victims). Property owners have evicted homosexuals and AIDS carriers from housing because of misperceptions of the risk of contagion through casual contact. *See* Marco, *AIDS 1986: A Medical-Legal Explosion*, 33 MED. TRIAL TECH. Q. 360, 364 (1987) (discussing discrimination that AIDS victims face). For example, a family whose three hemophiliac children were infected with the AIDS virus had to move from its home when arsonists set fire to the home. *See* Voboril, *The Castaways*, LIFE, Oct. 1987, at 98. The arsonists burned the home after the children attempted to attend a local school. *Id.* Furthermore, insurance companies have attempted to avoid providing insurance coverage to AIDS victims because of the high medical costs associated with the disease. *See* Comment, *supra* note 1, at 322 (describing

Additionally, because many antibody tests yield false positive results, and the presence of antibodies in a person's blood does not necessarily indicate the existence of AIDS, predict future illness, or imply a risk of contagion, disclosure to the public would not significantly inform the public of a danger and would discourge voluntary testing.[44] Therefore, the assurance of patient confidentiality is essential in the fight to contain the spread of AIDS.[45]

Noting the need to ensure patient privacy, the Centers for Disease Control has recommended, in a published list of suggestions for reducing further transmission of AIDS, that doctors provide more protection of patient confidentiality.[46] Similarly, the American Hospital Association has recommended that hospitals take special care to insure the confidentiality of information pertaining to the treatment of AIDS patients.[47] Furthermore, the American Medical Association has called for legislation to protect the confidentiality of antibody test results unless withholding the test results would threaten the public health.[48] Finally, Senator Edward Kennedy has acknowledged the need for strong safeguards to insure confidentiality in the AIDS context.[49] Kennedy has introduced into the Senate a bill that, in addition to authorizing funds for increased voluntary testing of possible AIDS carriers and counseling of AIDS victms, seeks to protect the confi-

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discrimination against AIDS victims). The Lambda Legal Defense and Education Fund filed suit against Prudential Insurance Company of America in federal district court in New York City claiming that the insurance company tested a man for the AIDS virus without the man's consent. *See* Ricklefs, *AIDS Cases Prompt a Host of Lawsuits*, Wall St. J., Oct. 7, 1987, at 37, col. 3. Prudential denied insurance coverage to the man after he tested positive for the AIDS antibodies. *Id.* Many employers have fired, refused to hire, or failed to promote known AIDS carriers, perceived infected persons, and members of high risk groups. *See* Comment, *supra* note 1, at 322. For example, Ratheon Company is appealing a California ruling which declared that Ratheon owes back pay to the estate of John Chadbourne, whom the company refused to reinstate in a job because Chadburne had AIDS. *See* Ricklefs, *supra*, at 37, col. 3. Vincent Chalk, a teacher, is suing the Orange County, California school system to allow Chalk to return to teaching. *Id.* The school system transferred Chalk to office duties after the system learned that Chalk had AIDS. *Id.* Likewise, schools have excluded students who are infected with HTLV-III. *See* Marco, *supra*, at 364. Finally, many people have called for the quarantine of AIDS infected persons. *See* Comment, *supra* note 1, at 365.

44. *See* Marco, *supra* note 43, at 366 (discussing need for confidentiality of AIDS test results).

45. *Id.*

46. *See* Comment, *supra* note 1, at 326 (discussing suggestions by Centers for Disease Control for reducing transmission of AIDS).

47. *See* Weldon-Linne, *supra* note 5, at 211 (discussing American Hospital Association recommendations for hospitals that treat AIDS patients).

48. *See* Rovner, *AMA Opposes Reagan on AIDS Testing*, 45 CONG. Q. WEEKLY REP. 1381, 1381 (1987) (discussing American Medical Association recommendations for AIDS legislation).

49. *See* Rovner, *Waxman, Kennedy Offer Bills Ensuring Privacy of AIDS Tests*, 45 CONG. Q. WEEKLY REP. 1744, 1744 (1987) (describing Congressional bills relating to confidentiality in AIDS context).

dentiality of AIDS antibody test records.[50] In addition, some states have adopted legislation that includes safeguards for the confidentiality of AIDS antibody test results.[51] Currently, California has the most comprehensive AIDS confidentiality statute.[52]

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50. *Id.* Section 2315 of Senate Bill 1575, which Senator Edward Kennedy introduced on July 31, 1987, requires that an organization which receives funds under the bill agree to ensure the confidentiality of information and records regarding individuals to whom the organization provided AIDS counseling and testing. S. 1575, 100th Cong., 1st Sess. § 2315, 133 CONG. REC. 128, 11058 (1987). Section 2318 requires that an organization which receives funds under the bill offer opportunities for an individual to receive AIDS counseling and testing without the organization's requiring that the individual provide any information about the individual's identity. *Id.* § 2318. Furthermore, section 2331 of the bill prohibits a person who receives identifying information about a protected individual through direct or indirect involvement in the process of the individual's AIDS counseling and testing from disclosing the information to a third party. *Id.* § 2331. Section 2337 of the bill defines identifying information as information that reveals the identity of a protected individual and that the individual has undergone or will undergo AIDS counseling or testing. *Id.* § 2337(2). Section 2337 also states that a protected individual is an individual who has undergone AIDS counseling or testing, regardless of whether the federal government funded the testing. *Id.* § 2337(3). In addition, section 2331 of the bill establishes a civil money penalty, civil causes of action, and a criminal penalty for violating the prohibition against disclosure of information that identifies a protected individual. *Id.* § 2331(c). A protected individual who is aggrieved as a result of another person's disclosure may obtain actual or punitive damages in a civil action against the person who made the disclosure. *Id.* § 2311(c)(2). Section 2331(c) also states that the award of damages shall not be less than $2,000. *Id.* § 2331(c)(4).

51. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 199.20 (West Supp. 1988) (prohibiting, in judicial, administrative, or legislative proceeding, compulsion of person to identify AIDS test subjects); *id.* § 199.21 (establishing penalties for unauthorized disclosures of AIDS test results); *id.* §§ 199.30-199.40 (establishing AIDS Research Confidentiality Act); *id.* §§ 199.42-199.44 (establishing AIDS public health records confidentiality act); D.C. CODE ANN. § 6-2805 (Supp. 1987) (protecting confidentiality of medical records of and information about persons with AIDS); FLA. STAT. ANN. § 384.25(2) (West 1986) (requiring that public health department adopt rules to protect privacy and confidentiality of patients with sexually transmitted diseases including AIDS); *id.* § 384.26(2) (requiring that health department keep confidential all information it gathers in course of sexual contact investigation); *id.* § 384.29 (requiring that public health department maintain confidentiality of all information and records relating to cases of sexually transmissible diseases including AIDS); KY. REV. STAT. ANN. § 214.410(2) (1985) (including AIDS within definition of "sexually transmitted diseases" in Kentucky Sexually Transmitted Disease Control Confidentiality Act of 1986); ME. REV. STAT. ANN. tit. 5, §§ 19203-19206 (Supp. 1987) (protecting confidentiality of AIDS test results and providing for civil liability for unauthorized disclosure of AIDS test results), MASS. GEN. L. ch.111, § 70F (Supp. 1987) (protecting confidentiality of AIDS test results); *infra* note 52 (discussing pertinent sections of California AIDS Research and AIDS Public Health Records Confidentiality Acts).

