

**ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672**  
**6906 HOUSE JUDICIARY**

150

APRIL 2, 1991

UNLESS HOUSE BILL 24 PASSES, YOU WILL NOT HAVE ACCESS TO YOUR RAPIST'S AIDS TEST RESULTS. BERT SHARP HAS BEEN VERY COURAGEOUS IN FIGHTING OFF OPPOSITION BY GAY RIGHTS GROUPS WHO HAVE STATED THAT FINDING OUT THESE RESULTS WILL UNNECESSARILY BURDEN THE VICTIM.

DO NOT ALLOW YOURSELF TO BE TREATED LIKE A CHILD WHO IS DENIED INFORMATION BECAUSE OTHERS PRESUME SHE CANNOT HANDLE IT.

DO NOT ALLOW THE RAPISTS IN THIS STATE TO HAVE MORE RIGHTS AND MORE PRIVACY THAN YOU, YOUR MOTHER, YOUR SISTER, AND YOUR DAUGHTER DO.

DO NOT ALLOW BERT SHARP TO FIGHT THIS BATTLE ALONE.  
-----

CALL, WRITE, OR SEND A FREE PUBLIC OPINION MESSAGE (THROUGH THE LEGISLATIVE AFFAIRS OFFICE) TO:

REPRESENTATIVES MILLER  
BOYER  
MOYER  
SHARP

SENATORS FAHRENKAMP  
FRANK

ALL CAN BE REACHED AT  
P.O. BOX V  
JUNEAU, 99811

Please do it today.

March 21, 1991  
24331 F Aster St.  
Elmendorf AFB, AK 99506  
907-338-3241

Mr. Dave Donnelly, Chairman  
P.O. Box V  
Juneau, AK 99811

Dear Mr. Donnelly:

Anyone can become infected with the HIV virus. Exposure requires direct inoculation or intimate sexual contact. There is an increasing number of people infected with the HIV virus. More and more people die from this killer disease.

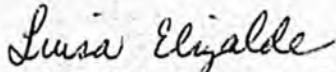
The U.S. Public Health Service is urging the public to become aware of the dangers of the HIV virus. There is an increasing awareness in the public about this sexually transmitted disease. People are changing their behaviors toward safe sex.

In hospitals, health care providers have a right to know if a patient is HIV positive. This is for the protection of the provider and other people that could be in the care of the HIV-positive-patient.

Since the HIV virus can be transmitted through sexual contact, rape victims are at high risk for contamination. The innocent victim should have a right to know whether the perpetrator is infected or not so that the victim can be given appropriate medical attention and precautionary measures.

I strongly feel that sexual offenders should be tested for the HIV virus because they are a great threat to the public. I hope that this bill is passed for the sake of innocent victims of a violent crime like rape.

Sincerely yours,



Luisa Elizalde, Student Nurse, UAA

# Alaska State Legislature

REPRESENTATIVE  
**BERT SHARP**

DISTRICT 20

MEMBER  
FINANCE COMMITTEE

FINANCE SUBCOMMITTEES.  
GOVERNOR  
FISH AND GAME  
LABOR



FAIRBANKS

119 N CUSHMAN  
FAIRBANKS, ALASKA 99701  
(907) 452-7885 / 7886

WHILE IN JUNEAU

PO BOX V  
STATE CAPITOL  
JUNEAU, ALASKA 99811  
(907) 465-3004 / 3018

## House of Representatives

### Sponsor Statement

CSHB24

One of the most significant elements of state government is its duty to protect the public from the spread of communicable diseases. Alaska law upholds this obligation by requiring blood tests of pregnant women to determine the presence of syphilis (AS 18.15.150). And, where it is believed to be necessary to preserve and protect public health, persons can also be ordered to submit to an examination to detect the presence of tuberculosis. (AS 18.15.135).

CSHB 24 is designed to safeguard certain crime victims and public safety personnel by making available information regarding risks to their health and relieving them of fear of infection from all communicable diseases including AIDS.

Alaska's duty to protect crime victims, peace officers, and emergency personnel is substantial. Therefore, it is not unreasonable to warrant blood testing of defendants charged with certain crimes to determine the presence of the human immunodeficiency virus (HIV) and other communicable diseases.

It is known that AIDS antibodies may usually be detected in the blood anywhere from two weeks to three months after infection,



REPRESENTING  
GOLDEN HEART  
OF ALASKA

and sometimes longer. If the defendant did infect the victim with AIDS, but the presence of antibodies cannot yet be detected in the victim's blood, the victim may infect someone else before learning he carries the AIDS virus. Therefore, the most timely way to find out whether the defendant may have infected the victim is to test the defendant. The risk of infecting others gives added weight to the government's interest in testing defendants charged with crimes.

The implied intrusion from a court mandated blood test is further minimized when compared to the advantages that may be gained from informing a crime victim as well as the offender whether he is at risk for infection with AIDS. Most recent information indicates early detection and treatment is extremely advantageous.

The great danger AIDS presents to our society and the rapid spread of the disease in recent years presents the government with a strong interest in establishing greater health safety standards. CSHB 24 does just that.

HIV is not a political debate or opinion - it is a life threatening illness. When it threatens the lives of innocent victims, it is in the public interest that government step in and take action.

# Alaska State Legislature

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## House of Representatives

### CSHB 24 SECTIONAL ANALYSIS

Section 1. Sets forth the legislative findings and intent relating to AIDS and other communicable diseases as they pertain to the health and safety of the public, victims of certain crimes and employees put at risk in the course of their official duties.

Section 2. Adds a new section to AS 18.15. (Health & Safety) to allow blood tests of certain defendants.

Sec. 18.15.250 Sexual offenses.

a & b) Victims of a sexual assault may petition the court for an order requiring the defendant charged of the offense to submit to a blood test for the purpose of determining the presence of the human immunodeficiency virus (HIV) and other communicable diseases.

c) The court shall conduct a hearing to determine if probable cause exists to believe there was an exchange of body fluids and issue an order accordingly.

d) Test results shall be disclosed to defendant, the victim or the victim's designee, and the chief medical officer of the facility in which the person is incarcerated or detained.

Sec. 18.15.250 Assaults on certain persons.

a & b) Peace officers, firefighters, or emergency medical personnel who are victims of an assault where there is an exchange of body fluids may petition the court for an order requiring the defendant charged of the offense to submit to a blood test for the purpose of determining the presence of the human immunodeficiency virus (HIV) and other communicable diseases.

c) The court shall conduct a hearing to determine if probable cause exists to believe there was an exchange of body fluids and issue an order accordingly.

d) Test results shall be disclosed to defendant, the petitioner, and the officer in charge of the facility in which person is incarcerated or detained.



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*Sectional Analysis*

Sec. 18.15.270. Testing and test results.

a & b) Outlines procedures for which testing may be performed and the types of tests to be conducted.

c) Test results shall be provided to Department of Health & Social Services.

d) Disclaimer shall be provided to recipients of the test results which state that results are not absolutely accurate and persons receiving results should monitor their own health and consult a physician as appropriate.

e) Minor's provision - test results of a minor shall be disclosed to parent or guardian.

f) All persons receiving test results must maintain confidentiality of information received except as necessary to receive medical or psychological care.

g) Specimens and results are not admissible evidence in a criminal or juvenile proceeding.

h) Civil liability immunity to all persons performing testing, transmitting test results, or disclosing information in accordance with provisions of this law.

Sec. 18.15.280. Persons in custody.

a & b) Medical personnel who have knowledge of an inmate's (including minors) exposure to or infection by the HIV virus or other communicable disease, including a positive test result or a statement made to the medical personnel, must convey this information to the officer in charge of the facility where the person is incarcerated or detained.

c) The officer in charge of the facility must notify all employees, medical personnel, contract personnel, and volunteers providing services at the facility who may have direct contact with the inmate or minor in question so that appropriate action for protection and safety can be taken.

d) Confidentiality must be maintained except as necessary to obtain medical or psychological care.

e) Persons who intentionally disclose personal identifying data regarding information obtained under this section are guilty of a class A misdemeanor.

Sec. 18.15.290. Definitions

Sectional Analysis

CSHB24

Page 2

# Alaska State Legislature

REPRESENTATIVE  
**BERT SHARP**

DISTRICT 20

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DEPARTMENT OF NATURAL RESOURCES



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JUNEAU, ALASKA 99811  
(907) 465-3004/3018

## House of Representatives

M E M O R A N D U M

December 17, 1990

SUBJ: AIDS Testing for Sexual Offenders (W.O. 17-LS0233)  
TO: Terri Lauterbach, Legislative Counsel  
FROM: Representative Bert Sharp *BMS*

My primary intent in proposing this legislation is to make this information available to the victim or the offender's spouse. In addition, it would be made available to prison officials to allow for possible segregation and medical treatment.

I understand that this may raise constitutional privacy issues. However, I believe that threshold was crossed with the establishment of mandatory DWI breathalyzer and blood tests for persons charged with DWI offenses.

The legislation would provide for testing for an HIV positive response as well as full-blown AIDS.

Please revise the bill accordingly, and let me know if I can provide you with further clarification.



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OF ALASKA

2-201

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

P.O. Box Y, Juneau, Alaska 99811  
(907) 465-3867 or 465-2450  
FAX (907) 465-2029

Deliveries to: 240 Main Street  
Court Plaza, Room 500  
Mail Stop 3101

**MEMORANDUM**

December 21, 1990

**SUBJECT:** HIV+ Testing for Sexual Offenders (Work Order No. 7LS-0233)

**TO:** Representative Bert Sharp

**FROM:** Terri Lauterbach *TML*  
Legislative Counsel

Enclosed is a new draft of your bill relating to HIV+ testing for sexual offenders.

As you requested, I have expanded the draft's scope to include HIV+ testing, not just AIDS testing. I have also provided for sharing the results of the test with the persons you requested.

I must advise you that the privacy issues I raised in my first memo are probably not the same sort that are raised by the DWI testing area that you mentioned. Testing following suspicion of DWI is an investigative technique for gathering evidence of a crime; having AIDS or HIV+ blood is not a crime. Also, DWI blood tests are not mandatory, and even breath tests can be refused, although with a penalty. So, the intrusive aspect of this bill is significantly greater (blood test vs. breath test) and for a different purpose (public health vs. criminal investigation) than the intrusiveness related to DWI investigations.

All this is not to say that your draft, if enacted into law, would be totally indefensible. There obviously are some implications for public health. I just want to let you know that the privacy and policy considerations involved in DWI cases are not really the same as those involved in HIV+ testing so DWI precedents would not be very helpful in supporting your bill if it were tested in court.

Let me know if I can be of further assistance.

TML:mi  
90-016.mai

Enclosure

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

# Alaska State Legislature

REPRESENTATIVE  
**BERT SHARP**

DISTRICT 20

COMMITTEE  
RESOURCE

FINANCE SUBCOMMITTEE  
DEPARTMENT OF NATURAL RESOURCES



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## House of Representatives

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LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

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*Deliveries to: 240 Main Street  
Court Plaza, Room 500  
Mail Stop 3101*

**MEMORANDUM**

November 28, 1990

**SUBJECT:** AIDS Testing for Sexual Offenders (W.O. No. 17-LS0233)

**TO:** Representative Bert Sharp

**FROM:** Terri Lauterbach *TL*  
Legislative Counsel

Enclosed is a draft relating to AIDS testing for sexual offenders.

You will note that the draft only requires testing, as you requested, and it makes the results of the tests confidential. It does not provide that the results of the test be communicated to anyone.

I have expanded the draft beyond "rapists" to include all degrees of sexual assault and sexual abuse of a minor. This is in keeping with a recently enacted Washington law, a copy of which is attached. The Washington law also requires testing for certain drug offenders and prostitution offenders and counseling for the persons who are tested, but I have not added those provisions to your bill.

You requested a discussion of the legal ramifications of the draft. Issues raised by mandatory testing lie in the area of privacy for the most part. A blood test is an intrusion into the body, an area for which society recognizes an expectation of privacy. Therefore, there are issues raised under art. I, sec. 22, Constitution of the State of Alaska, which recognizes a specific right of privacy, and under the federal constitution, which has been interpreted to grant an implied right of privacy under several different provisions.

There would be additional privacy issues raised if, instead of simply testing the offenders, your bill also provided for sharing information about the test with anyone else, for instance, the victim of the assault or abuse or the warden of the prison.

I cannot give you a full discussion of the constitutionality of your proposal until I understand the purpose for which you would require AIDS testing. Is the purpose to counsel inmates before they return to society? Is the purpose to allow segregation in prison? Is the purpose to inform the victim or the offender's spouse or other

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**MEMORANDUM**

December 21, 1990

**SUBJECT:** HIV+ Testing for Sexual Offenders (Work Order No. 7LS-0233)  
**TO:** Representative Bert Sharp  
**FROM:** Terri Lauterbach *TML*  
Legislative Counsel

Enclosed is a new draft of your bill relating to HIV+ testing for sexual offenders.

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Let me know if I can be of further assistance.

TML:mi  
90-016.mai

Enclosure

prevention, transmission, and treatment of AIDS and shall not be required for employees who are covered by comparable rules adopted under other sections of this chapter. In adopting rules under this section, the department shall consider infection control standards and educational materials available from appropriate professional associations and professionally prepared publications. [1988 c 206 § 608.]

**70.24.320 Counseling and testing—AIDS and HIV—Definitions.** Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Pretest counseling" means counseling aimed at helping the individual understand ways to reduce the risk of HIV infection, the nature and purpose of the tests, the significance of the results, and the potential dangers of the disease, and to assess the individual's ability to cope with the results.

(2) "Posttest counseling" means further counseling following testing usually directed toward increasing the individual's understanding of the human immunodeficiency virus infection, changing the individual's behavior, and, if necessary, encouraging the individual to notify persons with whom there has been contact capable of spreading HIV.

(3) "AIDS counseling" means counseling directed toward increasing the individual's understanding of acquired immunodeficiency syndrome and changing the individual's behavior.

(4) "HIV testing" means a test indicative of infection with the human immunodeficiency virus as specified by the board of health by rule. [1988 c 206 § 701.]

**70.24.325 Counseling and testing—Insurance requirements.** (1) This section shall apply to counseling and consent for HIV testing administered as part of an application for coverage authorized under Title 48 RCW.

(2) Persons subject to regulation under Title 48 RCW who are requesting an insured, a subscriber, or a potential insured or subscriber to furnish the results of an HIV test for underwriting purposes as a condition for obtaining or renewing coverage under an insurance contract, health care service contract, or health maintenance organization agreement shall:

(a) Provide written information to the individual prior to being tested which explains:

(i) What an HIV test is;

(ii) Behaviors that place a person at risk for HIV infection;

(iii) That the purpose of HIV testing in this setting is to determine eligibility for coverage;

(iv) The potential risks of HIV testing; and

(v) Where to obtain HIV pretest counseling.

(b) Obtain informed specific written consent for an HIV test. The written informed consent shall include:

(i) An explanation of the confidential treatment of the test results which limits access to the results to persons

involved in handling or determining applications for coverage or claims of the applicant or claimant and to those persons designated under (c)(iii) of this subsection; and

(ii) Requirements under (c)(iii) of this subsection.

(c) Establish procedures to inform an applicant of the following:

(i) That post-test counseling, as specified under WAC 248-100-209(4), is required if an HIV test is positive or indeterminate;

(ii) That post-test counseling occurs at the time a positive or indeterminate HIV test result is given to the tested individual;

(iii) That the applicant may designate a health care provider or health care agency to whom the insurer, the health care service contractor, or health maintenance organization will provide positive or indeterminate test results for interpretation and post-test counseling. When an applicant does not identify a designated health care provider or health care agency and the applicant's test results are either positive or indeterminate, the insurer, the health care service contractor, or health maintenance organization shall provide the test results to the local health department for interpretation and post-test counseling; and

(iv) That positive or indeterminate HIV test results shall not be sent directly to the applicant. [1989 c 387 § 1.]

