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Pittsburgh, Pennsylvania, 2012

COMPULSORY TESTING FOR HIV AND OTHER INFECTIOUS DISEASES

urn:nbn:de:kobv:517-vlib-10579

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COMPULSORY TESTING FOR HIV AND OTHER INFECTIOUS DISEASES

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I remember the outbreak of hysteria caused by a newly discovered disease called HIV or AIDS, in the late 1980s. The public discussion of the subject was irrational as could be expected. Among various proposals was the suggestion for compulsory testing for HIV for immigrants and high-risk groups. More recently SARS has frightened people and resulted in the screening of body temperatures of travelers arriving at airports, to identify potential carriers.

In some countries compulsory testing for HIV has become a reality, as for example, Cuba which introduced mandatory testing for HIV for all its citizens. In 2006 President Bill Clinton advocated mandatory testing for countries with a high infection rate.[1] On my recent arrival in the United States, I was required to state that I am not HIV positive; otherwise entrance would have been denied (which is not the case for most countries in the European Union). Elsewhere, opt-out screening has been promoted as recommended by the Centers for Disease Control and Prevention (*Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings* [September 2006]).[2]

The CDC's revised recommendations state explicitly that whereas health care providers should routinely administer tests for HIV, they may not do them against the patient's wishes, nor may they deny treatment.. The rationale for this ruling is the personal autonomy of the individual. The question of autonomy in general and in bioethics in particular continues to be of interest to us and is discussed constantly by liberal halachists. It needs to be seen alongside Judaism's concern with maintaining health, as Maimonides stated:

> If the body is healthy [it is] because of God's dealings, for behold it is impossible to understand or know of God's intention

> and why [this person] is sick. Therefore one needs to distance oneself from things that harm the body and to conduct ones life [in order to] be healthy *(*Yad *Hil. Deot* 4:1*)*.

Corollaries to this position are preventive measures formulated by the *Shulhan Arukh*:

> When life is endangered, it is a *mitzvah* to remove the threat,. guard against it, and to be very alert – "take utmost care and watch yourself" (Deut. 4:9). Anyone who fails to remove it and leaves it, he has transgressed the positive commandment "do not bring bloodguilt [into your house]" (Deut. 22:8 – *Shulhan Arukh* Hosh*en Mishpat* 427:8).

This idea ultimately led to the principle that when life is endangered *(pikuach nefesh)* all, except three commandments are set aside (San. 74a). The tradition also understands that the body is not personal property but leased from God as stated by Maimonides:

> The *Bet Din* must be careful not to accept ransom from a [convicted] murderer, even if he would give all the money in the world, and even if the blood-avenger wants to ransom him [the *Bet Din* shall not accept it], for the soul of this about to be executed individual does not belong to the blood-avenger but to the Holy One, blessed be He (*Yad Hil. Rozeah* 1:4).

This assumption is inconsistent with the notion of autonomy of some in the Reform movement since an individual cannot be autonomous while part of someone else. Practically, one can be autonomous in relation to God but not to the community in which one lives, which by its very nature restricts individual autonomy. This means that our discussion may have no meaning for some Liberal theologians except as a practical matter.

Our halakhic discussion concerning mandatory testing for HIV centers on whether the halakhic concept of the *rodef* applies here. A *rodef* is a person who is threatening the life of another. A *rodef* might be stopped even if that meant taking a life, as the *halakhah* would already consider the endangering individual dead.

As we turn to our issue, one scholar, Rabbi Deichowsky, argues that it is possible to identify high-risk groups (e.g. homosexuals and hemophiliacs), which are in the category of a *rodef*. He also contends that a person or group might be considered a *rodef* even when the danger is in doubt (*safek pikuach nefesh).*[3] Another scholar, G. Freudenthal disagrees on the grounds that (1) the laws of the *rodef* apply only to individuals and not to groups; (2) the victim is passive, whereas in our case the consenting partners transmit the disease.[4] Others rightly reject this notion as "even as one speaks about mutual consent [that is assent to the sexual activity, not] mutual consent to acquire [the disease]."[5]

Freudethal's first objection, however, stands. In addition, I find it hard to accept the notion that the person who causes a *potential* danger *(safek pikuach nefesh)* is a *rodef* as Golinkin has pointed out the original mishnaic text speaks of *immediate* danger.[6] Here I would also hold that the principle of *rodef* does not apply as HIV does not pose an "immediate" threat to others. Unlike other infectious diseases, the transmission of HIV is, in fact, restricted to specific forms of sexual practice, infected blood and contaminated syringes. To state that PWH are *rodfim* would mean that we consider them *per se* as promiscuous and without moral conscience. On the other hand with highly infectious diseases the category of *rodef* might apply.