52. *See* CAL. HEALTH & SAFETY CODE §§ 199.20-25 (West 1988) (requiring confidentiality of AIDS blood test results to protect public health); *id.* §§ 199.30-40 (establishing AIDS Research Confidentiality Act); *id.* §§ 199.42-44 (establishing AIDS Public Health Records Confidentiality Act). While other states simply have included AIDS within the scope of existing statutes protecting the confidentiality of medical records or have drafted short statutes relating to AIDS testing, the California Legislature enacted extensive statutes protecting AIDS test results in a variety of contexts. *Id.* For example, section 199.20 of the California Health & Safety Code prohibits, in a judicial, legislative, or administrative proceeding, a person from

In some instances, however, a doctor's duty to protect the public health may override a patient's right to confidentiality.[53] For example, in *Simonsen v. Swenson*[54] the Supreme Court for the State of Nebraska held that a doctor's privilege to disclose a patient's confidential information when disclosure is necessary to prevent the spread of a contagious disease may overcome the doctor's duty of confidentiality.[55] The *Simonsen* court explained that a doctor may give a warning about his patient's contagious disease to persons who are likely to contract the disease from the patient.[56] In justifying its decision, the *Simonsen* court noted that a physician has an obligation to prevent disease.[57] The *Simonsen* court further observed that expecting a doctor to remain silent while his patient exposes healthy individuals to the disease is unreasonable.[58]

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testifying about the identity of AIDS test subjects. *Id.* § 199.20. Section 199.21 establishes penalties, including monetary damages for the unauthorized disclosure of AIDS test results. *Id.* § 199.21. Section 199.22 states that no person shall test another person's blood for AIDS antibodies without the tested person's written consent. *Id.* § 199.22. Section 199.25, however, relieves a physician of liability for disclosing a positive test result to the spouse of an AIDS test subject. *Id.* § 199.25

California's Acquired Immune Deficiency Syndrome Research Confidentiality Act requires a researcher to keep confidential AIDS research records which identify an individual. *Id.* § 199.30. The person possessing the confidential research records cannot disclose the records to third parties. *Id.*

The Acquired Immune Deficiency Syndrome Public Health Records Confidentiality Act declares that public health records relating to AIDS which contain personally identifying information shall be confidential. *Id.* § 199.42(a). The agencies shall not disclose AIDS-related information, except as the law requires for public health purposes, or pursuant to written authorization either by the person who is the subject of the record, or by his or her guardian or conservator. *Id.*

53. *See* Kmentt, *Private Medical Records: Are They Public Property?* 33 MED. TRIAL TECH. Q. 274, 289 (1987) (explaining that doctor's duty to protect public health may override patient's right to confidentiality).

54. 104 Neb. 224, 177 N.W. 831 (1920).

55. Simonsen v. Swenson, 104 Neb. 225, ____, 177 N.W. 831, 832 (1920). In *Simonsen* the plaintiff alleged a breach by the defendant doctor of the doctor's duty to maintain doctor-patient confidentiality. *Id.* The doctor in *Simonsen* had informed the operator of the hotel in which the plaintiff was staying that the doctor thought the plaintiff was suffering from syphilis. *Id.* at ____, 177 N.W. at 831. The *Simonsen* court noted that a person infected with syphilis readily transmits the disease in its early stages. *Id.* For example, drinking cups, eating utensils, and other objects that the infected person has used may carry the syphilis virus. *Id.*

56. *Id.* at ____, 177 N.W. at 832.

57. *Id.*

58. *Id.* The *Simonsen* court explained that a patient cannot expect that, if his doctor finds that the patient's illness is contagious, the patient still can insist that the doctor keep secret the patient's condition. *Id.* The *Simonsen* court stated that, although the information that a patient gives to his physician is confidential, the patient must give that information to the physician subject to qualifications. *Id.* According to the *Simonsen* court, if the patient's disease is so contagious in nature that the patient will transmit the disease to other persons unless the doctor discloses the danger of contagion to them, the doctor may make whatever disclosure is necessary to prevent the spread of the disease. *Id.* The *Simonsen* court assumed that the patient necessarily would understand that, when the patient's disease is highly contagious, the doctor may disclose information about the patient's illness. *Id.* Thus, the

Furthermore, in a number of cases courts have stated that a physician not only may disclose certain information to persons who are at risk of contracting a contagious disease from a patient, but also has an affirmative duty to notify all persons who are in proximity to a patient that the patient has a contagious or infectious disease.[59] For example, in *Skillings v. Allen*,[60] the Supreme Court for the State of Minnesota recognized that a physician owes individuals who are likely to be in proximity to a patient a duty to warn of the contagious nature of the patient's illness.[61] The court explained that, when a person foreseeably will cause injury to another person if he does not use due care in his conduct, the person is responsible for the direct consequences of his negligent acts.[62] Thus, the *Skillings* court held that the doctor owed a duty to the parents of his minor patient to advise the parents of the infectious nature of the patient's illness.[63]

Similarly, in *Davis v. Rodman*,[64] the Supreme Court for the State of Arkansas ruled that, in treating a patient who has a contagious disease, a physician has a duty to exercise reasonable care to warn members of the patient's family and other persons who are likely to contact the patient that the patient's affliction is contagious.[65] The *Davis* court explained that a doctor owes persons who are ignorant of the patient's disease and who, because of family ties, are likely to be in proximity to the patient, a duty

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Simonsen court reasoned, the doctor's disclosure would not be a breach of the patient's confidence. *Id.*

59. *See infra* notes 60-72 and accompanying text (discussing doctor's duty to warn persons who are likely to contract contagious disease from doctor's patient).

60. 143 Minn. 323, 173 N.W. 663 (1919).

61. Skillings v. Allen, 143 Minn. 323, ____, 173 N.W. 663, 664 (1919). In *Skillings* a physician who was treating the daughter of the plaintiff for scarlet fever failed to warn the plaintiff and his wife that their daughter's illness was infectious. *Id.* at ____, 173 N.W. at 663. The doctor also negligently advised the plaintiff's wife that visiting her daughter in the hospital and removing the child to the plaintiff's home was safe. *Id.* Upon the child's return to the plaintiff's home, the plaintiff and his wife contracted scarlet fever. *Id.* The Supreme Court of Minnesota held that the physician had a duty to advise the plaintiff and his wife of the infectious character of the disease. *Id.* at ____, 173 N.W. at 664. The court determined that the doctor had a duty properly to advise the child's parents because they were more likely than anyone else to be exposed to the infection. *Id.*

62. *Id.* at ____, 173 N.W. at 663-64.

63. *Id.* at ____, 173 N.W. at 664.

64. 147 Ark. 385, 227 S.W. 612 (1921).