**70.24.330 HIV testing—Consent, exceptions.** No person may undergo HIV testing without the person's consent except:

(1) Pursuant to RCW 7.70.065 for incompetent persons;

(2) In seroprevalence studies where neither the persons whose blood is being tested know the test results nor the persons conducting the tests know who is undergoing testing;

(3) If the department of labor and industries determines that it is relevant, in which case payments made under Title 51 RCW may be conditioned on the taking of an HIV antibody test; or

(4) As otherwise expressly authorized by this chapter. [1988 c 206 § 702.]

**70.24.340 Convicted persons—Mandatory testing and counseling for certain offenses—Employees substantial exposure to bodily fluids—Procedure.** (1) Local health departments authorized under this chapter shall conduct or cause to be conducted pretest counseling, HIV testing, and posttest counseling of all persons:

(a) Convicted of a sexual offense under chapter 9A.44 RCW;

(b) Convicted of prostitution or offenses relating to prostitution under chapter 9A.88 RCW; or

(c) Convicted of drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.

(2) Such testing shall be conducted as soon as possible after sentencing and shall be so ordered by the sentencing judge.



# Alaska State Legislature

Please enter into the record my testimony to the Health, Education + Social Services committee name

committee on House Bill #24 , dated 2/1/91  
bill/subject

I support this bill whole heartedly! The experience of being sexually assaulted is degrading enough, without having to be degraded by the legal system when trying to obtain life and death information. Information concerning HIV is essential to healing. If you can't find out if your life is endangered ~~from~~ from exposure to HIV, getting healthy, healing and just getting on with your life is impossible. ~~Sometimes~~ <sup>often</sup> the days, weeks and months that it takes to get results in HIV testing can be a living hell. This can be easily circumvented by just forcing the perp. to be tested in a timely manner and making that information known to the victim in a timely manner.

Signed: Lisa Sober  
Testifier

WIC-CA  
Representing (Optional)

717 9th Ave, Fairbanks AK 99701  
Address

907-452-2293  
Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the House Bill  
committee name

committee on # 24, dated Feb 1 1991  
bill/subject

I totally support this bill. I believe the results of the HIV test should also be printed in the local newspaper.

Signed: Cathy Wingrove  
Testifier

WICCA

Representing (Optional)

717 Ninth Ave, FAIRBANKS, AK

Address

907-452-2293

Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the \_\_\_\_\_  
committee name

committee on House Bill NO. 24 , dated 2/1/91  
bill/subject

I support the bill requiring ~~and~~ HIV TESTING of sexual offenders. Its only logical to demand ~~sexual~~ HIV and STD testing of the sexual offenders ~~and~~ rather than ~~putting~~ on responsibility being placed on the victim. to test for STD and HIV testing

Signed: [Signature] SHREVE  
Testifier

Representing (Optional)  
Box 83279 FRK AK 99708  
Address  
452-2293  
Phone No.

Renee Herbst  
9902 Afognak Circle  
Eagle River AK 99577  
February 5, 1991

Bert Sharp  
State House  
PO Box V  
Juneau AK 99811

Dear Mr. Sharp:

I support the house bill 24. I think it is imperative that this be passed. It is unfair that victims of molestation or rape not know of other horrors that may befall them besides the trauma of the event. It is time to pay some attention to victims' rights especially as it is those same victims that vote for the legislators. Give us all a chance.

Sincerely,

*Renee Herbst*  
Renee Herbst

Thank you for introducing this legislation - I am 33 now and I'm starting to remember the rapes, tortures and traumas of my first 18 years. Others who live through this should have the right to know if they've been infected. If I may do anything else to help, please contact me.

P.O. Box 72884  
Fairbanks, 99707  
1 February 1991

Dear Bert Sharp:

I am writing to thank you for proposing HB24, and I plan to write to other legislators to solicit their support for your efforts.

It is a triumph of twisted reasoning that at this time rapists and molesters are, in effect, allowed to continue their torture and power over their victims long after the physical assault has ended.

Again, my appreciation for supporting legislation that is important for all women.

Sincerely,

*Linden Staciokas*

Linden Staciokas

P.O. Box 72884  
Fairbanks, 99707  
1 February 1991

Dear Bert Sharp:

Thank you for proposing HB24. I only hope that other legislators have the courage to support the bill.

Until recently I was not aware that victims of rape and incest were not allowed access to the results of HIV tests performed on their rapists and molesters. It is inconceivable that at this time rapists and molesters are, in effect, allowed to continue their control of their victim's lives long after the physical assault has ended.

My appreciation for your farsightedness in proposing this legislation before it became a popular issue.

Sincerely,

*Ted S. Sponsel*

Ted S. Sponsel

2-13-91

Mike Meath  
660 Wilcox Avenue #20  
Fairbanks, Alaska 99709

Bert Sharp  
State House  
P.O. Box V  
Juneau, Alaska 99811

Dear Sir:

This letter is to express my support of proposed House Bill 24. I fully support this proposal which would make HIV testing mandatory for persons convicted of sexual offenses. The results of such tests should be available to the victim, the victim's legal guardian and the spouse of the offender. A victim's inability to access to an offender's HIV results stands as a major obstacle to the process of healing and reestablishing a sense of security. The proposed legislation is a sign to the public that our criminal justice system may begin to recognize victim's rights. I would support any legislation that would improve victim's rights without infringing on the civil liberties of the accused. The proposed House Bill 24, on it's face, does not appear to pose any threat to a convicted sexual offender's constitutional rights. Thank you for your time and consideration.

Sincerely,



Mike Meath

Misc. Support

February 13, 1991

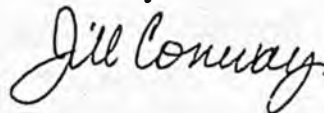
Jill Conway  
660 Wilcox Avenue #20  
Fairbanks, Alaska 99709

Bert Sharp  
State House  
P.O. Box V  
Juneau, Alaska 99811

Dear Sir:

This letter is regarding the proposed House Bill 24. I wholeheartedly support this proposal which would make HIV testing mandatory for persons convicted of sexual offenses. The results of such tests should be available to the victim, the victim's legal guardian and the spouse of the offender. A victim's inability to access to an offender's HIV results stands as a major obstacle to the process of healing and reestablishing a sense of security. The proposed legislation is a sign to the public that our criminal justice system is beginning to recognize victim's rights. I would support any legislation that would improve victim's rights without infringing on the civil liberties of the accused. The proposed House Bill 24, on it's face, does not appear to pose any threat to a convicted sexual offender's constitutional rights. Thank you for your time and consideration.

Sincerely,



Jill Conway

Good Morning. My name is Mark Tumeo. I am a co-founder and past Chair of the Interior AIDS Association. I currently serve on the Board of Directors and am here to testify on behalf of the Chair of the Board, Ms. Susan McInnis, and the Board of Directors of the Interior AIDS Association. We are strongly opposed to House Bill 24, the bill that would require HIV-testing of individuals convicted of sexual assault, without the individuals consent, and mandates notification of the convicted individual's spouse, the the victim of the offense, the victim's legal custodian, and the commissioner of corrections of the results of the test. We urge all legislators to oppose this bill, and ask the sponsors to withdraw it.

We are sure that the sponsors of the bill feel they are working towards a solution to the spread of HIV and, most importantly, towards the protection of victims of sexual assault. We applaud these goals. However, House Bill 24 will achieve neither. In fact, it will hurt victims of sexual assault and impede the efforts of organizations working to educate our communities on the risk of AIDS.

Our first and foremost concern must be with the victims of sexual abuse. House Bill 24 will do nothing for these victims. Consider first what HIV testing is, and is not. An HIV test will indicate if a person is positive AT THE TIME OF THE TEST. A test four months after an assault, the minimum time for sexual assault conviction after an arrest, will not indicate whether the person was positive at the time the sexual assault occurred. It is quite possible that a person convicted of a sexual assault may have contracted the virus AFTER the crime. And to what advantage is the knowledge that the assailant has tested positive for HIV, regardless of when the disease was contracted. It says absolutely nothing about the status of the victim !! A positive test of a convicted sexual assailant, several months to a year after the crime, will only serve to further traumatize the victim of a sexual assault.

Anybody who has been sexually assaulted should be tested the day of the assault, to ensure that the person assaulted was not ALREADY POSITIVE for HIV before the assault, and then tested again six-weeks afterwards - the maximum incubation period before antibodies for HIV are produced. No convictions will be completed within six weeks. In fact, in cases of stranger rape, an arrest may not even have been made by this point. By the time of a conviction, if it is achieved, the victim should have ALREADY BEEN TESTED, CONFIDENTIALLY AND VOLUNTARILY, so that appropriate health protection methods could already be underway. There is NO ADVANTAGE to a victim of sexual assault to force the convicted assailant to be tested, nor in sharing the results of this test with anyone.

We must also consider the effect this bill will have on others infected with HIV. House Bill 24 promotes the dangerous illusion that we are dealing with AIDS, but it will only force people away from the realization that they are particularly vulnerable. This bill will further stigmatize HIV-positive individuals by once again associating the illness with 'deviant' or illegal behavior. Worse, it will promote the illusion that the 'average' person is not at-risk for AIDS. The fact is that a person who commits rape is less likely to be a carrier than anyone who has sex with prostitutes or is promiscuous. HIV-infection is growing at its fastest rate among young women between the ages of 18 and 30 - not from sexual assault or drug use, but from consensual sexual relations !! The second highest rate of infection is among teenagers, an equally high rate for men and women, once again from consensual sexual contact. By furthering the false impression that only victims of sexual assault are at-risk, or that only those who are rapists, gay or drug-users are HIV-positive, is to place one more barrier in the way of effective AIDS education, and to help condemn our teenagers, especially young women, to death.

House Bill 24 is also an example of the type of potential state-sanctioned violation of personal rights that all HIV-positive individuals fear. The argument that AIDS should be treated like any other sexually transmitted disease when it comes to testing and reporting is fallacious and based on a misunderstanding of the AIDS epidemic. AIDS is NOT like other sexually transmitted diseases. Most notably, it is not curable. More important however, is that individuals with other sexually transmitted diseases are not singled out by society for discrimination. People do not lose their jobs if they are diagnosed with gonorrhea; they are not denied housing, insurance, or medical care if they are found to have syphilis; and no other diagnosis of a sexually transmitted disease will subject a rapist to a potential murder charge or result in isolation from the general prison population. With a diagnosis of HIV-positive, these are common occurrences.

The violation of an individual's right to privacy, a right guaranteed in our State constitution, as proposed in House Bill 24, will not benefit the victim of a sexual assault nor help stem the spread of AIDS. Its only possible effect is a punitive one for the convicted individual. In a nation that is struggling to reduce discrimination against populations that are identified closely with HIV, we cannot tolerate an obvious violation of an individual's right to privacy when it comes to HIV-testing. We would do much more to help victim and criminal alike by better educating the prison population about the dangers of HIV. As much as we dislike the idea, we should make condoms and voluntary CONFIDENTIAL HIV-testing available in prisons. We must educate the prison population and give them the necessary tools, so that THEY can stop the spread of HIV among themselves. We know that personal knowledge of one's own HIV status can help an individual take steps to change behaviors, remain healthy, and extend life. Behavior change is the only way to stop the spread of this disease, not mandatory testing and violation of confidence.

While AIDS education, the availability of condoms, and promotion of voluntary HIV-testing in prisons are important goals for a limited target group, we must not ignore the fact that it is our sisters and brothers, spouses, loved ones, family members and friends who are really at the greatest risk. Groups like the Interior AIDS Association, the Anchorage AIDS Assistance Association, and Shanti Juneau, are doing a great deal to educate local high-risk groups. In Fairbanks, the IAA is working with gay and bisexual males, teens, women at-risk and IV drug users. We are also actively educating the general population. These efforts will continue, and we hope the legislature will assist us in continuing our efforts.

You as legislators and we in grass-roots organizations such as the IAA, have an immense responsibility to reach out to society with education, encouragement for voluntary testing, and information on prevention of transmission of HIV, so that people realize that it is our teens, young men and women, gay, bisexual or straight, single or married, that this virus is threatening and killing: it is not the behavior of sexual assailant that is putting this nation, our state and our communities at risk, it is sexual behavior in GENERAL. Punitive measures against a reviled subgroup of the population will not prevent the spread of HIV nor provide assistance or solace to victims of sexual assault.. House Bill 24 will only further hamper our efforts, will result in punitive isolation of individuals in prisons, and will cause unnecessary and painful hysteria among the already traumatized victims of sexual assault.

We encourage our law makers, especially the sponsors of House Bill 24, to withdraw this bill and support legislation or resolutions that will encourage statewide education regarding HIV, promote voluntary, confidential HIV-testing, and support alternative testing sites, while at the same time protecting the civil rights and privacy of individuals who are HIV-positive.

I thank you for your time this morning, and for your willingness to address the difficult issues surrounding the AIDS epidemic. I stand ready to answer any questions you may have.



# Alaska State Legislature

Please enter into the record my testimony to the House HESS  
committee name

committee on 24, dated 2/21/91  
bill/subject

I AM the AIDS Coordinator for the Rural Alaska Health Education Center, and am on the board of directors of the Interior AIDS Association. I have worked with rape crisis centers, & cofacilitating a support group for women ~~but~~ who have been sexually assaulted and was on the board of the National Coalition Against Sexual Assault from 1981-1983. Finally I am a survivor of a stranger rape.

I AM opposed to this bill. We should not and cannot mandate HIV testing of anyone. If the offender is tested after conviction we cannot prove they were infected at the time the offense occurred (even though we don't want to admit it sexual activity does occur among our inmates). HIV testing should be a very private decision.

I understand this bill is for the victim's benefit. Sexual Assault is a tragedy and recovery from it's effects is a long hard process. Even if the offender does have HIV infection we do not know from this fact whether the victim will become ~~offended~~ <sup>infected</sup>. Just as the victim needs to be tested + treated for syphilis, gonorrhea, chlamydia and other sexually transmitted diseases, the victim now also needs to be tested for HIV.

This bill will do ~~nothing~~ nothing for the victim and will be an infringement on the privacy of the offender. We need societal changes so that sexual assault does not occur. AND we need legislative changes to protect confidentiality of HIV information

Signed: Beverly D. Alford RN  
Testifier

RAHEC, IAA  
Representing (Optional)

PO Box 84397 Fairbanks 99708  
Address

455-6639  
Phone No.

to mandate informed consent for HIV testing, to mandate ~~and~~ counseling to go along with HIV testing, to provide monies for treatment for HIV infected individuals.

TESTIMONY TO THE HOUSE  
HEALTH, EDUCATION AND SOCIAL SERVICE COMMITTEE

Date: March 6, 1991  
Given by: Susan Stephenson  
Representing: SHANTI of Juneau

SHANTI of Juneau is an organization committed to providing accurate, up-to-date AIDS education in Juneau and other Southeast communities, and to providing support to persons whose lives have been impacted by AIDS.

We depend upon current medical information from the Centers for Disease Control and from the State of Alaska Department of Health and Social Services, especially the Section of Epidemiology. We strive to meet our clients emotional and practical needs with the highest degree of confidentiality.

Our goal is to lessen peoples' fears about AIDS and to lessen the fears of people who have contracted the AIDS virus.

We and our colleagues oppose HB24 for a variety of reasons.

The bill has an air of panic which we feel is detrimental to the very persons it intends to defend. It proposes forced testing of a convicted person; an act, which if negotiated professionally, could reap far greater and earlier benefits for not only the victim, but indeed, all contacts made by the person charged. We feel that this bill, which violates an individual's right to privacy, will not benefit the victim and will not deter the spread of the HIV virus.

Testing indicates the presence of antibodies in the blood. It takes a window period of six weeks to six months to develop the antibodies. Conviction of an accused person will, in all probability, take several months as well. The appropriate response is to assume, as health care professionals now do, that the exposure was made to the HIV virus, and to take precautionary measures.

It is, of course, possible that a rapist can contract the HIV virus from his victim. Without a baseline test one is not able to confirm who may have given the virus to whom.

