Federal Ruling Reins In Liberal HIV Testing Law, Consensus Still Lacking on Controversial Issue

Despite attempts in recent years to destigmatize AIDS by treating the illness like any other infectious disease, an Alabama court says it still isn't so.

In an October ruling, a federal judge in Montgomery, Ala., declared unconstitutional the portion of a state law that allowed HIV testing without written, informed consent if, based on a physician’s “reasonable medical judgment,” the patient is at high risk for infection.

Overall, the 2-year-old law requires HIV testing with written, informed consent. But it listed three exceptions. Still intact are provisions that state explicit consent is unnecessary for the protection of health care workers, or if knowledge of the patient’s HIV status will change the course of medical care.

By upholding the two exceptions, advocates who believe that there is no substitute for explicit consent say the ruling doesn’t go far enough. However, the decision appears to halt the pendulum pushed by some groups, including the American Medical Association (AMA), that believe AIDS will never be depoliticized until it is treated like any other infectious disease for which testing does not require explicit consent.

United States District Court Judge Harold Albritton ruled that nonconsensual HIV testing based on physicians’ perception of patient risk violates the Fourteenth Amendment’s equal protection clause. More than a year in the making, the decision is significant because it is the first on HIV testing and informed consent to be decided in federal court. Thus, it stands as a precedent that federal district courts throughout the country may choose to follow.

Constitutionality of Testing

On June 5, 1991, Robert Hill, a volunteer at a Birmingham, Ala., AIDS treatment clinic, was 54 years old and single. Based on the state law, which had gone into effect just a month earlier, Hill felt that he might be perceived by many doctors to be at high risk for HIV infection and subjected to testing without his knowledge or consent. He felt uncomfortable seeking any type of medical care. But instead of avoiding physicians’ offices, he sued to change the law.

Hill and his Birmingham attorneys, Thomas Baddley and Wendy Brooks Crew, attempted to have the entire law struck down. Their lawsuit charged that the statute was vague, discriminatory, and violated constitutional rights to privacy and equal protection.

“We would prefer that doctors talk about it with patients, about why they may need to test. But many don’t choose to do that,” Hill says. Even so, he and his attorneys say they won their specific objective—ending discriminatory, judgmental practices—when Albritton declared only the first of the three exceptions unconstitutional and upheld the remainder of the law.

Albritton ruled that the first exception violated the constitutional right to equal protection because it created a classification of people—those considered to be at high risk for HIV infection—and then allowed them to be treated differently because testing could be done without consent.

“Although the disease itself is not discriminatory,” Albritton wrote, “the evidence established that individuals who test positive for HIV or who have AIDS are discriminated against,” and so testing must be done with the patient’s full acknowledgment and for reasons more substantial than perception of risk.

The ruling also noted that the stricken exception would not curb the spread of AIDS or further the state’s interest in public health. It could cause many high-risk individuals to avoid medical care when they might have agreed to testing if physicians conducted proper counseling and education.

“It’s a wonderful opinion: sober, well-reasoned, and well thought out,” says Brooks Crew.

Oddly enough, defense attorney Eric Johnston doesn’t disagree. He represented the state’s case, defending legislation that was drafted by the Medical Association of the State of Alabama in Montgomery. Its aim was to permit testing if health care workers were exposed to blood or fluids from patients who would not or could not give consent to an HIV test. It also included that AIDS patients be treated the same as patients with other infectious diseases.

However, Johnston described the federal ruling as one that merely corrected “superfluous” language in the law rather than changing it substantially. He says the judge threw out an exception that had no medical application for testing and therefore was irrelevant in the statute. “The outcome is the same, because physicians will still make the same medical judgments as before. The judge just said, ‘Don’t test for the fun of it.’”

Both sides also note that the ruling has a large loophole: it does not permit drawing blood without informed consent solely for the purpose of testing based on perceived risk. However, it does allow testing of previously drawn blood without consent. “It is de facto testing without informed consent,” Hill concedes.

Medical Society Executive Director Lon Conner says that’s irrelevant. “Physicians have not been testing without consent, so this will not affect them to a great extent. We are extremely pleased that the law still protects health care workers. Overall, the ruling will clarify what is legal, so it will have a positive effect on how physicians deal with this issue.”

Impact Outside Alabama

According to the Intergovernmental Health Policy Project of George Washington University, Washington, DC, 38 states require informed consent for HIV testing; 22 allow testing without it for emergency care or if the patient is unable to consent. Also, 30 states allow testing without patients’ consent if health care workers or emergency personnel have been exposed to HIV.