65. Davis v. Rodman, 147 Ark. 385, ____, 227 S.W. 612, 614 (1921). In *Davis* the Supreme Court of Arkansas explained that a contagious disease is one which a person contracts by casual contact with persons suffering from the disease, or through secretions or objects that the patient has touched. *Id.* at ____, 227 S.W. at 613. In *Davis* the defendant doctor was treating two of the plaintiffs' children for typhoid. *Id.* The doctor failed to notify the plaintiffs that typhoid was a contagious disease. *Id.* Because of the failure to notify, the plaintiffs and three other children contracted typhoid. *Id.* One child died from the disease. *Id.* Although the *Davis* court found that the doctor had breached his duty to notify the plaintiffs, the court held that the plaintiffs failed to allege sufficient facts to show that the doctor's breach proximately caused the plaintiffs and their children to contract the disease. *Id.* at ____, 227 S.W. at 614.

to advise them about the nature of the disease.[66] Furthermore, in *Jones v. Stanko*,[67] the Supreme Court of Ohio held that a doctor is negligent in failing to notify persons who are in proximity to a patient of the patient's contagious disease.[68] The *Jones* court futher held that the doctor also is liable to a third party for any injury to the third party resulting from the doctor's failure to notify.[69] Finally, in *Hofmann v. Blackmon*,[70] the Florida District Court of Appeals held that once a doctor diagnoses a patient as having a contagious disease, the doctor has a duty to use reasonable care in advising and warning family members of the contagious nature of the patient's illness.[71] The *Hofmann* court held that the doctor's failure to diagnose the contagious disease does not relieve the doctor of his duty.[72]

In a recent line of cases, state courts have extended a doctor's duty to protect the public health to include the duty to warn third parties of the foreseeable dangerous conduct of his patient.[73] Although these cases involve the psychotherapist-patient relationship, they are analogous to the physician-AIDS patient relationship.[74] In 1976 the Supreme Court for the State of

66. *Id.* at ____, 227 S.W. at 614.

67. 118 Ohio St. 147, 160 N.E. 456 (1928).

68. Jones v. Stanko, 188 Ohio St. 147, ____, 160 N.E. 456, 458 (1928). In *Jones* the plaintiff brought a wrongful death action against the defendant doctor. *Id.* at ____, 16 N.E. at 456. The plaintiff's decedent had contracted smallpox from a neighbor and died. *Id.* The decedent had asked the doctor about the nature of the neighbor's illness. *Id.* The doctor, having negligently failed to diagnose the neighbor's smallpox, informed the decedent that the neighbor was not suffering from a contagious disease. *Id.* Additionally, the doctor negligently explained that the decedent was not at risk of contracting the disease by caring for the neighbor during the neighbor's illness. *Id.* Relying on the doctor's assurances that the neighbor's disease was not contagious, the plaintiff's decedent cared for the neighbor prior to the neighbor's death, and performed services in preparation for the neighbor's burial. *Id.* The *Jones* court held that the doctor's failure properly to warn the plaintiff proximately caused the decedent's death. *Id.* at ____, 160 N.E. at 457.

69. *Id.*

70. 241 So. 2d 752 (Fla. Dist. Ct. App. 1970), *cert. denied*, 245 So. 2d 257 (Fla. 1971).

71. Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970), *cert. denied*, 245 So. 2d 257 (Fla. 1971). In *Hofmann* the plaintiff father and his minor child brought an action against the estate of the father's physician, who failed to diagnose the father's tuberculosis. *Id.* As a result, the plaintiff's child contracted the disease and required extensive medical treatment. *Id.*

72. *Id.* In *Hofmann* the Florida District Court of Appeals explained that if a doctor determines that a patient has a contagious disease the doctor has a duty to warn the members of the patient's immediate family of the nature of the disease. *Id.* The defendant doctor contended that he owed no duty to the plaintiff because the doctor did not actually know the tuberculosis existed. *Id.* The *Hofmann* court rejected the defendant's argument, stating that the defendant's negligence in failing to diagnose the contagious disease did not negate the defendant's duty to warn. *Id.* The court held that relieving the defendant of his duty to warn because the defendant breached his duty to diagnose the disease would be illogical. *Id.*

73. *See infra* notes 74-111 and accompanying text (discussing doctor's duty to warn third parties of foreseeable violence by patient).

74. *See* Hermann, *supra* note 7, at 74 (discussing whether physician has duty to warn patient's family members that patient has AIDS). *See generally* Marco, *supra* note 43 (discussing possible lawsuits against doctors for patient's transmission of AIDS virus). Spouses and sexual

California, in *Tarasoff v. Regents of University of California*,[75] held that if a therapist determines, or according to the standards of his profession should determine, that his patient presents a serious danger of violence toward a particular individual, the therapist incurs an obligation to use reasonable care to protect the intended victim against the danger.[76] In *Tarasoff* the patient confided to the therapist the patient's intention to kill the plaintiffs' daughter.[77] The therapist did not warn the plaintiffs or the plaintiffs' daughter about the patient's threat.[78] Approximately two months later the patient killed the plaintiffs' daughter.[79] The plaintiffs asserted that the therapist breached his duty to warn them or their daughter that the patient had threatened their daughter.[80] Thus, the plaintiffs alleged that the therapist's failure to warn proximately resulted in their daughter's death.[81] According to the *Tarasoff* court, the duty to protect the potential victim of a patient may require that the therapist take one or more of various steps, depending upon the nature of the case, to prevent the patient from harming the potential victim.[82] The court explained that, if a person occupies a position that enables the person to prevent injury to another person, a duty arises to exercise ordinary care to prevent the injury.[83] The *Tarasoff*

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partners of AIDS patients already have brought lawsuits against patients for transmitting the AIDS virus to the partner. *Id.* Sexual partners of AIDS patients also have brought lawsuits alleging both that the patients failed to disclose the patients' AIDS infection, and that the patients intentionally caused their partners to suffer emotional distress. *Id.*

75. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

76. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 439, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976). In *Tarasoff* the parents of Tatiana Tarasoff brought an action against the University of California Regents, the psychotherapists at the University of California at Berkeley student health center, and the campus police, after Prosenjit Poddar, a patient the psychotherapists treated, killed Tatiana. *Id.* at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19. Dr. Lawrence Moore, a psychotherapist employed by the Cowell Memorial Hospital at the University of California, had been treating Poddar, a graduate student, for mental illness. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21. Two months before the killing, Poddar had confided to Moore that Poddar intended to kill a woman who was identifiable as Tatiana. *Id.* Moore alerted campus police that Poddar was dangerous and that the police should commit Poddar to a psychiatric facility. *Id.* The campus police took Poddar into custody, but released Poddar when he promised to stay away from Tatiana. *Id.* Tatiana's parents claimed that each of the defendants had an affirmative duty to warn Tatiana or her parents of the danger Poddar posed to Tatiana. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19.

80. *Id.*

81. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

82. *Id.* The *Tarasoff* court explained that the steps which a therapist may take to discharge his duty to protect third persons from a patient's violence include warning the intended victim or other persons, such as the victim's family, who are likely to apprise the victim of the danger, notifying the police of the patient's potential for violence, or taking any other actions that are reasonably necessary under the circumstances. *Id.* The therapists in *Tarasoff* notified the campus police of Poddar's potential for violence. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.

83. *Id.* at 434, 551 P.2d at 342, 131 Cal. Rptr. at 22.

court further explained that, if a person can prevent foreseeable harm to a third party by controlling the actions of a dangerous person or warning the third party of the dangerous action, the common law has imposed on the person a duty to protect the potential victim.[84] The person has this duty, however, only if he has some special relationship to the dangerous individual or to the potential victim of the dangerous person's conduct.[85] Accordingly, the *Tarasoff* court ruled that the special relationship between the patient and the therapist imposed on the therapist a duty to protect the plaintiffs' daughter.[86]

In establishing the therapist's duty to warn individuals whom his patient has threatened, the *Tarasoff* court referred to the contagious disease line of cases.[87] The court explained that other jurisdictions had held that the doctor-patient relationship imposes on a doctor the duty to use reasonable care to protect other individuals from danger that might result from a patient's illness.[88] Recognizing that therapists encounter difficulties in attempting to determine whether a patient presents a serious threat of violence to other individuals, the *Tarasoff* court explained that a therapist must exercise only the reasonable skill that members of his profession ordinarily exercise in similar circumstances.[89] The court held that, if a therapist determines, or under professional standards should determine, that his patient poses a serious threat of danger to a foreseeable victim of his patient's conduct, the therapist has a duty to exercise reasonable care to protect the foreseeable victim from harm.[90]

While recognizing the importance of maintaining confidentiality between a therapist and his patient, the *Tarasoff* court also explained that it must weigh the public interest in safety from violent assault by mental patients against the need for confidentiality in the therapist-patient relationship.[91]

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84. *Id.* at 435, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23.