The legalities of the mandatory testing could lead the victim to litigation exposing her attack, her potential status of HIV+, her own behavior, to mandatory testing of the victim and so forth, ad infinitum. These potentials lead not to protecting the victim, but to further trauma.

Because of the window period, a mandatory test of the perpetrator could read negative. This would give the victim a false sense of assurance.

A test of the perpetrator provides information about the perpetrator. It provides no information about the victim.

\* The bill mentions the exchange of saliva. It would require approximately two quarts of saliva to place a person at risk.

The bill specifies a lengthy process of notification -- "the officer in charge of the facility shall notify all employees, medical personnel, contract personnel, and volunteers providing services at the facility who have or may have direct contact with the inmate or minor in question." At present there are state agencies working against such public notification in workplaces, calling that practice discriminatory. It promotes a misunderstanding of the transmission of the disease as does the use of the word "saliva" in this bill.

This bill proposes an invasive medical technique on a potentially unwilling human being.

Far better to provide counseling for the perpetrator at the time of the arrest. His co-operation can provide a baseline test, and potentially information regarding his behavior and therefore partner notification. The methods which have been implemented by our health care professionals are found to be effective. Involuntary testing is not conducive to co-operation.

HB24 aligns deviant behavior with the AIDS epidemic. It does virtually nothing to benefit the victim. It promotes negative connotations to an already stigmatized population. We feel that the funds which would go to implementing this act would be far better spent on education. It is the high risk behaviors which continue to perpetrate this epidemic and which must be changed.

on HB 24

Summary of testimony given March 6, 1991 to House HESS committee.

My name is Linda Linson. I am a board member and the most recent past-president of the Fairbanks NOW and consider myself a strong feminist. I have worked for most of my adult life in various human services, including domestic violence and sexual assault and children's mental health services. Among my co-workers, clients and friends are many people who have been sexually assaulted - children who have been molested, adults who have been raped, etc. I am very, very concerned about the spread of AIDS in general and appreciate the additional trauma this risk could impose on a victim of sexual assault. I also have many friends and co-workers who are health care and corrections workers.

I am also one of the people who received training by our local Red Cross to be a speaker for the American Red Cross AIDS Speakers' Bureau. I feel I must bring to bear all of my training and experience in sexual assault and AIDS prevention and tell you that House Bill 24 will not help a single one of my friends who have been molested or raped, will not help prevent the spread of AIDS to a single one of my friends who are health care and corrections workers and actually cannot help prevent the spread of the AIDS virus at all.

Any victim of sexual assault is in the same position as any other person who has, voluntarily or involuntarily, engaged in behaviors that put them at high risk for contracting HIV. They must get tested for HIV if they want to know if they have been infected with this virus. There is simply no way to judge the risk that a victim is exposed to by knowing the HIV status of the offender. I know from my training that some people have been infected from a one-time sexual contact with someone who is HIV+. There are also people who have been sexually active for years with an infected partner and have not contracted the disease. This virus is that unpredictable.

I very much want to see protocols developed by all counseling programs to inform all adults who are sexually assaulted and parents of children who are assaulted of the only effective way to find out if they have the HIV virus - they must be tested. I realize the process this bill outlines for getting an offender tested is optional and voluntary on the part of the victim, but why have these already traumatized people go through a hearing process which, no matter how simple, would be an additional stress on them and would be completely useless in determining if the victim has the AIDS virus? I am also afraid the very existence of this kind of legislation, this kind of hearing process, may falsely reassure a victim that he or she does not need to be tested, which could prevent an infected person from receiving the early treatment that some HIV+ people choose. Medical and

corrections personnel should also follow their protocols for dealing with all patients and offenders. They must be educated as to what high risk behaviors are and follow the universal precautions for preventing infection.

Mr. Sharp has cited tuberculosis (TB) testing as an example of testing for a communicable disease that we already require of some populations. The ethical and legal basis for imposing such testing is and always has been the existence of an overwhelming public health concern. This concern is in turn based on several facts :

1. TB can be spread by casual contact with an infected person
2. Those who are found to have tuberculosis can be treated and recover from TB, and
3. The spread of TB can be prevented from spreading through an institution if infected people are identified.

None of these things are true of the HIV virus or AIDS and therefore there is no overwhelming public health interest in providing a mechanism to get anyone tested against their will.

I understand that there are laws similar to this bill on the books in other states. I assure you that those laws are not helping anyone in those states either. We in Alaska are proud of our independence from the mass craziness that sometimes happens outside. Please don't be naive about this subject. Educate yourselves about the effective ways to prevent AIDS in Alaska. I think our goals are the same and I appreciate your concern, but HB 24 will unfortunately not help anyone.

Thank you for taking the time to read my comments. Please feel free to call me or write with any questions at all. I can find answers or make sure you find them even if I don't know myself.

Linda Linson *Linda Linson*  
871 Goldmine Trail  
Fairbanks, AK 99712  
457-3308 h  
456-1070 w



# Alaska State Legislature

Please enter into the record my testimony to the Health, Education + Social Services  
committee name

committee on House Bill #24, dated 2/1/91  
bill/subject

I support this bill whole heartedly! The experience of being sexually assaulted is degrading enough, without having to be degraded by the legal system when trying to obtain life and death information. Information concerning HIV is essential to healing. If you can't find out if your life is endangered ~~from~~ from exposure to HIV, getting healthy, healing and just getting on with your life is impossible. ~~Sometimes~~ <sup>often</sup> the days, weeks and months that it takes to get results in HIV testing can be a living hell. This can be easily circumvented by just forcing the perp. to be tested in a timely manner and making that information known to the victim in a timely manner.

Signed: \_\_\_\_\_

Testifier

WIC-CA

Representing (Optional)

717 9th Ave, Fairbanks AK 99701

Address

907-452-2293

Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the House Bill  
committee name

committee on # 24, dated Feb 1 1991.  
bill/subject

I totally support this bill. I believe the results of the HIV test should also be printed in the local newspaper.

Signed: Cathy Wingrove  
Testifier

WLCA  
Representing (Optional)

217 Ninth Ave, FAIRBANKS, AK  
Address

907-452-2293  
Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the \_\_\_\_\_  
committee name

committee on House Bill NO. 24, dated 2/1/91  
bill/subject

I support the bill requiring ~~that~~ HIV TESTING of  
sexual offenders. Its only logical to demand ~~sexual~~ HIV and  
STD testing of the sexual offenders ~~not~~ rather than ~~putting~~  
an responsibility being placed on the victim. to test for  
STD and HIV testing

Signed: *Shirley L. Shores* SHIRLEY  
Testifier

Representing (Optional)  
Box 83279 FRK AK 99708  
Address  
452-2293  
Phone No.

Renee Herbst  
9902 Afognak Circle  
Eagle River AK 99577  
February 5, 1991

Bert Sharp  
State House  
PO Box V  
Juneau AK 99811

Dear Mr. Sharp:

I support the house bill 24. I think it is imperative that this be passed. It is unfair that victims of molestation or rape not know of other horrors that may befall them besides the trauma of the event. It is time to pay some attention to victims' rights especially as it is those same victims that vote for the legislators. Give us all a chance.

Sincerely,

*Renee Herbst*  
Renee Herbst

Thank you for introducing this legislation - I am 33 now and I'm starting to remember the rapes, tortures and traumas of my first 18 years. Others who live through this should have the right to know if they've been infected. If I may do anything else to help, please contact me.

P.O. Box 72884  
Fairbanks, 99707  
1 February 1991

Dear Bert Sharp:

I am writing to thank you for proposing HB24, and I plan to write to other legislators to solicit their support for your efforts.

It is a triumph of twisted reasoning that at this time rapists and molesters are, in effect, allowed to continue their torture and power over their victims long after the physical assault has ended.

Again, my appreciation for supporting legislation that is important for all women.

Sincerely,

*Linden Staciokas*  
Linden Staciokas

P.O. Box 72884  
Fairbanks, 99707  
1 February 1991

Dear Bert Sharp:

Thank you for proposing HB24. I only hope that other legislators have the courage to support the bill.

Until recently I was not aware that victims of rape and incest were not allowed access to the results of HIV tests performed on their rapists and molesters. It is inconceivable that at this time rapists and molesters are, in effect, allowed to continue their control of their victim's lives long after the physical assault has ended.

My appreciation for your farsightedness in proposing this legislation before it became a popular issue.

Sincerely,

*Ted S. Sponsel*

Ted S. Sponsel

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 ra, 387 U.S. at 523.  
 rants shall issue, but  
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issued a judicial warrant based on probable cause.<sup>104</sup> For a search war-  
 rant to issue in a criminal context, there must be probable cause to  
 believe that a crime has been or is being committed.<sup>105</sup> Conversely, if  
 the search is deemed administrative, warrants to inspect premises or  
 persons are issued when there are reasonable legislative or administra-  
 tive standards that authorize these intrusions.<sup>106</sup> Furthermore, some cir-  
 cumstances will justify a warrantless administrative search.<sup>107</sup> Thus, the  
 standards that authorize criminal and administrative searches differ  
 and perhaps are less rigorous in the latter. Whether a search of an indi-  
 vidual's blood is reasonable, therefore, depends on whether the search is  
 criminal or administrative in nature.<sup>108</sup>

A. *Standards Governing Criminal Searches Under the Fourth Amendment*

In *Schmerber v. California*<sup>109</sup> the Supreme Court held that compul-  
 sory administration of a blood test is a search under the fourth amend-  
 ment.<sup>110</sup> While the Court determined that the police investigation of a  
 vehicular homicide had provided probable cause to believe that the de-  
 fendant had been driving while intoxicated, the defendant's blood alco-  
 hol test was conducted without a warrant.<sup>111</sup> The Court held, however,  
 that under these circumstances a warrantless search was reasonable be-  
 cause the evidence of drunk driving would have been lost by the time  
 the police had obtained a search warrant.<sup>112</sup> Therefore, promotion of a  
 legitimate governmental interest outweighed the intrusion into the de-  
 fendant's privacy.

*Schmerber* demonstrates that if the test of an individual's blood is  
 intended to discover and secure evidence for use in a criminal proceed-  
 ing, the government must obtain a search warrant founded on probable  
 cause that the test will yield evidence of a crime unless a time delay  
 would result in loss of the evidence altogether.<sup>113</sup> *Schmerber* and its  
 progeny,<sup>114</sup> however, shed little light on the reasonableness of a blood

104. *Skinner*, 109 S. Ct. at 1414.  
 105. *See Camara*, 387 U.S. at 534; Note, *Mandatory AIDS Testing*, *supra* note 3, at 1424.  
 106. *Camara*, 387 U.S. at 538.  
 107. *See Note, Mandatory AIDS Testing*, *supra* note 3, at 1424; *see also infra* notes 124-64  
 and accompanying text.  
 108. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1424.  
 109. 384 U.S. 757 (1966).  
 110. *Id.* at 767.  
 111. *Id.* at 768-69 & n.12.  
 112. *Id.* at 770-71; *see also Note, Mandatory AIDS Testing*, *supra* note 3, at 1425 (noting  
 that the alcohol "would have dissipated from the defendant's blood before a search warrant could  
 have been obtained").  
 113. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1427.  
 114. In *Winston v. Lee*, 470 U.S. 753 (1985), the Court refused to authorize removal of a

search in an administrative situation. Arguably, a program of mandatory HIV testing of sex offenders represents a search that is more administrative than criminal in nature. Because the primary purpose of mandatory testing is to protect some element or segment of public health and not to obtain evidence to be used in a criminal proceeding,<sup>116</sup> one must look closely at the way in which the Court has developed its doctrine of administrative searches in order to fit mandatory HIV testing for sex offenders within the fourth amendment framework.

*B. Standards Governing Administrative Searches Under the Fourth Amendment*

1. Warranted Searches

In *Camara v. Municipal Court*<sup>116</sup> the Supreme Court reversed the defendant's conviction, which was based on his refusal to allow state health inspectors to conduct a warrantless search of his home for housing code violations.<sup>117</sup> The Court held that an administrative search conducted to enforce state regulations in the public interest constitutes a significant intrusion on fourth amendment interests. When performed without a warrant, such a search lacks the necessary fourth amendment safeguards.<sup>118</sup> The *Camara* Court declared that an administrative search would be reasonable only if performed on the basis of a warrant that verifies the need for and delineates the scope of the search.<sup>119</sup> The Court did not impose criminal search standards for probable cause as a requirement for obtaining an administrative warrant. Rather, the Court sought to strike a balance between the public and private interests implicated in an administrative search by holding that there is probable

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bullet from the defendant's body that the Commonwealth of Virginia claimed would provide strong evidence of the defendant's guilt. Because the surgery was dangerous to the defendant, the intrusion was more severe than the one sanctioned in *Schmerber*. See *id.* at 761 & n.4. Further, because the Commonwealth had substantial additional evidence that would convict the defendant, the Court declared that the invasion of the defendant's body was unreasonable. *Id.* at 767.

115. See *supra* text accompanying notes 101-02. The Presidential Commission on the Human Immunodeficiency Virus Epidemic recommended legislation that would make knowing, intentional transmission of HIV a criminal offense. *Presidential Commission, supra* note 2, at 130. In this respect, a mandatory HIV test of a sex offender could be seen as a criminal search under the fourth amendment, since the government would be seeking evidence useful in a criminal proceeding. A few states, including Florida, Idaho, Louisiana, and Nevada, have passed criminal statutes specifically intended to cover intentional HIV transmission. *Id.* Furthermore, some states have chosen to use a positive HIV test to increase sentences in sexual assault convictions when the defendant was aware that he was HIV-infected at the time of the attack. Hoffman, *supra* note 4, at 39.

116. 387 U.S. 523 (1967).

117. *Id.*

118. *Id.* at 534.

119. *Id.* at 531-33 & n.10.

bly, a program of a search that is more the primary purpose of a segment of public a criminal proceed- the Court has devel- der to fit mandatory endment framework.

### Under the Fourth

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cause to issue a warrant to inspect when "reasonable legislative or administrative standards" mandate the inspection.<sup>120</sup>

The probable cause standards for an administrative search are relatively vague as compared with those required in the criminal context. For example, the *Camara* Court found that the condition of the surrounding area, the passage of time, and the nature of the premises to be inspected are reasonable legislative standards upon which a search warrant can issue.<sup>121</sup> The Court did not demand that authorities have express knowledge of the premises' particular condition before requesting a warrant.<sup>122</sup> Legislative standards, however, must be rational and must represent a valid public interest in order to provide probable cause to issue a "suitably restricted" administrative search warrant.<sup>123</sup>

## 2. Warrantless Searches

Twenty years after *Camara* the Supreme Court modified its stance on the issue of whether an administrative search could be reasonable if conducted without a search warrant. In *New York v. Burger*<sup>124</sup> the Court expanded the scope of administrative searches to allow warrantless inspections in situations of special need: situations in which individual privacy interests are weakened, and governmental interests are concomitantly heightened.<sup>125</sup> In upholding a warrantless inspection of an automobile junkyard, the Court determined that closely regulated industries subjected to substantial governmental oversight have a lowered expectation of privacy.<sup>126</sup>

The *Burger* majority stated that a warrantless inspection may be reasonable under the fourth amendment if three criteria are met. First, following the *Camara* rationale,<sup>127</sup> the government must demonstrate that a substantial state interest justifies the regulatory scheme under which the inspection is made.<sup>128</sup> Second, the warrantless inspection must be necessary to further the regulatory scheme.<sup>129</sup> Finally, the state's inspection program must be sufficiently certain and regular in its application to serve as a constitutionally adequate substitute for a search warrant.<sup>130</sup> To satisfy this last requirement, the program of in-

120. *Id.* at 538.

121. *Id.*

122. *Id.*

123. *Id.* at 539.

124. 482 U.S. 691 (1987).

125. *Id.* at 702.

126. *Id.* at 700.

127. See *supra* text accompanying notes 116-23.

128. *Burger*, 482 U.S. at 702.

