
WAYNE R. COHEN*

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ANTONIO:
The Duke cannot deny the course of law: For the commodity that strangers have with us in Venice, if it be denied, will much impeach the justice of his state.¹

INTRODUCTION

During the past several years, the subject of employee drug testing has generated a great deal of controversy.² Prior to the 1980s, testing employees for illicit drug use was a rarity.³ Although testing occurred in the military and in drug treatment programs, the concept of widespread employee drug testing in the 1970s would have shocked the American public.⁴ The 1980s and early 1990s have been different.⁵ The Government’s anti-drug campaign, heightened public awareness of the drug problem, and the increased availability of inexpensive urine drug testing services have caused the proliferation of drug testing in the private workplace.⁶ In addition to drugs, employers test for honesty, genetic defects, and, of concern here, the acquired immune deficiency syndrome (AIDS).⁷

The 1990s will see an America suffering from AIDS. Through

¹. William Shakespeare, Merchant of Venice, act 3, sc. 2.
². See Jon D. Bible, When Employers Look for Things Other Than Drugs: The Legality of AIDS, Genetic, Intelligence, and Honesty Testing in the Workplace, 41 Lab. L.J. 195, 195 (1990) (explaining that controversy over employee drug testing has erupted in recent years). Controversy regarding drug testing in the workplace originates from the opposing interests of employers and employees. Employers use testing programs to combat the business risks posed by employees under the influence of illicit substances. Employees often view the tests as a threat to their integrity and reputation, and attack them on grounds of privacy and accuracy. Id.; see also John Horgan, Your Analysis is Faulty, New Republic, Apr. 2, 1990, at 22-24 (questioning validity of justifications for mandatory employee drug testing given by official at National Institute on Drug Abuse); Body Invaders, The Nation, Jan. 8/15, 1990, at 39 (asserting that Department of Transportation’s drug testing program is “horrendous assault on personal autonomy, individual liberty and constitutional rights”); B.D. Colen, What Price Drug-Free?, Health, May 1988, at 6, 10 (positing that employee drug testing is constitutionally suspect and diverts resources from better measures of prevention); Neil Cohen, Just Say No . . . To Mandatory Drug Testing, Sport, May 1987, at 6 (contending that mandatory testing of athletes is “unreliable substitute” for more dependable methods of drug prevention); Nat Hentoff, Presumption of Guilt, Progressive, May 1986, at 24 (noting that drug testing of all Federal Government employees is “massive” invasion of workers’ privacy).
⁴. See id. (contending that employer’s demand for employee to provide monitored urine sample or lose job would have been “shocking” prior to 1980s). Also, at this time, drug testing in the military was not used for disciplinary purposes and testing in drug treatment programs focused primarily on individuals receiving methadone maintenance. Id.
⁵. See id. (stating that drug testing has become American way of life).
⁷. Bible, supra note 2, at 195.
AIDS IN THE WORKPLACE
March 1992, 218,301 AIDS cases have been reported in the United States, and the number is expanding so quickly that statistics at the Centers for Disease Control are updated monthly. Indeed, AIDS "carries the potential to be the greatest natural tragedy in human history." The World Health Organization's Global Programme on AIDS predicts quite shockingly that by the year 2000, 6,000,000 people will have developed AIDS worldwide.

The American workplace, like all aspects of society, cannot escape the impact of AIDS. Employers feel the pressure to detect which employees are infected because a healthy workforce is fundamental to a profit-seeking enterprise. Healthy employees sometimes refuse to work with those who have contracted the virus. Infected employees may require leave from work to recuperate from AIDS-related health problems. Additionally, ignorant customers, fearing contact with those who are infected, may take their business elsewhere.

AIDS presents such monumental societal concerns that a plethora of lenses exist through which to view mandatory HIV testing by employers and discrimination against those who are infected. In this Article, economics is the discipline of choice. Economics and the law have become increasingly intertwined during the past thirty years, the result being that economics is today applied to help ana-

12. Bible, supra note 2, at 201 (commenting that employees often refuse to work with others who are infected despite almost nonexistent possibility of virus being transmitted in typical workplace of most employees).
13. Bible, supra note 2, at 201. Such absences can disrupt the workplace and escalate an employer's costs.
14. Id. at 203 (positing that nervous customers may react adversely to an employee with AIDS).
lyze numerous legal questions. This Article employs economic theory to provide a springboard from which other, more far-reaching, jurisprudential topics may be considered. This predictive economic model establishes the roadmap for evaluating the possible varied responses to the AIDS question.

This Article specifically addresses the issue of mandatory HIV testing by employers and subsequent discrimination against those infected with the virus. Part I outlines the pertinent medical background. Part II traces the development of AIDS-related litigation, focusing primarily on the employment sector. Part III discusses the pressures that compel employers to implement mandatory HIV testing. Finally, Part IV examines the issues surrounding HIV testing through the lens of economics, applying Becker's "taste for discrimination" theory to the AIDS context. The Article concludes by exploring some far-reaching questions that implicate AIDS-related issues.

I. MEDICAL BACKGROUND

Before embarking on a discussion of mandatory HIV testing, a brief medical overview of AIDS is in order. AIDS is the acronym for the terms "acquired immune deficiency syndrome." Unknown until 1980, Dr. Michael Gottlieb of UCLA discovered AIDS while publishing a study documenting an outbreak of a rare pneumonia, known as Pneumocystis carinii pneumonia, in five homosexual men in Los Angeles. In addition to these previously healthy homosexual

15. See infra notes 165-71 and accompanying text (discussing relationship between law and economics).

16. Much is known about the prevalence of AIDS infection in the United States. Data is generated from surveys and studies conducted by state and local health departments, medical centers, the Public Health Service, and federal agencies. For a general overview of current knowledge, see The HIV/AIDS Epidemic: The First Ten Years, 40 MORBIDITY & MORTALITY WKLY. REP. 357, 357-63 (1991) (detailing spread of AIDS in United States by factors of sex, age, race, geography, and method of exposure).


18. See Michael S. Gottlieb et al., Pneumocystis Carinii Pneumonia and Mucosal Candidiasis in Previously Healthy Homosexual Men, 305 NEW ENG. J. MED. 1425, 1425 (1981) (illuminating fact that studies of cellular immune function in these patients revealed potentially transmissible immune deficiency); see also Pneumocystic Pneumonia—Los Angeles, 30 MORBIDITY & MORTALITY WKLY. REP. 250, 250 (1981) (concluding that data suggests possibility of cellular immune dysfunction related to common exposure leaving individuals vulnerable to opportunistic infections); Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California, 30 MORBIDITY & MORTALITY WKLY. REP. 305, 305-07 (1981) (stating that physicians should be alert for opportunistic infections associated with immunosuppression in male homosexuals based on rising incidence of Kaposi's Sarcoma in these persons); Henry Masur et al., An Outbreak of Community-Acquired Pneumocystis Carinii Pneumonia, 305 NEW ENG. J. MED. 1491, 1491 (1981) ("The occurrence of this infection among drug abusers and homosexuals indicates that these groups may be at high risk for this infection.")
men, later research revealed that intravenous drug abusers and recipients of contaminated blood products were also developing infections due to defective immune systems.19

Three years after Dr. Gottlieb published his study, research teams in France and the United States independently identified the virus that causes AIDS.20 French scientists termed the virus lymphadenopathy-associated virus (LAV).21 American scientists termed the virus T-lymphotropic virus type III (HTLV-III).22 Internationally, the term that refers to the AIDS virus is human immunodeficiency virus (HIV).23

HIV destroys the immune system.24 Different classes of blood cells compose the infection-resisting force of the human body.25 These blood cells identify foreign microorganisms, known as antigens, in the bloodstream.26 The blood cells respond to foreign microorganisms by producing antibodies.27 In turn, these antibodies bind to the antigens to aid in their removal and destruction.28 T-helper lymphocytes (helper T-cells), a type of white blood cell, play an integral role in the immune system by activating the specific disease-fighting cells and producing the chemical signals to create an-

19. See Abe M. Macher, The Medical Background, in AIDS AND THE LAW 1, 2 (William H.L. Dornette ed., 1987) (stating that intravenous drug users and persons receiving contaminated blood also developed profound defects in immune systems). Cases of Epstein-Barr virus-associated-Burkitt’s lymphoma, non-Hodgkin’s lymphoma, generalized lymphadenopathy, and auto immune phenomena in these populations further suggest the occurrence of a common underlying immune dysfunction. Id.

20. Id. at 6 (stating that during 1983 to 1984 separate research teams in France and United States identified virus that causes AIDS).


23. See Grmek, supra note 21, at 70 (stating that to resolve dispute between French and American scientific teams, international commission on virological nomenclature named virus HIV). Following isolation of LAV and HTLV-III, considerable dispute arose surrounding whether the two viruses were really one and the same. After medical researchers established that LAV and HTLV-III were actually the same virus, the controversy switched to the issue of which team discovered it first. The World Health Organization recommended that the virus be referred to as LAV/HTLV-III, whereas the U.S. Government and most English-language scientific literature used the term HTLV-III/LAV. The international commission eventually resolved the situation. Id. This Article will use the term HIV to refer to the virus.

24. See James D. Henry, AIDS in the Workplace, in AIDS AND THE LAW 31, 33 (William H.L. Dornette ed., 1987) (stating that AIDS destroys body’s ability to defend against infection). Ultimately, a person infected with AIDS can be subjected to a variety of diseases that are normally disposed of by a healthy immune system. Id.

25. Id.
26. Id.
27. Id.
28. Id.
To invade the helper T-cells, HIV camouflages itself in a substance identical to the outer coating of the helper T-cells. The virus sneaks into the cell unnoticed and ultimately destroys it. The immune system breaks down because the signals to produce antibodies cease to function.

Testing positive for HIV does not mean that a person has AIDS. Rather, testing positive reveals only that the person is seropositive—meaning that the patient is infectious and able to transmit the virus. The seropositive patient may appear totally healthy. In fact, those who test positive for HIV often show no symptoms for many years. Some estimate that only two to three percent of those exposed to HIV ever develop "full blown" AIDS. AIDS-related complex (ARC), the nonfatal condition related to AIDS but significantly less severe, occurs when a patient tests positive for AIDS and has a specific set of clinical symptoms, such as recurrent fever, fatigue, progressive weight loss, swollen lymph glands, night sweats, and diarrhea.

A. Transmission

The threshold question of whether a significant risk of transmission of HIV exists is integral to analysis of AIDS issues. AIDS,
although communicable, is not easily transmitted.\textsuperscript{38} The disease is transmitted only by direct injection of “bodily fluids” into the bloodstream, which is known to occur in very limited circumstances.\textsuperscript{39} Blood, semen, saliva, tears, breast milk, and urine are fluids in which HIV antibodies have been detected.\textsuperscript{40} The virus’ primary means of transmission, however, is through intimate sexual contact, intravenous drug administration, contaminated blood and blood products, and from infected mothers to newborns.\textsuperscript{41} To fully understand the transmission process, four areas merit brief discussion: (1) sexual transmission; (2) intravenous drug use; (3) saliva; and (4) blood.

1. Transmission during sexual contact

Although HIV is not as easily transmitted as other sexually related diseases, sexual intercourse is a primary mode of transmitting the AIDS virus.\textsuperscript{42} Both homosexual and heterosexual partners exchange bodily fluids during sexual relations. The transfer of semen and vaginal and cervical fluids during sexual contact can result in access of the virus to blood vessels in the anus, vagina, or penis.\textsuperscript{43}

Even though sexual contact is a primary mode of transmission, it does not guarantee transmission. The chances of contracting HIV from an infected person remain slim. A study of hemophiliacs who tested seropositive estimated that only one out of nine female sexual partners became seropositive, and that person regularly had both

\textsuperscript{38} See Richard Green, The Transmission of AIDS, in AIDS AND THE LAW 28, 28 (Harlon L. Dalton ed., 1987) (describing various modes of transmission of HIV and noting that AIDS does not spread by casual contact or typical contact experienced in working environment).

\textsuperscript{39} See id. at 81 (asserting that transmission of HIV occurs almost exclusively in specific narrow circumstances). The virus is transmitted through sexual contact and intravenous exposure to infected blood products. \textit{Id.}

\textsuperscript{40} Centers for Disease Control, Recommendations for Prevention of HIV Transmission in Health-Care Settings, 36 MORBIDITY & MORTALITY WKLY. REP. Supp. No. 2S, at 3S (1987).

