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AIDS and the Criminal Justice System: An Assessment of Legal and Policy Issues

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PREFACE

As the AIDS disease and the AIDS virus continue to spread and occupy the attention of the nation, a debate is emerging over whether and how the criminal justice system could be used to deter or penalize behavior likely to spread the disease. In particular, a number of states and the federal government are actively considering or have implemented proposals to impose criminal penalties on certain AIDS carriers and to require AIDS testing of certain criminal offenders. This report describes these proposals and analyzes the policy, legal and constitutional issues they raise. It is organized as follows:

The **Introduction** provides an overview of the AIDS problem by describing briefly the nature of AIDS and the AIDS virus and summarizing the nation's responses to it to date.

Chapter 1 discusses the use of criminal penalties to limit the behavior of AIDS carriers. It:

(1) summarizes the general policy issues raised by the use of criminal penalties in the context of a disease such as AIDS;

(2) describes and analyzes the ways in which prosecutors have used or might use current criminal laws to respond to activity perceived likely to expose others to the AIDS virus; and

(3) describes and analyzes a variety of legislative proposals that would make it a crime to transmit the AIDS virus or expose others to it.

Chapter 2 discusses the use of mandatory AIDS testing to identify criminal offenders who are carriers of the AIDS virus. It:

(1) summarizes the general policy issues raised by these mandatory testing programs;

(2) describes the mandatory testing programs that have been proposed or adopted to date; and

(3) analyzes the constitutional issues raised by some of these programs.

EXECUTIVE SUMMARY

I. The Use of Criminal Penalties Against AIDS Carriers.

The use of criminal penalties against AIDS carriers raises the general public policy issue of whether it is appropriate to use the criminal law to respond to a medical problem. Proponents of such criminal measures argue that they provide the strongest means available to protect society from the threat posed by those AIDS carriers who deliberately or recklessly engage in behavior likely to spread the deadly AIDS virus. Opponents argue that criminal penalties will neither inhibit the spread of the disease nor deter the conduct sought to be prohibited.

Prosecutors who choose to file criminal charges against an AIDS carrier have a number of options under current law among which to choose, depending on the facts involved in the case. These options include homicide, assault, sodomy, exposure of others to a communicable disease, prostitution and unlawful use or sale of controlled substances or hypodermic needles. Certain of these crimes, such as prostitution and exposure of others to a communicable disease, are readily applicable to the conduct of some AIDS carriers and could serve as effective mechanisms for punishing persons who cause or may cause the disease to spread. Others, however, such as homicide, assault and sodomy, present extremely difficult evidentiary and constitutional problems relating to such issues as criminal intent, causation, proof of transmission or exposure, and the constitutional right to privacy may either prevent successful criminal prosecution or limit such prosecutions to narrow fact situations.

As an alternative to prosecuting AIDS carriers under existing criminal statutes, some states are considering or have enacted laws which specifically make it a crime for AIDS carriers to engage in certain conduct known to cause transmission of the AIDS virus. The advantage of these criminal laws is that they are, for the most part, narrowly drafted to address those particular acts that place others at risk of infection by the virus. However, many of these new crimes present difficult evidentiary problems for prosecutors similar to those presented by the prosecution of AIDS carriers under current criminal laws. Additionally, those laws which specifically make it a crime for an AIDS carrier to engage in sexual activity may be unconstitutional as applied to sexual activity within the marital relationship or for the purpose of procreation.

II. Mandatory AIDS Testing of Certain Criminal Offenders.

Proposals requiring criminal offenders to submit to AIDS virus testing, like criminal penalty proposals, raise the general policy issue of whether it is appropriate to use the criminal justice system to address a medical problem. Proponents of such testing measures argue that AIDS testing of prisoners, sex offenders and intravenous drug users is necessary because these individuals are at high risk of carrying and transmitting the virus. Opponents challenge the efficacy of mandatory testing, however, and argue that these measures could set a dangerous precedent for the widespread, mandatory testing of other groups.

The mandatory testing programs that have been proposed or implemented to date vary considerably with respect to their scope and purpose.

Most testing programs apply to prison populations generally. Others apply only to certain convicted offenders, such as unlawful drug users and sex offenders. Still others apply to persons who have been arrested, but not yet convicted, for these crimes.

The purpose of most of the mandatory testing programs is to provide counseling and treatment to AIDS-infected criminal offenders. However, other programs are broader and require that AIDS-infected prisoners be segregated from the general prison population under certain circumstances and that AIDS-infected criminal offenders refrain from high risk behavior while on parole or probation.

Depending on the program's scope, mandatory testing of criminal offenders raises one or more of the following constitutional issues: (1) whether mandatory testing violates the offender's constitutional right to privacy; (2) whether mandatory testing violates the offender's constitutional right to equal protection of the law; (3) whether mandatory testing constitutes an unconstitutional search or seizure under the Fourth Amendment; and (4) whether the denial of probation or parole to an AIDS-infected offender constitutes cruel and unusual punishment in violation of the Eighth Amendment.

There is no definitive answer to most of these constitutional questions. Indeed, strong arguments can be made both for and against the constitutionality of most of the mandatory testing programs proposed or implemented to date. However, the courts are likely to rule unconstitutional (1) those programs which require arrested criminal offenders to submit to AIDS testing and (2) those programs which deny an AIDS-infected offender release on probation or parole solely because of his or her medical condition.

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INTRODUCTION. AIDS AND THE AIDS VIRUS

What is AIDS?

Acquired Immune Deficiency Syndrome (AIDS) is a fatal, medical condition in which the body's normal immunity mechanism breaks down, leaving the body vulnerable to deadly infections and cancers which it is unable to combat. AIDS is caused by a type of virus known as the Human Immunodeficiency Virus (HIV), commonly referred to as the AIDS virus.

How is AIDS transmitted?

According to current medical evidence, the AIDS virus is not generally contagious and cannot be spread by casual contact. It resides in an infected person's bodily fluids, such as the person's blood or semen, and can be transmitted only when these bodily fluids are mixed with those of another person.

The AIDS virus has been transmitted most commonly by the following means: (1) the transfusion of infected blood, (2) the sharing of contaminated hypodermic needles by intravenous drug users, and (3) certain types of intimate sexual penetration, particularly anal intercourse. Additionally, the AIDS virus can be transmitted from an infected pregnant mother to her fetus, causing the baby to be born with the virus.

How many people have AIDS or the AIDS virus?

An estimated 1,500,000 Americans are infected with the AIDS virus and over 25,000 Americans have developed a clinically-reportable case of AIDS.[1] Deaths among AIDS sufferers have occurred in approximately 56% of the cases thus far. Current estimates are that between 20 and 30 percent of the people infected with the AIDS virus will develop a full-blown case of AIDS within five years of infection with the virus. It is possible, however, that a higher percentage of those infected will develop the disease at some later date.

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[1] U.S. Surgeon General's Report on AIDS, p. 3 (Department of Health and Human Services, October, 1986). According to the Centers for Disease Control, a person has a clinically-reportable case of AIDS if the person has developed one or more specified opportunistic diseases indicative of cellular immunodeficiency that can be attributed only to the presence of the AIDS virus. AIDS Issue Team, State of Minnesota Executive Branch Policy Development Program, p. 4 (Final Report) (November 1986).

As of October 1986, 133 cases of AIDS have been diagnosed in the state of Minnesota. Of these, 69 persons (52%) have died, including all of the people diagnosed with AIDS before July, 1984. By 1990, as many as 1860 new cases of AIDS will have been diagnosed in Minnesota and as many as 1200 AIDS-related deaths will have occurred.[2]

Who has contracted the AIDS virus or disease?

In the United States, intravenous drug users and male homosexuals have, thus far, been most vulnerable to infection by the AIDS virus. In addition, some people have been infected with the virus from the transfusion of contaminated blood products. However, recent efforts directed at identifying likely AIDS carriers among blood donors and testing blood donations before transfusion have reduced these transmissions to nearly zero.