85. *Id.*

86. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

87. *Id.* at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24. The *Tarasoff* court proposed that the relationship between a doctor and his patient is sufficient to support the doctor's duty to use reasonable care to protect other persons against dangers arising from the patient's illness. *Id.* In support of its proposition, the court cited the contagious disease cases. *See id.* (citing Davis v. Rodman, 147 Ark. 385, 227 S.W. 612 (1921); Hofmann v. Blackmon, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970); Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919); Jones v. Stanko, 118 Ohio St. 147, 160 N.E. 456 (1928)).

88. *Tarasoff*, 17 Cal. 3d at 437, 551 P.2d at 334, 131 Cal. Rptr. at 23. According to the *Tarasoff* court, by entering into the doctor-patient relationship, a therapist becomes sufficiently involved with the patient to justify imposing on the therapist the responsibility for the safety of his patient and any other persons whom the therapist knows the patient has threatened to harm. *Id.*

89. *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25. The *Tarasoff* court failed to mention any concrete standards that a therapist must follow in determining whether a patient presents a serious threat of violence to other persons. *Cf. id.* (stating that therapist must warn persons whom patient has threatened).

90. *Id.*

91. *Id.* at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26.

The court noted that the California state legislature already had recognized the need to balance the competing interests of the public and the individual patient.[92] To support the proposition that therapist-patient confidentiality must yield if disclosure of the patient's dangerous propensities is essential to prevent danger to foreseeable victims, the court cited California Evidence Code section 1024.[93] Section 1024 establishes that communication between a therapist and his patient is not privileged if disclosure of the patient's potential for violence is necessary to prevent threatened harm to a third person.[94] The *Tarasoff* court also stated that, in disclosing a patient's confidential information to prevent harm to a third person, a therapist would not violate professional ethics.[95]

In addition to California, other jurisdictions also have held that a therapist owes third persons whom a patient has threatened to harm a duty to warn of the patient's dangerous propensities.[96] These jurisdictions have attempted to clarify the *Tarasoff* ambiguities as to whom and when a therapist owes a duty to warn.[97] Shortly after the *Tarasoff* decision, in *McIntosh v. Milano*[98] the Superior Court for the State of New Jersey held that a therapist may have a duty to warn a potential victim of the therapist's

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92. *Id.*

93. *Id.*; *see* CAL. EVID. CODE § 1024 (West 1965)(containing exception to confidentiality of therapist-patient relationship).

94. *Tarasoff*, 17 Cal. 3d at 437, 551 P.2d at 346, 131 Cal. Rptr. at 26. The California Evidence Code contains a limited exception to the therapist-patient privilege. *Id.*; *see* CAL. EVID. CODE § 1024 (West 1965) (containing exception to confidentiality of therapist-patient relationship). The exception applies when the therapist reasonably believes that the patient is in a condition that is dangerous to the patient or to other persons and that disclosure is necessary to prevent the danger. *Id.* at 441, 551 P.2d at 347, 131 Cal. Rptr. at 27 (citing from California Evidence Code); *see* CAL. EVID. CODE § 1024 (West 1965) (containing exception to confidentiality of therapist-patient relationship).

95. *Tarasoff*, 17 Cal. 3d at 437, 551 P.2d at 347, 131 Cal. Rptr. at 26. The *Tarasoff* decision, which created a therapist's duty to warn foreseeable victims of his patient's violent actions, was not unanimous. Justice Clark dissented from the majority decision, arguing that overwhelming policy considerations weigh in favor of the duty of confidentiality rather than a therapist's duty to warn of a patient's foreseeable violence. *Id.* at 457, 551 P.2d at 358, 131 Cal. Rptr. at 30 (Clark, J., dissenting). The dissent explained that imposing on a psychiatrist a duty to warn a potential victim would frustrate psychiatric treatment, invade the patient's rights, increase violence, and offer virtually no benefit to society. *Id.* at 458, 551 P.2d at 358, 131 Cal. Rptr. at 38 (Clark, J., dissenting). Justice Clark believed that protecting confidentiality was important for three reasons. *Id.* at 458, 551 P.2d at 359, 131 Cal. Rptr. at 39 (Clark, J., dissenting). First, Justice Clark explained, persons in need of treatment will avoid seeking help unless the therapist gives them an assurance of confidentiality. *Id.* Second, full disclosure of all relevant information by a patient to his therapist is necessary for the therapist effectively to treat the patient, and the guarantee of confidentiality will encourage disclosure. *Id.* Finally, the dissent explained, the therapist's assurance of confidentiality will foster the trust necessary for effective treatment. *Id.*

96. *See infra* notes 97-111 and accompanying text (discussing *Tarasoff* and other psychotherapy cases).

97. *See infra* notes 98-111 and accompanying text (discussing court decisions deciding to whom and when psycotherapist has duty to warn).

98. 168 N.J. Super. 466, 403 A.2d 500 (1979).

patient if the victim clearly is the object of the patient's aggression.[99] Similarly, in *Leedy v. Hartnett*,[100] the United States District Court for the Middle District of Pennsylvania held that a therapist has a duty to warn particular, identified victims of the danger the therapist's patient has posed.[101] In *Cairl v. State*[102] the Supreme Court for the State of Minnesota also held that a therapist has a duty to warn only if a patient makes specific threats to harm specific individuals.[103] In *Brady v. Hopper*[104] the United States District Court for the District of Colorado ruled that a therapist owes no duty to warn third persons about his patient's violent tendencies, absent

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99. McIntosh v. Milano, 168 N.J. Super. 466, ____, 403 A.2d 500, 511-12. In *McIntosh* the plaintiff sued the defendant doctor for wrongful death after the doctor's patient murdered the plaintiff's daughter. *Id.* at ____, 403 A.2d at 502. During the patient's treatment for a mental condition, the patient confided to the doctor that the patient had been sexually involved with the decedent. *Id.* at ____, 403 A.2d at 503. The defendant knew that the patient had possessive feelings toward the decedent. *Id.* The patient confided to the defendant that the patient once had fired a B.B. gun at the decedent's car. *Id.* Thus, the plaintiff claimed that the defendant should have known that the patient posed a serious threat of violence to the decedent. *Id.* at ____, 403 A.2d at 505. The plaintiff further alleged that the defendant had a duty to warn the decedent or the decedent's parents of the patient's threat. *Id.* The Superior Court for the State of New Jersey held that the doctor had a duty to warn the decedent because the decedent clearly was an object of the patient's aggression. *Id.* at ____, 403 A.2d at 512.

100. 510 F. Supp. 1125 (M.D. Penn. 1981), *aff'd* 676 F.2d 686 (3d Cir. 1982).