\textsuperscript{41} James W. Curran et al., The Epidemiology of AIDS: Current Status and Future Prospects, 229 SCt. 1352, 1355 (1985).

\textsuperscript{42} See Gerald H. Friedland & Robert S. Klein, Transmission of the Human Immunodeficiency Virus, 317 NEW ENG. J. MED. 1125, 1128 (1987) (stating that HIV is “fundamentally a sexually transmitted virus, which is transmitted by both homosexual and heterosexual activity”); see also Thomas A. Peterman & James W. Curran, Sexual Transmission of Human Immunodeficiency Virus, 256 J.A.M.A. 2222, 2222 (1986) (asserting that acquiring infection through sexual transmission can depend on number of sexual contacts, type of body fluid to which person is exposed, and anatomic area exposed). Hepatitis B, syphilis, and gonorrhea seem to be more easily communicated than HIV. \textit{Id.} at 2222-23.

\textsuperscript{43} Transmission through anal intercourse is, in fact, thought to be more efficient. See James J. Goedert et al., Determinants of Retrovirus (HTLV-III) Antibody and Immunodeficiency Conditions in Homosexual Men, 2 LANCET 711, 715 (1984) (asserting that study suggests rectal mucosa may be unusually vulnerable to HTLV-III lymphocytotoxic agent); Lawrence A. Kingsley et al., Risk Factors for Seroconversion to Human Immunodeficiency Virus Among Male Homosexuals, 1 LANCET 345, 347 (1987) (concluding that data clearly show that receptive anal intercourse is major mode of HIV acquisition).
anal and vaginal intercourse with her partner.\textsuperscript{44} Another study found that only ten percent of the sexual partners of seropositive hemophiliac partners tested seropositive.\textsuperscript{45} Sexual transmission among heterosexuals is also a difficult task, although a male is more likely to transmit HIV to a female partner than a female is to transmit HIV to a male partner.\textsuperscript{46}

2. Transmission by intravenous drug use

As of 1986, intravenous (IV) drug use accounted for the transmission of twenty-five percent of AIDS cases in the United States, seventeen percent occurring where the recipient's only risk factor was the IV drug use.\textsuperscript{47} IV drug users transmit HIV when they share drug paraphernalia, such as needles and syringes. Addicts typically purchase the drugs, but only "rent" the needles and syringes.\textsuperscript{48} Sharing needles symbolizes camaraderie among the drug users.\textsuperscript{49}

The sharing of needles provides an easy route of access for the virus because the needle sometimes transmits blood from an in-

\textsuperscript{44} Mads Melbye et al., Anal Intercourse As a Possible Factor in Heterosexual Transmission of HTLV-III to Spouses of Hemophiliacs, 312 New Eng. J. Med. 857, 857 (1985).


\textsuperscript{46} See P. Volberding, AIDS—Variations on a Theme of Cellular Immune Deficiency, 85 Bull. Inst. Pasteur 87, 90 (1987) (asserting that majority of cases in United States in which one heterosexual partner infected another involved male-to-female transmission while in Africa female-to-male transmission of HIV has been documented at great lengths); see also Thomas C. Quinn et al., AIDS in Africa: An Epidemiologic Paradigm, 234 Sci. 955, 958 (1986) (stating that unlike majority of North American and European AIDS patients, African AIDS victims rarely report history of homosexual activity or intravenous drug use). Heterosexual activity, blood transfusions, vertical transmission from mother to infant, and frequent exposure to unsterilized needles seem to account for the spread of HIV in Africa. Id. Furthermore, a study suggests that HIV infection was associated with other sexually transmitted diseases, such as gonorrhea, genital ulcers, and syphilis. Id. These diseases, prevalent in Africa, negatively affect genital epithelial integrity and may aid in transmission of HIV during vaginal contact. Id. at 959.

In the United States, the incidence of female-to-male transmission is not as well known and any conclusions are extremely controversial. See Friedland & Klein, supra note 42, at 1129-30 (noting that occurrences of female-to-male transmission have been reported infrequently in United States whereas they are well documented in Africa). Friedland and Klein posit two explanations for the infrequency of female-to-male transmission in the United States. First, the disease may be simply more difficult to transfer from women to men. Id. Second, the long incubation period for HIV ensures that many cases of AIDS that are reported today are the result of activities that occurred years ago, when the disease was primarily transmitted between homosexual men or intravenous drug users. Id. at 1130. As more women become infected, transmission from females to males may become more common, and thus, more readily documented. Id.

\textsuperscript{47} Friedland & Klein, supra note 42, at 1127.

\textsuperscript{48} See Larry Gostin, The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties, 49 Ohio St. L.J. 1017, 1022 (1989) (stating that syringes can be "rented" from "shooting galleries" where drugs are bought and sold).

\textsuperscript{49} See id. (asserting that camaraderie is part of drug culture).
fected person to a healthy person. The first user of a new sterile needle obviously faces no threat of contracting HIV from that needle. The user inserts the needle directly into a vein to inject the preferred drug. When the needle is removed, it is likely to contain traces of the user's blood. If the initial user has the AIDS virus, a subsequent user could contract HIV when inserting the used needle into a vein.

3. Transmission through saliva

The AIDS virus has been detected in saliva. Detection means only that the antibody has been isolated, not that the fluid can transmit the virus. Most scientists believe that the risk of transmitting AIDS through saliva is nonexistent. Four observations support this proposition. First, HIV has been isolated in saliva only rarely and in small amounts. Second, experiments indicate that both whole saliva and saliva filtrates contain components that inactivate HIV in vitro. Third, there has never been a documented case where AIDS was transmitted by saliva. Finally, major population studies of households, dentists, and healthcare workers in intimate contact with infected persons evidence that viral transmission occurs in only limited circumstances.

Whether HIV can be transmitted via saliva continues to be a soci-

50. Friedland & Klein, supra note 42, at 1128.
51. See id. (stating that intravenous drug users often repeatedly inject small quantities of drugs, thus providing ample opportunity for syringe to become contaminated with blood); Harold M. Ginzburg, Intravenous Drug Abusers and HIV Infections: A Consequence of Their Actions, 14 LAW MED. & HEALTH CARE 268, 269 (1986) (explaining how drug users often withdraw small amount of blood into syringe after injecting drug). This process, known as “boating,” ensures that all of the drug is injected from the syringe. Id. In the “shooting galleries,” the syringes are not sterilized. Id.
52. See Gostin, supra note 48, at 1022 (noting that while rate of seroconversion for single percutaneous exposure may be small, drug abusers may inject themselves thousands of times, thus increasing risk of contracting HIV).
53. See Jerome E. Groopman et al., HTLV-III in Saliva of People with AIDS-Related Complex and Healthy Homosexual Men at Risk for AIDS, 226 SCIENCE 447, 447 (1984) (noting that HTLV-III was isolated in saliva of 8 of 20 individuals infected with HTLV-III); David D. Ho et al., Infrequency of Isolation of HTLV-III Virus from Saliva in AIDS, 313 NEW ENG. J. MED. 1606, 1606 (1985) (noting that in study of 83 saliva specimens from 71 homosexual males seropositive for HIV, only 1% tested positive for HIV).
54. See Alan R. Lifson, Do Alternate Modes for Transmission of Human Immunodeficiency Virus Exist?, 259 J.A.M.A. 1353, 1355 (1988) (stating that laboratory data suggests that HIV is recoverable much less frequently from saliva than from blood).
55. See Patricia N. Fultz, Components of Saliva Inactive Human Immunodeficiency Virus, 2 LANCET 1215, 1215 (1986) (concluding that study indicates whole saliva and saliva filtrates can inhibit HIV).
56. See Friedland & Klein, supra note 42, at 1132-33 (contending that preliminary studies of persons at increased risk for HIV infection by another's saliva, such as dentists, have revealed no evidence of transmission); Lifson, supra note 54, at 1353-54 (noting that no cases of transmission through kissing or biting have been conclusively determined).
57. See Friedland & Klein, supra note 42, at 1131-33 (stating that study of 101 household
etal concern. Health care specialists have conducted a great deal of research on the issue. One report, for example, documented an adult HIV-infected patient who bit thirty health care workers without transmitting the virus.58 Other studies have examined households that lodged an HIV-infected person.59 Members of the households shared common items such as eating utensils, plates, drinking glasses, and toothbrushes. Healthy household members also helped the infected member with eating and bathing, and even kissed the infected member on the cheek and lips.60 Not one member of these households who did not previously have any additional exposure through a blood transfusion, sexual relations, or perinatal transmission, contracted the AIDS virus.61

Health workers who care for HIV-infected patients have also been the subject of studies.62 These workers are potentially exposed to contacts of 39 AIDS patients indicates that "household contacts who are not sexual partners of, or born to patients with AIDS are at minimal or no risk of infection with HTLV-III/LAV".

Although incidents of transmission of the virus in the health care context are rare, significant controversy erupted recently regarding a Florida dentist who allegedly transmitted HIV to five of his patients. See Update: Transmission of HIV Infection During Invasive Dental Procedure—Florida, 40 MORBIETY & MORTALITY WkLY. REP. 377, 380 (1991) (reporting that evidence "strongly suggests" that dentist suffering from AIDS transmitted HIV to five patients). The infected dentist performed invasive dental procedures on all five of the patients after being diagnosed with AIDS. Id. The United States Department of Health and Human Services (HHS), unable to determine the exact method of HIV transmission to the patients, reported that "variations in procedures performed and techniques used by the health care worker, infection-control precautions employed, and the tier of the infecting agent . . ." may have played a role in the transmission. Id. HHS further stated that this is the only known case with strong evidence suggesting a transmission of the virus by a health care worker during an invasive procedure. Id. It is probable that the HIV transmission in these cases was not through saliva, but through dental instruments or equipment previously contaminated by the blood of the dentist or another patient. Id.
the HIV virus by way of parenteral, mucous membrane, or open wound exposures to blood or other bodily fluid, contact with blood or saliva during mouth-to-mouth cardiopulmonary resuscitation, and performance of invasive procedures with direct exposure to saliva. None of the studies documented a single case of HIV transmission from saliva. Interestingly, nearly all the cases in which health care workers contracted HIV resulted from accidental needlestick injuries or mucous membrane exposure to large amounts of blood. Indeed the evidence indicates that neither saliva nor casual contact can transmit AIDS.

See McCray, supra note 62, at 1128 (stating that study only focused on health care workers potentially exposed to HIV-infected bodily fluids by needlestick, cuts from sharp objects, contamination of open wounds, or contamination of mucous membrane).

Susan M. Saviteer et al., HTLV-III Exposure During Cardiopulmonary Resuscitation, 313 New Eng. J. Med. 1606, 1606-07 (1985) (recommending that disposable ventilating bag and oral airway be kept at bedside of AIDS-infected patients in event that cardiopulmonary arrest occurs and mouth-to-mouth resuscitation is required).

See Friedland & Klein, supra note 42, at 1132-33 (noting that dentists are theoretically at increased risk because they perform invasive procedures that expose them to saliva).

See Henderson, supra note 62, at 644 (finding that none of 150 health care workers who reported percutaneous or mucous membrane exposure to contaminated blood or bodily fluids demonstrated serologic evidence of HTLV-III/LAV in follow-up tests 6 to 46 months after exposure); Hirsch, supra note 62, at 1 (reporting that none of 85 health care workers who experienced accidental nosocomial exposure to contaminated specimens tested positive for HIV); McCray, supra note 62, at 1228 (stating that only 2 of 451 workers tested for HTLV-III antibody were seropositive). Both of these latter employees experienced parenteral exposure to contaminated blood, and one may have acquired the virus through heterosexual activity. Id.; see also Weiss, supra note 62, at 2089 (noting that only three health care workers in study with no recognized AIDS risk factors tested seropositive). One of these three suffered puncture wounds from an infected needle. Id. Heterosexual sexual activity could not be ruled out as a cause of transmission in the other two cases. Id.


The Surgeon General's Report on AIDS is conclusive on this point:

There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes, and kissed each other.