Among adult AIDS patients, approximately 93% are men, 90% of whom are between the ages of 20 and 49. Homosexual or bisexual men not known to have used intravenous drugs represent 66% of all reported cases and heterosexual intravenous drug users represent 17%. The remaining cases consist of homosexual or bisexual male drug users (8%), persons with hemophilia/coagulation disorders (1%), heterosexual sex partners of persons with AIDS or at risk for AIDS (4%), recipients of contaminated blood products (2%), and persons whose means of disease acquisition is undetermined (3%).[3]

Of the 133 persons afflicted with AIDS in Minnesota, 85% are homosexual or bisexual men not known to be intravenous drug users, and the remainder are heterosexual intravenous drug users (2%), homosexual or bisexual intravenous drug users (7%), persons with hemophilia/coagulation disorders (2%), recipients of blood products (1%), heterosexuals (2%), and persons not otherwise classified (2%).[4]

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[2] AIDS Issue Team, note 1, supra at pp. 5-6.

[3] Centers for Disease Control, "Update on AIDS", Morbidity and Mortality Weekly Report, pp. 757-758 (Dec. 12, 1986).

[4] AIDS Issue Team, note 1, supra at p. 6.

What is being done to combat AIDS?

Society has responded to the "AIDS epidemic" in a number of ways thus far.[5]

Perhaps most importantly, public and private groups have developed educational programs and literature to teach the public how the AIDS virus can and cannot be transmitted and how to avoid behavior likely to cause the virus to spread. Of equal importance, the government and the Red Cross have dramatically altered the blood donation system in recent years to prevent the use of contaminated blood products in transfusions.

Meanwhile, the medical and scientific communities have increased their research efforts, in hopes of developing a cure for the disease or a vaccine to combat the virus. Despite these efforts, however, most experts predict that such medical solutions will not be forthcoming for many years, if ever.

State and federal governments have focused not only on public education, but also on developing and implementing public health guidelines and procedures for identifying and counseling persons at risk of contracting the disease, protecting health care professionals who may come into contact with AIDS carriers and, if necessary, confining and counseling those AIDS carriers who repeatedly engage in behavior likely to cause transmission of the virus. Policymakers at both the state and federal level have also been concerned about the availability and financing of health care and health insurance for persons afflicted with AIDS and the potential for discrimination against AIDS carriers, particularly in housing and employment.

A number of policymakers have promoted clinical testing as a means of identifying individuals in need of AIDS treatment and counseling and, consequently, have sought to encourage or require testing of certain groups believed to be at risk for transmitting or obtaining the AIDS virus. These groups include marriage license applicants, prisoners, military personnel, aliens and arrested or convicted sex offenders.

Finally, several states have considered imposing or have attempted to impose criminal penalties on AIDS carriers who intentionally or recklessly commit acts likely to cause transmission of the virus.

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[5] More than 360 pieces of AIDS-related legislation were introduced in state legislatures during the first half of 1987. These bills dealt with a variety of issues, including mandatory AIDS testing of specified groups, blood and body part donation, quarantine of known AIDS carriers, public education and prevention efforts, contact tracing, medical research, discrimination, and criminal penalties. See Intergovernmental Health Policy Project, A Synopsis of State AIDS Related Legislation, (Working Draft) (Wash. D.C. 1987). Of the states considering legislation, California and New York have been the most active, probably because they have experienced the largest number of AIDS and AIDS-related cases thus far. Other states with active legislative agendas on the AIDS issue include Rhode Island, Hawaii, Illinois, New Jersey and Connecticut. Intergovernmental Health Policy Project, State Health Notes (no. 73, May 1987), p. 1.

CHAPTER 1. THE USE OF CRIMINAL PENALTIES AGAINST AIDS CARRIERS.

Part I. Policy Issues and Arguments.

Proposals to impose criminal penalties on certain AIDS carriers raise the general policy issue of whether it is appropriate to use the criminal law and the criminal justice system to respond to a medical problem. The following is a brief summary of the arguments that have been made on both sides of this policy issue.

Proponents argue that criminal penalties provide the strongest means available of protecting society from the threat posed by those AIDS carriers who deliberately or recklessly engage in conduct directly threatening the public health. They argue that education and counseling are ineffective deterrents to such extreme conduct, and that society has a right and obligation to punish individuals who engage in it and to segregate them and the public health threat they pose from the rest of society.

Opponents argue that criminal penalties will neither inhibit the spread of the disease nor deter the conduct sought to be prohibited. Indeed, they argue, the threat of criminal penalties may discourage people from seeking AIDS testing and counseling and, thereby, increase the risk that the disease will be spread. Second, they argue that criminal prosecution of AIDS carriers gives the public a false sense of security by misleading it into believing that effective measures are being taken by the government against the disease. Finally, these critics contend that proposed criminal measures against AIDS carriers are virtually impossible to prosecute successfully due to overwhelming evidentiary and constitutional problems.

Part II. Prosecution of AIDS carriers under existing criminal laws.

To date, there have been few criminal prosecutions of AIDS carriers alleged to have knowingly or recklessly exposed others to the AIDS virus. However, as both the incidence of AIDS and fear of it become more widespread, it is increasingly likely that the existing criminal law will be used as one means of responding to the disease.

A prosecutor who seeks to file criminal charges against an AIDS carrier has a number of options under current law among which to choose, depending on the facts involved in the case. These options include such crimes as homicide, attempted homicide, assault, sodomy, exposure of others to a communicable disease, prostitution and unlawful use or sale of controlled substances or hypodermic needles.

Certain of these crimes, such as prostitution and exposure of others to a communicable disease, are readily applicable to the conduct of many AIDS carriers and could serve as effective mechanisms for punishing persons who cause or may cause the disease to spread. However, several others, such as homicide, assault and sodomy, present extremely difficult evidentiary and constitutional problems which may either prevent successful prosecution or limit their application to narrow fact situations.

The following is a description of the criminal statutes under which AIDS carriers might be prosecuted and an analysis of the legal issues they raise.

Homicide

Existing homicide statutes could be used to prosecute AIDS carriers who intentionally or recklessly transmit the AIDS virus to another person and thereby cause the victim's death. However, the evidentiary problems associated with proving intent and causation make the success of homicide prosecutions extremely unlikely. A prosecutor could avoid some of these evidentiary problems by reducing the homicide charge to attempted homicide, but probably would still have difficulty proving that the defendant had the requisite mental state to be guilty of the crime charged.

Elements of the crime. In Minnesota, the crime of homicide could be charged in the following situations:

first degree murder charges could be brought against a person who deliberately transmitted the AIDS virus to a victim and, thereby, intentionally caused the victim's death;[6]

first or second degree murder charges could be brought against a person who unintentionally caused death by transmitting the AIDS virus to a victim in the course of a violent felony, such as forcible rape;[7]

third degree murder charges could be brought against a person who knew he or she had the virus and unintentionally caused the victim's death, on the theory that the person committed "an act eminently dangerous to others...evincing a depraved mind, without regard for human life";[8]

manslaughter charges could also be brought in such cases on the theory that the person's behavior involved "culpable negligence whereby the person creates an unreasonable risk and consciously takes chances of causing death or great bodily harm to another";[9] and

attempted murder or manslaughter charges could be brought against a person who, with intent to commit murder or manslaughter, did an act which was a substantial step toward commission of the crime.[10]

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[6] Minnesota Statutes, §609.185.

[7] Minnesota Statutes, §§609.185 and 609.19.

[8] Minnesota Statutes, §609.195.

[9] Minnesota Statutes, §609.205.

[10] Minnesota Statutes, §609.17. In September, 1987, a male prostitute afflicted with AIDS was ordered to stand trial in Los Angeles, California on attempted murder charges for allegedly selling his blood knowing that it was contaminated by the AIDS virus. This case is believed to be the first in the nation in which an AIDS victim was charged with attempted murder for allegedly selling tainted blood. The National Law Journal, (July 20,

Evidentiary issues. A prosecutor who charges an AIDS carrier with homicide must resolve a number of difficult evidentiary issues.

Proof that the defendant was an AIDS carrier. First, the prosecutor must prove beyond a reasonable doubt that the defendant had AIDS or the AIDS virus at the time of the alleged act. The prosecutor would be unable to prove this fact directly unless the defendant admits to it or there is contemporaneous medical evidence of it. If evidence of the defendant's infection is unavailable from either of these sources, the prosecutor could seek a court order requiring the defendant submit to AIDS testing and then could try to prove by circumstantial evidence, if possible, that the defendant had the virus at the time of the alleged crime. Such circumstantial evidence may be difficult to obtain, however.