101. Leedy v. Hartnett, 510 F. Supp. 1125, 1130 (M.D. Penn. 1981), *aff'd* 676 F.2d 686 (3d Cir. 1982). In *Leedy v. Hartnett* the plaintiffs alleged that the defendant hospital was negligent in failing to warn the plaintiffs of its patient's violent tendencies. *Id.* at 1126. While visiting the plaintiffs' home, the patient assaulted the plaintiffs. *Id.* The plaintiffs alleged that the hospital had a duty to protect them because the hospital knew that the patient had a tendency toward violence when drinking alcohol and that the patient was planning to stay with the plaintiffs when he left the hospital. *Id.* at 1127. Although, in *Leedy*, the United States District Court for the Middle District of Pennsylvania recognized that a mental health care provider has a duty to warn the identifiable victims of a patient's dangerous conduct, the court found that the hospital owed the plaintiffs no duty. *Id.* The court denied relief to the plaintiffs because they had argued that the hospital had failed to confine the patient, not that the hospital had failed to warn the plaintiffs. *Id.*

102. 323 N.W.2d 20 (Minn. 1982).

103. Cairl v. State, 323 N.W.2d 20, 26 (Minn. 1982). In *Cairl* a boarding student set fire to Cairl's apartment building while the student was visiting his family on holiday leave from the Minnesota Learning Center at Brainerd State Hospital. *Id.* at 21. Cairl sued the State of Minnesota, the Ramsey County Welfare Department, and certain state and county employees for damages arising out of the destruction of Cairl's building. *Id.* Plaintiff, Connelly also sought damages for the death of one daughter and injuries to another daughter that occured during the fire. *Id.* The plaintiffs alleged that, because the student had a history of starting fires, the hospital was negligent in releasing the student. *Id.* The plaintiffs also alleged that the defendants breached their duties to warn the plaintiffs of the student's dangerous propensities. *Id.* In *Cairl*, the Supreme Court for the State of Minnesota held that the hospital had a duty to warn only if the patient made specific threats against specific individuals. *Id.* at 26. The court explained that the hospital had no duty to warn the plaintiffs because the student did not present a threat to specific victims. *Id.* In particular the court explained that the student did not pose to the plaintiffs a danger that was any different from the dangers he posed to any member of the public. *Id.*

104. 570 F. Supp. 1333 (D. Colo. 1983), *aff'd* 751 F.2d 329 (10th Cir. 1984).

specific threats by the patient to harm identifiable victims.[105] In *Bardoni v. Kim*[106] the Michigan Court of Appeals held that, if a plaintiff claims that a therapist should have known of the existence and identity of a patient's victims, the plaintiff must show that the therapist readily could identify the target of the patient's violence.[107] The *Bardoni* court explained that the plaintiff also must show that, according to professional standards, the therapist should have known that the readily identifiable person was the target of his patient's threat of violence.[108] In *Sharpe v. South Carolina Department of Mental Health*[109] the South Carolina Court of Appeals held that a therapist does not have a duty to warn the general public that a hospital has released a dangerous mental patient.[110] These courts and the *Tarasoff* court have created a rule that mental health professionals have a legal duty to warn the identified and foreseeable victims of the professionals' patients, in addition to having a legal and professional duty to provide confidential medical care for their patients.[111]

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105. Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983), *aff'd* 751 F.2d 329 (10th Cir. 1984). In *Brady* a former patient of the defendant psychiatrist shot and seriously injured the plaintiffs in the patient's attempt to assassinate President Reagan. *Id.* at 1334. The plaintiffs sued the psychiatrist for failing to warn third persons of the danger that the patient posed to the plaintiffs. *Id.* The plaintiffs alleged that the psychiatrist should have warned the patient's parents of their son's dangerous tendencies. *Id.* at 1335. The plaintiffs further argued that the psychiatrist should have warned the police of the patient's potential for political assassination. *Id.* at 1335. The United States District Court for the District of Colorado held that the psychiatrist owed no duty to warn because the patient had not made specific threats to harm identifiable victims. *Id.* at 1338.

106. 151 Mich. App. 169, 390 N.W.2d 218 (1986).

107. Bardoni v. Kim, 151 Mich. App. 169, 181, 390 N.W.2d 218, 224 (1986). In *Bardoni* the plaintiffs, survivors of the decedents, sued the defendant doctor after his patient killed the patient's mother and brother. *Id.* at 174, 390 N.W.2d at 221. The plaintiffs claimed that the doctor negligently failed to diagnose the patient as dangerous to members of the patient's family and failed to warn the family of the patient's potential for violence. *Id.* The Michigan Court of Appeals denied relief to the plaintiffs, explaining that the patient had not shown any signs of violent behavior directed toward the plaintiffs or any other readily identifiable victims. *Id.* at 182, 390 N.W.2d at 225.

108. *Id.* at 181, 390 N.W.2d at 224.

109. 292 S.C. 11, 354 S.E.2d 778 (S.C. App. 1987).

110. Sharpe v. South Carolina Dep't of Mental Health, 292 S.C. 11, ____, 354 S.E.2d 778, 780 (S.C. App. 1987). In *Sharpe* the administrator of the decedent's estate brought a wrongful death action against the Department of Mental Health and certain doctors. *Id.* at ____, 354 S.E.2d at 779. The plaintiff alleged that the defendants had a duty to warn the community when the defendants released a patient with a history of mental illness and violence. *Id.* The *Sharpe* court held that the defendants had no duty to warn the general public that the defendants had released a dangerous patient. *Id.* at ____, 354 S.E.2d at 780.

111. *See* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 439, 551 P.2d 334, 345-46, 131 Cal. Rptr. 14, 25-26 (1976)(discussing to whom doctor owes duty to warn of patient's violent tendencies); *see also*, Crocker, *Judicial Expansion of the* Tarasoff *Doctrine: Doctors' Dilemma*, 13 J. PSYCHIATRY & L. 83, 88 (1985)(discussing *Tarasoff* and other psychotherapy cases); Greenberg, *The Evolution of* Tarasoff*: Recent Developments in the Psychiatrist's Duties to Warn Potential Victims, Protect the Public, and Predict Dangerousness*, 12 J. PSYCHIATRY & L. 315, 322 (1984). In his article, Dr. Linn Greenberg discusses a Pennsylvania general

Tarasoff and the other psychotherapy cases, and the cases considering contagious disease and a doctor's duty to warn persons who are likely to contract the disease from the doctor's patient seem to indicate that a physician has, or should have, a duty to warn the spouse or sexual partner of a known AIDS carrier that the carrier is HTLV-III infected.[112] If a duty to warn exists, a doctor must consider the duty along with the importance of maintaining doctor-patient confidentiality and ensuring the privacy of the AIDS patient.[113] An AIDS patient's right to confidentiality in the doctor-patient relationship has been an issue in recent lawsuits.[114] Third parties

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district court case in which the court held that a psychotherapist practicing under Pennsylvania law may not disclose confidential information without the patient's consent even when the patient presents a serious threat of violence to a third person. *See* Greenberg, *supra* at 322 (discussing *Hopewell v. Adebimpe*). Additionally, in *Lipari v. Sears, Roebuck & Co.*, the United States District Court for the District of Nebraska imposed on a psychiatric hospital a duty to protect a class of persons from a patient's violence if the hospital reasonably could have foreseen the risk of harm to the class. Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 194-95 (D. Neb. 1980). The plaintiffs in *Lipari* did not claim that the hospital failed to warn them of the patient's dangerous propensities. *Id.* Instead, the plaintiffs alleged that the hospital did not properly confine the patient. *Id.* The *Lipari* court held that, although a hospital cannot identify the potential victims of the hospital's patient, the hospital has a duty to prevent injury that the hospital can foresee. *Id.* at 195. Because the hospital could foresee the patient's violence, the court held that the hospital was negligent in releasing the patient. *Id.*

112. *See supra* notes 60-111 and accompanying text (discussing doctor's duty to warn third parties in contagious disease and psychotherapy cases).