129. *Id.*

130. *Id.* at 703.

spection must alert a party to the possibility of being subject to a search, and the search must be limited in time, place, and scope.<sup>131</sup>

In *Burger* the Court did not discuss whether the three part reasonableness test would govern administrative searches of an individual's body and body fluids, but two years later the Supreme Court considered this issue in *Skinner v. Railway Labor Executives' Association*.<sup>132</sup> Finding that on-the-job intoxication is a significant problem in the railroad industry and that employees who abuse alcohol and drugs constitute a serious threat to public safety, the Court upheld administrative regulations mandating warrantless blood and urine tests of employees who are involved in specified accidents.<sup>133</sup> As in *Schmerber*,<sup>134</sup> the Court confirmed that blood, urine, and breath tests are searches under the fourth amendment.<sup>135</sup> Noting that a presumption in favor of a search warrant issued upon a degree of individualized suspicion still exists, the Court observed that individualized suspicion is not a constitutional requisite for every search.<sup>136</sup> Instead, judicial review of the railroad industry's drug testing program requires a balancing test similar to those applied in *Camara*<sup>137</sup> and *Burger*.<sup>138</sup>

In *Skinner* the Court observed that special needs necessitated a balancing of governmental and private interests and made warrant requirements impracticable.<sup>139</sup> Here, as in *Burger*, the Court found that the customary governmental regulation of the railroad industry had weakened privacy interests and heightened governmental interests thereby making a warrantless search constitutionally acceptable.<sup>140</sup> The Court held that a substantial state interest in regulating the conduct of railroad employees justified the regulatory program under which the state administered toxicological tests.<sup>141</sup>

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131. *Id.*

132. 109 S. Ct. 1402 (1989).

133. *Id.* at 1407, 1421-22. The Federal Railroad Administration found that from 1972 to 1983 at least 21 significant train accidents involved drug or alcohol intoxication, and that these incidents resulted in 25 fatalities, 61 injuries, and damage to property estimated at \$19 million. *Id.* at 1407-08.

134. 384 U.S. 757 (1966).

135. *Skinner*, 109 S. Ct. at 1412-18.

136. *Id.* at 1417.

137. 387 U.S. 523 (1967).

138. 482 U.S. 691 (1987).

139. *Skinner*, 109 S. Ct. at 1414.

140. *Id.*; Note, *Mandatory AIDS Testing*, *supra* note 3, at 1430-31.

141. The Court remarked that the test regulations were intended to reduce or eliminate accidents and other fatal incidents, and that the "governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty . . . This interest also require[s] and justify[ies] the exercise of supervision to assure that the restrictions are in fact observed." *Skinner*, 109 S. Ct. at 1415 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987)).

being subject to a search, and scope.<sup>141</sup> The three part reasonableness of an individual's search is the Court considers in *Association of Railroads' Association*.<sup>142</sup> The problem in the railroad industry and drugs constituted administrative burdens on the interests of employees. In *Schmerber*,<sup>144</sup> the Court held that the searches under suspicion still exist in favor of a search is not a constitutional review of the balancing test simi-

lars necessitated a search made warrant required. The Court found that the railroad industry had a legitimate interest in the conduct of the search under which the

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The Court further found that the warrantless inspection was necessary to implement the regulatory scheme.<sup>142</sup> Because the regulations relied principally on blood tests to evidence recent drug or alcohol use prior to an accident, the Court determined that any delay in obtaining a warrant would defeat the effectiveness of the blood assay because evidence of drug or alcohol use deteriorates rapidly in the bloodstream.<sup>143</sup> Furthermore, although employees know that an accident will trigger testing, the unpredictability of the occurrence of such an event enhances the deterrent effect of the penalties for the use of drugs or intoxicants.<sup>144</sup> Thus, the *Skinner* inspection program is regular enough in application to further the underlying administrative scheme and to alert the individual of the possibility of being subject to a suitably limited search. Because the government's interest in testing railroad employees outweighed the employees' justifiable expectations of privacy under these circumstances, and because the *Skinner* warrantless inspection program met the *Burger* standards for such a scheme, the Court found no fourth amendment violation.<sup>145</sup>

The Court followed a similar analysis in *National Treasury Employees Union v. Von Raab*<sup>146</sup> when upholding a suspicionless drug testing program for any customs officers who carried firearms or who directly participated in drug interdiction.<sup>147</sup> While holding that urine testing for illicit drug use clearly implicates the fourth amendment,<sup>148</sup> the Court determined that the realities of the workplace justify certain physical intrusions that might be unreasonable in other situations.<sup>149</sup> Finding that customs employees perform a function which substantially impacts public safety and welfare and that the safety of each employee depends largely on each employee's fitness for the job, the Court stated that these individuals should expect some inquiries that might be intrusive in other circumstances.<sup>150</sup> Certain forms of public employment, the majority concluded, result in a diminished expectation of privacy even with respect to intrusive physical searches.<sup>151</sup> Ultimately, under these circumstances the government has a compelling interest in ascertaining the trustworthiness and fitness of its drug interdiction force that out-

142. *See id.* at 1421.

143. *Id.* at 1420-21; *see also Schmerber*, 384 U.S. at 770-71.

144. *Skinner*, 109 S. Ct. at 1419-20.

145. *Id.* at 1418-21.

146. 109 S. Ct. 1384 (1989).

147. *Id.* at 1397.

148. *Id.* at 1390.

149. *Id.* at 1393.

150. *Id.* at 1394.

151. *Id.* at 1393.

weighs individual privacy expectations.<sup>152</sup> Persuaded that the drug testing program bore a close and substantial relation to the government's goal<sup>153</sup> and that the regulation clearly informed the employee of the rationale and scope of the test,<sup>154</sup> the Court applied the warrantless search standards of *Burger* and resolved the balancing test between public and private interests in the government's favor.<sup>155</sup>

At least one commentator has contended that the *Skinner* and *Von Raab* balancing test would apply to court-ordered HIV testing as well as to drug testing.<sup>156</sup> Under this rationale, involuntary HIV tests would be permitted if the physical intrusion served a special governmental need that outweighed the individual's expectation of privacy.<sup>157</sup> The Supreme Court has yet to consider whether compulsory HIV testing can meet that fourth amendment standard.<sup>158</sup> In *Glover v. Eastern Nebraska Community Office of Retardation*,<sup>159</sup> however, one federal court considered a policy that mandated HIV testing as a condition of state employment.<sup>160</sup>

The *Glover* court considered the constitutionality of an agency policy that required certain employees who had extensive contact with agency clients to undergo testing for HIV.<sup>161</sup> The court found that although the legislature might have enacted the policy to combat the spread of HIV, evidence showed that the risk of HIV transmission between agency employees and clients was so insignificant that the policy had no real effect in preventing the spread of HIV.<sup>162</sup> The court, therefore, decided that the government's interests in providing a safe environment for agency clients did not outweigh the employees' reasonable expectation of privacy in their blood.<sup>163</sup> Repeating that the governmental intrusion must be reasonable in both inception and scope, the court

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152. *Id.* at 1396.

153. *Id.* Presumably, the Court applied the *Skinner* deterrence rationale to the warrantless urine testing in *Von Raab*. The majority remarked that the petitioner's claim that such testing is ineffective and, therefore, not conducive to the regulatory scheme was unfounded because it is extremely difficult for a drug user to alter the test results by avoiding use of the drug after the test date is known. *Id.*

154. *Id.* at 1394.

155. *Id.* at 1396.

156. See CRIM. JUST. NEWSL., Apr. 17, 1989, at 3.

157. *Id.* (statement of Judge Mary C. Morgan).

158. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1431.

159. 686 F. Supp. 243 (D. Neb. 1988).

160. The governing board of the Eastern Nebraska Human Services Agency had adopted a policy that required certain employees to submit to mandatory testing for tuberculosis, hepatitis B, and HIV. *Id.* at 244. In addition, the policy contained reporting and disclosure requirements for employees who know or suspect they have one of the diseases or are treated for any of them. *Id.*

161. *Id.* at 247.

162. *Id.* at 249.

163. *Id.* at 250.

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V. AN ADMINISTRATIVE SCHEME FOR MANDATORY AIDS TESTING:  
CALIFORNIA'S PROPOSITION 96

On November 8, 1988, the California electorate approved an initiative known as Proposition 96. Added as Chapter 1.20 to the California Health and Safety Code,<sup>165</sup> Proposition 96 enables victims of sexual crimes as well as certain peace officers, firefighters, and emergency medical personnel who have been assaulted in their official capacity to request HIV testing of their assailants.<sup>166</sup> The Proposition 96 HIV test is administrative in nature because the test is structured to gather information that will be used to protect the public health, not as evidence in a criminal proceeding.<sup>167</sup> The HIV test is essentially a warrantless search that may be analogized to the search upheld in *Burger*.<sup>168</sup> It is also similar in nature to the physically intrusive searches discussed in *Skinner*<sup>169</sup> and *Von Raab*.<sup>170</sup>

Under Proposition 96 assault victims may petition the court for an order authorizing compulsory HIV testing of an assailant charged with either a sexual assault or with physical interference with the official duties of a peace officer, firefighter, or emergency medical officer.<sup>171</sup> Upon such petition, the court will conduct a hearing to determine whether probable cause exists to believe that a transfer of body fluids from the defendant to the victim occurred during the assault or altercation.<sup>172</sup> Upon finding probable cause, the court will order the defendant to undergo HIV testing.<sup>173</sup>

Proposition 96 states that a licensed medical laboratory will conduct the HIV tests<sup>174</sup> and that the results of the test will be disclosed to the defendant, the requesting victim, and if the defendant is incarcer-

164. *Id.* The court commended the agency's adoption of a safety-oriented approach, but determined that achieving the goal could not overshadow the impermissible infringement on the personal liberty of the agency's employees. *Id.* at 251.

165. CAL. HEALTH & SAFETY CODE §§ 199.95-199.99 (West Supp. 1990).

166. *Id.* §§ 199.96-199.97.

167. *Id.* §§ 199.95, 199.98(f); see also Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

168. 482 U.S. 691 (1987); see also Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

169. 109 S. Ct. 1402 (1989); see *supra* notes 132-45 and accompanying text.

170. 109 S. Ct. 1384 (1989); see *supra* notes 146-55 and accompanying text.

171. CAL. HEALTH & SAFETY CODE §§ 199.96-199.97 (West Supp. 1990).

172. *Id.*

173. *Id.*

174. Proposition 96 specifies that participating laboratories will conduct tests for "medically accepted indications of exposure to or infection by" HIV. *Id.* § 199.98(b). Presumably, this language refers to the testing procedures discussed *supra* at notes 55-64 and accompanying text.

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ated, the incarcerating facility.<sup>175</sup> A disclaimer informing the recipient that the test may be inaccurate accompanies the results.<sup>176</sup> Test results which indicate that the defendant has been exposed to or is infected with HIV also will be transmitted to the California State Department of Health Services.<sup>177</sup>

Proposition 96 provides that anyone who receives information of the defendant's test results under the statute must maintain the confidentiality of any personal identifying data relating to the test results except for disclosure necessary to obtain medical or psychological care.<sup>178</sup> Any person who discloses test results pursuant to a statutory authorization is immune from civil liability.<sup>179</sup> Finally, no test results obtained pursuant to the statute are admissible as evidence in any criminal or juvenile proceeding.<sup>180</sup>

Proposition 96 is deceptive because it uses the term "probable cause" to justify a search of an individual's blood. This term seems to suggest that the statute authorizes a criminal search. The statute, however, does not authorize a court to issue a testing order based on probable cause to believe that a crime has been committed, but instead on probable cause to believe that there has been an exchange of body fluids between defendant and victim.<sup>181</sup> The question is whether this standard establishes a sufficiently articulated legislative scheme that makes the mandatory AIDS test a constitutionally legitimate warrantless administrative search.<sup>182</sup> In other words, Proposition 96 must conform to the criteria set out in *Burger* and utilized in *Skinner* and *Von Raab* in order for its compulsory HIV testing to be a valid administra-

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175. CAL. HEALTH & SAFETY CODE §§ 199.96-199.97 (West Supp. 1990). Disclosure to the incarcerating facility entails disclosure only to the officer in charge and the chief medical officer of the facility. *Id.* If the requesting victim is a peace officer, a firefighter, or an emergency medical technician, the statute also requires disclosure of test results to the victim's employing entity. *Id.* § 199.97. Finally, if the defendant is a minor, the test results will be communicated to the minor's parents or guardian. *Id.* § 199.98(d).

176. The disclaimer states: "The tests were conducted in a medically approved manner but tests cannot determine exposure to or infection by AIDS . . . with absolute accuracy. Persons receiving this test result should continue to monitor their own health and should consult a physician as appropriate." *Id.* § 199.98(d).

177. *Id.* § 199.98(c).

178. *Id.* § 199.98(e).

179. *Id.* § 199.98(g).

180. *Id.* § 199.98(f).

181. *Id.* §§ 199.96-199.97. Proposition 96 does not require that the court issue a formal search warrant in order to inspect the defendant's blood. The court's only role in the inspection process is to determine whether there is probable cause to believe that there was an exchange of body fluids between defendant and victim, i.e., that the administrative standards authorizing the search have been met. Thus, the intrusion here is analogous to the warrantless search in *New York v. Burger*. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

182. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

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tive search.

For a mandatory HIV test to be valid under the fourth amend- ment, the government's interest in conducting the test must outweigh the individual's expectation of privacy in his or her own blood.<sup>183</sup> If the government constitutionally can utilize blood tests for employment pur- poses, for ascertaining a driver's blood alcohol level, and for determin- ing fitness for military service, the underlying safety rationale conceivably could be expanded to include testing of persons charged with a crime in order to provide their victims with information relevant to the victims' health.<sup>184</sup> Under such circumstances, the defendant ar- guably has a limited expectation of privacy.

Furthermore, the state has a substantial and perhaps compelling interest in curbing the transmission of HIV and in protecting crime vic- tims.<sup>185</sup> The state's interest is reflected in the purpose of the regulatory program, which is to acquire vital information and to disclose it as nec- essary to allow interested parties to take precautions, or alternatively, to relieve the parties from groundless fear of contracting the virus.<sup>186</sup> Arguably, the inspection authorized in Proposition 96 furthers the regu- latory scheme contemplated in the statute: the mandatory test purports to be an effective way of achieving the statute's stated goal. The ques- tion is whether the inspection scheme is necessary to further the regula- tory scheme. Finally, because the statute alerts the individual to the timing, manner, and scope of the mandatory HIV test, the inspection program appears to be sufficiently regular in its application to provide a constitutionally adequate substitute for a search warrant. If a court were to consider Proposition 96 under the criteria governing the consti- tutionality of administrative searches, it appears that the statute could survive fourth amendment scrutiny.<sup>187</sup>

183. *Id.* at 1439 & n.230.

184. *Id.* at 1443.

185. See CAL. HEALTH & SAFETY CODE § 199.95 (West Supp. 1990).

186. *Id.*

187. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1445.

HB24 Testimony  
Representative Bert Sharp

HESS committee  
February 21, 1991

I have introduced HB24, which would make HIV testing mandatory for persons convicted of sexual offenses. Test results would be made available to the Commissioner of Corrections and, upon request, to the victim or the spouse of the offender.

Sexual offenses are recognized as one of the most offensive in our nation. It is appalling when one considers that withholding life threatening information from a victim who is struggling to overcome the effects of an assault, essentially allows an offender to continue mentally attacking the victim long after the physical assault.

Studies indicate that fear of exposure to the AIDS virus is more pronounced when intimate contact is involuntary. To subject a victim to the added stress of "not knowing" is inequitable and cruel justice.

HB24 requires that the offender be tested. The victim may receive the test results upon request. Many believe this information needs to be made available to help minimize the victim's trauma and aid in recovery.

HB24 also provides the test results be provided to the Commissioner of Corrections. The Federal Bureau of Prisons reports that up to 20% of the prison population are targets of aggressive sexual acts during their incarceration. Mandatory testing will provide the Department of Corrections with vital information in

making decisions concerning housing, counselling, and providing medical treatment to offenders who test positive.