B. Testing for HIV

No test exists to detect the AIDS virus in the body. Instead, tests detect HIV by recognizing antibodies to the AIDS virus. Physicians and health care workers primarily use two tests. The United States Food and Drug Administration first approved and licensed a test for detecting HIV exposure in 1985. The test is referred to simply as "ELISA"—the acronym for enzyme-linked immunosorbent assay. ELISA, a highly sensitive and relatively inexpensive test, detects antibodies that white blood cells create in response to invasion by the virus. ELISA produces results within a few hours.

The second test used to detect HIV antibodies is the Western Blot (WB). An individual is considered to be seropositive for HIV only after the enzyme immunoassay is repeatedly reactive and a confirmatory test, such as the WB, is performed. If the first ELISA test produces a positive result, a repeat ELISA test is suggested. If the second ELISA test also produces a positive result, a more sophisticated confirmatory test becomes necessary. The WB is most often used to confirm repetitive positive results. Like the ELISA test, the WB test detects the presence of antibodies, not the AIDS virus itself.

Neither the ELISA nor the WB produces entirely accurate results.

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69. Henry, supra note 24, at 34-35.
70. Id.
71. See GRMEK, supra note 21, at 85 (stating that by summer of 1985, test developed by Food and Drug Administration (FDA) became routine diagnostic procedure for AIDS).
72. Id. at 84.
73. Bible, supra note 2, at 202. After a blood sample is taken from the test subject, it is mixed with a deactivated virus, and antibodies are added to the test to produce binding reactions that can be measured by a light meter. Id.
74. Id.
75. See GRMEK, supra note 21, at 69 (noting that advent of Western Blot technique greatly improved sensitivity of HIV tests).
76. See Update: Serologic Testing for Antibody to Human Immunodeficiency Virus, 36 MORBIDITY & MORTALITY Wkly. Rep. 833, 833 (1988) (stating that Public Health Service emphasizes that person should be considered to have serologic evidence of infection only after repeated reactivity to screening tests and validation of those results by another type of test). According to the Public Health Service, the medical and social significance of being diagnosed as HIV positive demands that the test results be both accurate and accurately interpreted. Id.
77. See Bible, supra note 2, at 202 (commenting that standard protocol is to administer second ELISA test if first one is positive).
78. Id.
79. Id. (noting that WB test is generally not used as initial screening test because it is more expensive and harder to administer than ELISA). The FDA recently approved a third diagnostic test for AIDS. See Christopher J. Chipello, FDA Approves Five-Minute AIDS-Test Developed by Cambridge BioScience, WALL ST. J., Dec. 14, 1988, at B5 (explaining that test requires only one drop of blood from finger and rules out negative subjects in only five minutes without use of laboratory instruments). The new test is not widely used. At the time of its initial marketing, the new test was priced around $10 as compared to $1 to $3 for an ELISA test. Clinical trials of the new test on over 7000 specimens resulted in 0.4% false positives and
The ELISA often yields false positive results, meaning that test results indicate that patients have HIV when, in fact, they do not. By comparison, the Western Blot generates a high rate of false negative results, meaning that test results indicate that patients are free from HIV when, in fact, they are not. More accurate results occur only when the two tests are used in conjunction. Health and Human Services estimates that ninety-nine percent accuracy can be expected when repeatedly reactive ELISAs are confirmed by a Western Blot.

II. OVERVIEW OF AIDS LAW

Predicting the road down which AIDS law will travel requires an understanding of its recent historical development. Those practitioners who first litigated AIDS-related issues framed legal questions concerning AIDS and employment in terms that thrust the issues within the scope of then-existing civil rights laws prohibiting employment discrimination. Historically, an employer retained the right to discharge a worker for any reason, valid or not. Sec 504 of the Rehabilitation Act (Act), which plays an integral part in AIDS-related litigation, prohibits government agencies and contractors from discriminating against "individuals with handicaps." It was not until October 7, 1988 that the Department of
Justice defined "individuals with handicaps" to include persons with AIDS, or ARC, or who test seropositive. The Department of Justice had earlier released a memorandum concluding that section 504 prohibited covered employers from discriminating on the basis of the disabling effects of AIDS, but that the statute did not prevent employers from taking measures to prevent the spread of the disease.

A. The Early Cases

The case that laid the foundation for AIDS jurisprudence did not concern HIV. In 1979, prior to the proliferation of the AIDS epidemic, the Second Circuit decided New York State Association for Retarded Children v. Carey. The court addressed the issue of whether mentally impaired school children who were infected by hepatitis B virus (HBV) should be segregated from noninfected, mentally impaired students. Concerned with whether HBV infection posed a significant risk of infection to other students in the program, the court noted that the New York City Board of Education was "unable to demonstrate that the health hazard posed by the hepatitis B carrier children was anything more than a remote possibility." The Second Circuit reasoned that no one had ever shown that nonparenteral routes such as saliva could transmit the HBV infection. Even if such evidence existed, there was no proof that classroom activities "posed any significant risk that the disease would be

Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Id.

87. Justice Department Memorandum on Application of Rehabilitation Act's Section 504 to HIV-Infected Persons, Daily Lab. Rep. (BNA) No. 195, at D-5 (Oct. 7, 1988) (stating Department of Justice conclusion that section 504 applies to all HIV-infected individuals, symptomatic and asymptomatic alike, whether in employment or nonemployment contexts). The Department of Justice's rationale for its conclusion was that persons who suffer from AIDS, ARC, or who test seropositive are all infected with HIV, which affects the lymphatic system. Id. Section 504 defines "individual with handicaps" to include those who suffer from "physical impairments." In turn, section 504 defines "physical impairment" to include impairment of the lymphatic system. Id.

88. Memo from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS, Daily Lab. Rep. (BNA) No. 122, at D-16 (June 25, 1986) [hereinafter Memo from Assistant Attorney General Cooper] (reporting that Section 504 does not address issue of communicability and Congress' silence on subject supports Department of Justice's conclusion that control of communicability of HIV be relegated to state and local authorities).

89. 612 F.2d 644 (2d Cir. 1979).


91. Id. at 650.

92. Id.
transmitted." Although the Board of Education was aware that Department of Health investigations "observed drooling, kissing, and mouthing of mutually used equipment," the Board never presented this evidence to the court. In fact, the court noted that several educators who had inspected classrooms did not find evidence of unhygienic conditions in any of the classrooms.

The court found that the health hazard posed by the hepatitis B carrier children was remote. Consequently, the court concluded that the New York City Board of Education's plan to exclude certain mentally retarded children from regular school classes because they were carriers of serum hepatitis violated section 504 of the Rehabilitation Act.

Although the court in Carey contemplated issues concerning the hepatitis B virus, the case nonetheless set the stage for District 27 Community School Board v. Board of Education. In this case, parents of healthy students demanded that school children with AIDS be excluded from attending the same school as healthy children. The court relied on Carey in determining that "handicapped individual" included all HIV-infected persons, irrespective of whether they had developed symptoms of ARC or AIDS. The court concluded that the exclusion of school children with AIDS violated section 504 of the Act.

The near unanimity of opinion that biting is an unlikely route of [HIV] transmission in the classroom setting is premised upon the epidemiologic data indicating no evidence that saliva has ever been a means of transmission, even among household members exposed to the saliva of infected persons; the "extremely low" concentration of the virus in saliva as suggested by the infrequency in culturing the virus from the saliva of persons with AIDS; the minimal capacity of younger children to penetrate the skin to the point where enough virus particles could enter the system of the bitten child; and the relative ease in destroying the virus through the same precau-
B. The Employment Sphere

Much of the statutory and judicial response to the AIDS epidemic has developed in the context of the workplace. Litigation often involves situations where an employer discriminates against an employee who has AIDS, ARC, or is seropositive. *School Board v. Arline* 102 is a leading case in the employment sphere. Although not dealing directly with HIV, courts regularly cite *Arline* as precedent in cases concerning AIDS-related employment issues because it holds that persons with contagious diseases fall within section 504.103

Gene Arline taught elementary school for thirteen years, beginning in 1966.104 In 1979, the Nassau County School Board discharged her after she suffered a third relapse of tuberculosis within two years. The Supreme Court, in an opinion authored by Justice Brennan, framed the issue as "whether a person afflicted with tuberculosis, a contagious disease, may be considered a 'handicapped individual' within the meaning of [section] 504 of the Act, and, if so, whether such an individual is 'otherwise qualified' to teach elementary school."105 Shortly after the Court granted certiorari, the Department of Justice issued its memorandum asserting that discrimination by an employer against persons infected with HIV or suffering from ARC or AIDS would not be unlawful if prompted by fears of contagion, even if such fears were unreasonable.106 The United States attempted to adopt this argument and apply it to tu-
berculosis. Justice Brennan, however, rejected this argument and the Court ultimately held that a person suffering from tuberculosis can be a handicapped person within the meaning of section 504. The Court remanded the case to the district court to determine whether plaintiff was “otherwise qualified” for her position. In answering this question, the Court instructed the district court to give appropriate weight to the legitimate concern of “avoiding exposing others to significant health and safety risks.”

_Arline_ led the way for future courts to apply section 504 in situations in which employees with AIDS were victims of discrimination. The Ninth Circuit, in _Chalk v. United States District Court_, held that protection under section 504 does not require as a prerequisite absolute certainty that HIV transmission could not occur from school-room or workplace contact. In _Chalk_, the local Board of Education denied reinstatement to a high school special education teacher diagnosed with AIDS, even though his physician certified his ability to return to work.

More recently, in _Leckelt v. Board of Commissioners_, the Fifth Circuit concluded that the Rehabilitation Act did not protect Leckelt, a licensed practical nurse who was discharged after he refused to submit to an HIV test. A physician at the hospital employing Leckelt informed the hospital’s infection control committee that she knew of an employee who was the associate of a current AIDS patient at the hospital, namely Leckelt. While working as a nurse, Leckelt administered oral and intravenous medication, changed dressings, performed catherizations, administered enemas, and started IV

vancy of reasonableness analysis of employment decisions based on characteristics beyond scope of section 504).

107. _Arline_, 480 U.S. at 282 n.7. Justice Brennan attempted to distinguish the tuberculosis situation from the AIDS situation. He commented that, unlike AIDS, where a carrier of the disease may not suffer any symptoms or physical impairments, tuberculosis gives “rise both to a physical impairment and to contagiousness.” _Id._ (emphasis in original). He explained:

This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

_Id._

108. _Id._ at 289.
109. _Id._ at 286.
110. 840 F.2d 701 (9th Cir. 1988).
111. _Chalk_ v. United States Dist. Court, 840 F.2d 701, 709 (9th Cir. 1988).
112. _Id._ at 703-04. The teacher, Vincent Chalk, sought a preliminary and permanent injunction barring the Orange County Department of Education from excluding him from classroom duties. _Id._ at 703. Finding that Chalk had a strong probability of success on the merits and that there was a possibility of irreparable injury, the Ninth Circuit reversed the lower court’s denial of the motion. _Id._ at 710.
113. 909 F.2d 820 (5th Cir. 1990).
114. _Leckelt_ v. Board of Comm’rs, 909 F.2d 820, 833 (5th Cir. 1990).
115. _Id._ at 822.
tubes. Leckelt wore rubber gloves when performing a catheterization or changing a dressing, but unless he had a cut, abrasion, or open wound on his hands, he only used a hand wash when starting an IV or giving an injection. The court concluded that section 504 was inapplicable because the hospital discharged Leckelt for violating infection control policies on reporting infectious or communicable diseases, and not because he was an AIDS carrier.

A final example of the Arline decision's influence on the application of section 504 in the context of HIV is Cain v. Hyatt. In Cain, a district court held that section 504 protected an employee who was discharged because of testing positive for HIV. In this case, Hyatt Legal Services, an establishment that provides legal services for a fee, discharged a regional partner after he was hospitalized for pneumonia and subsequently diagnosed with AIDS. In finding that the partner was entitled to punitive damages, the court concluded that AIDS is a handicap that was not shown to be job related.