113. *See* Weldon-Linne, *supra* note 5, at 210 (discussing balance between doctor's duty to warn and AIDS patient's right to confidentiality); *supra* notes 39-52 and accompanying text (discussing need for confidentiality in AIDS context). Lawrence Gostin, the executive director of the American Society of Law and Medicine, stated recently that "AIDS spears physicians on one of the greatest dilemmas, a torturous dilemma—the conflict between the duty to the patient and the duty to society." N.Y. Times, July 30, 1987, at D20, col. 4.

114. *See* Delaware Dep't of Correction v. Delaware Public Employees Council 82, Civ. A. No. 8462 (Del. Ch. Jan. 7, 1987) (WESTLAW, States library, DE-CS file). In *Delaware Department of Correction* the Department of Correction challenged the validity of an arbitration award which determined that the department had violated a provision of a collective bargaining agreement between the department and the Delaware Public Employees Union. *Id.* The provision stated that the department agreed to notify the union president of any inmate who had, or was medically suspected of having, any communicable disease. *Id.* The provision further stated that the department would notify all employees who worked in the area of an inmate who had, or was medically suspected of having, a communicable disease. *Id.* After a Delaware Correctional Center inmate died of AIDS, 20 inmates disclosed to prison officials that they had engaged in homosexual relations with the deceased inmate. *Id.* The department provided the inmates with confidential AIDS tests. *Id.* Several inmates tested positive for the virus. *Id.* The department refused to disclose to the union the names of the inmates who had positive test results because the department had promised the inmates that the test results would be confidential. *Id.* The Delaware Court of Chancery held that the provision in the collective bargaining agreement required the department to act reasonably to ascertain which inmates in its custody had, or were medically suspected of having AIDS. *Id.* The court further held that the department had violated the provision by failing to ascertain the names of suspected AIDS carriers. *Id.* Therefore, the court upheld the arbitration award. *Id.*

In *Tarrant County Hospital District v. Hughes*, another AIDS-related lawsuit, the defen-

also have sued doctors for failing to inform them that a particular patient has AIDS.[115] Members of the medical and legal communities disagree about the extent and content of a doctor's duty in AIDS cases.[116] State governments have begun to enact legislation requiring doctors to report the names of AIDS carriers to public health authorities.[117] Additionally, Senator Kennedy

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dant sought a writ of mandamus to compel a trial judge to rescind his order that required the defendant hospital to produce certain documents identifying blood donors. 734 S.W.2d 675, 676 (Tex. Ct. App. 1987). In the case below, the plaintiff alleged that her daughter's death was a result of the daughter's contracting AIDS through a blood transfusion and the names of the blood donors were necessary to prove that the defendant negligently provided contaminated blood. *Id.* The *Tarrant* court held, however, that the trial court's order did not violate the blood donors' rights to privacy. *Id.* at 679. The court explained that the trial court's order did not violate the donors' rights of privacy because the donors need for anonymity was no greater than the plaintiff's need for the identities of the donors to prove her claim against the defendant. *Id.* The court further explained that the order itself protected the donor's privacy. *Id.* The order directed the plaintiff not to contact any of the donors nor disclose the names of the donors to third parties. *Id.* In *Rasmussen v. South Florida Blood Service, Inc.*, however, the Supreme Court of Florida held that the privacy interests of volunteer blood donors and society's interest in maintaining a strong volunteer blood donation system outweighed a plaintiff's interest in discovering the names and addresses of blood donors. 500 So. 2d 533, 534 (Fla. 1987). The plaintiff hoped that further discovery would provide some evidence that the plaintiff had contracted AIDS from blood transfusions, which she had received during medical treatment for injuries that were the subject of the suit. *Id.*

115. *See* Baruch, *supra* note 2, at 166, 190 (discussing lawsuit against doctors for failing to warn patient's sexual partner that patient was suffering from AIDS). Marc Christian, a former lover of Rock Hudson, who died of AIDS, has filed a lawsuit against Hudson's estate. *Id.* at 166. Christian also has sued Hudson's doctors. *Id.* at 190. Christian has alleged that Hudson's doctors knew that Hudson had AIDS and was continuing to have sexual relations with Christian. *Id.* Christian further has claimed that the doctors never informed him of Hudson's condition. *Id.* Christian is suing under the theory of intentional infliction of emotional distress. *Id.* at 179 n. 93. As yet, Christian has not tested positive for the presence of the AIDS antibodies, nor does he suffer from any symptoms of the disease. *Id.* Similarly, in San Francisco, California, a hospital nurse has sued a doctor for failing to disclose to the nurse that a patient whom the nurse was attending suffered from AIDS. Marco, *supra* note 43, at 361. After learning from the patient whom she had just injected that the patient was suffering from AIDS, the nurse nervously stuck herself with the needle. *Id.*

116. *See* Baruch, *supra* note 3, at 191 (discussing doctor's duty to warn third persons that patient has AIDS). Dr. McBride of the District of Columbia Public Health Department claims that physicians have a duty to warn persons who are likely to have contact with AIDS patients. *Id.* Other members of the medical community, such as Jim Graham, director of the Whitman-Walker AIDS clinic in Washington D.C., do not agree with McBride's description of the doctor's duty. *Id.* Attorney Alice Philipson, chairman of the AIDS Legal Referral Panel in San Francisco, argues that any disclosures by physicians of AIDS patients are unethical and will accelerate the spread of the disease. N.Y. Times, July 30, 1987 at D20, col. 5. Philipson believes that, if doctors regularly disclose information about their patients' afflictions, the doctors will violate their duties of confidentiality and will discourage individuals from volunteering for AIDS testing. *Id.* Philipson states that to assume that AIDS infected individuals are irresponsible and intend to hurt the people they love is unreasonable. *Id.*

117. *See* AIDS AND THE LAW 349, app. P at 349-50. (W. Dornette ed. 1987) (tabulating state venereal disease reporting requirements). New York state requires that physicians, hospital administrators, health officers, laboratories, or persons in charge of state institutions file with the commissioner of health confidential reports of all cases or suspected cases of AIDS. N.Y.

has proposed federal legislation that would permit physicians to set aside confidentiality in certain instances, thus freeing doctors from liability to patients for informing known sexual partners of HTLV-III infected patients that the patient is an AIDS carrier.[118] Case law supports the contention that a physician has a duty to warn specific individuals that they potentially are at risk of contracting the AIDS virus from an identified carrier.[119] Accordingly, a doctor of a known AIDS carrier has a duty to warn the carrier's spouse or sexual partner of the carrier's condition.