Lisa Bowleg of the project’s AIDS Policy Center expects that the ruling will help some states refine rather than revise their statutes. “The most egregious violation of this law was that physicians could test because they thought someone was in a high-risk group. Other states generally have steered clear of that.”

However, Bowleg says, some states have loopholes because they say testing without consent is allowed when “medically necessary,” but they don’t define the term. “There is a potential for discrimination. I hope someone will test this and go back and revise their laws.”

Policy matters are more complex. Major health and medical groups haven’t arrived at any consensus on many issues surrounding HIV testing. The Centers for Disease Control and Prevention, Atlanta, Ga., says that in hospitals and clinics, nonemergency patients should be offered counseling and testing with informed consent and in accordance with local laws. The American Academy of Orthopedic Surgeons and the American Society of Internal Medicine have
similar views: that testing be voluntary and include counseling.

AMA Policy

American Medical Association policy says physicians should be able to test for HIV, as indicated by their medical judgment, without explicit informed consent and that general consent given for hospital treatment is adequate to include HIV testing.

However, notes AMA Trustee Nancy Dickey, MD, the Association's ethics policy states that physicians should not knowingly and intentionally break the law. She also notes that the AMA believes that "whenever possible, communication, if it is explicit consent or education, is a desired part of evaluating patients for possible HIV disease."

Dickey says the Alabama ruling shows how complex the issue remains after years of discussion. Many AIDS advocacy groups are more blunt. "The decision is utterly irrational," says Michael Isbell, director of the AIDS Project of the Lambda Legal Defense and Education Fund Inc, New York, NY. He says there should be no exceptions to explicit, informed consent.

Isbell points out that exceptions for the protection of health care workers "are inexplicable." He says the medical community has determined that it is inappropriate to consider patient testing as a means of infection control because universal precautions have been proven effective. What's more, he says, postexposure prophylaxis with zidovudine (AZT) has not been shown to prevent infection with any certainty.

But he calls it "even more disturbing" that Albrighton considered trial testimony that health care workers may take extra precautions during invasive procedures if they knew the patient's serostatus. Unless or until universal precautions become standard operating procedure, "a decision of this kind can result in more [health care worker] exposures because it doesn't emphasize the standard uniformity of universal precautions."

The statute's medical care exception, upheld in the ruling, "runs counter to all trends in medical ethics. There has been a shift in the law—health care workers cannot, on their own, determine unilaterally what happens to another person's body," Isbell adds.

Marketplace of Views

However, Dickey says there isn't likely to be consensus on the issue any time soon. On hospital consent forms, she notes, physicians must try to perceive how patients view the risk associated with different procedures.

"HIV testing in itself is not going to cause bodily harm. Our concern is the lack of knowledge of what that test means. It's a difficult judgment call. Do you lump it in with the dangerous tests, or do you say it's easy to do so you lump it in with the blood count?" But refinements in laws and policies reflect an ongoing evolution, she says. "This is recognition that society and the medical profession still are not comfortable with the broad range of diseases, diagnoses, and their implications and our relationships with individuals who have contracted this disease."

—by Rebecca Voelker

Military Medicine Faces at Least 4 More Months of Supporting US, Other Peacekeepers in Somalia

THIS YEAR'S meeting of the Association of Military Surgeons of the United States (AMSUS)—which ended just over a week ago—was held in San Antonio, Tex. But the thoughts of many of those present, whether active service personnel, reservists, or retirees, were on Somalia, where US military medicine continues to cope with appalling and often dangerous conditions.

In addition to combat wounds, other injuries, and disease among US personnel, the US Army's 46th Combat Support Hospital/Medical Task Force 46 in the Somali capital of Mogadishu also provides some medical support for some of the other nations' United Nations (UN) peacekeeping troops and treats Somali civilians when circumstances dictate and permit.

Although there are a great many sources of disease in Somalia, US military medical people have encountered just one case of HIV infection among the patients seen to date. That was a Somali who underwent testing before US military physicians performed surgery. No HIV infection has been detected among US troops that are or were serving there.

Second Year Starts

Next week will mark the start of the second year of a US military medical presence in the war-ravaged nation on the horn of east Africa. Despite efforts by critics to bring US forces home from Somalia sooner, it appears that US Army, Air Force, Marine Corps, and Navy personnel—and their medical sup-