C. Mandatory HIV Testing

Courts have issued few published opinions that consider mandatory HIV-infection testing for employment purposes. Only one case has reached the federal appellate level. In that case, Glover v. Eastern Nebraska Community Office of Retardation, employees of a health services agency challenged the validity of a Nebraska administrative agency's personnel policy requiring HIV and hepatitis B testing. Eastern Nebraska Human Services Agency (ENHSA) is a state agency that provides care for mentally retarded persons in Nebraska. In 1987, ENHSA adopted Chronic Infectious Disease

116. Id. at 821.
117. Id. At trial, a patient under Leckelt's care testified that Leckelt removed bandages from the patient's incision, manipulated her wound, and reinserted a needle intravenously. Leckelt v. Board of Comm'r's, 714 F. Supp. 1377, 1383 (E.D. La. 1989), aff'd, 909 F.2d 820 (5th Cir. 1990). At no time did he wear gloves, even though he had a cut on his finger that was covered with a blood-soaked adhesive bandage and a paper towel. Id. Because the patient was under the effect of various medications when she made these observations, the district court found "the full extent of [the patient's] testimony to be unlikely." Id. Nonetheless, the court also found that Leckelt "did not utilize barrier precautions (gloves) during his care of [the patient's] intravenous line and surgical wound." Id.
118. Leckelt, 909 F.2d at 825-26.
121. Id. at 672-76.
122. See id. at 678-82 (describing consideration of AIDS under Pennsylvania Human Relations Act).
125. Id.
Policy No. 8.85, which required certain employees to submit to HIV and hepatitis B testing. ENHSA was concerned that the mentally retarded patients who engaged in violent or aggressive behavior, including biting and scratching, risked contracting either AIDS or hepatitis B from an infected employee. Consequently, ENHSA instituted the policy in "the pursuit of a safe work environment for all employees and a safe training and living environment for all developmentally disabled persons receiving services from the [agency]."

Interestingly, neither the district court nor the appellate court discussed section 504 of the Rehabilitation Act. The courts instead analyzed the issues as if they involved drug testing, deciding the controversy by a balancing of Fourth Amendment rights. After establishing that mandatory blood testing constitutes a search and seizure, the Eighth Circuit noted that the "search's reasonableness is measured by 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" At trial the parties presented extensive evidence, including the medical characteristics of the AIDS virus. The evidence established that the risk of transmission of AIDS from an employee to a patient was negligible. Both the district court and the Eighth Circuit seriously considered the severe nature of AIDS. As a constitutional matter, however, ENHSA's articulated interest in requiring testing failed to justify requiring employees to submit to testing as a requisite of continued employment.

Local 1812, American Federation of Government Employees v. United States Department of State also addresses mandatory testing for

126. Id. at 462.
127. Id. at 463.
128. Id. at 462.
129. Glover, 867 F.2d at 463 (quoting O'Connor v. Ortega, 480 U.S. 709, 719 (1987)).
131. Glover, 867 F.2d at 464; Glover, 686 F. Supp. at 249. In fact, the district court found the chance that a patient would contract HIV from an infected employee is "minuscule, trivial, extremely low, extraordinarily low, theoretical, and approaches zero." Id. at 251.
132. See Glover, 867 F.2d at 464 (acknowledging severe nature of diseases that state agency sought to address, yet finding that procedures are unwarranted due to minimal risks of contagion in workplace); Glover, 686 F. Supp. at 249 (noting that while there is presently no cure for AIDS, there is almost nonexistent chance of infection of health care workers through exposure at work).
133. Glover, 867 F.2d at 464. In reaching its conclusion, the Eighth Circuit seemed concerned with how future courts would interpret the decision. The Eighth Circuit explicitly stated that it did not intend to create a "broad-based rule with regard to testing public employees for any infectious disease, including AIDS and hepatitis B." Id. Rather, the Eighth Circuit merely held that ENHSA's policy was properly enjoined "as an unreasonable search and seizure under the fourth amendment." Id.
HIV. In *Local 1812*, the Department of State required Foreign Service candidates, prior to appointment, and current employees to submit to a comprehensive medical examination "to determine the presence of any physical, neurological, or mental condition of such a nature as to make it unlikely that they would be able to function on a worldwide basis." The examination involved a number of blood tests to detect a variety of diseases, including hepatitis, syphilis, sickle-cell anemia, and various forms of cancer. In November 1986, the Department of State expanded its fitness program to include mandatory testing for HIV.

Integral to the court's analysis was the notion that the testing program targeted fitness for duty in a specialized government agency, rather than stopping the spread of HIV. According to the Department of State, HIV-infected persons were impaired and medically unfit for worldwide service because they might be put at posts where medical care was inadequate to handle HIV-related sicknesses. These employees could be exposed to health and sanitary conditions that are particularly hazardous to carriers of HIV. The testing involved nothing more than an additional examination of a blood sample already required of an employee or candidate under established procedures. The court, relying on the Fourth Amendment and section 504, concluded that testing for HIV was "rational and closely related to fitness for duty."

**III. Why Would an Employer Test?**

Having outlined the medical background of AIDS and having traced the development of the law of AIDS testing, the Article now...
addresses the question, "Why would an employer choose to institute a mandatory HIV test?" Employers justifiably have many reasons for screening applicants and current employees as a condition of extending an offer of employment or for continued employment. Businesses bear the costs of hiring and training workers. An employer seeks to recruit quality employees, regardless of the position. Ideally, an employer would hire only faithful, stable, trustworthy, credible, dependable, reputable, and reliable persons. This may be a difficult task because an applicant's credentials do not always paint a clear or accurate picture of an employee. The conscientious employer needs to look beyond the four corners of a resume. Limited job markets and intense competition force some workers to embellish their qualifications. Extensive investigation into the background of every individual who applies for a position is an expensive task.\textsuperscript{142} Intelligence and psychological testing, honesty testing via polygraphs, genetic screening, drug testing, and HIV testing are all methods that help the inquisitive employer probe into the psyche of the worker at reasonable costs.\textsuperscript{143}

The concept of employment screening is not new. Aptitude and psychological testing began in the 1940s when large industrial companies preparing for war needed an efficient way to determine which applicants were best suited for certain tasks.\textsuperscript{144} Only a few decades ago employers used honesty testing to evaluate employees.\textsuperscript{145} During the 1970s, chemical companies required workers to submit to genetic screening.\textsuperscript{146}

Testing for HIV detects a different quality about workers—health. Employers need a healthy work force because poor health causes excessive absenteeism, high insurance costs, safety problems, disability, and sometimes even death.\textsuperscript{147} In addition to health problems, employers must deal with problems stemming from healthy employ-

\textsuperscript{142} See Ronald G. Ehrenberg & Robert S. Smith, Modern Labor Economics 136, 141-42 (2d ed. 1985) (asserting that total costs of hiring may be lower for firms when hiring standards are used rather than when firms rely on more intensive investigations of applicant characteristics).

\textsuperscript{143} See Bible, supra note 2, at 195 (discussing tests commonly used by employers in examining background and abilities of job candidates).

\textsuperscript{144} Id.

\textsuperscript{145} See id. (stating that honesty testing originated in area of criminal science in 1920s). Employers tested job candidates for honesty through polygraph tests, voice stress tests, truth serum, and hidden cameras. Id. at 200. Employers used honesty tests to predict an applicant's reliability on the job and to assess applicants' truthfulness about their background and abilities. Id. at 195.

\textsuperscript{146} Id. Because physical and mental health can affect productivity, employers used genetic testing to determine character traits that might impact a prospective employee's ability to perform a job. Id. at 195-96.

\textsuperscript{147} See Jill Barker, Fit for Work: Best Interests of Business Well Served by Fit Employees, The Gazette (Montreal), Dec. 6, 1991, at C2 (reporting that absenteeism because of poor health
ees who refuse to work with the HIV-positive employee, and from consumers who might boycott the employer's business because of the composition of its workforce.  

A hypothetical example helps illustrate the many costs facing an employer. Assume that Ronald Restauranteur owns a restaurant named Ronny's Place. Ronny's Place is located in a town with a large AIDS-infected population. Fearing that he might employ an AIDS-infected staff member, Ronald implements a program whereby all current employees are required to submit to an HIV test as a condition of continued employment. Applicants for work at the restaurant are also required to submit to an HIV test. Ronald agrees to finance the testing, irrespective of whether the applicant ultimately works for him. Why would Ronald, as an employer, take such a measure? What costs does he fear?

First, an employee who tests positive for HIV will probably require time away from work. “Full blown” AIDS is identified by certain “opportunistic” infections that invade the body when the immune system is suppressed. The most common of the opportunistic infections is Pneumocystis carinii pneumonia, a rare lung disease. Treating the pneumonia requires hospitalization and a substantial recuperation period. AIDS-related complex, the nonfatal condition related to, but significantly less severe than AIDS, also has many debilitating symptoms. They include recurrent fever, fatigue, progressive weight loss, swollen lymph glands, night sweats, costs each Canadian employer average of $600 per year — 25 times more costly than labor strikes).

148. See Marlene Cimons, Corporate Executives Urge AIDS Policy for Workplace, L.A. TIMES, Jan. 21, 1988, at 1 (noting how business community is developing response to issue of AIDS in workplace by formulating guidelines to address concerns, such as refusal of co-worker to work alongside employee with AIDS).

149. The restaurant example will be referred to throughout the continuation of this Article. It was chosen because it forces discussion of marginal issues. The Surgeon General’s Report on Acquired Immune Deficiency Syndrome expressly raises the point. Surgeon General’s Report, supra note 37, at 17. In discussing what constitutes safe behavior, the report notes that AIDS cannot be transmitted from casual social contact, “even if a restaurant worker has AIDS or carries the virus.” Id. Arguably, however, the same arguments can be applied to an employer in any business. The notion of AIDS in the food service industry, as of late, has received increased attention. See, e.g., Frederick M. Muir, Council Rejects AIDS Tests for Restaurant Workers, L.A. TIMES, Dec. 12, 1991, at B2 (reporting defeat of controversial proposed ordinance that would require AIDS testing of waitstaff, kitchen help, and cooks every six months); HIV-Positive Worker Files Bias Suit, S.F. CHRON., Apr. 18, 1991, at A20 (describing discrimination lawsuit brought against fast-food restaurant by shift manager who was fired after being diagnosed with AIDS); Cerisse Anderson, $30,000 AIDS Discrimination Award Upheld, N.Y. LJ., Nov. 16, 1990, at 1 (providing account of upholding on appeal of $30,000 award by administrative law judge to former waiter in discrimination case brought against restaurant).

150. See supra notes 24-32 and accompanying text (explaining how AIDS destroys immune system therefore lessening ability of body to defend against disease).


152. Id. at 7.
and diarrhea. With either AIDS or ARC, the HIV-infected candidate will likely be absent from work, often for substantial periods of time.

A restaurant, like any other profit-seeking operation, succeeds or fails based largely on the performance of its workforce. A reliable staff is critical. An employee who constantly needs time away from work disrupts the entire system. That an opportunistic infection may seize the HIV-infected worker without notice exacerbates the problem. Planning cannot usually be made prior to an illness because the employer has no time to prepare for the illness. Shifts need to be changed. Tasks need to be re-assigned. Even temporary help may be a necessity in some businesses. A bartender or waitperson who informs Ronald at the onset of a month-long absence causes much disorder, potentially causing Ronny's Place to forfeit substantial profits. Weekend evenings typically generate the most revenue at restaurants. If, for example, Ronald cannot replace an absent waitperson on a Saturday evening, every other waitperson will be forced to handle additional tables. Service will be inadequate, which can be the downfall of any restaurant.

Second, a business that employs individuals with AIDS may unintentionally drive customers seeking similar products to establishments that hire only healthy persons. The situation, possible in virtually every business context, is especially pronounced in the hospitality industry. Ronny's Place profits because of its customers.

153. Id. at 7-8.

154. See Barker, supra note 147, at C2 (indicating that increasing number of corporations are beginning to examine long-term costs of managing ill health of their employees because of realization that absenteeism, diminished or lost productivity, and retraining are all costs employer must assume if worker is ill).

155. The waitperson who, at maximum capacity, services five tables simultaneously now must service the regular number of tables plus additional tables that the sick employee would have worked. Service declines for all of the tables, which can be the downfall of any restaurant.

This is not to suggest that employees do not get sick. Even an employer with a "clean" workforce—that is, a workforce without any HIV-infected employees—suffers losses from the last minute illnesses of its workforce. From an employer's perspective, those absences cannot be avoided. There is no test to detect how many colds an employee will contract in a year. But testing positive for HIV is different insofar as it unequivocally guarantees that at some point the employee will get sick. Although this reasoning is not economically justified, it nonetheless appeals to employers. See Leonard, supra note 83, at 955 (discussing belief of employers that they have good reasons to preclude hiring persons who are at risk of developing AIDS).