The Department of Corrections has indicated that prisoners in the Alaska prison system are presently given a medical examination if their prison stay exceeds 14 days. This exam includes routine blood tests for Hepatitis.

Some have expressed concerns that it would be more unfair to provide a victim with false results because the methods of testing are inaccurate. A 1989 study concludes that new test procedures are available that virtually eliminate false positive results, thereby putting these concerns to rest.

In addressing the Fourth Amendment question, courts have determined that a government's interest in protecting the health and safety of the general public outweigh the criminal's privacy rights, and therefore administrative search may be conducted without a warrant. Courts have held that "blood tests are not a significant intrusion into the individual's privacy because they have become 'routine in our everyday life.'"

Your bill packets have information addressing these issues.

Recent studies also indicate that early treatment would, among other things, reduce the possibility of an HIV-infected individual actually contracting AIDS.

Many states have addressed this issue. By 1987, 14 states enacted legislation on the issue of antibody testing. Today there are at least 29 criminal and civil statutes concerning this topic, and at least 12 states have enacted legislation directly concerning mandatory HIV testing.

HIV is not a political debate or opinion - it is a life threatening illness. When it threatens the lives of innocent victims, it is in the public interest that government to step in and take action.

I urge your favorable consideration of this legislation.

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Forthcoming issues of the *Journal* will address issues related to AIDS, and serious juvenile offenders. The editors welcome unsolicited manuscripts which examine specific topics within these general categories from an ethical perspective. Articles should be directed to the Lead Articles Editor; regretfully, manuscripts cannot be returned unless postage is provided.

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## MANDATORY AIDS TESTING: THE LEGAL, ETHICAL AND PRACTICAL ISSUES

A. ALYCE WERDEL\*

By 1981, a new worldwide epidemic was recognized. This epidemic is known as Acquired Immunodeficiency Syndrome (AIDS). The World Health Organization (WHO) estimates that between five and ten million people may be infected with the virus,<sup>1</sup> and over one million will be killed by the virus by the year 2000.<sup>2</sup> The number of AIDS cases is currently doubling every ten months.<sup>3</sup> An International Summit on AIDS held in London warned: "The AIDS virus threatens hundreds of millions of lives around the world and is likely to create an explosive epidemic far into the next century."<sup>4</sup> With no vaccine presently available, one way to halt the spread of the disease is to alert people to the possible danger in the hope that they will avoid high risk behavior. Many countries have developed, or are in the process of developing, laws to control the spread of this fatal virus.<sup>5</sup> One scheme proposed in the United States is mandatory testing. This article will examine the practical, ethical, and legal considerations of mandatory testing among certain high risk populations. It concludes that testing should be required among the following groups: (1) prisoners, (2) arrested prostitutes and drug users, and (3) those who attend sexually transmitted disease and drug abuse clinics.

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\* B.A. Human Biology, Stanford University 1986; J.D. University of Notre Dame 1990.

1. Gallo, *Quest for a Vaccine*, WORLD HEALTH, March 1988, at 9.

2. Mesce, *AIDS Infection Rate is Declining: Report*, S. Bend Trib., Feb. 2, 1990, at A2, col. 1.

3. Montefiore, *AIDS: The Only Answer*, The Times (London), Aug. 10, 1988, at 10, col. 2.

4. Prentice, *Generations at Risk from 'Explosive AIDS Epidemics'*, The Times (London), Jan. 27, 1988, at 3, col. 1.

5. By March 1988, over fifty countries had laws in force pertaining to AIDS. Other countries have extended their public health codes or communicable disease statutes to apply to AIDS cases. Jayasuriya, *AIDS Related Health Legislation*, 14 COMMONWEALTH L. BULL. 879 (1988).

## I. BACKGROUND: STAGES OF THE VIRAL INFECTION AND COMMON SYMPTOMS

AIDS is caused by a virus, known as the Human Immunodeficiency Virus (HIV). A virus is defined as an ultramicroscopic parasite, which invades a living cell and takes over its metabolic machinery in order to reproduce.<sup>6</sup> The HIV virus is a retrovirus; a retrovirus can easily invade the living cell "turning it into factories for more viruses."<sup>7</sup> HIV invades and multiplies within the white blood cells (lymphocytes) which are found in the immune system. It either destroys the host cell immediately or lies dormant for a period of time, delaying the onset of the disease.<sup>8</sup> No vaccine has ever been developed for a retroviral disease.<sup>9</sup>

The human immune system is the body's natural defense against potentially harmful, infectious microorganisms (microscopic life forms), such as bacteria, viruses and fungi.<sup>10</sup> The immune system consists of two types of cells: T-lymphocytes and B-lymphocytes. In a healthy immune system, the T-lymphocytes recognize and attack foreign cells in the body, known as antigens. There are two types of T-lymphocytes: T-killer cells and T-helper (T-4) cells. The T-killer cell binds to the antigen and kills it. The T-4 cell helps the T-killer cell to multiply, so that there are enough killer cells to fight the foreign cells.<sup>11</sup> The HIV virus attacks the body's immune system by destroying the T-4 cells.<sup>12</sup> As a result, the T-killer cells do not

multiply and the immune system is unable to fight infections.<sup>13</sup> Because the body has a high number of T-4 cells, it is easy for the virus to spread once it is in the system.<sup>14</sup> When the virus has destroyed the T-4 cells, the immune system is weakened and germs that normally are harmless can create fatal diseases.<sup>15</sup>

There are three stages of infection: HIV infection, AIDS-related complex, and full-blown AIDS.<sup>16</sup> The first stage of the disease, HIV infection, begins at the time that the virus enters the body and begins to attack the T-4 cells. At this stage, HIV tests can usually detect antibodies to the virus two to eight weeks after the initial infection.<sup>17</sup> Antibodies are proteins manufactured by T-lymphocytes in the immune system in response to an infection.<sup>18</sup> The role of the antibodies is to neutralize the viral antigen (foreign protein) in the body.<sup>19</sup> In order to do this, they block the HIV cells from binding to the T-4 cells.<sup>20</sup> However, as the body continues to fight the HIV infection, fewer and fewer antibodies are produced because the virus destroys the T-4 cells. As a result, HIV patients have low counts of these neutralizing agents<sup>21</sup> and are unable to fight off

surface of the T-4 cell; after they have attached, they are able to invade and destroy the T-4 cell. *Id.* at 43-44, 47.

The HIV virus attacks only the T-lymphocytes, not the B-lymphocytes. The immune system has two parts: humoral immunity and cellular immunity. The humoral immunity relies on the B-lymphocytes, while the cellular immunity relies on the T-lymphocytes. The T-lymphocytes attack virally infected cells or tumor cells. Therefore, this article only addresses the role of T-lymphocytes in the immune system. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE, *supra* note 9, at 573.

13. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE, *supra* note 9, at 573.

14. J. LANGONE, *supra* note 6, at 44.

15. *Id.* at 48.

16. Other authors have divided the disease into different classification systems which are typically more detailed than the one proposed in this text. More detailed classification systems are useful for antiviral therapy analysis as well as epidemiological purposes. For a survey of these classification systems and a more detailed analysis of their usefulness, see Smiley, *HIV Infection and AIDS: Definition and Classification of Disease*, 12 DEATH STUD. 399 (1988).

17. J. LANGONE, *supra* note 6, at 11. Note that there have been sporadic reports of delayed seroconversion (the time at which the body produces antibodies to the virus). For a possible explanation and examples of this rare phenomenon, see Moss & Bacchetti, *Editorial Review, Natural History of HIV Infection*, 3 AIDS 55 (1989).

18. J. LANGONE, *supra* note 6, at 10.

19. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE, *supra* note 9, at 115.

20. Yarchoan & Mitsuya, *supra* note 9, at 191.

21. *Id.* There is some indirect evidence that persons with high counts

6. J. LANGONE, AIDS: THE FACTS 22 (1988).

7. *Id.* at 43.

Genetic information comes the form of ribonucleic acid (RNA) or deoxyribonucleic acid (DNA). Wright, *AIDS: A Brief Overview*, 12 NOVA L. REV. 973, 974-75 (1988). The genetic information of most viruses and all living things is normally found in the DNA, which replicates itself into RNA when it is time to make a protein. *Id.* In a retrovirus the genetic information is found in the RNA rather than the DNA. *Id.* When the virus attaches to the cell, it uses a special enzyme, reverse transcriptase, in order to copy its genetic information into the host cell's DNA. At this point, the virus is able to replicate itself within the host cell. *Id.*; J. LANGONE, *supra* note 6, at 43.

8. Mann, . . . for a Global Challenge, WORLD HEALTH, March 1988, at 4, 5.

9. Yarchoan, Mitsuya, & Broder, *Clinical and Basic Advances in the Antiretroviral Therapy of Human Immunodeficiency Virus Infection*, 87 AM. J. MED. 191 (1989) [hereinafter Yarchoan & Mitsuya]. Other retroviral diseases include degenerative brain diseases and possibly some types of cancers. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 1051 (1989).

10. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE, *supra* note 9, at 570.

11. *Id.* at 573.

12. J. LANGONE, *supra* note 6, at 27. The viral antigens attach to the

the HIV infection. Because the infected individual may not exhibit exterior signs of illness at this stage, he or she may be unaware of the infection. This lack of awareness is particularly dangerous in the AIDS context since any infected person is capable of spreading the disease.<sup>22</sup>

The second stage of infection, AIDS-related-complex, begins at the time the infected individual exhibits signs of immunological defects which are similar to those of full-blown AIDS.<sup>23</sup> However, at this stage, these defects cause a less profound weakening of the immune system.<sup>24</sup> Researchers and scientists do not know exactly how many people will advance to this stage,<sup>25</sup> but approximately 350,000 Americans have advanced to this stage of the virus.<sup>26</sup> The virus can be detected either by testing for the antibodies to the virus or by recognizing the clinical symptoms, which include swollen glands, unexplained loss of appetite and weight loss, heavy night sweats, persistent and chronic diarrhea, persistent dry cough, white spots or unusual blemishes on the mouth, hairy leukoplakia (a precancerous condition), shingles and lymphoma.<sup>27</sup>

Full-blown AIDS is the third and final stage of infection. At this stage, the immune system is so weak that the body is unable to fight off opportunistic infections.<sup>28</sup> Opportunistic infections refer to those infections which ordinarily do not cause disease in human beings. However, due to the weakened immune system of the AIDS patient, they can cause death.<sup>29</sup>

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of these neutralizing agents have a better disease course, and the question remains whether administering anti-HIV antibodies would help AIDS patients suffering from ARC symptoms. *Id.* For a further discussion of this theory, see Dr. Jonas Salk's approach in developing a vaccination to the virus, *infra* notes 257-260 and accompanying text.

22. Piot & Colebunders, *The Clinical Symptoms*, WORLD HEALTH, March 1988, at 25, 26.

23. J. LANGONE, *supra* note 6, at 11.

24. Mann, *supra* note 8, at 5.

25. *Id.* at 6.

26. 100 CONG. REC. H6367 (daily ed. July 15, 1987) (statement of Rep. Dannemeyer).

27. J. LANGONE, *supra* note 6, at 12-13.

Leukoplakia is characterized by raised white patches on the mucous membrane of the mouth or vulva. Herpes zoster is the medical term for shingles, an infection of the nerves which service certain areas of the skin. It can cause a painful rash and blisters. Lymphoma is defined as "[a]ny group of cancers in which the cells of lymphoid tissues (found mainly in the lymph nodes and spleen) multiply unchecked." AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE, *supra* note 9, at 638.

28. Piot & Colebunders, *supra* note 22, at 26.

Infection at this stage may be confirmed by testing for antibodies to the virus or by recognizing the clinical symptoms which include a weakened and disfigured body, nervous system disorders ranging from forgetfulness to dementia, pneumocystis carinii pneumonia (a type of pneumonia common among AIDS patients), severe diarrhea, central nervous system infection, herpes simplex virus, tuberculosis, kaposi's sarcoma (malignant skin tumors) and emaciation.<sup>30</sup> AIDS dementia can affect anyone who carries the virus; it occurs in up to seventy-five percent of AIDS cases.<sup>31</sup> The term "dementia" refers to a wide range of symptoms. The milder symptoms include muddled thinking, apathy, irritability, forgetfulness, and depression. The severe cases usually include more dramatic symptoms such as an "acute psychotic state manifested by euphoria and hyperactivity."<sup>32</sup> There are two types of dementia: that which directly affects the central nervous system, and that which does not. The type of dementia which directly affects the central nervous system may be one of the first signs of infection because it is believed to occur at the time of seroconversion (the time at

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30. J. LANGONE, *supra* note 6, at 14-16.

As infection progresses, fewer and fewer antibodies are produced. Therefore, the second two stages are more likely to be recognized by the clinical symptoms than by testing for antibodies to the virus.

Clinical symptoms refer to the symptoms and source of a disease as opposed to the laboratory findings which refer to anatomical changes. STEDMAN'S MEDICAL DICTIONARY 1308 (5th ed. 1982). In other words, clinical symptoms refer to those which pertain to or are founded on actual observation and treatment of the patients. THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 149 (1987).

The prevalence of certain opportunistic infections varies with the geographical area because the type of infection depends on the patient's exposure to microbial [short-lived] agents. For example, pneumocystis carinii pneumonia is the most common opportunistic infection among Americans and Europeans, while the gastro-intestinal system is commonly affected in Africans with the disease. Piot & Colebunders, *supra* note 22, at 26.

31. Adams, *HIV-Related Dementia*, NURSING TIMES, Jan. 20, 1988, at 45. Other estimates have been significantly lower. See e.g., Piot & Colebunders, *supra* note 22, at 26. The authors estimate that dementia occurs in approximately one-third of all AIDS patients. However, they may not be including both types of dementia in their estimate, or they may not be including the milder symptoms, such as forgetfulness or depression, in the definition of dementia.

32. Raeburn, *AIDS Dementia Puzzles Doctors*, S. Bend Trib., Nov. 6, 1989, at A2, col. 1. Bocellan, the Director of Neuropsychology at San Francisco General Hospital, said that those patients who experience the more severe symptoms "become very grandiose and delusional." *Id.*

which the immune system produces antibodies to the virus).<sup>33</sup> Both types of dementia continue until death.<sup>34</sup>

Scientists do not know the exact percentage of infected persons who will develop full-blown AIDS. Although early studies indicated that only a minority may go on to develop clinical symptoms of AIDS, the latency period appears to have misled researchers.<sup>35</sup> Recent studies indicate that in the absence of treatment, most infected persons will progress to AIDS, with a median time of seven to ten years from the time of infection.<sup>36</sup> One report estimates that up to ninety-eight percent of AIDS victims will die less than three years after diagnosis.<sup>37</sup>

## II. THE MODE OF VIRAL TRANSMISSION AND HIGH RISK GROUPS

The HIV virus is transmitted through infected body fluids.<sup>38</sup> The virus has been detected in blood, semen, vaginal fluids, breast milk, saliva, and tears.<sup>39</sup> However, there are no reported cases of viral transmission through tears<sup>40</sup> or saliva.<sup>41</sup> This can be explained by the fact that it takes a fairly large amount of the virus to infect a healthy person, and the virus is fragile outside the human body.<sup>42</sup> It is also unlikely that

33. Adams, *supra* note 31, at 46.

34. *Id.* at 45-46.

35. Moss & Bacchetti, *supra* note 17, at 57.

36. *Id.* The Director of the American Medical Association (AMA) task force said that it may be "very likely" that almost all infected persons will go on to develop AIDS. Van de Kamp, *The Cost of AIDS*, L.A. LAW., Sept. 1988, at 30, 32. A Dr. Crenshaw, while testifying before Congress, said, "[m]ost experts, including Dr. Gallo [one of the co-discoverers of the HIV virus], . . . agree that up to one hundred percent of infected individuals could eventually die of AIDS or ARC." 100 CONG. REC. H6370 (daily ed. July 15, 1987) (statement of Dr. Crenshaw).