We should remember that the number of people involved remains low. The European Centre for Disease Prevention and Control reports that, "in 2008, 25,656 HIV cases were diagnosed and reported by 27 European Union and EEA/EFTA Member States (excluding

Austria, Denmark and Liechtenstein), a rate of 5.7 per 100,000 ."[7] The total number of those living with HIV in Western and Central Europe is estimated at 620,000, i.e. 0.2.[8] That such a low rate of infection has been achieved without compulsory measures is the most compelling evidence that compulsory testing for HIV is unwarranted. This may be different in countries of Sub-Saharan Africa where the rate is high as, for example in Swaziland where it is as high as 25.9% Fortunately the global HIV rate in Sub-Saharan Africa is falling among adults (ages 15–49).[9]

Other means of lowering the rate of infectionare possible and have been attempted in other societies. In Cuba those found infected after mandatory testing from 1986 to 1993, were quarantined. The Cuban health authorities subsequently permitted infected individuals to live outside the sanatoria, when considered responsible. Cuban health authorities also "actively pursue contact tracing and HIV testing of sexual partners."[10] This results in the lowest HIV infection rate in the world. As one Jewish cholar has pointed out, a community could pass protective legislation as a preventive measure (Isserles, *Shulhan Arukh, Hoshen Mishpat* 427:1) It is unlikely that we would be prepared to take such measures, even if we find precedence in the *halakhah* Because the incubation period for HIV is long, repeated testing would be necessay.

We have limited our discussion to those living within a certain state, and have not dealt with it as a mandatory requirement for immigrants. One might consider such measures warranted for those entering from countries with a high HIV rate. The International Task Team on HIV-related Travel Restrictions of the UN is currently discussing this matter. The defense for such restrictions has stated that generally travel restrictions have no public health justification. HIV is not a public health hazard since the virus cannot be transmitted by casual contact.Restrictive measures may run counter to public health interests, since exclusion of HIV-positive non-nationals adds to the climate of stigma and discrimination against people living with HIV and

may thus deter nationals and non-nationals alike from using HIV prevention and care services. Such travel restrictions may encourage nationals to consider HIV a "foreign problem," so that they feel no need to engage in safe behavior themselves.

Travel restrictions have no economic justification because people living with HIV can now lead long and productive working lives; they pose no potential drain on national health resources. Furthermore such treatments are constantly becoming less expensive.[11]

We may ask whether treatment should be forced upon an individual who has tested positive. The tradition would seem to demand it. There is a biblical obligation to maintain health along with the assumption that our body actually belongs to God. These principles would operate even when the medical measures only lengthen life, but do not cure it of disease as with HIV.

From my perspective this should not occur, as it infringes on the individual's autonomy for no good reason. Since there is no cure for HIV, the risk, of transmission remains the same. We might best follow the principle of do nothing (*shev v'al ta-ase*).

Mandatory testing might be relevant in the compulsory testing of everyone that enters a health care setting. Mandatory as opposed to opt-out testing would make sense only, if the physician could refuse treatment to such an individual. Since the risk of becoming infected with HIV in a health care setting is very small, it would constitute only a doubtful danger (*safek sakana*), so no treatment should be demanded.[12]

For all these reasons there is no need for compulsory testing for HIV, though opt-out screening would be acceptable.

Notes

1. http://www.ft.com/cms/s/0/0485c2ec-d3f8-11da-b2f3-0000779e2340.html?nclick_check=1.

2.. http://www.cdc.gov/hiv/topics/testing/index.htm. These recommendations seem to have alreadybeen implemented by some states. For instance the State of New Jersey, has enacted a law to implement routine opt-out screening for all pregnant women (http://biotech.law.lsu.edu/cases/STDs/4218_R2.pdf).

3. S Deichowsky "Compulsory Testing and Treatment for AIDS" in G. Freudenthal (ed.) *AIDS in Jewish Thought and Law* (Hoboken, N.J. 1998), p. 105.

4. G. Freundenthal "Introduction" in G. Freudenthal (ed.) *AIDS in Jewish Thought and Law,* p. xxxviii.f..

5. M. Halprin, A. Steinberg "AIDS – Reward and punishment and compulsory testing – Remarks to the Reply" (Heb.) found at: http://www.medethics.org.il/articles/ASSIA/ASSIA61-62/ASSIA61-62.14.asp.

6. D. Golinkin, "Responsa Regarding the Assassination of Prime Minister Yitzhak Rabin z"l in *Responsa of the Va'ad Halakhah of the Rabbinical Assembly of Israel* (Jerusalem 1998), Vol. 6, p. 314 f.

7. http://ecdc.europa.eu/pdf/ECDC_epi_report_2007.pdf, p. 44.

8. UNAIDS Report on the Global Epidemic | 2010 (20101123_GlobalReport_full_en.pdf), p. 188.

9. Ibid., 181.

10. http://www.thebody.com/content/art32967.html.

11.http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2008/20080304_HIVrelated_travel_restrictions.asp

12. To such cf. for an extensive treatment of the subject: J. Roth, "Organ Donation: Part IV: Live Donors - Kidneys" in K. Abelson, D.J. Fine (eds.) *Responsa 1991 – 2000* (New York 2002), p. 256 ff.