156. The possibility of this setting has also received much attention. Even television sitcoms have caught on. NBC's A Different World faced the issue when a college student at Hillman College revealed to her class that she was HIV positive. A Different World, NBC television broadcast, Apr. 11, 1991. The reactions of her peers varied from compassion and understanding to panic-stricken phobia and hysteria. Id. The HIV-infected student worked part-time in a restaurant that was frequented by other students. Id. After her startling revelation in class, some students refused to eat at the restaurant or be served by the HIV-infected woman. Id.
To hire an HIV-infected food server is to take a great chance. Customers who fear that the disease might be transmitted via food will go elsewhere. Who wants a person with AIDS to come into contact with food that ultimately will be ingested? Although this is an irrational concern, it nonetheless reflects society's unfortunate lack of education about AIDS. To the ignorant patron, death—the eventual result of contracting HIV—infinity outweighs any preference that initially led that customer to Ronny's Place. The fact that AIDS cannot be transmitted by casual contact is irrelevant; the fact that many in society are ignorant about HIV is dispositive.\footnote{157}

Further costs exist. Many employers realistically fear that co-workers and managers will refuse to work with an AIDS victim.\footnote{158} In addition to personal disputes between workers, difficulties with co-workers may also have great legal costs. Equal Employment Opportunity Commission (EEOC) guidelines recognize a Title VII cause of action in cases where harassment creates a hostile or offensive working environment.\footnote{159} The Supreme Court, in Meritor Savings Bank \textit{v.} Wilson,\footnote{160} established the framework for Title VII lawsuits that hold an employer liable when co-workers disturb a protected person with a "harassing atmosphere" of teasing, racial epithets, or sexual slurs.\footnote{161} These cases arguably apply to the AIDS

\footnotetext{157}{See Rick Maiman, \textit{As AIDS Spooks the Schoolroom}, U.S. \textit{News} \& \textit{World Rep.}, Sept. 23, 1985, at 7 (reporting wave of anxiety in school systems nationwide is causing boycotts and demonstrations because of "public ignorance" in falsely believing that AIDS can be transmitted by casual contact); \textit{Agency Plan AIDS Rules}, \textit{N.Y. Times}, Mar. 22, 1988, at C11 (noting proposed guidelines for federal workplace state that regardless of fact that fellow employees have no medical basis for refusing to work with people with AIDS virus, such concerns must nonetheless be taken seriously and addressed through appropriate counseling).}

\footnotetext{158}{See Cronan \textit{v.} New England Tel. Co., 41 Fair Empl. Prac. Cas. (BNA) 1268, 1273 (Mass. Super. Ct. 1986) (holding that employee who was fired after contracting AIDS had stated claim under Massachusetts Fair Employment Practices Act for unauthorized disclosure of confidential information, and indicating that this disclosure prompted co-worker refusal to work with HIV-infected employee). The parties settled the suit and the plaintiff transferred to another facility. \textit{Id.}}

\footnotetext{159}{29 C.F.R. § 1604.11(a) (1991). This section provides:

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

\textit{Id.}}

\footnotetext{160}{477 U.S. 57 (1986).}

setting and would accord relief to an AIDS-infected employee subjected to co-worker harassment.  

Finally, insurance issues also cause problems. AIDS-infected persons incur approximately $100,000 in medical costs during their remaining lifetimes. Regardless of whether the employer is self-insured for health benefits or purchases health insurance, the employer will feel the economic consequences from the costs of treatments associated with AIDS.

IV. Economic Analysis

The relationship between law and economics has become increasingly intertwined during the past three decades. Despite this recent upsurge, the intermingling of law and economics is not new. As far back as 1916 Justice Brandeis wrote that the "[s]tudy of economics . . . embod[i]es the facts and present[s] the problems of today." He held the belief that "[a] lawyer who has not studied economics is very apt to become a public enemy." Several different schools of thought offer insight as to the relationship between the two disciplines. The modern school of law and economics—the so called "new" law and economics—dates back to the early 1960s when Guido Calabresi's first article on torts and Ronald Coase's
article on social cost were published. Today, economics is regularly applied to an ever-increasing range of legal fields. Indeed, as Judge Richard Posner noted, economics now applies across the board "to common law fields such as torts, contracts, restitution, admiralty, and property; the theory and practice of punishment; civil, criminal, and administrative procedure; the theory of legislation and regulation; law enforcement and judicial administration; and even constitutional law, primitive law, and jurisprudence."  

A. Becker's Model of Discrimination

The most widely accepted economic theory of discrimination was written by Gary Becker. This section of the Article applies Becker's seminal work, *The Economics of Discrimination*, to analyze economic causes and ramifications of mandatory HIV testing and resulting discrimination. Although other approaches have been advanced to examine the impact of HIV testing, none has been as uniformly accepted. Even the Equal Employment Opportunity Commission's Proposed Rules for the Equal Employment for Individuals with Disabilities cites Becker.

Becker's notion of "taste for discrimination" is the foundation of his theory and is crucial in understanding his ideas. He writes:

Money, commonly used as a measuring rod, will also serve as a measure of discrimination. If an individual has a "taste for discrimination," he must act as if he were willing to pay something, either directly or in the form of a reduced income, to be associated with some persons instead of others. When actual discrimination occurs, he must, in fact, either pay or forfeit income for this privilege. This simple way of looking at the matter gets at the

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171. *Id.*


173. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); *see also* LUNDAHL & WADENSO, *supra* note 172, at 1-7 (describing Beckerian model). It should be noted at the outset that no understanding of economics by the reader is presupposed. The theories herein are explained, with one exception, without the use of graphs or mathematics.

174. *See* 56 Fed. Reg. 35,734, 35,737 (1991) (to be codified at 29 C.F.R. § 1630) (effective July 26, 1992) ("These [market] failures have been explained in three different ways in the seminal works of Becker, Thurow, and Arrow. These works originally addressed race discrimination, but they are equally applicable to discrimination against disabled workers."); *see also infra* notes 232-44 and accompanying text (discussing federal response to AIDS question in employment setting).
essence of prejudice and discrimination.\textsuperscript{175} When applied to AIDS and the workplace, Becker's model covers employers, employees, and customers. This section will discuss the taste for discrimination of employers, employees, and customers. The employer's taste for discrimination, which is the most dominant factor, will be discussed at length.

1. The employer's taste for discrimination

According to Becker, an employer who has a taste for discrimination will be willing to pay higher wages to ensure that certain groups are not extended offers of employment.\textsuperscript{176} Firms face a finite number of candidates to whom employment offers may be extended.\textsuperscript{177} This group is termed the labor market.\textsuperscript{178} The firm that discriminates, whether because of gender, skin color, national origin, or infection with a virus, excludes a portion of its labor market.\textsuperscript{179}

Briefly revisiting our hypothetical example helps illustrate. Assume that 100 people are eligible to work as waitpersons at Ronny's Place. Conditioning employment on the results of an HIV test would reduce the pool of eligible candidates. Fifteen percent of the applicants, for example, might test positive. The total number of eligible candidates would decrease to eighty-five. Ronny's Place, simply by implementing mandatory HIV testing, must pay a higher wage rate.

The argument is best illustrated by using simple supply and demand curves. In terms that economists use, the supply of workers shifts inward because a portion of the labor pool is excluded from

\[ \text{di} = \left( \frac{W}{W_m} \right) - 1 \]

where $W_m =$ the wage the employer would offer the AIDS victim or other minority. \textit{Id.; see also} Daniel S. Hamermesh \& Albert Rees, \textit{The Economics of Work and Pay} 350 (4th ed. 1988) (explaining Becker's theory of discrimination).

\textsuperscript{177} See Roy J. Ruffin \& Paul R. Gregory, \textit{Principles of Microeconomics} 331 (4th ed. 1990) (noting that employers face limited number of qualified candidates at each wage level offered in marketplace). Of course, if a firm offers a higher wage, the number of qualified job candidates will increase because more workers will be willing to work for a higher wage.

\textsuperscript{178} See id. at 328 (defining labor market as "an arrangement that brings buyers and sellers of labor services together to agree on pay and working conditions").

\textsuperscript{179} See Reynolds, \textit{supra} note 172, at 240-41 (noting that workers who are victims of discrimination will be excluded from labor market due to firms' unwillingness to pay equal wages to them vis-à-vis other candidates in labor market).
consideration. The number of waitpersons needed to staff Ronny's Place, termed the demand, remains constant.

Graph (a) represents the supply and demand for workers in a firm that does not test for HIV. The point where the demand curve (D) intersects the supply curve (S) is the equilibrium wage rate (P), which is the amount Ronald must pay his staff. Graph (b) represents the supply and demand for workers in a firm that requires HIV tests, and subsequently discriminates against AIDS patients. Because there are fewer candidates from which to choose, supply shifts inward and becomes S'. The demand for staff (D) remains constant. The point where the demand curve intersects the new supply curve is the new equilibrium wage rate (P') for the discriminating firm. The new wage rate increases because of the shift in supply. Therefore, the firm that requires an HIV test prior to employment is forced to pay a higher wage rate.\(^\text{180}\)

Economic rationality suggests that the profit-seeking firm that chooses to discriminate disadvantages itself because it is forced to pay a higher price for the same labor.\(^\text{181}\) An employer's decision to discriminate against those who test positive for HIV indicates that the employer is maximizing utility, not profits.\(^\text{182}\) The employer

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181. Id.

182. See HAMERMESH & REES, supra note 176, at 352 (noting that discrimination causes higher wages due to decrease in labor market).

183. See id. (stating that discriminatory employers maximize utility through willingness to
who discriminates on the basis of HIV values the composition of its workforce over monetary returns. Even though the equilibrium wage rate might be four dollars per hour, the employer would be willing to pay six dollars per hour to regulate the composition of its employees.

A worker who tests positive for HIV might not develop any debilitating symptoms of AIDS for ten years. In many instances the infected worker is as productive as any other worker. Assuming that the productivity of the healthy worker equals the productivity of the infected worker, the discriminating employer pays more for the same product. Labor is like any other commodity to the employer. Paying more for a worker with the same productivity is no different than paying more for the same, fungible widget. The employer pays higher-than-necessary wages, thereby forfeiting money profits to satiate its taste for discrimination.

In a system of competitive markets—assuming that other firms are not discriminatory—the firm that chooses to discriminate will fail. In a competitive market, no economic profits exist. The firm that pays a higher rate not to employ HIV-infected persons operates at a loss as compared to those firms willing to hire HIV-infected individuals. In the long run, the firm that discriminated will not survive.

sacrifice profits in form of higher wages for sake of indulging their tastes with regard to composition of their workforce).

184. See id. at 252-53 (noting that discriminatory employers sacrifice monetary returns to indulge taste for discrimination in workforce).

185. See supra notes 35-36 and accompanying text (noting that within 10 years of HIV infection, about one half of individuals develop AIDS); see id. (stating that those who test positive for HIV often do not manifest symptoms for many years).

186. See LLOYD G. REYNOLDS, MICROECONOMICS 99-100 (4th ed. 1982) (noting that firms treat labor like other factors of production when trying to minimize cost and maximize profits).

187. See ROGER MILLER, ECONOMICS TODAY 523-24 (6th ed. 1988) (noting that success in perfectly competitive market requires firm to provide product at market price). Economists speak in terms of "perfect competition" as a market structure. Id. at 522. The perfectly competitive firm is a firm that constitutes such a small part of the total industry that it cannot affect the price of the product it sells. Id. As a result, the perfectly competitive firm cannot affect the price of a good. Id. Four qualities characterize the perfectly competitive market: (i) there must be a large number of buyers and sellers; (ii) the product that is sold by the firms in the industry is homogeneous; (iii) there must be information about prices, qualities, and sources of supply; and (iv) any firm can enter or exit the industry without serious impediment. Id.

188. Id. at 531-32. Economic profits differ from accounting profits. Businesspeople generally regard accounting profits as total revenues less expenses. By comparison, economists view economic profits as total revenues minus total explicit and implicit costs. Economic profits take into account the opportunity cost of the capital that is invested into a business. In the perfectly competitive setting there are no economic profits, whereas in the monopoly setting, economic profits are expected. Id.