37. McLaughlin, *Legal Issues in Health Care Settings, AIDS: Current State of the Law—An Overview*, 3 J.L. & HEALTH 77, 79 (1988-1989). See also 100 CONG. REC. H6368 (daily ed. July 15, 1987) (statement of Mr. Dornan) (as of July 1987, ninety-one percent of those diagnosed with AIDS between January and June 30, 1981, have died).

38. J. LANGONE, *supra* note 6, at 83.

39. Summary: *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 682 (Nov. 15, 1985); Selwyn, *AIDS: What is Now Known*, HOSP. PRAC., May 15, 1986, at 67, 73.

40. Piot & Colebunders, *supra* note 22, at 26.

41. Smith, *III Transmitted by Kissing*, 294 BRIT. MED. J. 1033 (1987).

42. J. LANGONE, *supra* note 6, at 54, 70, 73. If one cubic centimeter (cc) of blood containing the HIV virus is diluted in a quart of water, and then one

infected food can transmit the virus because T-4 cells are usually not found in the digestive tract.<sup>43</sup> In general, it is widely accepted that casual transmission of the virus, although theoretically possible, is highly unlikely.<sup>44</sup>

The virus can be transmitted through sexual activity, blood transfusions, and needle sharing.<sup>45</sup> Mothers can transmit the virus to their infants before birth (intrauterine), during delivery (peripartum), and possibly after birth while breast-feeding with infected breast milk.<sup>46</sup> Heterosexual transmission occurs through penile-vaginal intercourse.<sup>47</sup> Although the virus is present in both semen and cervical fluid,<sup>48</sup> it is transmitted more efficiently from men to women than from women to men.<sup>49</sup> This is most likely due to the fact that men inoculate women with a substantial dose of the virus during sexual intercourse,<sup>50</sup> and women naturally retain the bodily secretions.<sup>51</sup>

cc of the solution is injected back into the blood of a human or chimpanzee, it would not be a sufficient amount to infect either with the virus. Compare this to HBV, the virus responsible for hepatitis B, which under the same circumstances, would cause infection. *Id.* at 73.

The fact that the virus is very fragile outside the body is supported not only by the fact that nobody has caught the disease on toilet seats, doorknobs, or shower stalls, but it is also supported by scientific research. Although the virus thrives in a cool environment, it deactivates quickly under heat and can be killed by household bleach. *Id.* at 70, 78; Steinhilber, *AIDS and Employment: Legal and Policy Considerations*, 35 FED. BAR & NEWS J. 377 (1988). When the virus was placed in a fluid-filled test-tube at room temperature for twenty four hours, it has only a ten percent chance of surviving. However, when placed in a water-based solution of human blood cells at room temperature, it is capable of surviving up to fifteen days. J. LANGONE, *supra* note 6, at 78.

43. J. LANGONE, *supra* note 6, at 44.

44. *Id.* at 75-78; Mann, *supra* note 8, at 4. But see Cannon, *Corrected Statistical Analysis Suggests Casual Transmission of AIDS in the African Study of the Center for Disease Control*, 60 PSYCHOLOGICAL REP. 177 (1987). The author corrects the CDC's statistical analysis in an African study and concludes that the study does "not disprove casual transmission of AIDS, . . . [and] because the statistical analysis was incorrectly done, evidence that tends to support casual transmission was thereby suppressed." *Id.*

45. Mann, *supra* note 8, at 4.

46. National Institute of Justice, *HIV Infection and AIDS: Definitions and Means of Transmission*, AIDS BULL., Aug. 1989, at 5. It is not clear when transmission from mother to child takes place. Some evidence indicates that it occurs as early as the first trimester, while other evidence indicates infection after birth. Yarchoan & Mitsuya, *supra* note 9, at 197.

47. J. LANGONE, *supra* note 6, at 83-84.

48. *Id.*

49. Zuckerman, *The Enigma of AIDS Vaccines*, AIDS LETTER, Dec. 1988/Jan. 1989, at 4.

50. Leishman, *The Second Stage of the Epidemic: Heterosexuals and AIDS*, ATLANTIC MONTHLY, Feb. 1988, at 39-40.

There are currently three broad patterns of HIV infection throughout the world. In North America, Western Europe, New Zealand, and many urban areas in Latin America, the disease is primarily spread through homosexual and bi-sexual men and intravenous (IV) drug users.<sup>52</sup> In some major cities, fifty to seventy percent of the homosexual men are already infected with the virus.<sup>53</sup> Heterosexual transmission is increasing in these areas as is the number of pediatric cases.<sup>54</sup> The National Academy of Sciences estimates that the majority of new cases will continue to come from the currently recognized high risk groups.<sup>55</sup>

In sub-Saharan Africa and increasingly in Latin America, especially the Caribbean, heterosexual transmission is the predominant mode of transmission.<sup>56</sup> In Latin America, the virus was originally spread primarily through homosexual contacts. However, the pattern has recently shifted and is now increasingly spread through heterosexual contacts.<sup>57</sup> In Africa, up to ninety percent of the prostitutes are infected.<sup>58</sup> Pediatric cases are also a major problem because fifteen percent or more of the pregnant women are infected.<sup>59</sup> Infection through blood continues to be a problem in areas where the blood is not routinely screened and the needles are not sterilized.<sup>60</sup>

51. Zuckerman, *supra* note 49, at 4.

52. *Id.* at 6.

53. 100 CONG. REC. H6366 (daily ed. July 15, 1987) (statement of Rep. Dannemeyer).

54. Van de Kamp, *supra* note 36, at 31. The National Academy of Sciences estimates a seven-fold increase in heterosexual cases by 1991 and a ten fold increase of pediatric cases by the same year. *Id.*

55. *Id.* See also notes 77-112 *infra* and accompanying text, which qualify this prediction: Although the disease is likely to continue among the currently recognized high risk groups, IV drug users and homosexuals who participate in unsafe sex will account for a higher percentage of the cases. High risk heterosexuals include those who participate in unsafe sex and those whose partners are IV drug users or participate in unsafe sex.

56. Zuckerman, *supra* note 49, at 6.

57. Hiltz, *World AIDS Epidemic Draws New Warning*, N.Y. Times, Dec. 1, 1989, at D19, col. 1. In some areas, men and women are equally infected. The infection rate among women is ten percent in some countries in this region. *Id.*

58. Prentice, *supra* note 49, at 6.

59. Zuckerman, *supra* note 49, at 6; See also Pepin, Plummer, Brunham, Piot, Cameron & Ronald, *The Interaction of HIV Infection and Other Sexually Transmitted Diseases: An Opportunity for Infection*, 3 AIDS 3 (1988) [hereinafter Pepin & Plummer]. In Kampala, seroprevalence among pregnant women has increased from 10.8% in 1985 to 24.1% in 1987. *Id.*

The third pattern of infection is in North Africa, the Middle East, Eastern Europe, Asia and the Pacific.<sup>61</sup> The HIV virus was not recognized in these areas until the mid-1980s. Its presence there is due mainly to contact with countries in groups one and two or through imported infected blood.<sup>62</sup> However, the number of cases has dramatically increased in some countries in these regions. Thailand, where there were virtually no cases a few years ago, has recently reported that the infection rate among IV drug users has risen from less than one percent in 1987 to forty percent in 1989.<sup>63</sup> This is probably due to the increased popularity of drug use in Thailand, Malaysia and Pakistan.<sup>64</sup> Southeast India, where the disease was also virtually unknown until recently, has reported that three to seven percent of the prostitutes are infected with the virus.<sup>65</sup>

The most dramatic increase of AIDS cases in these regions has taken place in Romania. The epidemic exists predominantly among infants and young children. Nicolae Ceausescu and his government would not admit that this epidemic existed because they considered AIDS a capitalist disease which hardly existed in Romania.<sup>66</sup> Since the revolution, several studies have revealed the severity of the epidemic: at least seven hundred children are infected with the virus; at one orphanage, ninety-two out of one hundred thirty eight babies tested positive for the virus.<sup>67</sup> There are three reasons why this epidemic is primarily among children and infants: (1) hospitals use the old practice of injecting blood into the infant's umbilical cord in order to stimulate its growth, (2) blood donors are not screened, and (3) health care professionals use contaminated syringes or needles.<sup>68</sup> The World Health Organization has recently sent doctors to Romania in order to determine the extent of the epidemic.<sup>69</sup>

The current high risk groups in the United States are homosexual men (sixty-three percent of all cases), intravenous

61. *Id.*

62. *Id.*

63. Hiltz, *supra* note 57, at D19.

64. Engelman, *Advice Alone Fails to Stop the Spread of AIDS*, S. Bend Trib., Nov. 2, 1989, at 7, col. 1.

65. *Id.*

66. Purvis, *Romania's Other Tragedy*, TIME, Feb. 19, 1990, at 74.

67. Bohlen, *Romania's AIDS Babies: A Legacy of Neglect*, N.Y. Times, Feb. 8, 1990, at A1, col. 2.

68. *Id.*

(IV) drug users (nineteen percent),<sup>70</sup> and heterosexuals who do not practice "safe sex" (four percent).<sup>71</sup> Experts debate whether there will be a heterosexual explosion of AIDS cases in the western world similar to the phenomenon that countries such as Africa have experienced. There are several cofactors in Africa, where high risk behavior such as anal intercourse is virtually absent, which may explain why the HIV virus is spread primarily through heterosexual contacts.<sup>72</sup> Most of these cofactors are common only among specific high risk groups in the United States, namely prostitutes and IV drug users. First, sexually transmitted diseases (STDs), which increase the risk of transmission, are more prevalent among the general population in Africa. STDs such as syphilis, chancroid, genital herpes, genital warts, chlamydia trachomatis, and gonorrhea are associated with HIV infection; some are more strongly associated than others.<sup>73</sup> Genital ulcer disease, which enhances the efficiency of transmission by providing a direct entry into the bloodstream, is also more prevalent in Africa than in the United States and other western countries.<sup>74</sup> The large number of prostitutes, a high percentage of whom are infected with STDs, intensify the presence of these cofactors.<sup>75</sup> Second,

70. Herek & Glunt, *An Epidemic of Stigma*, 43 AM. PSYCHOLOGIST 886, 887 (1988).

71. Johnson, Petherick, Davidson, Brettle, Hooker, Howard, McLean, Osborne, Robertson, Sonnex, Tchamouloff, Shergold & Adler, *Transmission of HIV to Heterosexual Partners of Infected Men and Women*, 3 AIDS 367 (1989) [hereinafter Johnson & Petherick]; see also Center for Disease Control, *Update: Heterosexual Transmission of Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus Infection — United States*, 262 J. AM. MED. A. 463 (1989). The CDC estimates that thirty percent of the women infected with the virus contracted it through heterosexual contacts. Ginsburg, *More Women Face Life with AIDS*, San Francisco Examiner, Jan. 1, 1989, at A1, col. 2.

72. Pepin & Plummer, *supra* note 59, at 3.

73. *Id.* at 3-6. STDs are likely to directly increase the infectivity of seropositive individuals or enhance the susceptibility of their contacts. *Id.* at 3.

74. Rosenberg & Weiner, *Prostitutes and AIDS: A Health Department Priority*, 78 AM. J. PUB. HEALTH 418, 421 (1988).

Genital ulceration is characterized by an eroded area of the skin in the genital area. In men, the ulcer is located on the penis or the scrotum; in women, the ulcer is on the vulva or within the vagina. The most common cause and type of genital ulcer is an STD. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE, *supra* note 9, at 485.

75. Pepin & Plummer, *supra* note 59, at 3-4. Prostitution is "more readily available and accepted" in Central Africa. They are considered a reservoir of disease, which is supported by the following statistical rates of seroprevalence among prostitutes in different parts of Africa: twenty-seven percent in Kinshasha, twenty-nine percent in Dar as Salaam, fifty-six percent in Malawi, sixty-eight percent in Uganda, eighty-eight percent in Nairobi, and

there are various cultural practices in Africa which may also enhance the spread of AIDS among heterosexuals. For example, African women are circumcised with unsterilized knives, razor blades, sharp stones, or broken glass which can cause genital infections, menstruation irregularities, and blood clots.<sup>76</sup> If there is a "heterosexual explosion" of AIDS in the United States, it will most likely be channeled through IV drug users and prostitutes. These groups already have a high infection rate, and they possess many of the cofactors discussed above. The following discussion will explain why prostitutes, IV drug users, those who attend STD clinics, and prisoners are at a heightened risk of infection and, therefore, should be included in the mandatory testing scheme.

#### (a) Prostitutes

A prostitute exchanges sex for money or other items.<sup>77</sup> They are considered a "reservoir of infection"<sup>78</sup> and AIDS is no exception. The rate of seroprevalence among prostitutes varies among American cities. It is as low as zero percent in Las Vegas, but as high as six percent in San Francisco, sixty-nine percent in Newark,<sup>79</sup> and fifty percent in Washington D.C.<sup>80</sup> In a multi-city study, the CDC found that thirteen percent of female prostitutes were infected with the HIV virus.<sup>81</sup>

Prostitutes are at the highest risk of infection among heterosexuals.<sup>82</sup> Many prostitutes in the United States are infected

eighty-eight percent in Rwanda. The different rates of seroprevalence may be because (1) the virus was introduced to different areas at different times, and (2) the patterns of prostitution, i.e. part-time prostitutes as opposed to full-time prostitutes, vary in each region. *Id.* at 4.

76. J. LANGONE, *supra* note 6, at 89.

77. Rosenberg & Weiner, *supra* note 74, at 419.

78. *Id.*

79. Pepin & Plummer, *supra* note 59, at 4. In Nevada, prostitution is legal in all but five counties. Leishman, *supra* note 50, at 47. The Board of Health has been testing prostitutes for HIV infection since March 1986 as a condition of employment. Center for Disease Control, *Antibody to Human Immunodeficiency Virus in Female Prostitutes*, 36 MORBIDITY & MORTALITY WEEKLY REP. 48, 50 (March 27, 1987). The women have weekly medical inspections and are tested for the virus once a month. If positive, the woman is denied employment. Leishman, *supra* note 50, at 47. This explains why such a low number of "official" prostitutes are HIV positive in Las Vegas.

80. 100 CONG. REC. E1726 (daily ed. May 5, 1987) (statement of Rep. Dannemeyer). This statistic is based on a study conducted by Harvard University in Washington D.C. which found that thirteen of twenty-six prostitutes had been infected with the HIV virus.

81. Center for Disease Control, *supra* note 71, at 467.

82. Hooykaas, Pligt, van Doornum, van der Linden & Coutinho,

with STDs which, as explained previously, are cofactors in the transmission of the virus.<sup>83</sup> In the United States, syphilis and herpes are high risk factors,<sup>84</sup> because they cause genital ulceration (open lesions) which make it easier for the virus to enter the bloodstream.<sup>85</sup> In addition, many prostitutes have numerous sexual encounters with partners whom they are unable to screen, and many do not use barrier methods of contraception.<sup>86</sup> A study found that an average prostitute had unprotected vaginal intercourse with one hundred and sixty partners in four months.<sup>87</sup>

Prostitutes are also considered a high risk group because they often have regular non-paying relationships with boy-friends or husbands who are IV drug users<sup>88</sup> or because they are IV drug users themselves.<sup>89</sup> In a recent study conducted by the CDC, eighty percent of the prostitutes who were HIV-infected reported using IV drugs.<sup>90</sup> Among all prostitutes,

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*Heterosexuals at Risk for HIV: Differences Between Private and Commercial Partners in Sexual Behavior and Condom Use*, 3 AIDS 525 (1989) [hereinafter Hooykaas & Pligt].

83. Rosenberg & Weiner, *supra* note 74, at 418. A study in Atlanta found that 17.4 percent of the prostitutes were infected with gonorrhea. Other studies show an increased rate of syphilis in prostitutes than among the general female population. *Id.*

84. *Id.* at 421.