Proof of causation. Second, the prosecutor must prove beyond a reasonable doubt that the defendant caused the victim's death by transmitting the AIDS virus to the victim. The causation element of the crime is probably the prosecutor's most difficult evidentiary problem because, practically speaking, the prosecutor must prove two "negative" facts in order to prove that the defendant transmitted the virus to the victim. First, the prosecutor must prove that the victim was not infected by the AIDS virus prior to the defendant's alleged conduct. Second, the prosecutor must prove that the victim did not become infected afterwards from some other source, such as unsafe sexual activity with another AIDS carrier or intravenous drug use. Because of the difficulty of proving causation, prosecutors may choose to reduce homicide charges against AIDS carriers to attempted murder or attempted manslaughter and, thereby, avoid having to prove that the defendant caused death.[11]

Proof of criminal intent. Third, the prosecutor must prove that the defendant had the requisite "mens rea" or criminal intent to be guilty of the crime alleged. The type of criminal intent that must be proven varies, depending on the severity of the offense charged.

In intentional homicide cases, such as first or second degree murder, the prosecutor must prove beyond a reasonable doubt that the actor knew he or she had the AIDS virus at the time the offense was committed and specifically intended to cause death by transmitting the virus to the victim. Thus, intentional homicide charges would only apply to the most extreme fact situations.

In unintentional homicide cases, such as third degree murder and manslaughter, the prosecutor must show that the defendant knew he or she had AIDS or the AIDS virus and either "evinced a depraved mind" or was "culpably negligent" in engaging in the conduct at issue. Whether such extreme recklessness could be shown depends on the particular facts of each case. For example, a single act of heterosexual intercourse might not be enough to show that the defendant had the requisite mens rea to be guilty of third degree murder or manslaughter since, according to recent studies, the

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1987) p. 3, column 1.

[11] See e.g., Robinson, AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal, 14 Hofstra L. Rev. 91, 97 (1985) [hereinafter cited as Robinson].

chance of transmitting the AIDS virus through this means is only 1 in 1,000.[12] In contrast, multiple acts of anal intercourse with the victim or the sharing of contaminated hypodermic needles carry higher risks of AIDS virus transmission. Therefore, such conduct may involve the kind of culpable recklessness that falls within the purview of the third degree murder and manslaughter crimes.

Proof of felony-murder. If the defendant caused the victim's death by transmitting the AIDS virus in the course of a violent felony, such as rape, the prosecutor could charge the defendant with felony-murder and would not have to prove that the defendant intended to cause the victim's death.[13] However, the prosecutor would, instead, be confronted with the evidentiary problem of proving that the victim's death occurred in the course of the underlying felony. Because a victim infected by the AIDS virus probably will not contract AIDS or die from the disease for a number of years, the connection between the defendant's felony and the victim's death may be too attenuated to permit a successful prosecution under this type of homicide charge.[14]

Assault.

Prosecutors could use the existing assault statutes to impose criminal sanctions on AIDS carriers who either transmit or expose others to the AIDS virus. However, like homicide prosecutions, these cases raise difficult evidentiary problems relating to proof of harm and criminal intent which prosecutors may be unable to overcome.

Elements of the crime. In Minnesota, the crime of assault is committed when a person either (1) intentionally inflicts bodily harm upon another or (2) commits an act with intent to cause fear in another of immediate bodily harm or death.[15] The criminal penalty for this crime generally depends on the degree of harm suffered by the assault victim.[16]

First degree assault, a felony, requires proof that the victim suffered "great bodily harm" due to the assault; that is, permanent bodily injury, or injury creating a high probability of death.

Third degree assault, a felony, requires proof that the victim suffered "substantial bodily harm" due to the assault; that is temporary but substantial injury or disfigurement.

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[12] New York Times (June 19, 1987), p. 10, col. 1.

[13] Under such circumstances, the prosecutor must prove only that the defendant intended to commit the rape, not that the defendant intended to cause the victim's death.

[14] See e.g., State v. Mauldin, 529 P.2d 124, 126 (Kan. Sup. Ct. 1974) (discussion of causation issue in felony-murder cases).

[15] Minnesota Statutes, §609.02, subdivision 10.

[16] Minnesota Statutes, §§609.221 to 609.224.

Second degree assault, a felony, does not require a showing of a particular degree of harm but, instead, requires proof that a "deadly weapon" was used in the alleged assault.

Fifth degree assault, a misdemeanor offense, likewise does not require proof of a specific amount of harm, but merely requires proof that an assault was committed against the victim.

The felony assault crimes are often referred to as "aggravated assaults" and the misdemeanor assault crime is often referred to as a "simple assault".

Existing assault prosecutions. Criminal prosecutions against AIDS carriers under the assault statutes, while rare, have been the most common type of criminal prosecution brought against AIDS carriers to date. For example, in May 1987, the U.S. Army sought to court martial an army private on the basis that he committed aggravated assault by engaging in consensual heterosexual and homosexual relations after having tested positive for the AIDS virus.[17] Criminal charges are also pending in Los Angeles against Joseph Markowski who is alleged to have committed aggravated assault by engaging in prostitution. In June 1987, the first and only criminal conviction of an AIDS carrier occurred when a federal jury in Minneapolis found a prison inmate, James Moore, guilty of assault with a deadly weapon for biting two prison guards after having tested positive for the AIDS virus.[18] In contrast, a prosecutor in New York recently reduced aggravated assault charges against a prostitute alleged to have bitten a peace officer because of the lack of medical evidence showing that the AIDS virus can be transmitted through biting.[19]

Evidentiary issues. Prosecutors who bring assault charges against AIDS carriers, particularly aggravated assault charges, must overcome many of the same types of evidentiary problems as those who bring homicide charges.

Proof that defendant was an AIDS carrier. First, the prosecutor must show that the defendant was a knowing carrier of the AIDS virus at the time of the alleged conduct. Such proof is required not only for purposes of causation but also for purposes of proving the necessary mens rea of the assault crime; i.e., that the actor intended to cause harm to the victim or intended to create fear in the victim of immediate harm. As was discussed earlier, the prosecutor may have significant difficulties proving that the defendant was infected with the AIDS virus when the alleged assault occurred and that the defendant knew of this condition.

Proof of victim harm. Second, in order to prove aggravated assault, the prosecutor must show that the victim suffered either "great bodily harm" or "substantial bodily harm" as a result of the defendant's conduct. To meet this burden of proof, the

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[17] The National Law Journal (May 11, 1987), p. 6.

[18] The National Law Journal (July 20, 1987), p. 32.

[19] Id.

prosecutor must show that the victim was infected by the actor with the AIDS virus[20] and probably must show that the victim has or is likely to develop a full-blown case of AIDS as a result. In those rare cases where the victim of the alleged assault has already developed AIDS by the time criminal charges are filed, proof of great or substantial bodily harm is relatively easy to provide since all persons with AIDS either die as a result of the disease or suffer the bodily harm caused by those opportunistic diseases that their immune systems are unable to combat. However, if the victim has only been diagnosed as a carrier of the AIDS virus, it may be impossible for the prosecutor to prove that infection with the virus has caused great or substantial bodily harm, given current medical evidence that AIDS virus carriers have between a 25 and 50 percent chance of developing AIDS. In such cases, the prosecutor may only be able to prosecute the defendant for simple assault.

Proof of use of a deadly weapon. The prosecutor could avoid the problem of proving victim harm by charging the defendant with assault with a deadly weapon, as was done successfully in the Moore case. As was mentioned earlier, this aggravated assault crime does not turn on the extent of bodily harm. Rather, it is based on the deadly nature of the weapon or other instrumentality used in committing the assault. To prove this crime, the prosecutor must convince the jury that either the AIDS virus itself or the means through which it is transmitted (e.g. biting, sexual intercourse) is a deadly weapon.[21] This may be difficult, given the lack of medical evidence supporting transmission of the AIDS virus through saliva or biting, and the relatively low likelihood of either transmitting the AIDS virus through a single sexual contact or developing AIDS as a result of infection with the virus. On the other hand, the prosecutor in the Moore case was apparently able to prove these facts to the satisfaction of that jury, even though there are no known cases involving transmission of the virus through biting.[22]

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[20] As was discussed earlier on page 7, proof of causation may be difficult to obtain.

[21] Minnesota Statutes, §609.02, subdivision 6 defines "deadly weapon" as an "instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm".