189. See RUFFIN & GREGORY, supra note 177, at 179 (noting that perfectly competitive firm must accept market price of labor to compete with other firms in same market).
the competition. Consumers would go to the firm that maintained lower prices, namely, the nondiscriminating firm. Returning to our example, the cost of a hamburger at Ronny's Place necessarily takes into account the higher compensation paid to its staff. For instance, the price of the same hamburger at a competitor might cost six dollars whereas the price at Ronny's Place would be eight dollars.

This economic analysis has some exceptions. If every firm in an industry were to discriminate against HIV-infected persons, no individual firm would be at an economic disadvantage. That is, Ronny's discriminating against HIV-infected persons would not disadvantage itself so long as every other restaurant in the industry also discriminated. Industry-wide discrimination would result in a higher cost of labor to all firms, ultimately translating into higher prices for the consumer. Thus, hamburgers everywhere would rise to eight dollars. No firm would receive the signal that it is engaging in economically irrational behavior.

Ignoring for the moment the morality and rationality of AIDS discrimination, it is unlikely that all firms in an industry would discriminate in a competitive market. Because a competitive industry is characterized by a large number of firms, some form of collusion would be necessary for every firm to discriminate. If only some firms discriminated, consumers would shift to those firms with lower prices, namely, the nondiscriminating firms that pay less for their labor. In the long run, the discriminating firms would be forced out of the market while nondiscriminating firms would survive.

It is easier to discriminate when the employer is not a small business acting as one player in a large industry, but rather is a single supplier comprising the entire industry. To the economist this is known as a monopoly. Generally, monopoly prices are higher

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190. See Reynolds, supra note 172, at 241 (noting that competitive forces should tend to eliminate discrimination by forcing discriminating firms to exit market).

191. See Ruffin & Gregory, supra note 177, at 180 (explaining that if firm A charges higher price than firm B for identical product, no rational buyer will buy from firm A).

192. See Vogel, supra note 180, at 977 (noting that if all firms discriminate in given economic market, no firm would receive signal that its behavior was economically unsound). This explains the necessity of antidiscrimination laws. Where there is industry wide discrimination, the market fails to provide economic disincentives. Where all firms in an industry discriminate against some groups these discriminatory firms are not at a competitive disadvantage vis-à-vis each other. Id.

193. See id. (asserting that result of discrimination across industry would result in higher prices for products).

194. See Reynolds, supra note 172, at 246-47 (analyzing discrimination in noncompetitive markets where monopoly power exists).

195. See Miller, supra note 187, at 112 (defining monopoly as "[a] firm that has great control over the price of a good... [or is] the only seller of a good or service"). See generally
than prices under perfect competition. Unlike the perfect competitor, the monopolist realizes economic profits that are conducive to the encouragement of discriminatory practices. In the monopoly situation, an employer has the financial freedom to seek out non-pecuniary returns, including discriminating against AIDS victims. In Becker's terms, a monopoly has a greater ability to pursue its taste for discrimination. The monopolist, because it receives a higher-than-normal price for its goods, can afford to pay a higher wage rate to its employees to ensure getting only certain groups in the workforce. The monopolist, as the only supplier in the industry, will not be at a debilitating disadvantage simply because it charges inflated prices that reflect its discrimination. Profits will be reduced, but the monopolist will not be forced to exit the industry.

An example helps clarify the issue. Assume that Ronald secured a patent for an ingredient, such as a spice, that made his hamburgers infinitely more tasty than his competitors' hamburgers. Ronny's Place would have a monopoly on those types of hamburgers. Because the patent prevents competition on that product, a higher-than-normal price could be charged. Ronny's Place would be reaping economic profits that would enable it to implement mandatory HIV testing.

The extent to which a firm will be able to implement mandatory HIV testing and subsequently discriminate against AIDS-infected employees varies with the level of competitiveness. A firm in a purely competitive industry lacks the profits to purchase according to its taste for discrimination, whereas a firm in a monopolistic setting may realize profits, thus enabling it to engage in discriminatory behavior. A firm in a market that is neither purely competitive nor monopolistic will be able to discriminate only to the extent it realizes economic profits.

_— WERNER HIRSCH, LAW & ECONOMICS, AN INTRODUCTORY ANALYSIS 315, 316 (2d ed. 1988) (describing economic incentive to monopolize market)._  

196. See RUFFIN & GREGORY, supra note 177, at 216-17 (discussing monopoly pricing).  

197. _Id._  

198. See REYNOLDS, supra note 172, at 246-47 (rationalizing that monopoly position allows discrimination because normal market concerns do not apply).  

199. See BECKER, supra note 173, at 46-47 (applying "taste for discrimination" analysis to monopoly situation).  

200. See REYNOLDS, supra note 172, at 246-47 (noting that discrimination is basically costless to firm operating under monopolistic conditions).  

201. For an empirical discussion of Becker's "taste for discrimination" model as applied to monopolies, see BECKER, supra note 173, at 47-50.
2. The employee's taste for discrimination

Becker's theory can also be applied to employees. Under this approach, employees might also have a taste for discrimination. Anxiety over the possibility of contracting HIV plagues those who work with an AIDS-infected employee. Uneducated employees fear working with those who are HIV-positive. A task as routine as sharing dishes in a cafeteria could frighten the ignorant staff worker, even though the dishes have been washed and sanitized. Because healthy workers will perceive their close association with infected workers as a risk, healthy workers will demand higher-than-normal wages to work with AIDS victims. If the job entails supervising workers who have AIDS, the manager of Ronny's Place, for example, might demand a $28,000 a year salary instead of the lower, normal rate of $23,000. Without the increased compensation, the employee has no reason to remain in the same setting, and would seek employment for the same wage rate at a firm that did not employ AIDS-infected workers. In order to keep healthy employees, the employer needs to pay a higher-than-normal wage rate to compensate for the employee's perceived risks. As a result, employers have an incentive not to hire HIV-infected persons because additional compensation would be required for all employees. Paying a higher wage rate to employees results in higher costs for the employer's goods. The firm that pays higher wages to its employees passes the costs to its consumers. The same results that occurred when the employer pays a higher wage to exercise its taste for discrimination are also seen when employees exercise their tastes for discrimination.

3. The customer's taste for discrimination

Finally, Becker's theory can be applied to customers, who also pay higher prices to discriminate against HIV-infected workers. As in the case with the employer and employee, whether a consumer...
harbors a taste for discrimination against AIDS victims depends on that person's education about the disease. The customers who apprise themselves about the modes of transmission of HIV will have a lesser taste for discrimination, whereas the consumers who succumb to the AIDS hysteria will be willing to pay more to discriminate. Put another way, an informed consumer will be less willing to pay more to avoid AIDS victims than will the ignorant consumer.

The consumer's taste for discrimination is also a function of the type of business that the employer operates. In some industries a consumer would be less likely to pay higher prices to avoid people with AIDS. For example, it is doubtful that a person who subscribes to a periodical such as Time would be willing to pay an additional amount if the publisher hired only noninfected journalists. In that setting, the consumer never comes into contact with the reporter, and even the most ignorant among us knows that HIV cannot be transmitted from a reporter writing for the magazine to the reader. The consumer gains nothing from paying even a penny more than the normal subscription rate.

A consumer's taste for discrimination displays itself more distinctly in the restaurant setting. Food, unlike a periodical, gets ingested by the consumer. The fear that HIV might be transmitted by a waitperson with AIDS causes the consumer to foster an increased taste for discrimination. As contracting HIV means certain death, the uneducated consumer's taste for discrimination results in the consumer's willingness to pay eight dollars for a hamburger instead of six dollars, so long as healthy workers cook and serve the hamburger.

B. Costs to Society

Discrimination against persons infected with HIV is inefficient to society as well as to the individual employer. Society suffers because investment in training of employees is lost. Productivity levels are also lost. An employer expends resources to train an individual for a particular position. Initially, there is no return on that capital expenditure. In the hypothetical example, Ronald teaches

208. See Reynolds, supra note 172, at 242 (noting that consumer discrimination is much more relevant in sales-oriented jobs as opposed to production-oriented jobs).

209. See id. (inferring that because restaurant requires close contact with consumers, level of potential taste for discrimination is higher).

210. See Vogel, supra note 180, at 975 (arguing that expenditures on workers' prior training will be wasted when worker is discriminated against and cannot find similar employment).

211. See id. at 974-76 (contending that employers who discharge employees on basis of unfounded fears waste investment that has been made to increase employees' productivity).

212. Id. at 975.
new employees the specifics of Ronny's Place, such as the items on the menu and the computer system. First-time employees are instructed on the specifics of their positions. An applicant who never before has tended bar, for example, needs to learn the mechanics of that position. The resources that the employer expends on training realize no return until the employee actually begins working.

AIDS cannot be contracted by casual contact.\(^{213}\) Terminating a current employee because of a positive result on an HIV test promotes inefficiency in three ways.\(^{214}\) First, terminating an HIV-infected employee wastes at least some of the resources spent on training the individual.\(^{215}\) For the inexperienced employee learning a new trade, all the training will not be wasted if that employee subsequently secures a similar job, but with a different business entity.\(^{216}\) However, that portion of the training specifically relating to Ronny's Place will be wasted. Inefficiency also occurs if the employee remains with the same business entity, but transfers to a different position.\(^{217}\) Second, a rational employer chooses an employee based in part on the perceived potential productivity of that worker.\(^{218}\) Terminating that employee means that the employer loses a high-caliber producer. Third, workers develop skills with time on the job.\(^{219}\) Therefore, when an AIDS victim gets terminated or reassigned due to society's irrational fears, society loses the benefit of the productivity that this worker gained from experience on the job.

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\(^{213}\) See supra notes 38-68 and accompanying text (discussing ways HIV may be transmitted).

\(^{214}\) See Vogel, supra note 180, at 974-75 (discussing economic inefficiency in light of employment discrimination).

\(^{215}\) See supra note 210 and accompanying text (discussing loss of money spent on worker who is subsequently fired by discriminating firm).

\(^{216}\) See Vogel, supra note 180, at 975 (contending that employee training is especially wasted when employee cannot be placed in alternative equal employment). For example, an inexperienced bartender who learns the trade from on-the-job experience at Ronny’s Place, but subsequently is terminated after an HIV test, might secure a job elsewhere because of the past bartending training.

\(^{217}\) An example of this would occur if the bartender was transferred to a position in which food handling was not necessary, perhaps to corporate headquarters.

\(^{218}\) See Vogel, supra note 180, at 974-75 (positing that employees are hired because their productivity potential is greater than those not hired).

\(^{219}\) See id. at 975 (noting that employees learn on-the-job skills not learned during training). Keeping within the restaurant framework, a veteran bartender is infinitely more productive than a bartender who is first learning to pour. The experienced bartender finds common denominators in drinks. A “Martini” and a “Tom Collins,” for example, both contain gin. The experienced bartender will prepare the glasses for the drinks simultaneously, only needing to retrieve the bottle of gin once. By contrast, the inexperienced bartender will pour the drinks separately, which requires retrieving the bottle of gin twice. Thus, the inexperienced bartender takes much longer to produce the same product.
V. CONCLUDING OBSERVATIONS

A. The States' Response

Legislators at both the state and federal level have begun to respond to the AIDS question in the employment setting. Some inroads have been made. Many states have enacted laws that deal with HIV-related or AIDS-related issues in the workplace. Recent state legislation in several states forbids employers from requiring applicants or current employees to submit to HIV-antibody tests, except in limited circumstances.\(^{220}\)

The Florida statute, representative of this type of state legislation, specifically addresses discrimination on the basis of AIDS, ARC, and HIV. Under the Florida provision, an employer may not "require an individual to take a human immunodeficiency virus-related test as a condition of hiring, promotion, or continued employment unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification for the job in question."\(^{221}\) An em-

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\(^{220}\) CAL. HEALTH & SAFETY CODE § 199.22 (West 1990) (requiring written, informed consent of subject as precondition to administering test for antibodies associated with causative agent of AIDS); FLA. STAT. ANN. § 760.50(3)(a) (West Supp. 1992) (mandating that no person be required to submit to human immunodeficiency virus-related test unless absence of human immunodeficiency virus infection is bona fide qualification for job sought); ME. REV. STAT. ANN. tit. 5, §§ 19203-19206 (West Supp. 1991) (requiring informed written consent of subject and limiting disclosure of results of HIV test to subject, health care providers designated by subject, persons designated by subject, and certain government agencies and research facilities); MASS. GEN. L. ch. 111, § 70F (Supp. 1991) (prohibiting employers from requiring HTLV-III antibody or antigen test as condition for employment); TEX. HEALTH & SAFETY CODE ANN. § 81.102 (West 1991) (establishing that no person may require another to undergo procedure to help determine presence of AIDS or HIV infection unless procedure relates to bona fide occupational qualifications of individual and no less discriminatory means exists); VT. STAT. ANN. tit. 21, § 495 (Supp. 1990) (stating that it is unlawful employment practice to discriminate against employee on basis of HIV-related blood test or to require another person to submit to HIV-related blood test); WASH. REV. CODE § 49.60.172 (Supp. 1988) (mandating that employers not require persons to submit to HIV test or discriminate on basis of HIV test unless absence of HIV infection is bona fide occupational qualification).