Because the best solution to help curb the spread of AIDS is counseling infected persons to inform voluntarily their sexual partners that the infected

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COMP. CODES R. & REGS. tit. 10, § 24-1 (1985). Similarly, a Florida statute requires that a person who diagnoses a case of a sexually transmitted disease, including AIDS, file a report with the health department. FLA. STAT. ANN. § 384.24 (West Supp. 1987). The Florida statute further requires that the health department establish rules to protect the confidentiality of AIDS reports. *Id.* A Maine statute that prohibits a person from disclosing the results of an AIDS test provides an exception for required disclosures to the department of health. ME. REV. STAT. ANN. tit. 5, § 17003 (Supp. 1986). Pennsylvania requires physicians and hospitals to file reports of all AIDS cases with the department of health. 28 PA. CODE § 27.32 (1987). The reports must contain the name, address, and phone number of the test subject. *Id.*

118. S. 1575, 100th Cong., 1st Sess. § 2335, 133 CONG. REC. 128, S11058 (1987). Section 2235 of Senator Kennedy's bill states that, under certain circumstances, a physician or professional counselor may disclose identifying information about a protected individual. *Id.* The bill requires, however, that the person disclose the information only to the spouse of the protected individual or to an individual whom the protected individual has identified during the process of professional counseling or testing as a sexual partner of the protected individual. *Id.* Finally, the doctor or professional counselor making the disclosure reasonably must believe that the disclosure is medically appropriate and the protected individual will not provide the spouse or sexual contact with the identifying information involved. *Id.*

119. *Cf. supra* notes 60-111 and accompanying text (discussing doctor's duty to third parties who are at risk of injury from patient). The psychotherapy cases and contagious disease cases are distinguishable from cases that may arise in the AIDS context. *See supra* notes 59-111 (discussing psychotherapy and contagious disease cases). The psychotherapy cases concern mental patients well known for their social irresponsibility and who had confided to their doctors their intention to harm third persons. *See supra* notes 72-111 and accompanying text (discussing *Tarasoff* and other psychotherapy cases). In the majority of AIDS cases, however, although a doctor cannot be sure whether a patient poses a specific threat of AIDS transmission to the patient's sexual partner, most patients are socially responsible and do not intend to harm anyone they care about. *See* N.Y. Times, July 30, 1987, at D20, col. 3 (discussing individual's responsibility to avoid transmitting AIDS virus). Commentators have stated that, with appropriate counseling, most patients will inform their sexual partners of the potential danger of continued sexual relations. *Cf.* Hermann, *supra* note 7, at 74 (discussing duty to warn patient's sexual partner that patient has AIDS). The contagious disease cases dealt with diseases that a patient readily transmits to other persons through casual contact. *See* Davis v. Rodman, 147 Ark. 385, ____, 227 S.W. 612, 613 (1921); *supra* notes 60-72 and accompanying text (discussing contagious disease cases). For example, in *Davis v. Rodman*, the Supreme Court of Arkansas explained that a contagious disease is a disease that a person contracts by casual contact either with a carrier of the disease or with secretions or objects that the carrier has touched. *Davis*, 147 Ark. at ____, 227 S.W. at 613. An AIDS carrier, however, transmits the disease primarily through intimate sexual contact, shared needles, or donated blood. *See supra* notes 21-23 and accompanying text (discussing transmission of AIDS virus). AIDS is not spread through casual contact. *Id.*

person carries the AIDS virus, and because assurance of confidentiality is necessary to encourage persons at high risk of contracting the AIDS virus to undergo testing,[120] a physician should have a limited duty to warn only the spouses or sexual partners of AIDS carriers.[121] As in the contagious disease cases and the psychotherapy cases, a doctor should disclose confidential information to a third party if disclosure is necessary to prevent the spread of the AIDS virus.[122] The doctor must act in good faith and disclose the confidential information only to a person whom the doctor reasonably believes may be exposed to the disease.[123]

A physician's duty to warn the sexual partner of his AIDS patient arises out of the relationship between the doctor and his patient.[124] Because of the unique nature of the doctor-patient relationship, courts have imposed on doctors the duty to exercise reasonable care in protecting other individuals to whom the patient poses a dangerous threat.[125] A doctor must take reasonably necessary steps to protect a person whom the doctor determines his patient may harm.[126]

Because carriers primarily transmit AIDS through sexual relations rather than casual contact, a doctor should have a duty to warn only the spouse or known sexual partner of the HTLV-III infected person.[127] In the psycotherapy line of cases, courts reasoned that the therapist-patient relationship imposed on a therapist the duty to warn only specifically identified or forseeable victims of the patient's conduct.[128] The *Tarasoff* court, for example, recognized the unreasonableness of requiring a doctor to interrogate his patient or conduct an independent investigation to discover a

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120. *See* Comment, *supra* note 1, at 319 (discussing need for voluntary counseling and confidentiality in AIDS context); *supra* notes 39-51 and accompanying text (same).

121. *See* Dornette, *Confidentiality Issues*, in AIDS AND THE LAW 251, 256 (W. Dornette ed. 1987) (stating that doctors must disclose AIDS test results when disclosure is necessary to prevent further spread of infection).

122. *Cf.* Simonsen v. Swenson, 104 Neb. 224, ____, 177 N.W. 831, 832 (1920) (discussing times when doctor may disclose confidential information); *supra* notes 52-71 and accompanying text (discussing contagious disease exception to doctor's duty of confidentiality).

123. *Cf.* Simonsen v. Swenson, 104 Neb. 224, ____, 177 N.W. 831, 832 (1920) (explaining when doctor may disclose to third person patient's confidential information).

124. *Cf.* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976) (discussing doctor's duty to warn third persons to whom patient poses danger).

125. *See id.* at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24 (discussing doctor's duty to warn third persons of danger arising from patient's illness).

126. *See* McIntosh v. Milano, 168 N.J. Super. 466, ____, 403 A.2d 500, 511 (1979) (discussing doctor's duty to protect persons patient endangers); *cf. supra* note 82 and accompanying text (discussing steps that doctor may take to discharge duty to protect persons from patient's violence).

127. *See infra* notes 128-43 and accompanying text (discussing to whom doctor owes duty to warn in AIDS context). Although an AIDS carrier may transmit the virus through shared hypodermic needles and donated blood, this paper discusses only a doctor's duty to warn in the context of the sexual transmission of AIDS.

128. *See supra* notes 73-111 and accompanying text (discussing to whom therapist owes duty to warn of patient's dangerous propensities).

potential victim's identity.[129] The *Tarasoff* court stated that a doctor owes a duty to those persons whom the doctor could identify by a "moment's reflection."[130] Thus, by analogy, in the AIDS context the doctor should not have to question his patient or undertake a separate investigation to discover the patient's sexual contacts.[131] In fact, an investigation may invade the right to privacy of both the patient and the contact and would impose a great burden on the doctor by extending the doctor's liability to all persons whom he failed to warn of the AIDS patient's diagnosis.[132]

In the contagious disease cases, the courts found that the doctor had a duty to warn persons likely to contract the disease from his patient.[133] In an AIDS case, only the spouse and sexual partners of the AIDS carrier are apt to contract HTLV-III from the carrier.[134] If persons at a high risk of contracting AIDS know that their doctors will interrogate them about their sexual relations, or that their doctors publically will release a positive test result, these high-risk individuals will hesitate to volunteer for testing.[135] The resulting reduction in the amount of testing would have a serious impact

129. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 439 n.11, 551 P.2d 334, 345 n.11, 131 Cal. Rptr. 14, 25 n.11 (1976). *But see* Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 194-95 (D. Neb. 1980) (holding that doctor owes duty to warn class of persons that patient threatens to harm).

130. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 439 n.11, 551 P.2d 334, 345 n.11, 131 Cal. Rptr. 14, 25 n.11 (1976). In *Tarasoff*, the Supreme Court for the State of California explained that, in determining whether a physician should have known that his patient posed a threat of danger to a specific individual, the court must examine the particular circumstances of the case. *Id.*

131. *See supra* notes 94-109 and accompanying text (discussing to whom doctor owes duty to warn of patient's dangerous conduct).