[22] Interestingly, several members of the jury in the Moore case stated that they would have convicted Moore of assault with a deadly weapon even if he had not been an AIDS carrier. National Law Journal (July 20, 1987), p. 32. However, it is hard to believe that Moore's status as an AIDS carrier was irrelevant to the jury's decision, given the amount of testimony presented regarding Moore's infection with the AIDS virus, and given that people who bite other people are not usually charged with or convicted of this type of assault. To the contrary, it is quite clear from the trial court's recent opinion upholding the jury's verdict that Moore's status as an AIDS carrier was crucial to the jury's factual finding that an assault with a deadly weapon was committed. See U.S. v. Moore, 41 Crim. L. Rptr. 2485 (Sept. 30, 1987).

Victim's consent to contact. Finally, if the victim consented to contact by the defendant, as is likely in most sexual transmission cases, some courts would rule that this consent bars criminal prosecution of the defendant for assault. Other courts take a different view, however, and would rule that consent to physical contact is not equivalent to consent to bodily harm.[23] It would seem, therefore, that the impact, if any, that the victim's consent may have on assault prosecutions will vary from jurisdiction to jurisdiction.

Sodomy

A number of states, including Minnesota, make it a crime to engage in or submit to an act of sodomy. These anti-sodomy laws could be used to prosecute and, theoretically, deter AIDS carriers from engaging in sexual practices known to permit transmission of the AIDS virus, such as anal intercourse. However, because acts of sodomy typically occur in private, consensual situations, proof of their occurrence may be difficult for prosecutors to obtain. Additionally, it is possible that some state courts would rule that consensual acts of sodomy are protected from governmental regulation under their state Constitutions.

Elements of the crime. "Sodomy" in Minnesota is defined as "carnally knowing any person by the anus or by or with the mouth".[24] A person who voluntarily engages in or submits to an act of sodomy with another is guilty of a gross misdemeanor.

Constitutional and evidentiary issues. In recent years, prosecutions against individuals for committing acts of sodomy have been relatively rare. One reason is that many people questioned whether anti-sodomy laws were constitutional as applied to private, consensual sexual conduct between adults.[25] Although the U.S. Supreme Court ruled recently[26] that state anti-sodomy statutes are constitutional under the federal Constitution, it is possible that state courts will reach a different result under their respective state constitutions.[27]

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[23] See Robinson at 97.

[24] Minnesota Statutes, §609.293. Anti-sodomy laws in a number of states have been repealed by legislative or judicial action in recent years. However, the spread of the AIDS virus has recently rekindled some interest in these crimes.

[25] See e.g., Richards, Homosexuality and the Constitutional Right to Privacy, 8 N.Y.U. Rev. L. & Soc. Change 311 (1979).

[26] Bowers v. Hardwick, ___U.S.___, 106 S. Ct. 2841 (1986).

[27] Such a different result is possible in the state of Minnesota. In State v. Gray, 413 N.W.2d 107 (Minn. 1987), a recent case involving the constitutionality of the state anti-sodomy law, the Minnesota Supreme Court found that the anti-sodomy law was constitutional as applied to situations involving prostitution. However, it reserved for another day the question of whether the law, as applied to the noncommercial sexual activity of consenting adults, violates the state constitutional right to privacy.

The other reason why sodomy prosecutions are rare is evidentiary. Because the conduct prohibited by these laws is consensual and usually occurs in private, proof of the crime is difficult to obtain unless one of the partners to the activity agrees to testify against the other or there is independent evidence of the unlawful acts. If, however, this evidentiary problem can be overcome, and if the constitutionality of state anti-sodomy laws is upheld by state appellate courts, they could provide a means of penalizing and, perhaps, deterring sexual activity known to transmit the AIDS virus.[28]

Exposure to communicable disease

A number of states, including Minnesota, make it a crime to knowingly transmit or expose others to a communicable disease.[29] These statutes supplement non-criminal public health measures, such as quarantine, vaccination and other medical treatment, which are more commonly used to combat the spread of contagious and infectious diseases. However, because the elements of Minnesota's crime limit its application to exposure in public places, its application to the AIDS disease is relatively narrow.

Elements of the crime. Minnesota's law dates back to at least 1905, and makes it a misdemeanor to wilfully expose oneself or another in any public place or thoroughfare when affected with any contagious or infectious disease.[30] Because of its reference to public places, this statute apparently is aimed at those communicable diseases which can be spread by casual contact, such as by touch or by airborne infectious or contagious agents.

Evidentiary issue. Because the AIDS virus cannot be transmitted through casual contact but, rather, only through the exchange of bodily fluids, this statute could be applied only to AIDS carriers who exchange bodily fluids in a public place. These situations could include unsafe sexual conduct in a public bathhouse or other public place, as well as the sharing of hypodermic needles in a public location, but would not include such activities carried out in a nonpublic place. Nevertheless, it could be argued that conduct causing transmission of the AIDS virus does occur in public locations and, therefore, that enforcement of this statute could have some deterrent impact on the spread of the disease.

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[28] Whether states will choose to proceed against AIDS carriers under their anti-sodomy laws is a separate issue. In this regard, it is interesting to note that a grand jury in Mississippi recently refused to indict an AIDS-infected male prostitute under that state's anti-sodomy statute. The individual was, instead, ordered not to have sexual relations without informing prospective partners of his condition, and not to donate blood. New York Times (October 14, 1987), p. 14, col. 4.

[29] The scope of some of these statutes is limited to venereal diseases such as syphilis and gonorrhea. New York Times (June 19, 1987) p. 10.

[30] Minnesota Statutes, §145.36.

Other relevant criminal statutes

There are two other types of criminal statutes that relate to conduct known to contribute to the spread of the AIDS virus. Increased enforcement of these criminal laws potentially could help to limit the spread of AIDS.

Prostitution laws. One of these categories consists of the criminal laws outlawing prostitution. More vigilant enforcement of the prostitution laws could assist AIDS prevention efforts because prostitution is believed to be a relatively efficient means of transmitting the AIDS virus for two reasons: (1) many prostitutes are intravenous drug users; and (2) a prostitute's multiple sex partners present greater opportunities for spreading the virus both to the prostitutes themselves and to the sexual partners of the prostitutes' patrons.[31]

Illegal use of drugs and hypodermic needles. The other category consists of the criminal laws outlawing illegal drug use and distribution. Concededly, most states already strongly enforce criminal laws prohibiting unlawful drug sale, possession and use. However, it has been suggested that more vigorous enforcement of related laws prohibiting the unlawful sale of hypodermic needles may discourage illegal intravenous drug use and, consequently, reduce the risk of AIDS transmission through this means. Others argue, however, that enforcement of these laws may increase rather than reduce the spread of the AIDS virus by making the sharing of contaminated hypodermic needles more likely. These persons argue, therefore, that such laws should either be repealed or not enforced.[32]

Part. III. Prosecution of AIDS carriers under new criminal laws

As an alternative to prosecuting AIDS carriers under existing criminal statutes, some states are considering or have enacted laws that specifically make it a crime for an AIDS carrier to engage in activity known to cause transmission of the AIDS virus. The advantage of these criminal laws is that they are, for the most part, narrowly drafted to address those particular acts that place others at risk of infection by the virus. Despite this advantage, however, many of these new crimes raise evidentiary problems for prosecutors similar to those raised by prosecutions under existing criminal laws. Additionally, those laws which specifically make it a crime for an AIDS carrier to engage in sexual activity (an approach favored by a number of states) may be unconstitutional as applied to sexual activity within the marital relationship or for the purpose of procreation.

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[31] Robinson at 99.

[32] Robinson at 100. See also Minnesota Daily (July 15, 1987), p. 6, which suggests that Minnesota's "liberal and ambiguous" drug paraphernalia laws make it easy to purchase insulin syringes from any drug store, and that this fact may account for the relatively low incidence of the AIDS virus among Minnesota drug users (2%) as compared to the national average (17%).