85. Cheang, Piot, Simonsen, Ronald, Gakinya, Ndinya-Achola & Brunham, *Female to Male Transmission of Human Immunodeficiency Virus Type 1: Risk Factors for Seroconversion in Men*, LANCET, Aug. 19, 1989, at 405. A recent study found that genital ulcer disease increased the risk of transmission from seropositive women to seronegative men during vaginal intercourse. In cases where the woman was suffering from genital ulcer disease, the authors attributed these results to the increased virus shedding in the female genital tract. This shedding is most likely mediated by HIV-infected lymphocytes responding to the local inflammation in the genital tract. The woman's sexual partner would then come into contact with the infected blood and exudate [discharged fluid from blood cells into a tissue or onto a tissue's surface which is produced as a result of inflammation] within the genital epithelium [cells which cover the entire surface of the body]. In the alternative, if the male was infected with genital ulcer disease at the time of exposure to the HIV infected woman, this could act as a direct portal entry into his system. *Id.* at 406.

86. Rosenberg & Weiner, *supra* note 74, at 418.

87. Hooykaas & Pligt, *supra* note 82, at 525.

88. Rosenberg & Weiner, *supra* note 74, at 418.

89. Leishman, *supra* note 50, at 46. In a multi-city study, eighty percent of the infected prostitutes were IV drug users. Center for Disease Control, *supra* note 71, at 467.

90. Center for Disease Control, *supra* note 71, at 467. Other studies in Las Vegas found that most prostitutes and their pimps are on hard drugs and

fifty-one percent have reported IV drug use and twenty-seven percent were sexual partners of HIV-infected men or men at risk of infection.<sup>91</sup> This interrelationship between prostitutes and IV drug users is important because heterosexual transmission seems to occur more efficiently when one person is an IV drug user.<sup>92</sup> A man has a fifty percent chance of becoming exposed to the HIV virus in an unprotected encounter with a prostitute who is also an IV drug user.<sup>93</sup> In addition, prostitutes who are drug addicts are most likely to forgo the condom for a few extra dollars.<sup>94</sup>

Prostitutes are a high risk group not only because they often carry STDs which enhance the transmission of the virus, but also because of the interrelationship between prostitutes and IV drug users. This interrelationship includes prostitutes who use drugs themselves, and those who have relationships with drug users. Prostitutes could unleash the HIV virus into the heterosexual population fairly rapidly, because a high percentage are infected and they have many indiscriminate, "unprotected" heterosexual contacts.<sup>95</sup> Furthermore, drug dependent prostitutes, who are the most likely to be infected, are arrested rather frequently.<sup>96</sup> Therefore, this population is reachable because they are already within the health care system administered by health departments.<sup>97</sup> For these reasons, prostitutes should be included in the mandatory testing scheme.

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91. Center for Disease Control, *supra* note 79, at 48.

92. Leishman, *supra* note 50, at 40. A 1986 study of male to female transmission reported that transmission to partners of IV drug users occurred in approximately thirty to seventy percent of the cases, as opposed to partners of hemophiliacs where it occurred in only ten percent of the cases. *Id.*

93. *Id.* at 46.

94. *Id.*

95. *But see* M. FUMENTO, *THE MYTH OF HETEROSEXUAL AIDS* (1990). The author discredits the forecast of widespread AIDS among the heterosexual population as a political maneuver to raise more money. He also suggests that it is the result of a sensation-seeking press. However, there is an abundance of evidence to the contrary which indicates that there will in fact be a drastic increase in AIDS among heterosexuals. The majority of these cases will be among prostitutes, IV drug users, and the heterosexual partners of both prostitutes and IV drug users.

96. Kleinman, *AIDS, Vice, and Public Policy*, 51 L. & CONTEMP. PROBS. 315, 353 (1988).

97. Rosenberg & Weiner, *supra* note 74, at 418.

*(b) Intravenous Drug Users*

Intravenous (IV) drug users account for nineteen percent of all AIDS cases.<sup>98</sup> The virus is now spreading fastest among IV drug users and addicts who perform anonymous sex in exchange for drugs in crack houses.<sup>99</sup> In New York, fifty percent of all AIDS cases are IV drug users,<sup>100</sup> and the number of cases among this group is expected to outnumber those among homosexual men in the next few years.<sup>101</sup>

IV drug users transmit the disease through drug paraphernalia.<sup>102</sup> This process begins when the drug user injects the drug, usually cocaine or heroine, into his or her veins with an unsterile needle.<sup>103</sup> Blood is often retained in the syringe after the drug user has injected the drug, and this residual blood is transferred to the subsequent users of the same needle or syringe.<sup>104</sup> The virus can spread very quickly since sharing a needle once is sufficient to transmit the virus.<sup>105</sup> Unfortunately, this is a common practice among drug users; up to ninety-five percent of the IV drug users in Los Angeles County have reported sharing needles.<sup>106</sup> Behavioral factors common among IV drug users can also increase the risk of spreading the virus. For example, "shooting galleries," which usually exist in abandoned buildings, provide a location where the drug user can buy the drugs, rent the paraphernalia, and hire someone to administer the drugs if necessary.<sup>107</sup> It becomes necessary to hire someone to administer the drugs if the only remaining available veins are in the buttocks or thighs.<sup>108</sup>

The number of AIDS cases is increasing rapidly among IV drug users. There is a high risk of transmission among IV drug users through needle sharing. Moreover, there is a high risk of transmission to innocent victims, namely, their heterosexual

partners and their children. Sexual partners of IV drug users now account for the majority of heterosexual AIDS cases.<sup>109</sup> Therefore, IV drug users should be included in the mandatory screening scheme.

*(c) Sexually Transmitted Disease Clinics*

Heterosexuals who do not practice "safe sex" are also a high risk group. The prevalence of HIV infection among those who attend sexually transmitted disease clinics is rapidly increasing. Heterosexuals who are seropositive are usually IV drug users or their sexual partners are IV drug users.<sup>110</sup> In a recent study of heterosexuals at an STD clinic, forty-seven percent of the IV drug users were HIV positive, while thirteen percent of those whose sex partners were IV drug users were HIV positive.<sup>111</sup> In addition, the practice of trading sex for drugs, especially for crack, is growing at an alarming rate. In a STD clinic in New York, thirty percent of the crack users, with no other high risk activity, tested positive for AIDS.<sup>112</sup>

A high percentage of those who attend STD clinics are also IV drug users or crack users. Because STDs enhance the transmission of the virus and IV drug users are also a high risk group, those who attend STD clinics and drug abuse clinics should be included in the mandatory testing scheme.

*(d) Prisons*

Prisons create a unique problem regarding the spread of AIDS, because several high risk groups reside in a closed environment. The CDC warns that prisons will become a "hotbed" of the virus,<sup>113</sup> because IV drug users and male homosexuals

98. Herek & Glunt, *supra* note 70, at 887.

99. Dr. Joseph and *AIDS Testing*, N.Y. Times, Nov. 16, 1989, at A30, col 1.

100. *AIDS and Drugs, Shooting Up*, ECONOMIST, April 1, 1989, at 48.

101. *The Parliament of AIDS*, ECONOMIST, June 17, 1989, at 97.

102. Ginzburg, *Intravenous Drug Abuses and HIV Infections: A Consequence of Their Actions*, 14 L. MED. & HEALTH CARE 268, 269 (1986).

103. *Id.* at 268.

104. *Id.* at 269. Drug users withdraw blood into the syringe after injection in order to ensure that all of the drug is in their system. This is often referred to as "booting." *Id.*

105. *Id.*

106. Mascola, Lieb, Iwakoshi, McAllister, Siminowski, Giles, Run, Famin & Strantz, *HIV Seroprevalence in Intravenous Drug Users: Los Angeles, California, 1986*, 79 AM. J. PUB. HEALTH 81 (1989).

107. Ginzburg, *supra* note 102, at 269.

108. *Id.*

109. Dannemeyer & Franc, *The Failure of AIDS-Prevention Education*, PUN. INTEREST, Summer 1989, at 47, 57. As of November 10, 1988, fifty-four percent of AIDS cases among adults were associated with heterosexual drug users, while 8.4 percent were linked to heterosexual contact alone. In the Bronx, where drug abuse is more prevalent than other areas of the country, forty-eight percent of the drug-free partners of IV drug users were HIV infected. Most of the heterosexual transmissions in these areas are from men to women. Women are four times as likely as heterosexual men to obtain the disease from heterosexual contacts. Women often do not know of their partners high risk behavior until they discover that they are infected with the virus. *Id.* at 57-58.

110. Center for Disease Control, *supra* note 71, at 467.

111. *Id.*

112. *The Parliament of AIDS*, *supra* note 101, at 97.

113. Rowe, *Death Row, AIDS is Turning Prison Into a Potential Death Sentence*, CAL. LAW., Sept. 1987, at 49, 51.

It is currently estimated that approximately twenty-one thousand to

make up a significant percentage of incoming inmates.<sup>114</sup> The majority of AIDS cases in prisons are among IV drug users, many of whom are infected before entering prison.<sup>115</sup> Prison officials are concerned about the high risk of transmission caused by forced or consensual homosexual activity,<sup>116</sup> violent outbursts,<sup>117</sup> and drug use within the prison walls.<sup>118</sup> This concern is amplified by the fact that there is an increase in the number of high risk individuals entering prison, especially IV drug users.<sup>119</sup> The concentration of AIDS cases has already reached high percentages in some cities. In New York prisons, more than fifty percent of all prisoners' deaths were caused by AIDS.<sup>120</sup> In Washington D.C., up to eighty percent were infected with the virus.<sup>121</sup>

There is a high risk that the above groups are infected with the virus and will transmit it to healthy individuals. They are reachable because they are within the public health care system. Therefore, the mandatory screening policy should include these groups. The next section will analyze the practicality of carrying out such a proposal.

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forty-two thousand prisoners nationwide are infected with the virus. As of October 1, 1987, there had been 1,964 cases of full-blown AIDS in correctional institutions. Gostin & Curran, *AIDS Screening, Confidentiality, and the Duty to Warn*, 77 AM. J. PUB. HEALTH 361, 363 (1987).

114. Gostin & Curran, *supra* note 113, at 363 (1987).

115. Fordham, *AIDS, Facts and Fallacies*, CORRECTIONS TODAY, Feb. 1988, at 62. See also U.S. Dept. of Justice, *Prisoners and Drugs*, U.S. BUREAU OF JUST. STATISTICS BULL., March 23, at 1 (Thirty percent of prisoners sampled had used heroine at some point in their lives).

116. Nacci & Kane, *Sex and Sexual Aggression in Federal Prisons '7* (Bureau of Prison Policy, unpublished report 1982) (Thirty-five to forty percent of incarcerated males may have a homosexual experience. Twenty-eight percent of federal inmates reported homosexual experience). See also 100 CONG. REC. E1726 (May 5, 1987) (statement of Rep. Dannemeyer).

117. Glass, PA-C, Hausler, Loeffelholz, & Yesalis, *Seroprevalence of HIV Antibody Among Individuals Entering the Iowa Prison System*, 78 AM. J. PUB. HEALTH 447 (1988).

118. Kleinman, *supra* note 96, at 364.

119. Rowe, *supra* note 112, at 51. In order to address this problem, the National Institute of Justice has prescribed an AIDS education and training program for all criminal justice personnel and offenders so that they "receive accurate, timely, and regular information about AIDS." See Hammett, *AIDS and HIV Training and Education and Criminal Justice Agencies*, AIDS BULL., Aug. 1989, at 1.

120. Gostin & Curran, *supra* note 113, at 363 (1987).

121. 100 CONG. REC. E1726 (May 5, 1987) (statement of Rep. Dannemeyer). This statistic was reported by the chief medical officer at a

## III. PRACTICAL CONSIDERATIONS OF MANDATORY TESTING: THE ADVANTAGES AND DISADVANTAGES

In order for mandatory testing to be practical, the advantages of testing must outweigh the disadvantages. The disadvantages of testing are (1) errors, including false positives and false negatives, (2) cost of testing, including the opportunity cost, (3) risk of driving the disease underground, and (4) stigma and psychological stress caused by a positive test result. The advantages include (1) providing treatment for those infected with the virus and (2) providing reliable epidemiological data. This section will evaluate each of the advantages and disadvantages listed above, and it will conclude that the advantages outweigh the disadvantages.

### A. Disadvantages of Mandatory Testing

#### 1. Errors: False Positives and False Negatives

The tests available for detecting the HIV virus are not perfect. They can produce two types of erroneous results: false positives and false negatives. A false positive occurs when a person tests positive for the virus when, in fact, he or she is not infected. False positives occur in almost all medical tests,<sup>122</sup> but they are of particular concern in the AIDS context because of the serious implications of testing positive. False negatives, on the other hand, occur when the test renders a negative result, but the person is actually infected with the virus. In such a case, an infected person may unknowingly transmit the disease to a healthy individual.

The two most common methods of testing for the HIV virus are the Enzyme-Linked Immunosorbant Assay (ELISA) test and the Western Blot test. Research groups have recently developed new ELISA-type tests which are more accurate than previous immunoassay tests.<sup>123</sup> A positive test result does not necessarily mean that the person will develop full-blown AIDS, but it does mean that the infected person is capable of transmitting the disease to a healthy individual.<sup>124</sup>

The Food and Drug Administration (FDA) approved the ELISA test on March 2, 1985.<sup>125</sup> This test detects the antibodies to the virus, the earliest sign of infection.<sup>126</sup> Antibodies

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122. *AIDS Test Examined*, ECONOMIST, July 2, 1988, at 90.

123. See *infra* notes 142-147 and accompanying text.

124. The test detects infection. Any infected person is capable of transmitting the disease. See *supra* note 22.

125. J. LANGONE, *supra* note 6, at 215.

created by the body's immune system bind to the antigens,<sup>127</sup> the protein on the surface of the viral cell. The ELISA procedure is as follows: First, the laboratory technicians detach the antigens from the inactivated HIV virus and place them on plastic sheets.<sup>128</sup> Next, they add the blood sample to the plastic sheets; if the blood is infected it will contain antibodies to the virus which will bind to the antigens on the plastic sheet.<sup>129</sup> Finally, they will confirm the presence of the antibodies by rinsing the sample with a chemical solution which produces a color reaction when it encounters the antibodies. This process can also determine the degree of positivity.<sup>130</sup> A person is considered "seropositive" if antibodies are found in the blood sample.

The ELISA test is extremely sensitive because it was developed for the purpose of increasing the safety of the blood supply.<sup>131</sup> It is designed to identify virtually all blood which contains antibodies to the virus.<sup>132</sup> Therefore, among non-high risk groups, it may render a high number of false positives. Some estimates indicate that as many as one-half to two-thirds of all positive test results in any given sample of blood donors may be false positives.<sup>133</sup> In order to avoid false positives, sequential testing is usually performed. In other words, if the results of the ELISA test are positive, then the test is repeated two or three times in order to confirm the result.<sup>134</sup> If the result is still positive, a Western Blot test is conducted to confirm this result.

127. *Id.*

128. *Id.* The HIV virus is grown in a laboratory and treated with a detergent which kills the virus, dissolves the outer coat, and breaks the rest into partly purified pieces. These pieces are put onto the plastic sheet. *AIDS Test Examined*, *supra* note 122, at 90.

129. J. LANGONE, *supra* note 6, at 215.

130. *Id.*; see also *AIDS Test Examined*, *supra* note 122, at 90.

131. Petriccianni, *Licensed Tests for Antibody to Human T-Lymphotropic Virus Type III*, 103 *ANNALS INTERNAL MED.* 726, 727 (1985). In January of 1985, the United States Health Service recommended screening all blood donations. Gostin & Curran, *supra* note 113, at 319. Currently all donated tissue, blood, organs, and semen are screened. Smith, *HIV Testing Is the Answer—What Is the Question?*, 319 *NEW ENG. J. MED.* 1010, 1011 (1988).

"Sensitivity" in screening refers to the proportion of individuals with a positive test result for the disease that the test is intended to reveal, *i.e.*, true positive results as a proportion of the total of true positives and false negative results. *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 30, at 1274.

132. J. LANGONE, *supra* note 6, at 217.

133. *Id.*

134. *AIDS Test Examined*, *supra* note 122, at 90.