For instance, Massachusetts and Vermont prohibit employers from testing for the HIV virus as a condition for employment. MASS. GEN. L. ch. 111, § 70F (Supp. 1991); VT. STAT. ANN. tit. 21, § 495(a)(6), (7) (Supp. 1990). California and Maine limit the testing of employees and job applicants for the HIV virus by requiring the informed, written consent of the subject to the disclosure of test results as a precondition to testing. CAL. HEALTH & SAFETY CODE § 199.22(a) (West 1990); ME. REV. STAT. ANN. tit. 5, § 19203-A (West 1991). Florida, Texas, and Washington allow applicants for employment or current employees to be tested for the HIV virus only if the absence of HIV infection is a bona fide occupation qualification for the job at issue. FLA. STAT. ANN. § 760.50(3)(a) (West Supp. 1992); TEX. HEALTH & SAFETY CODE ANN. § 81.102 (West 1991); WASH. REV. CODE § 49.60.172 (Supp. 1988).

Texas also requires that an employer show that testing is necessary as a bona fide occupational qualification. TEX. HEALTH & SAFETY CODE ANN. § 81.102(b) (West 1991). Similarly, Washington limits the scope of permissive testing by finding a bona fide occupational qualification to exist when "performance of a particular job can be shown to present a significant risk, as defined by the board of health by rule, of transmitting HIV infection to other persons, and there exists no means of eliminating the risk by restructuring the job." WASH. REV. CODE § 49.60.172(3) (Supp. 1988).

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ployer who justifies HIV testing by claiming that a bona fide occupational qualification exists must satisfy two burdens of proof. First, the HIV-related test must be necessary to determine whether employees are able to perform the duties of their particular position, or to determine whether employees present a significant risk of transmitting HIV to other persons in the course of normal work activities. Second, no means of reasonable accommodation short of requiring that the individual be free of HIV must exist. The provision has not yet been interpreted by any judicial forum.

B. The Federal Response

On July 26, 1990, President Bush signed the Americans with Disabilities Act of 1990 (ADA) into law. The ADA, which was introduced by the 101st Congress in May 1989, prohibits workplace discrimination based on a wide range of disabilities, including AIDS. The ADA sets the parameters within which HIV-infected persons may enforce their rights against discrimination in the areas of employment, public accommodations, transportation, public services, and telecommunications.

222. Id. § 760.50(3)(c)(1).
223. Id. § 760.50(3)(c)(2).
224. The Florida Court of Appeals expressly cited the provision in Hummer v. Unemployment Appeals Comm'n, 573 So. 2d 135, 138 n.1 (Fla. Dist. Ct. App. 1991). The court held that an HIV-positive employee was entitled to unemployment benefits and did not engage in misconduct by falsely representing to his employer that he was selling products on the side, when, in fact, he had taken one leave day a month for HIV treatment. Id. at 138. The court based its holding on past cases involving alleged employee misconduct and ruled that Hummer's misrepresentations did not amount to misconduct. Id. Referring to section 760.50, the court stated that the "[l]egislature has expressly recognized that AIDS victims suffer from irrational discrimination." Id. Further, the court observed that the "statute prohibits any AIDS-related discrimination in employment, housing, public accommodations, or governmental services." Id. at 138 n.1.
226. The Americans with Disabilities Act of 1990 (ADA), § 102(a), Pub. L. No. 101-336, 104 Stat. 327, 331-32 (to be codified at 42 U.S.C. § 12112). Section 102(a) states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Id. The ADA broadly defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Id. § 3(2), 104 Stat. at 329-30 (to be codified at 42 U.S.C. § 12102). Of particular significance to AIDS victims, the ADA specifically extends the prohibition against discrimination to include discrimination on the basis of medical examinations and inquiries.
228. Id. §§ 301-310, 104 Stat. at 353-65 (to be codified at 42 U.S.C. §§ 12181-12189).
The ADA specifically addresses the question of whether an employer may screen applicants and current workers for HIV. Under the ADA, an employer may not require an applicant for a job to submit to a medical examination either prior to a job offer or as part of a conditional job offer. The employer may, however, question applicants as to their ability to perform job-related functions such as driving a car, lifting fifty pounds, or answering the telephone, so long as these are essential functions of the job.

Under the ADA, an employer is allowed to extend a conditional job offer to an applicant. Once the employer determines that an applicant possesses the necessary qualifications for a position, the employer may condition the employment on the applicant’s results of a medical test. The ADA limits the use of these examinations in three ways. First, the employer must require all applicants to take a medical test; the employer may not require a select group of applicants to submit to the test. The requirement of an HIV test, for example, must be a routine one requested of all applicants for a particular job category. Second, the results of any medical examination must be kept strictly confidential. Third, the results of the medical examination may not be used to withdraw the conditional job offer from an applicant unless the results indicate that the applicant is no longer qualified to perform the job. This section of the ADA is probably the most important provision pertaining to HIV testing.

The two-step process requiring a conditional job offer prior to testing protects “applicants with disabilities by allowing them to isolate, if and when, their disability unjustifiably influenced a hiring decision.”

232. Id. § 102(c)(2)(A).
233. Id. § 102(c)(3)(A)-(C).
234. Id. § 102(c)(2)(B).
235. Id. § 102(c)(3) (“A covered entity may require . . . a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination.”).
236. Id. § 102(c)(3)(A).
237. Id.
238. Id. § 102(c)(3)(B) (mandating that information obtained be stored in separate files and treated as confidential). Information, however, may be given to supervisors concerning necessary restrictions of duties, first aid and safety personnel, and government officials investigating compliance with the ADA. Id.
239. Id. § 102(c)(3)(C). Withdrawing a conditional offer based solely on the test results and not on the applicant’s inability to perform the job constitutes discrimination thereby violating the mandate of § 102(c)(3)(C) that “the results of such examination . . . [be] . . . used only in accordance with this subchapter.” Id.
240. Chai R. Feldblum, Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View From the Inside, 64 TEMP. L. REV. 521, 532-33 (1991) (stating that requirement prohibiting withdrawal of conditional job offer unless applicant is no longer qualified to perform job is of key importance to Act).
practice.” If an applicant who was judged sufficiently qualified to receive a conditional job offer can assume that the only medical information of interest revealed was that the person was HIV-positive, the applicant could probably isolate HIV status as the determining factor in the employment decision.

The employment-related provisions of the ADA become effective on July 26, 1992 for employers with twenty-five or more workers, and on July 26, 1994 for employers with fifteen to twenty-four workers. The ADA does not cover employers with fewer than fifteen workers, as they are not covered by Title VII of the Civil Rights Act of 1964.

C. The Bigger Picture

Resting alone, in a vacuum, applying the Beckerian model to help analyze the economic issues surrounding mandatory HIV testing and discrimination against AIDS victims is of limited usefulness. The model merely helps predict the behavior of employers, employees, and consumers. To that end, it is an effective lens through which to view the AIDS question. But one should not examine the bark of a tree without examining the tree itself. What doors of thought are opened by studying the economics of HIV in the workplace? Should not the appraisal also consider those disciplines that are higher on the jurisprudential food chain? In short, how does the economic assessment shed light on the bigger picture?

I. Utility

Examining the economic issues that surround AIDS provides an effective springboard into an investigation of whether discrimina-

241. *Id.* at 533.
242. *Id.* (observing that two-step process allows applicants with disabilities to isolate when their disability influenced hiring process).

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job related and consistent with business necessity.

tion against HIV-infected persons violates, or is in accordance with, traditional notions of utility. A society's failure to create a law prohibiting mandatory HIV testing and discrimination based on HIV, or its creation of a law requiring HIV testing, constitutes anti-utilitarian behavior. In simplest terms, utility means achieving


By utility is meant . . . [that which] . . . tends to produce benefit, advantage, pleasure, good, or happiness . . . or . . . to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community . . .

Id.

246. In several settings, legislation is being introduced that would mandate HIV testing. For example, a dentist in Florida who allegedly infected his patients with AIDS "sparked an avalanche of bills in the state Legislature where some lawmakers seek to expand vastly the power of the state to test people against their will for the disease and to keep track of the results." Ellen McGarrahan, Bills Urge Mandatory AIDS Tests, MIAMI HERALD, Apr. 2, 1991, at 6A; see supra note 57 (discussing example of Florida dentist in context of various modes of transmission of disease). These bills would require that mandatory HIV tests be required of "doctors, patients, people charged with sex crimes or indecent behavior, people seeking treatment at hospitals receiving public money and drug users . . ." McGarrahan, supra, at 6A.


It is too soon to tell how this legislation will fare. An Ohio bill concerning the HIV testing of health care providers passed the State House and is being considered by the State Senate. 1991 Ohio H.B. 419, 119th Gen. Assembly, Reg. Sess. The bill would require a dentist, dental hygienist, nurse, podiatrist, or physician who has received a positive HIV test result to inform the Department of Health, the licensing board, the health care facility employer, and certain patients. Id. In comparison, a New Hampshire bill requiring health care providers who perform certain procedures to be tested for communicable diseases failed to pass the State Senate. 1991 N.H.S.B. 312, 152d Legis. Sess., Reg. Sess.

In many instances, the proposed legislation depicts the ignorance and irrationality that pervade public reaction to the AIDS epidemic. An Arizona bill would repeal the law requiring
the most good for the most people in a society. Irrational hysteria over the remote, almost nonexistent possibility of contracting AIDS by casual contact causes society as a whole to lose, and simultaneously inflicts additional pain upon the afflicted.

Society loses because the price of goods increases when businesses are allowed to discriminate against HIV-infected persons. The market would control price increases but for the possibility that every firm in an industry would choose to discriminate. Ideally, the nondiscriminating firm would be the norm. A firm that discriminated would need to charge higher prices, forcing it to leave the industry. The market fails to regulate prices, however, when every firm discriminates, resulting in the price of all goods increasing. Consequently, consumers are left with less disposable income than they would have under a system that does not permit mandatory HIV testing. Because a larger portion of the consumer's fixed income is being spent to consume the same amount of goods, less is available for consumption of other goods.


Further complicating matters is a recently released study by the Centers for Disease Control (CDC). Update: Investigations of Persons Who Have Been Treated by HIV-Infected Health-Care Workers, 41 Morbidity & Mortality Wkly. Rep. 344 (1992). The CDC evaluated the HIV status of 15,795 people treated by 32 HIV-infected health-care workers. Id. at 345. The CDC identified 84 patients of the HIV-infected health-care workers, specifically of dentists and surgeons, as HIV positive. Id. After investigating 47 of those cases, the CDC uncovered no evidence that any of the patients contracted the virus from health-care workers. Id. at 346. The CDC investigation concluded that "the risk for HIV transmission from an infected [health-care worker] to a patient during an evasive procedure is very small. The investigation of a dental practice in Florida remains the only instance in which transmission of HIV from an infected [health-care worker] to patients has been reported." Id.

247. See supra notes 176-219 and accompanying text (discussing costs of discrimination in workplace).

248. See supra notes 192-93 and accompanying text (discussing effects of industry-wide discrimination).

249. See supra notes 188-91 and accompanying text (stating that in perfectly competitive market, discriminatory businesses would be forced to incur higher costs, and thus, be driven out of business).

250. See supra notes 192-93 (explaining that exception to market regulation of employment occurs where every firm in industry discriminates, thereby ensuring that no individual firm is at economic disadvantage).