Description of proposed or enacted legislation

Criminal legislation directed at the activity of AIDS carriers has been enacted in five states and is being considered in twelve others.[33] The criminal laws that have been proposed or enacted thus far can be categorized into the following five groups for descriptive purposes:

Blood donations: laws imposing criminal penalties on persons who donate blood knowing that they have AIDS or have tested positive for the AIDS virus (**California, Illinois, New Jersey** and **Ohio**);

Sex offenders: laws imposing enhanced penalties on persons who commit a sex offense or engage in prostitution knowing they have AIDS or have tested positive for the AIDS virus (**California, Connecticut, Hawaii, Michigan, Nevada, North Carolina, Oklahoma**);

Sexual conduct: laws imposing criminal penalties on persons who engage in sexual intercourse or penetration knowing they have AIDS or have tested positive for the AIDS virus. Some of these laws make such conduct a crime only if the actor's sexual partner has not been notified of the actor's condition (**Florida, Louisiana, New Jersey, New York, Rhode Island**);

Transmission or exposure: laws imposing criminal penalties on persons who have AIDS and who knowingly commit any act likely to expose another to the AIDS virus or cause transmission of the virus to another (**Alabama, Idaho, Illinois, South Carolina**); and

Death certificates: one proposed law makes it a crime for a doctor to fail to indicate on a death certificate the fact that the person died from a contagious disease (**Rhode Island**).

Analysis of proposed or enacted legislation.

The appropriateness of using criminal sanctions as a means of controlling or preventing the spread of AIDS is a controversial public policy issue.[34] Laws imposing such criminal sanctions also raise several evidentiary and constitutional issues.

Evidentiary issues. Evidentiary issues similar to those discussed in Part II of this chapter are raised by some of the proposed or enacted bills.

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[33] The five states that have enacted such criminal laws are Idaho, Nevada, Florida, Louisiana and Alabama. New York Times (October 14, 1987), p. 14, col. 3. The twelve states that are considering such legislation are California, Connecticut, Hawaii, Illinois, Michigan, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island and South Carolina. Intergovernmental Health Policy Project, A Synopsis of State AIDS Related Legislation, (Working Draft) (Wash. D.C. 1987).

[34] See discussion of policy issues at p. 5, supra.

Evidence of infection and criminal intent. First, under all the bills, the prosecutor must prove that the defendant had AIDS or the AIDS virus at the time of the proscribed conduct and was aware of his or her condition. The prosecutor may have difficulty obtaining this evidence, unless the defendant admits to these facts or there is available medical evidence of infection. Some of the bills deal with this problem by limiting the crime to persons who have been previously convicted of a crime, such as prostitution, and who engage in the proscribed conduct after having been informed of a positive AIDS test result.[35] Assuming that the test results are not confidential, these proposals have the advantage of providing the prosecutor with readily obtainable evidence of infection and criminal intent. However, these proposals also have the disadvantage of limiting the scope of the crime to include only those persons who are previously convicted criminal offenders.

Proof of transmission of the virus. Second, some of the proposals require the prosecutor to prove that the defendant transmitted the AIDS virus or disease to the victim. To prove transmission, the prosecutor must show that the victim was free of the virus before the actor's conduct occurred and did not engage in any other conduct between the time of the alleged crime and the victim's positive test result that could have transmitted the virus to the victim. Proof beyond a reasonable doubt of these two "negative facts" may be an impossible evidentiary burden for the prosecutor.

One way to avoid the latter evidentiary problem is to change the elements of the offense and make it a crime to expose another to, rather than to transmit the AIDS virus. Under this approach, the prosecutor would still have to prove that the defendant engaged in the type of conduct through which the virus can be spread, but would not have to show either that the victim became infected with the AIDS virus or that the defendant caused the infection. However, this approach raises the additional issue of whether it is appropriate or constitutional to impose criminal liability on an individual for otherwise non-criminal conduct in the absence of proof of injury to the victim or, if injury occurred, in the absence of proof that the defendant caused the injury.

Constitutional issue: right to privacy. It could be argued that a law which specifically makes it a crime for an AIDS carrier to engage in sexual conduct is an unconstitutional violation of the actor's right to privacy. This argument is based on a series of Supreme Court cases holding that the federal Constitution generally prohibits the government from interfering with or creating classifications that affect the exercise of fundamental rights, such as the right of an individual to engage in certain types of intimate and personal conduct or decision-making,[36] and the right to be free from government intrusion in

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[35] See e.g., H.B. 1798 (Hawaii).

[36] Thus far, the Supreme Court cases decided on "right to privacy" grounds have addressed such matters as child rearing and education, Pierce v. Society of Sisters, 268 U.S. 51 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); family relationships, Prince v. Massachusetts, 321 U.S. 158 (1944); procreation, Skinner v. Nebraska ex. rel. Williamson, 316 U.S. 535 (1942); marriage, Loving v. Virginia, 388 U.S. 1 (1967); contraception, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); and abortion, Roe v. Wade, 410 U.S. 113 (1973).

private places.[37] According to these cases, any governmental action that interferes with an individual's constitutional right to privacy is subjected by the courts to a rigorous level of review known as strict scrutiny. Under this level of review, the government's action will be upheld only if it is found to be necessary to achieve a compelling state interest, a test that is rarely satisfied.

Most of the legislative proposals will survive a constitutional challenge on privacy grounds because the right to privacy either has been held not to protect the type of sexual activity involved or has not yet been extended to the sexual activity in question. However, those proposals prohibiting sexual activity by AIDS carriers within the marital relationship or for procreative purposes are vulnerable to constitutional challenge on privacy grounds and will be ruled invalid unless they can survive strict scrutiny review.

Rape and prostitution. First, it is clear that the right to privacy does not protect unlawful sexual conduct such as rape and prostitution.[38] Therefore, the courts are likely to uphold those legislative proposals that impose enhanced penalties on AIDS carriers who knowingly engage in such criminal conduct.

Sodomy. Second, according to the Supreme Court's recent decision in Bowers v. Hardwick,[39] the right to privacy under the federal Constitution does not protect sexual conduct in violation of a state's anti-sodomy statute, even when the activity is consensual. In this case, the Supreme Court held that Georgia's anti-sodomy statute does not violate the constitutional right to privacy because the type of conduct prohibited by the law bears no resemblance to the type of intimate conduct protected by the Court's earlier cases. The Court also held that acts of sodomy are not protected by the federal Constitution even when committed by consenting adults in the privacy of the home. Therefore, as applied to AIDS carriers who engage in acts of sodomy, the legislative proposals do not violate the right to privacy under the federal Constitution.[40]

Adultery and fornication. A final type of sexual activity not clearly protected by the federal Constitution is extramarital sexual conduct committed in violation of a state's adultery or fornication laws. Although some courts have ruled that such

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[37] See e.g., Stanley v. Georgia, 394 U.S. 557 (1969) (possession of obscene material in the privacy of one's home may not constitutionally be regulated by the government).

[38] See e.g., State v. Price, 237 N.W.2d 813 (Ia. 1976), appeal dismissed 426 U.S. 916.

[39] ___U.S.___, 106 S. Ct. 2841 (1986).

[40] Compare State v. Gray, 413 N.W.2d 107 (Minn. 1987) (right to privacy under the Minnesota Constitution does not protect those who engage in commercial sex). As was indicated in note 27, supra, the Minnesota Supreme Court in the Gray case expressly reserved the question of whether the right to privacy under the state constitution protects the right of consenting adults to engage in noncommercial acts of sodomy. Therefore, it is possible that the right to privacy under the Minnesota Constitution is a broader privacy right than the one interpreted in Hardwick. If so, criminal statutes in Minnesota relating to the sexual activity of AIDS carriers may be vulnerable to challenge on state constitutional grounds.

conduct is constitutionally protected,[41] a number of other courts have reached the opposite conclusion.[42] Thus far, the U.S. Supreme Court has refused to resolve the conflict between these lower court decisions. Until it does so, the constitutionality of laws regulating extramarital sexual conduct, including proposed AIDS legislation, will depend on the constitutional case law of the relevant jurisdiction.[43]

Sexual activity within the marital relationship. Unlike the three types of sexual activity discussed above, the right to privacy clearly does protect sexual activity within the marital relationship. Under existing Supreme Court case law, an individual's right to privacy with respect to this activity generally outweighs the government's interest in regulating it.[44] Therefore, as applied to this type of sexual conduct, criminal AIDS legislation would be ruled unconstitutional unless it survived strict scrutiny review by a showing that the state has a compelling purpose in regulating the conduct at issue, and that the means chosen by the state to achieve its objective are the least restrictive means available to it.[45]

With respect to the first prong of this strict scrutiny test, it is almost certain that a court would find that protection of the public health is a compelling state purpose.[46] However, it is doubtful that prohibiting all sexual conduct by an AIDS carrier within the marital relationship is the least restrictive means available for safeguarding the public health. While it is true that the AIDS virus is transmittable through intimate conduct, the risk of transmission varies, depending on the type of sexual activity engaged in and the precautions taken, if any, to avoid the exchange of bodily fluids between the sexual partners.[47] Given these varying medical risks, a court is likely to find that a statute which prohibits all AIDS carriers from engaging in any type of sexual activity is unconstitutionally overbroad as applied to activity within the scope of marital privacy.