132. *See* Gostin & Curran, *supra* note 40, at 45. Gostin and Curran argue against contact tracing as a public health response to the AIDS crisis. *Id.* Contact tracing is an investigation into the sexual contacts of an AIDS carrier. *Id.* Gostin and Curran argue that the direct public health benefits of contact tracing would be marginal. *Id.* They also assert that the use of intrusive tracing methods would have serious adverse effects on voluntary testing and other existing public health efforts to curb the spread of AIDS. *Id.* Gostin and Curran further argue that doctors' assurances of patient confidentiality will encourage high risk individuals to volunteer for AIDS testing. *Id.*

133. *See supra* notes 60-72 and accompanying text (discussing doctor's duty to warn persons who are likely to contract contagious diseases).

134. *See supra* note 22 and accompanying text (discussing transmission of AIDS virus); *see also* Hermann, *supra* note 7, at 74 (discussing whether doctor has duty to warn patient's family that patient has AIDS). A doctor need not warn family members other than the patient's spouse or sexual partner that a patient has AIDS because other family members are not at risk of contracting the virus through casual contact with the AIDS patient. *See* Brigham, *supra* note 13, at 532 (discussing transmission of AIDS virus). Thus, the family members are not foreseeable victims of harm to whom the doctor owes a duty to warn. *See supra* notes 73-111 (explaining that doctor owes duty only to foreseeable or identifiable victims of harm patient poses).

135. *See* Comment, *supra* note 1, at 319 (discussing need for doctor's assurances to patient of privacy and confidentiality to encourage voluntary AIDS testing); *supra* notes 39-52 and accompanying text (discussing need for confidentiality in effort to control spread of AIDS).

on the spread of AIDS.[136] Reductions in voluntary testing for AIDS would affect the amount of AIDS-related information available for the treatment of AIDS patients, research to find a cure for the disease, and attempts to inform the public about AIDS.[137] Furthermore, persons who would avoid AIDS testing because of the negative implications of a positive test result would continue to spread the disease, unaware that they were HTLV-III carriers.[138] The number of persons who would avoid testing likely would exceed the small number of sexual partners who would avoid contracting the disease because of a warning from a doctor.[139] Thus, by limiting disclosure of a patient's condition to the spouse or sexual partner of the patient, courts will foster the public health.[140]

Many of the arguments for imposing on a doctor only a limited duty to warn third persons about his patient's infection with the AIDS virus are similar to the arguments that the dissent raises in *Tarasoff*.[141] The *Tarasoff* dissent explained that imposing on a psychiatrist a duty to warn a potential victim would frustrate psychiatric treatment and would offer virtually no benefit to society.[142] Similarly, imposing on a doctor a duty to warn all persons who are likely to be in proximity to an AIDS patient, instead of only the known sexual partner of the patient, would frustrate AIDS treatment and research and would offer little benefit to society.[143]

As the hysteria surrounding AIDS grows, doctors increasingly will become concerned about their potential liability when a patient transmits the AIDS virus to a third person. Courts have found that a doctor has a duty to warn persons who are likely to contract a contagious disease from the doctor's patient.[144] In addition, courts have held that a psycotherapist

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136. *See* Gostin & Curran, *supra* note 40, at 46 (discussing need for voluntary AIDS testing in effort to control spread of AIDS).

137. *See* Comment, *supra* note 40, at 46 (discussing need for voluntary AIDS testing in effort to control spread of AIDS).

138. *See* Gostin & Curran, *supra* note 40, at 46 (discussing need for voluntary testing in effort to control spread of AIDS). High risk individuals' fear of a doctor's unwarranted disclosure of AIDS test results would discourage the individuals from seeking testing, counseling, care, and treatment. *Id.* Persons who avoid testing will continue to spread the disease, provide no additional AIDS-related information to research efforts, and frustrate public health objectives. *Id.*

139. *Id.* The probable outcome of an investigation into an AIDS carrier's sexual contacts is that individuals who are at high risk of contracting an HTLV-III infection will hesitate to undergo testing, thus impeding research efforts. *Id.* Because investigating a carrier's sexual relations has limited public health benefits and actually may be counterproductive to achieving public health goals, doctors should refrain from investigating a patient's sexual contacts. *Id.*

140. *See supra* notes 39-52 and accompanying text (discussing need to prevent unnecessary disclosure to third persons of AIDS test results in effort to control spread of AIDS).

141. *See* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 458, 551 P.2d 334, 358, 131 Cal. Rptr. 14, 38 (1976) (Clark, J. dissenting); *supra* note 95 (discussing *Tarasoff* dissent).

142. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 458, 551 P.2d 334, 358, 131 Cal. Rptr. 14, 38 (1976) (Clark, J. dissenting); *see supra* note 95 (discussing *Tarasoff* dissent).

143. *See supra* notes 121-42 and accompanying text (discussing reasons for imposing on doctor duty to warn only known sexual partners of AIDS patients).

144. *See supra* notes 60-72 and accompanying text (discussing doctor's duty to warn persons who are likely to contract contagious disease from patient).

has a duty to protect from harm persons whom his patient has threatened.[145] By analogy to a doctor's duty in the contagious disease and psychotherapy cases, a doctor has a duty to warn an AIDS patient's sexual partner who is likely to contract the AIDS virus from the patient.[146] The doctor's duty to warn his AIDS patient's sexual partner, however, directly conflicts with the doctor's duty to maintain patient confidentiality.[147] This conflict imposes on a doctor a significant dilemma: whether to warn the sexual partner and risk violating the doctor's duty to maintain patient confidentiality or refuse to disclose any of the patient's confidential information and risk violating the doctor's duty to the sexual partner. One public health official has argued that the sexual partner's right to know about the patient's AIDS infection overrides the patient's right to confidentiality.[148] Other commentators argue that a doctor must not violate patient confidentiality under any circumstances.[149] Determining whether an AIDS patient will inform the patient's sexual partner about the AIDS infection is an impossible task for a doctor. Thus, forcing a doctor to choose between his competing duties places a doctor in an unfair, no-win situation. Accordingly, federal and state legislatures must resolve the conflict. In resolving the conflict, legislatures must consider the strong need for confidentiality to encourage voluntary AIDS testing, society's interest in stopping the spread of AIDS, and the great burden caused by extending a doctor's liability for failing to warn all persons of an AIDS patient's diagnosis.[150] A legislative resolution of the conflict between a doctor's competing duties would notify all concerned persons of the respective rights and duties relating to a patient's AIDS diagnosis.

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145. *See supra* notes 73-111 and accompanying text (discussing therapist's duty to warn foreseeable and identifiable victims of patient's violent propensities).

146. *See supra* notes 112-43 and accompanying text (discussing doctor's duty to warn patient's sexual partner that patient has AIDS).

147. *See supra* notes 25-33 and accompanying text (discussing doctor's duty to maintain patient confidentiality).

148. *See* Wash. Post, Oct. 27, 1987, at A19, col. 3 (discussing doctor's conflicting duties of maintaining patient confidentiality and warning AIDS patient's sexual partner). Dr. Stephen Joseph, New York City's health commisioner, has proposed state legislation that would impose on doctors and hospitals a clear duty to inform the sexual partners of AIDS patients that the partner may contract the AIDS virus. *Id.* The proposed legislation would safeguard physicians from any liability for having made the disclosure. *Id.*

149. *See id.* at A19, col. 4 (discussing whether sexual partner's right to know overrides AIDS patient's right to confidentiality). The New York State Department of Health argues that doctors must not disclose to third persons confidential AIDS-related information. *Id.* The Department further argues that persons who are at a high risk of contracting AIDS will be reluctant to volunteer for AIDS testing if they know that doctors will disclose positive test results to the persons' sexual partners. *Id.*

150. *See supra* notes 39-52 and accompanying text (discussing need for confidentiality in AIDS context).