251. Utility analysis also plays a role in economic theory, although it differs from Bentham's utilitarian theory. In economic terms, utility means "[t]he want-satisfying power of a good." JAMES HARVEY DODD & CARL W. HASEK, ECONOMICS: PRINCIPLES AND APPLICATIONS 66 (1948) (emphasis in original). Assume that a piece of pie represents the income that a consumer earns in a year. The pie has eight slices, each capable of being traded for goods. Under a system that prohibits HIV discrimination in the workplace, a consumer could eat out in a restaurant for a quarter of a piece of pie. The remainder of the pie can be used to purchase other goods. Under a system that allows HIV discrimination in the workplace, the same consumer will spend a half of a piece of pie for the same good, leaving less of the pie for other goods. Because HIV cannot be transmitted through casual contact, the consumer
Similarly, society loses because those who are HIV-positive are forced to leave the workforce. The social costs are great because less supply of labor translates into higher prices, again resulting in losses to consumers. Discrimination diminishes utility because wealth—both to the consumer and to society—is lessened. Some will argue that the possible risks of contracting HIV outweigh any costs to society, and that utility lies in expounding laws requiring testing in the workplace, among other places. This reasoning comes from lack of education and is without medical support. AIDS cannot be transmitted by casual contact; injecting

would not rationally choose to spend more pie for the same good. In other words, the consumer would not have a taste for discrimination because to do so would be irrational.

252. See supra notes 210-19 and accompanying text (describing losses to society caused by discrimination against AIDS victims in workplace).

253. See supra notes 179-81 and accompanying text (describing how HIV discrimination affects market price of labor).

254. Bentham expressly sets forth those pleasures that should be taken into account when evaluating an activity from a utilitarian perspective. According to Bentham, the several simple pleasures of human nature include sense, wealth, amity, good name, power, piety, benevolence, memory, imagination, expectation, and relief. Bentham, supra note 245, at 279-80 (emphasis added).

255. Education about AIDS needs to begin at an early age. See supra note 157 and infra note 257 and accompanying text (illustrating irrational hysteria with which people often react toward persons with AIDS). In addition to eliminating these fears, early education is necessary to prevent individuals from contracting the virus. The Federal Centers for Disease Control predicts that over 300,000 cases of AIDS will be reported in the next two years, up from just over 200,000 at the present. AIDS Epidemic Passes Milestone: 200,000 Cases, Over 100,000 Dead, ATLANTA TRIB., Jan. 16, 1992, at 4A.

In Florida, the Dade County School System is implementing a curriculum that would begin teaching children about AIDS in kindergarten. Charisse L. Grant, School Curriculum Calls for Frank Lessons on AIDS, MIAMI HERALD, Apr. 27, 1991, at 5B. Kindergarten teachers will begin with the basic facts about AIDS, including identifying it as the acronym for acquired immune deficiency syndrome. Id. Children in the fourth grade will discuss how AIDS is transmitted. Id. By the fifth grade, students would learn about the use of condoms as a measure to prevent transmission. Id. Students in the middle and high school grades will be exposed in detail to the medical and sociological impact of the disease. Id. In addition to the Dade County effort, other public schools are emphasizing early education of children of the hazards of HIV infection. See Maia Davis, Ventura County News Roundup: Moorpark 7th-Graders Urge AIDS Education, L.A. TIMES, Feb. 27, 1992, at B2 (stating that means of spreading AIDS and methods of preventing its spread are currently part of seventh-grade curriculum); Leslie Knowlton Herzog, Elementary Schools to Offer AIDS Class, L.A. TIMES, Jan. 27, 1992, at B5 (indicating that Newport-Mesa Unified School District, California, is beginning second year of teaching fifth- and sixth-grade students on AIDS and AIDS prevention); Ray Smith, T.H.E. Group to Be In; Teen Mentors-In-Training Learn That Safe Sex Is Cool, NEWSDAY, Jan. 21, 1992, Closeup, at 25 (describing group of teenagers who train other students about HIV virus and to humanize AIDS affliction by introducing students to persons with AIDS that are their own age); Marie C. Franklin, An Elementary Understanding of AIDS; Teaching the Youngest Students About the Deadly Disease; Teaching Tools, BOSTON GLOBE, Dec. 15, 1991, at A30 (detailing efforts of fourth-grade teacher to instruct students about AIDS and HIV, including methods of transmission, protection against disease, and not to fear people afflicted with AIDS); Elizabeth New Weld, Today's Classes Discuss HIV, T-cells and Hope, BOSTON GLOBE, Nov. 24, 1991, North Weekly, at 1 (providing overview of curriculum for ninth graders); Don Aucoin, Massachusetts Soon to Issue K-12 Curriculum Guide on AIDS; Recommendations Are Geared to Age, BOSTON GLOBE, Nov. 13, 1991, Metro/Region, at 1 (reporting Massachusetts' adoption of state-wide plan to teach public school students about AIDS beginning in kindergarten, with focus on comprehending disease and its methods of transmission, as well as undercutting youths' ignorance and negative atti-
bodily fluids is a requisite to transmission.\textsuperscript{256} Any statement to the contrary is simply unfounded. The most good for the most, in short, means resisting the temptation of allowing blanket HIV testing in the workplace. The implicit and explicit costs to society that would result from implementing HIV testing and not prohibiting the subsequent discrimination greatly outweighs the remote possibility of contracting AIDS. The greatest good for the greatest number means, from a utilitarian perspective, that our legislative and judicial practitioners should not expound laws that sanction discrimination by implementing HIV testing.

2. Customs as a source of law

The customs that develop in response to the AIDS epidemic will help define the laws that will evolve. Society must fear the possibility that utility will be superseded by customary acts, which in turn will provide the impetus to the creation of laws. Society's response to HIV is still in the formative stages. Some who come into contact with AIDS victims show compassion, understanding, and rationality, while others respond with panic and hysteria.\textsuperscript{257} If responses tend toward the irrational, unfortunate customs such as mandatory HIV testing in unnecessary arenas will develop.

As these customs develop, so too will the law. Social customs pro-

\textsuperscript{256} See supra notes 38-68 and accompanying text (discussing methods by which transmission of AIDS virus is possible).\textsuperscript{257} Hysteria seems to be more the norm than the exception. A journalist captured the emotion well:

No sooner had the rumor about the woman begun last December than the phone calls to her house started.

"Leave town now," the voices would say. Or more ominously, just long, heavy breathing and the incessant "click" of the phone.

Then came the stares on the street, the whispers, the little things—like when the grocery cashier refused to place change in her hand. Or when the drugstore clerk disinfected the counter after she had made a purchase.

By then many in this rural community [Columbia, Louisiana] of 680 people had heard: Although she showed no physical symptoms, the woman had tested positive for the human immunodeficiency virus.

Marilyn Milloy, Victim of AIDS Lives Rural Nightmare, MIAMI HERALD, Apr. 21, 1991, at 12A. Education and public awareness of the HIV virus and AIDS, however, may be increasing. Former professional basketball star, Earvin "Magic" Johnson, in particular, has raised the public-consciousness of the HIV virus. Of Johnson's 25-point, 9-assist, 5-rebound, and 2-steal performance in the 1992 NBA All-Star Game, it was observed that "more than anything . . . Johnson special-delivered his intended message—that a person inflicted with the AIDS virus can be exceedingly productive." Jack McCallum, Most Valuable Person, SPORTS ILLUSTRATED, Feb. 17, 1992, at 19-20.
vide the energy for law; they are its source. As Jean Dabin commented: "Nor is there anything to prevent a custom that originally is a moral one or one of manners from attaining the rank of a legal custom. . . ."258 Where education about AIDS fails, and customs and habits develop such that mandatory HIV testing becomes the norm, laws implementing utilitarian objectives will follow.

If the immediate attempts to educate society about AIDS fail, time should eventually eradicate the irrational responses to HIV.259 If laws arise from the irrational customs that develop, then time will erase those laws. Reason cannot be denied and will ultimately prevail.260 Indeed, "[m]any of the legal and moral rules which obtain in the most civilized communities, rest upon brute custom, and not upon manly reason. They . . . are deeply tinctured with barbarity . . . [and] will gradually disappear."261 That AIDS cannot be transmitted by casual contact, which is "truth," will eventually come to be knowledge and override any contrary beliefs.262 The myths that sur-

258. Jean Dabin, General Theory of Law, in THE GREAT LEGAL PHILOSOPHERS 466, 468 (Clarence Morris ed., 1959) ("This phenomenon will be brought about precisely when in the public . . . there germinates the idea that the effective practice of these morals or these manners touches in some manner upon the life of the group or its social ideal . . . . Moral or social conformity thus comes to generate the judicial rule."); Friedrich Carl von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence, in THE GREAT LEGAL PHILOSOPHERS 290, 291 (Clarence Morris ed., 1959) ("The sum . . . of this theory is that all law is originally formed in the manner, in which, in ordinary but not quite correct language, customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence,—everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver."). See Benjamin Cardozo, The Nature of the Judicial Process, in THE GREAT LEGAL PHILOSOPHERS 510, 519 (Clarence Morris ed., 1959) ("Life casts the moulds of conduct, which will someday become fixed law. Law preserves the moulds, which have taken form and shape from life."); Thomas Aquinas, Summa Theological, in THE GREAT LEGAL PHILOSOPHERS 57, 79 (Clarence Morris ed., 1959) (stating that prevailing custom obtains force of law by toleration of custom by lawmakers).

259. Even William Shakespeare understood that time, eventually, eradicates irrational laws and customs. He wrote:

Time, as Chorus:
[S]ince it is in my power,
To o'erthrow law and in one self-born hour
To plant and o'erwhelm custom.

WILLIAM SHAKESPEARE, THE WINTER'S TALE, act 4, sc. 1.


261. Id.

262. Knowledge differs from belief in that knowledge is truth, whereas belief is speculation:

SOCRATES: Now take this point. You would agree that there is such a thing as "knowing"?
GORGIAS: Certainly.

SOCRATES: And such a thing as "believing"?

GORGIAS: Yes.

SOCRATES: Well, do you think that knowing and believing are the same, or is there a difference between knowledge and belief?

GORGIAS: I should say that there is a difference.
round AIDS and seize the unsophisticated mind will ultimately fail for want of reason. Reason opens the door so that truth may enter.

That reason cannot be denied should not be a surprise because nature is inherently rational, as it is controlled by reason. Accepting the medical truism that AIDS cannot be transmitted by casual contact, and the economic truism that AIDS-based discrimination is irrational, the only conclusion is that mandatory HIV testing in the workplace and AIDS-based discrimination contravene reason. Eventually society will rid itself of that which runs contrary to reason; mandatory blanket HIV testing will be prohibited.

3. Final remarks

If boundaries of time and place could be transcended, more light could be shed on the resolution of the AIDS question. A conference could be held in which the renowned thinkers from antiquity—Aristotle, Plato, Aquinas, Locke, Hobbes, Hume, Rousseau, Kant, Bentham, Hegel, Mill, Dewey, Cardozo, and Pound—would lead the way for today's academicians and practitioners to answer the AIDS question. Bentham and Becker, and Plato and Posner, could brainstorm and jointly pave the way for society. Together they would reason rationally and without the effects of the media's socialization, relying on each other's mental strength to attain objectivity. They would find a way to inject reason into the minds of the masses, such that the simple truism—that AIDS cannot be transmitted by casual contact—would be understood, and employers would reconsider what seems to be the emerging trend of forcing their employees to submit to mandatory HIV testing.

SOCRATES: Quite right; and you can prove it like this. If you were asked whether there are such things as true and false beliefs, you would say that there are, no doubt.
GORGIAS: Yes.
SOCRATES: But are there such things as true and false knowledge?
GORGIAS: Certainly not.
SOCRATES: Then knowledge and belief are clearly not the same thing.

PLATO, GORGIAS 31 (Penguin Classics ed., 1960). Knowledge is that AIDS cannot be transmitted through casual contact. Society's ignorant belief is that it can.

263. See Georg Wilhelm Friedrich Hegel, Philosophy of Right, in The Great Legal Philosophers 303 (Clarence Morris ed., 1959) ("So far as nature is concerned, people grant that . . . what knowledge has to investigate and grasp in concepts is this actual reason present in it. . . ."). This conclusion is also supported by John Locke and his notions of the state of nature. Locke asserted that "[t]he state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind. . . ." John Locke, Two Treatises of Civil Government, Book II, Of the State of Nature, in The Great Legal Philosophers 137 (Clarence Morris ed., 1959) (emphasis added).