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[41] See e.g., City of Muskegon v. Briggs, 746 F.2d 1475 (6th Cir. 1985), cert. denied 105 S. Ct. 3535 (1985); and cases cited in White dissent from denial of certiorari, 105 S. Ct. at 3536.

[42] See e.g., Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983), cert. denied sub nom., Whisenhunt v. Spradlin, 104 S. Ct. 404 (1984); and cases cited in White dissent from denial of certiorari, City of Muskegon v. Briggs, 105 S. Ct. 3535, 3536 (1985).

[43] For example, the Minnesota Supreme Court could hold that such consensual sexual activity is protected under the state Constitution if it determines that the state Constitution broadly protects privacy interests. State v. Gray, note 40, supra.

[44] See cases cited in note 36, supra.

[45] Kramer v. Union Free School Dist., 395 U.S. 621, 633 (1969); Note, The Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1274, 1280 (1986); Burris, Fear Itself: AIDS, Herpes and Public Health Decisions, 3 Yale Law & Policy Rev. 479, 481 (1985).

[46] See e.g., Brown v. Stone, 378 So.2d 218 (Miss. 1979), cert. denied, 449 U.S. 887 (1980) (state's interest in compulsory vaccination of school children sufficiently compelling to override parents' religious interests).

[47] Robinson at 104.

Sexual activity for procreative purposes. Another type of activity which the Supreme Court has held to be protected by the right to privacy is activity involving reproductive decisions.[48] Criminal AIDS legislation infringing on the right of a person to engage in sexual activity for procreative purposes would, therefore, also be subjected by the courts to strict scrutiny review. Again, the courts would likely find that the state has a compelling state interest in safeguarding the public health in these situations, particularly given the additional medical risk that a fetus can receive the AIDS virus from an infected mother. However, it is not at all clear that imposing criminal sanctions on such conduct is the least restrictive means available of safeguarding the public health. It could be argued that the state's compelling purpose is equally well-served by educating and counseling AIDS carriers to enable them to make an informed reproductive decision. On the other hand, a court could find that this alternative insufficiently protects the public health and that the only reasonable means available to the state to achieve its compelling purpose are criminal sanctions. This decision would raise troubling implications, however, for potential parents who have other medical conditions that place a fetus at risk, such as Tay-Sachs genetic factors, sickle cell disease, or genital herpes.

Possible legislative solution. The fact that criminal AIDS legislation raises privacy issues does not mean that the state is wholly without power to regulate activity which creates a substantial risk of AIDS virus transmission. One legal commentator has suggested a legislative proposal that seems to address a number of the constitutional concerns noted above.[49] This proposal is directed not only at sexual activity, but at all activity involving the knowing or reckless transfer of bodily fluids by a diagnosed AIDS carrier to another person. Thus, the proposal would include all bodily fluids known to contain the AIDS virus,[50] as well as all known methods of transmission.[51]

Perhaps more importantly, the proposal contains several affirmative defenses to criminal liability, including the following: (1) proof that the conduct was sexual intercourse between married partners with consent after full disclosure of the risk; (2) proof that the transfer of bodily fluid was apparently prevented by the use of a condom, after consent following full disclosure of the risk, including informing the potential transferee that the condom may be ineffective to prevent infection; and (3) proof that the transfer occurred after advice from a licensed physician that the actor was noninfectious.

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[48] Skinner v. Oklahoma, 316 U.S. 535 (1942); Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services International, 431 U.S. 678 (1977).

[49] Robinson at 101.

[50] "Bodily fluid" is defined in the proposal to include semen, blood, saliva, vaginal secretion, urine and fecal material.

[51] "Transfer" is defined in the proposal to include sexual intercourse, reuse of hypodermic needles without sterilization, and the giving of blood or semen to a blood bank, hospital, or other medical care facility.

Whether this proposal is limited enough to convince a court that it is the least intrusive means available to preserve the public health is a question that only the courts can answer. At the very least, however, it represents an attempt to address potential constitutional concerns in advance of judicial direction, while at the same time addressing activity with which a state, under its police power, may be justifiably concerned.[52]

[52] The question of whether the government should use the criminal law to combat the spread of AIDS, as opposed to other methods of government intervention, is a policy issue about which reasonable minds can differ. See discussion of policy arguments for and against criminal AIDS legislation at page 5, supra.

Chapter 2. MANDATORY AIDS TESTING OF CERTAIN CRIMINAL OFFENDERS

Part I. Policy issues and arguments.

Proposals requiring criminal offenders to submit to AIDS virus testing, like criminal penalty proposals, raise the general policy issue of whether it is appropriate to use the criminal justice system to address a medical problem. The following is a brief summary of the arguments that have been made on both sides of this policy issue.

Proponents of mandatory testing argue that AIDS testing of sex offenders, intravenous drug users and prisoners is needed because these individuals have been shown by medical evidence and behavioral studies to be at high risk of carrying and transmitting the AIDS virus. Under appropriate policies governing the use of the test results, the information gained can help protect society from transmission of the virus as well as enable the offender who tests positive to obtain necessary medical care and counseling.

Opponents of mandatory testing argue that since one-half to three-quarters of the persons who test positive for the virus will not actually contract the disease, mandatory testing will do little to stop the spread of AIDS. Instead, it will create enormous costs and cause many people to worry unnecessarily about their health. Furthermore, opponents argue, there is little evidence to show how subjects of involuntary testing will react to the news of a positive test result. They may not change their behavior and seek counseling or treatment but may, instead, deny their medical condition or lose hope about their future. Mandatory testing could also subject these individuals to discriminatory treatment in employment, housing, education, insurance and health care and could set a dangerous precedent for widespread, mandatory testing of other groups. Finally, opponents argue that mandatory testing requirements violate the subject's right to privacy and, therefore, may be unconstitutional.

Part II. Description of legislation and programs.

The mandatory testing programs that have been proposed or enacted to date vary considerably with respect to the following issues:

(1) who is subject to testing?

(2) what is the effect of a positive test result?

(3) to whom may positive test results be disclosed?

Who is subject to testing?

Testing of all prisoners. Perhaps the best-known AIDS testing program involving criminal offenders is the federal one established by the **U.S. Bureau of Prisons** in June, 1987 at the direction of President Reagan and Attorney General Meese.[53] Under this program, an AIDS test must be performed on persons sentenced to incarceration in a federal prison, inmates who are scheduled to be released from prison within 60 days, and inmates who will be involved in community programs, such as halfway houses.[54]

Similar testing programs involving prison populations are being implemented or considered at the state level.[55] For example, **Nevada** has enacted a law requiring all prisoners to be tested for exposure to the AIDS virus before release from prison. Proposals in the states of **Alabama, California, Illinois, Michigan, Missouri, New York, New Jersey, Rhode Island** and **Washington** would require the testing of all inmates in correctional facilities. In contrast, legislation being considered in the state of **Hawaii** would merely authorize correctional authorities to test inmates.

Testing of certain prisoners and/or convicts. Some testing proposals would apply only to persons convicted of crimes or committing acts in prison involving behavior known to permit transmission of the AIDS virus. For example, **Nevada** has passed a law requiring AIDS testing of persons convicted of either prostitution or possession of certain controlled substances. The state of **Iowa** has enacted a proposal for mandatory AIDS and venereal disease testing of those prisoners who bite or otherwise cause another person to be exposed to bodily fluids. **Alabama, California, Georgia, Illinois** and **New Jersey** are considering mandatory testing of convicted sex offenders, whether or not imprisoned. Proposals to require or permit the testing of persons convicted of prostitution are pending in **California, Illinois,** and **Oklahoma.**[56] **New Jersey** is considering a proposal to require AIDS testing of persons convicted of unlawful drug use. Finally, the state of **Illinois** is considering AIDS testing of persons convicted of the unauthorized use of a hypodermic syringe.

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[53] See New York Times (June 9, 1987), p. 1.

[54] Recent statistics released by the Bureau of Prisons show that of the 16,372 federal inmates tested thus far, 494 (3%) have tested positive for the AIDS virus. Testing has identified 31 cases of AIDS thus far out of a total federal prison population of more than 44,000. New York Times (Oct. 24, 1987), p. 11.

[55] The description of state testing proposals in this chapter is based on information contained in Intergovernmental Health Policy Project, A Synopsis of State AIDS Related Legislation, (Working Draft) (Wash. D.C. 1987).

[56] Oklahoma's proposal would also require AIDS testing of all individuals named under oath by a convicted prostitute as having had sexual intercourse with the prostitute within the preceding 24 months.

Testing of certain arrestees. Several states are considering mandatory testing proposals that would apply to persons who have been arrested, but not yet convicted of certain crimes, such as prostitution (**Hawaii, Illinois, Michigan,** and **Washington**[57]), sexual assault or sodomy (**New York**), illegal drug use (**Michigan**), and assault and other acts of physical aggression involving exposure to bodily fluids (**Rhode Island**).

What is the effect of a positive test result?

Most of the state testing proposals authorize or require counseling and treatment for AIDS-infected persons (**Alabama, Georgia, Iowa, Illinois, Missouri, New York**). **Hawaii** and **New Jersey** would make the offender's positive test result a permanent part of the offender's criminal record. **Rhode Island's** proposal would require that all inmates who test positive for the virus be segregated from the general prison population. **Missouri** proposes only to segregate those prisoners who have actually contracted the AIDS disease.

The **U.S. Bureau of Prisons** announced recently that it intends to segregate from the general prison population those inmates who have tested positive for the AIDS virus and who display "predatory or promiscuous behavior".[58] These inmates will be housed in single person cells and will not eat, work or have recreational activities with the other inmates. Inmates who have tested positive, but do not display problem behavior, will receive education, counseling and medical care.

Whether and to what extent a positive test result should affect a federal inmate's eligibility for parole is presently an open question. The **U.S. Parole Commission** is in the process of seeking public comment on a number of proposed responses to this question, including the following:

> requiring, as a condition of parole, that inmates who test positive for the AIDS virus disclose their infection to any prospective sex partner; and
>
> prohibiting parolees who test positive for the AIDS virus from transmitting bodily fluids through unprotected sex, the donation of blood, or otherwise.

The Commission has also asked for comments on the general issue of whether these proposals inappropriately extend the role of the Commission from the prevention of crime to the prevention of disease.[59]

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[57] The Washington proposal would include not only persons arrested for prostitution, but also persons "reasonably suspected" of engaging in prostitution.

[58] New York Times, (Oct. 24, 1987), p. 11. According to the Bureau, an inmate who is known to have raped another inmate has exhibited "predatory behavior". However, the Bureau has not yet defined "promiscuous behavior" and, as a result, has been criticized by the National Prison Project of the American Civil Liberties Union.

[59] Criminal Justice Newsletter, p. 4 (vol. 18, no. 17. Sept. 1, 1987) (Pace Publications, N.Y., N.Y.).

To whom may positive test results be disclosed?

Many of the testing proposals being considered at the state level are silent on the issue of whether and to whom positive AIDS test results may be disclosed. **Michigan's** proposal, however, would specifically require that test results be kept confidential. Other states would authorize disclosure of test results to interested government agencies (**Alabama, California, Georgia, Illinois, Iowa, North Carolina**) or crime victims (**New Jersey, New York**).

Similarly, the **U.S. Parole Commission** is currently considering whether to instruct probation officers to disclose positive test results to spouses and fiances of parolees, to other classes of persons who are in danger of being infected, and to public health agencies.[60]

Part III. Constitutional issues.

Mandatory AIDS testing of prison inmates and other criminal offenders by the government raises the following four constitutional issues:

Does mandatory testing violate the offender's **right to privacy** under the Ninth and Fourteenth Amendments to the U.S. Constitution?

Does mandatory testing of offenders violate the **equal protection** clause of the Fourteenth Amendment?

Does mandatory testing violate the Fourth Amendment's prohibition against **unreasonable searches and seizures**?

Does the denial of probation or parole to an offender with a positive test result constitute **cruel and unusual punishment** in violation of the Eighth Amendment?

Does mandatory testing violate an offender's right to privacy?

Conclusion. Whether mandatory testing violates a criminal offender's constitutional right to privacy[61] depends on the scope of the testing program. Mandatory testing of prison inmates and of certain convicted offenders would probably survive constitutional challenge. In contrast, mandatory testing of offenders who have been arrested but not yet convicted of a crime would probably not be upheld by the courts.

Analysis. At least one legal commentator has suggested that, as a general matter, mandatory blood testing of any individual for the AIDS virus is an unconstitutional infringement of "the individual's protected privacy interest in avoiding disclosure of

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[60] Id.

[61] See note 36, supra, and accompanying text for a discussion of the scope of the constitutional right of privacy.

personal matters."[62] This infringement arises not from the fact of bodily intrusion, which the commentator admits is similar to that involved in compulsory immunization[63] but, rather, from the potentially devastating impact that a positive AIDS blood test could have on the individual's life. For example, a falsely positive test result could result in significant psychological trauma to the subject of the test. Additionally, any positive test result could result in discrimination against the individual in employment, education, housing and medical treatment. Finally, it could be argued that a positive test result, if disclosed, could lead to the individual's loss of his or her good name and reputation. Given these privacy interests, this commentator argues that mandatory testing measures are constitutional only if they can survive strict scrutiny review. Under this level of constitutional review, the testing measure would be upheld only if it were found to be necessary to advance the state's compelling interest in public health.[64]

(1) Mandatory testing of all prisoners. It is unlikely, however, that mandatory AIDS testing of prisoners would be subjected to the rigor of strict scrutiny review. The U.S. Supreme Court recently held that a prison regulation that affects an inmate's constitutional rights need not pass strict scrutiny review. Rather, the regulation will be upheld if it is reasonably related to legitimate penological objectives.[65] This level of review merely requires some showing that the regulation at issue is logically related to the asserted goal and is not an exaggerated response to prison concerns.[66]

Under this test, it is probable, but by no means assured, that mandatory AIDS testing of prisoners would survive constitutional challenge. The argument for constitutionality is that mandatory testing furthers the legitimate penological objective of ensuring adequate medical care and protection for both the tested inmate and the general inmate population.[67] Indeed, the provision of adequate medical care to inmates is not only a legitimate penological objective, it is a constitutional duty placed on prison officials by the Eighth Amendment.[68] Mandatory testing is reasonably related to this penological objective because of the heightened risk in prison of violence and homosexual behavior and, to some extent, intravenous drug use; all of which are potential means of transmitting the AIDS virus.

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[62] Note, The Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1274, 1287 (1986), citing Whalen v. Roe, 429 U.S. 589, 599 (1977).

[63] As was discussed earlier in note 46, the constitutionality of compulsory immunization laws has been upheld by the courts.

[64] 99 Harv. L. Rev. at 1287, 1288.

[65] Turner v. Safley, ___U.S.___, 107 S. Ct. 2254 (1987).

[66] Id.

[67] See e.g., LaRocca v. Dalsheim, 120 Misc. 2d 697, 710, 467 N.Y.S.2d 302, 311 (Sup. Ct. 1983).

[68] The U.S. Supreme Court has ruled that the failure to provide adequate medical care to prisoners in deliberate indifference to the prisoner's health or safety constitutes "cruel and unusual punishment" in violation of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

The argument against constitutionality is that such testing is unreasonable because it is not limited to those prisoners whose past or present behavior shows they are at risk of transmitting the virus to other inmates; i.e., those inmates who are or have been intravenous drug users, or those who are likely to engage in predatory or promiscuous, sexual behavior. According to this argument, mandatory testing of all inmates is not a reasonable regulation, but an invalid "exaggerated response" to concerns about the spread of AIDS within the prison walls; concerns that could be better addressed by more targeted regulations.

(2) Mandatory testing of certain convicted offenders. In contrast, mandatory AIDS testing of non-incarcerated criminal offenders would likely be subjected to strict scrutiny review. With respect to those offenders who have been convicted of a crime involving activity known to transmit the AIDS virus, such as intravenous drug use, sexual assault, or prostitution, such testing may be constitutionally permissible. In this context, testing may be the least restrictive means available to further the government's compelling interest in safeguarding the public health, given the kind of behavior engaged in by the offender in the past.

(3) Mandatory testing of certain arrested offenders. As compared to mandatory testing of prisoners or convicted offenders, mandatory testing of arrested offenders would almost certainly be held unconstitutional by the courts. Because these individuals have not been convicted of committing any crime, they are presumed by the criminal law to be innocent until proven guilty.[69] Given this presumption of innocence, it is difficult to imagine how mandatory AIDS testing of arrested individuals could survive strict scrutiny review. Indeed, if such testing proposals did survive strict scrutiny, then the government would presumably be justified in requiring all individuals to submit to AIDS testing; a proposal that no state has advanced to date.

Does mandatory testing violate equal protection of the law?

Conclusion. It is likely that mandatory testing programs involving criminal offenders would survive constitutional challenge on equal protection grounds.

Analysis. The equal protection argument against the mandatory testing of criminal offenders is that the legislative classification identifying those to be tested does not bear a fair relationship to a legitimate governmental purpose.[70]

This argument, however, would probably not be successful for the following reasons. First, it is clear that subjecting prison inmates to AIDS testing is rationally related to the government's legitimate objective of providing adequate medical care to those inmates who

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[69] See United States v. Salerno, ___U.S.___, 107 S. Ct. 2095, (1987) (dissenting opinion of Justices Marshall and Brennan).

[70] It is likely that the courts would employ this less-exacting "rational relationship test" instead of either "strict" or "heightened" scrutiny in reviewing an Equal Protection challenge to the mandatory testing requirements at issue. Criminal offenders do not constitute a "suspect class" deserving of strict scrutiny analysis; nor have the courts ruled in the past that legislation involving criminal offenders gives rise to recurring constitutional difficulties demanding heightened scrutiny of governmental means and objectives by the courts. See McKnight, Minnesota Rational Relation Test, 10 Wm. Mitch. L. Rev. 711, 712 (1984).

may need it and protecting the rest of the prison population from infection by the virus. Second, mandatory AIDS testing of persons arrested or convicted of relevant crimes, such as sex crimes and intravenous drug use, appears to bear a fair relationship to the government's interest in safeguarding the public health generally from the risks involved in these specific types of behaviors.

Does mandatory testing constitute an unreasonable search or seizure?

Conclusion. While the Fourth Amendment usually invalidates searches and seizures that are not based on probable cause, it is possible that the courts would uphold the mandatory testing of criminal offenders under the "administrative or regulatory search" exception to the Fourth Amendment's normal probable cause requirement.

Analysis. It could be argued that mandatory testing of criminal offenders constitutes an unreasonable search or seizure in violation of the Fourth Amendment. This argument is conceptually related to the privacy concerns discussed earlier, and is based on the notion that a search and seizure of a blood sample from an individual is unreasonable and, therefore, unconstitutional unless based on probable cause (i.e. individualized suspicion) to believe that the person has committed a crime.[71]

Although the language of the Fourth Amendment is not limited to criminal investigations, most Fourth Amendment cases do involve searches and seizures related to and for the purpose of detecting evidence of unlawful activity. The application of Fourth Amendment analysis to mandatory AIDS testing situations is, therefore, a relatively novel constitutional approach, at least in the absence of related legislation making it a crime to knowingly transmit the AIDS virus or knowingly engage in certain activity after having tested positive for the virus.

While there are no direct precedents indicating how courts might respond to a Fourth Amendment challenge to AIDS testing requirements, there are related cases which indicate a rationale for approving mandatory AIDS testing against Fourth Amendment attack. Specifically, these cases, known as "administrative or regulatory search" cases, recognize an exception to the usual probable cause limitations of the Fourth Amendment. They permit searches which are not based on individualized suspicion of criminal wrongdoing where the government's interest is regulatory rather than prosecutorial, and where the search is conducted pursuant to standardized procedures that minimize the potential for arbitrary action.[72] Under this line of cases, courts have approved mandatory random drug testing of certain categories of employees,[73] weapons searches of passengers at airports,[74] border searches,[75] and inspections of buildings for health and safety violations,[76] without

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[71] Kamisar, Drugs, AIDS and the Threat to Privacy, New York Times Magazine (September 13, 1987), p. 109.

[72] Id. at 113.

[73] McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (correctional employees); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986) (horse jockeys).

[74] United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

[75] United States v. Ramsey, 431 U.S. 606 (1977).

requiring the government to demonstrate probable cause to believe a particular individual has committed a particular crime. Whether these cases will likewise authorize mandatory AIDS blood testing[77] of entire populations of individuals, such as prison inmates or alleged sex offenders, is an open and controversial[78] legal question.

Would denial of probation or parole on the basis of a positive test result constitute cruel and unusual punishment?

Conclusion. Past Supreme Court decisions indicate that the government may, consistent with due process and the Eighth Amendment, impose some restrictions on the liberty of AIDS-infected criminal offenders in pursuit of its valid regulatory goal of preventing danger to the community. However, the government may not refuse to release such individuals on probation or parole solely because of their medical condition, unless there is substantial evidence showing that the individual has not or will not behave in a manner consistent with the public safety, and no less restrictive options are available to achieve the government's regulatory goal.

Analysis. If a court or parole authority imprisoned an individual or denied the individual release on parole based on the individual's positive test result, it could be argued that the action violates both the Due Process Clause of the Fifth or Fourteenth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment because the individual's severity of punishment is based on his or her medical condition, not on his or her behavior.[79]

However, the rationale for imposing limitations on the freedom of a criminal offender who is an AIDS virus carrier is that such limitations are regulatory, not punitive, and are necessary to protect the public safety.[80] This rationale is based on a recent U.S. Supreme Court case upholding the constitutionality of pretrial preventive detention, in which the Court held that it is not impermissible punishment to restrict a person's liberty if (1) the

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[76] Camera v. Municipal Ct., 387 U.S. 523 (1967) (housing code inspection); See v. City of Seattle, 387 U.S. 541 (1967) (fire inspection).

[77] The degree of personal intrusion involved in involuntary blood testing may be a factor influencing the courts' willingness or unwillingness to approve mandatory AIDS blood testing under this exception to the probable cause requirement of the Fourth Amendment. It is possible that courts will find that such an intrusion into a person's body simply goes too far. See e.g. Rochin v. California, 342 U.S. 165, 172 (1952); but compare Schmerber v. California, 384 U.S. 757 (1966) and cases cited in note 73, supra.

[78] See e.g. Kamisar, supra note 71, at 113.

[79] New York Times, (June 9, 1987) p. 22, col. 2. See e.g., Robinson v. California, 370 U.S. 660 (1962) (holding unconstitutional the criminalization of the status of heroin addiction).

[80] Indeed, when Attorney General Meese announced the mandatory testing program in the federal prison system, he stated, "One of the factors on when people leave prison on parole certainly has to do with whether they are a danger to the community." New York Times, (June 9, 1987), p. 22, col. 3.

purpose of the restriction is regulatory rather than penal, and (2) the restriction is not excessive in relation to the regulatory goal sought to be achieved.[81]

With respect to the first prong of this test, it would be relatively easy for the government to justify the denial of probation or parole to an AIDS-infected offender on the basis that its purpose is to protect the public safety, not punish the offender for his or her medical condition. Indeed, the Supreme Court has specifically recognized that the prevention of danger to the community is a legitimate regulatory goal.[82]

However, it would be extremely difficult for the government to satisfy the second prong of the test; that is, to demonstrate that a denial of probation or parole on the basis of a positive AIDS test is not excessive in relation to the regulatory goal sought to be achieved. Clearly, there are other, much less restrictive, alternatives available to the government to protect the public safety short of total denial of probation or parole. For example, the probationer or parolee could be ordered not to engage in behavior carrying a high risk of AIDS transmission, as has been proposed in some states. Additionally, the individual could be ordered to participate in AIDS counseling and treatment programs. Failure to abide by the conditions of probation or parole could then be the basis for additional restrictions on the individual's liberty.

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[81] United States v. Salerno, ___U.S.___, 107 S. Ct. 2095 (1987).

[82] Id.