The Western Blot is a more accurate test. It detects each antibody which the immune system produces in response to each of the virus's main proteins (antigens) and, therefore, is less likely to react to the wrong antibody.<sup>135</sup> The first step in this procedure is to change a solution of an inactivated, laboratory-grown HIV virus into a gel which is then placed between two pieces of glass.<sup>136</sup> An electric current is applied to the gel which forces the main proteins of the virus, the antigens, to separate and form bonds on the gel.<sup>137</sup> The gel is removed and placed onto strips of paper.<sup>138</sup> The blood specimen is added to these strips; those which do not contain antibodies to the virus do not react with the antigens while those which do contain antibodies will bind to a particular antigen.<sup>139</sup> This test requires overnight incubation and a skilled researcher to interpret the results.<sup>140</sup> When an ELISA test is confirmed by a subsequent Western Blot Test, the result is 99.9 percent reliable.<sup>141</sup>

Although the sequential testing procedure outlined above produces reliable results, researchers continue to search for the perfect test. The future is likely to bring tests which will render results at least as accurate as sequential testing. In addition, they will cost less and will be easier to interpret than the Western Blot. In a recent study, a new test called the recombinant HIV-1 antigen ELISA panel, demonstrated one hundred percent sensitivity and specificity in distinguishing seropositive from seronegative individuals.<sup>142</sup> The authors of this study concluded that this new ELISA testing procedure could "virtu-

135. *Id.* The Western Blot is a more "specific" test which compensates for the sensitivity of the ELISA test. "Specificity" in screening refers to the proportion of individuals with a positive test result for the disease that the test is intended to reveal, *i.e.*, true positives result as a proportion of the total true positive and false negative results. *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 30, at 1308.

136. *AIDS Test Examined*, *supra* note 122, at 90.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Smith, *supra* note 131, at 1011. One study found the rate of false positives to be 0.0007 percent, which renders a specificity of 99.9993 percent. *Id.*

142. NG, Chiang, Debouck, McGrath, Grove & Mills, *Reliable Confirmation of Antibodies to the Human Immunodeficiency Virus Type 1 (HIV-1) with an Enzyme-Linked Immunoassay Using Recombinant Antigens Derived from HIV-1 gag, pol, and env Genes*, 27 *J. CLINICAL MICROBIOLOGY* 977, 980 (1989) [hereinafter NG & Chiang].

ally eliminate false positive results."<sup>143</sup> This procedure involves using various antigens produced by the HIV virus in order to accurately detect human antibodies to the virus.<sup>144</sup> The advantages of this test include (1) highly sensitive and specific results for detecting antibodies to the HIV virus, (2) fewer indeterminate results than the Western Blot, (3) the ability to verify more positive results than the Western Blot, and (4) a procedure which easily renders itself to automation.<sup>145</sup> Because current assays for HIV antibodies have sensitivities and specificities of 99.9 percent or greater, the future tests are likely to vary the antigen which is used to detect the antibodies, since the assay procedure itself has almost no room for improvement.<sup>146</sup> Many manufactures are currently developing simple, rapid assays which can be performed virtually anywhere. These tests should be available by 1991.<sup>147</sup>

The original ELISA test is very effective, but its effectiveness in purifying the blood supply is the very reason that, when used by itself, it is ineffective for testing individuals. The flaw is the high rate of false positives. The present solution is the sequential testing procedure, which uses both the ELISA and Western Blot methods to render a 99.9 percent reliable result. The new testing procedures will, at the very least, match the reliability of the sequential procedure. Moreover, they will reduce the cost and administrative burdens of the Western Blot test.

False positives are not only due to the testing procedure, but are also a function of the quality of the laboratory where

143. *Id.* at 981.

144. *Id.* at 980-81. This test uses six recombinant proteins corresponding to large segments of the HIV gene products; these gene products are antigens, substances which cause the human immune system to develop antibodies to the virus. When the serum sample of the individual reacts with one of the antigens, the serum is seropositive. Some antigens appear to be more accurate than others. For example, the Kp41 antigen demonstrated one hundred percent accuracy in determining seropositive from seronegative individuals. Although this antigen may be sufficient in itself, the authors suggest requiring reactivity against more than one of the gene products (antigens) in order to eliminate false positives. *Id.*

145. *Id.*

146. Gust & Maskill, *Diagnostic Tests for the Human Immunodeficiency Virus*, 151 MED. J. AUSTRALIA 57, 58 (1989).

147. *Id.* For example, an immuno-dot blot assay was recently tested and proved to be inexpensive, rapid, and reliable (highly sensitive and specific) for detecting HIV antibodies. In addition, expensive and sophisticated equipment was not needed to carry out the test. Xu, Gorny, & Pazner, *An Immuno-dot Blot Assay for the Detection of Antibody to HIV*, 120 J.

the tests are conducted. The blood samples are often sent to private laboratories where they are tested for the virus. Dr. Dan Burton, Chief of the Department of Virus Diseases at the Walter Reed Army Institute of Research, said that "[t]he fact that false positive rates are unacceptably high in some private sector laboratories is a direct consequence of the feeble quality control programs implemented by civil public health authorities."<sup>148</sup> In order to address this problem, the federal government should set minimum quality laboratory standards. In addition, health officials should provide strict, written procedural guidelines for the laboratories to follow.

As a result of their rigorous testing procedure, the United States Military has succeeded in achieving an extremely high rate of accuracy. Each recruit's blood sample is tested with ELISA. If the result is positive, the sample is tested again with ELISA. If the second test is positive, a new blood sample is drawn which is tested with Western Blot. If the result is positive, the blood sample undergoes a second Western Blot test. Finally, if that test is positive, the recruit is considered seropositive.<sup>149</sup> The military has received only one false positive result after testing 135,000 recruits.<sup>150</sup> Dr. Redfield of the Walter Reed Army Institute of Research said that the military has improved its test and false positive results are now one in every million.<sup>151</sup> The military's success in eliminating false positives indicates that this problem can be overcome if the laboratory follows a thorough procedure and meets the minimum quality standards.

The rate of false positives rapidly declines when testing high risk groups because there is a higher percentage of infected persons within the population.<sup>152</sup> Therefore, if the government requires HIV testing among convicted prostitutes, IV drug users, prison inmates, and those who attend STD and drug abuse clinics, the rate of false positives will rapidly decline. Thus, the test will be more than 99.9 percent accurate. Statistically, false positives will be virtually eliminated, thereby eliminating this particular disadvantage of mandatory testing.

148. Burke, *A Strategy to Prevent the Spread of AIDS*, SAT. EVENING POST, May-June 1988, at 22.

149. *Military AIDS Test Unusually Accurate*, Washington Times, Oct. 13, 1988, at A1, col. 1.

150. *Id.*

151. *Id.*

152. Gostin & Curran, *supra* note 113, at 961; Petriccianni, *supra* note

False negatives pose another problem to mandatory testing. False negatives occur when the individual tests negative for the virus, but is in fact infected. This is problematic because the infected person has a false sense of security. False negatives can occur in two situations: (1) When the person has only recently become infected with the virus and has not yet developed antibodies to the virus, and (2) when the test fails to recognize the HIV antibodies in the blood sample. In regard to the first situation, the so called "window period" is usually only a few weeks with modern assays.<sup>153</sup> These assays are capable of detecting the early antibodies to the virus and therefore, are effective in detecting recent infection.<sup>154</sup> Although cases of late seroconversion have been reported, they are rare.<sup>155</sup> In regard to the second situation, it is highly unlikely that the testing procedure will fail to recognize an HIV antibody in the blood sample. As explained above, the ELISA test was developed in order to create a safe blood supply; by its very nature, it is more likely to be over inclusive rather than under inclusive. Therefore, the problem of false negatives, although real, is not great.<sup>156</sup> It is not a sufficient reason to prohibit mandatory testing.

## 2. The Cost of HIV Testing (in Terms of Dollars and Lives)

The HIV virus will cost an enormous amount in terms of both dollars and lives. The Center for Disease Control (CDC) estimates that between one and one-and-a half million Americans are infected with the virus.<sup>157</sup> In New York City, the U.S. city with the highest infection rate, approximately one of every fifteen persons carries the virus.<sup>158</sup> The future outlook is grim. The United States Public Health Service (PHS) estimates that by the end of 1992, there will be approximately 365,000 AIDS

cases in the United States and 263,000 people will have died of AIDS.<sup>159</sup> In this same year, there will be 80,000 new cases and 65,000 deaths.<sup>160</sup> In 1989, the Federal Center for Disease Control estimated that 35,000 people would die from AIDS during that year, as opposed to 500,000 who died from cancer and 770,000 who died from heart disease.<sup>161</sup> However, the number of AIDS related deaths will increase rapidly as those presently infected develop AIDS-related illnesses, while deaths from other major diseases remain stable.<sup>162</sup>

Although the death rate for AIDS is not as high as that for cancer or heart disease, the cost of treating those with AIDS is certainly comparable. In 1989, the federal government spent an estimated 2.2 billion dollars on AIDS, 1.3 of which was spent on research and prevention.<sup>163</sup> In comparison, 1.5 billion dollars was spent on research and prevention of cancer and one billion was spent on heart disease.<sup>164</sup> Everett Koop, the former Surgeon General of the United States, estimated that the cost of treating AIDS by 1991 will be approximately eight to sixteen billion dollars per year.<sup>165</sup> In that same year, it is estimated that the nation will lose fifty-five billion dollars in loss of earnings due to AIDS,<sup>166</sup> and spend 2.3 billion dollars on research, testing, education, and general support services.<sup>167</sup> These estimates only include the cost of AIDS patients and not the cost of ARC patients. Although cancer and heart disease presently cause far more death and disability than AIDS, by 1991 the cost of treating AIDS patients is estimated to be higher than that of both of the other two leading causes of death.

The actual cost of HIV testing varies from report to report. The ELISA test costs as little as three to eight dollars, while the Western Blot test costs as much as forty to seventy-five dol-

153. Gust & Maskill, *supra* note 146, at 58.

154. *Id.* While most assays are designed to detect total antibody or the immunoglobulin (IgG), modern assays are designed to detect the HIV IgM antibody; most of the early antibodies belong to the latter subclass. *Id.*

155. *Id.*

156. Researchers at the CDC found that approximately one in every forty thousand were false negatives. *AIDS Test Examined*, *supra* note 122, at 90.

157. Zucherman, *supra* note 49, at 8. A new report recently reported that 1.4 million Americans will be infected by 1991. As of December 31, 1989, full-blown AIDS had been diagnosed in 117,781 Americans. By the year 2000, this report estimates 1.1 million AIDS cases and 1.1 million AIDS deaths. These figures do not include AIDS cases due to blood transfusions, hemophiliacs, and children, which account for five percent of all cases. Mesce, *supra* note 2, at A2.

158. J. LANGONE, *supra* note 6, at 67.

159. Haney, *Despite More Tools to Fight AIDS, Experts Fear for Urban Poor in '90s*, S. Bend Trib., Oct. 30, 1989, at A11, col. 1.

160. *Id.*

161. Leary, *AIDS Outlay Equals that for Cancer and Heart Disease*, N.Y. Times, June 15, 1989, at B13, col. 1.

162. *Id.*

163. *Id.*

164. *Id.*

165. *AIDS is Here to Stay*, WORLD HEALTH, March 1988, at 27.

166. *The Incalculable Cost of AIDS*, ECONOMIST, March 12, 1988, at 63. Loss of earnings refers to that income the person would have produced if he or she had lived to life expectancy. This estimate (55 million) probably does not take account of the cost of "late stage illness" — the cost of what would have been spent on health care when the person became ill in old age.

167. Van de Kamp, *supra* note 36, at 32.

lars.<sup>168</sup> The United States Military has been able to carry out HIV testing with an average of three dollars per person.<sup>169</sup> Their low cost may be due to efficiency in numbers and the low rate of positives found in the first round of ELISA testing, thereby abrogating the need to conduct further testing on the blood sample. However, it is commonly accepted that massive testing of the general population could be carried out at five dollars per person.<sup>170</sup> At this price, it would cost approximately 1.2 billion dollars to screen every person in the country.<sup>171</sup> If the total dollar cost of the disease in 1991 is 73.3 billion dollars,<sup>172</sup> the cost of testing the entire population would be approximately one-sixtieth of the total cost of AIDS.<sup>173</sup> The cost of testing the high risk groups proposed in this article would cost significantly less than 1.2 billion since they account for a relatively small amount of the total population.<sup>174</sup> Therefore, the cost of testing is low in comparison to the total cost of this disease.

Even though the cost of mandatory testing is relatively low when compared to the total cost of AIDS, it is still an opportunity cost; every dollar spent on testing is unavailable for research, education, and treatment. In this context, the cost of

168. *AIDS Test Examined*, *supra* note 122, at 90.

169. *Id.*

170. Burton, *The Case for Mandatory AIDS Testing*, *Indianapolis Star*, Sept. 14, 1987, at A9, col. 1.

171. *Id.*

172. *See supra*, notes 163-167 and accompanying text.

173. These calculations have been based on the following numbers:

Cost of treating AIDS patients	=	up to 16 billion
Loss of earnings	=	approx 55 billion
Research, etc.	=	approx 2.3 billion
TOTAL	=	73.3 billion

Cost of testing the entire population at \$5.00/person: 1.2 billion

Burton, *supra* note 170, at A9.

Cost of testing as compared to cost of the disease:  $1.2/73.3 = \text{approx.}$

1/61.

174. The proposed scheme keeps the size of the group which will undergo testing down to a tolerable limit, because a large percentage of AIDS carriers, including those in high risk groups, would not be tested. The mandatory testing plan proposed in this article only requires testing arrested prostitutes, arrested IV drug users, prisoners, and those who attend STD and IV drug use clinics. Therefore, many persons in high risk groups will not be mandatorily tested, such as homosexual males and all of the unarrested prostitutes and IV drug users (primarily because it is not practical — such a plan could not realistically be carried out on an organized basis). Testing is

testing is significantly higher. However, this cost can be justified by the fact that testing for the virus can save money and prolong lives in the long run.

Testing may save the lives of uninfected persons because some people who test positive for the virus might change their conduct if they learn that they can infect others. Indeed, the majority of studies show that HIV testing is associated with a reduction in high risk activity.<sup>175</sup> Recent reports among male homosexuals and IV drug users indicate that those who are aware of their positive status reduce their high risk behavior.<sup>176</sup> Therefore, testing will reduce the rate of infection and the cost of the disease.

The cost of testing is neutralized by the savings which result from early treatment of AIDS-Related-Conditions (ARC). The available treatment costs less than hospitalization for the particular condition. For example, aerosolized pentamidine, which prevents pneumocystis carinii pneumonia, the major killer of AIDS victims, costs approximately one hundred dollars per month.<sup>177</sup> Experts agree that the cost of this treatment would be offset by savings in the cost of treating pneumonia.<sup>178</sup> A typical pneumonia hospitalization costs ten thousand dollars, and most AIDS patients have two or three spells of the disease before they succumb.<sup>179</sup> Therefore, a twelve hundred dollar annual cost of providing aerosolized pentamidine would be offset by a savings in subsequent hospitalization costs by as much as thirty thousand dollars.<sup>180</sup> In response to the potential savings, the United States Army has routinely treated all HIV-infected personnel with aerosolized

175. Coates, Stall, Keegles, Lo, Morin & McKusick, *AIDS Antibody Testing*, 43 AM. PSYCHOLOGIST 859 (1988) [hereinafter Coates & Stall].

176. *Id.* at 860. In this study, homosexual men who were aware of their seropositive status after undergoing antibody testing reduced unprotected anal receptive intercourse to forty-two percent of baseline, as opposed to sixty-two percent for the seronegative group, and fifty-seven percent for the uninformed group (not tested). These results are "statistically significant." *Id.*

177. Shilts, *U.S. May Mandate Costly AIDS Tests and Treatment*, *San Francisco Chron.*, June 7, 1989, at A7, col. 1. Pneumocystis carinii pneumonia was responsible for seven thousand AIDS deaths in 1988. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* U.S. Representative Henry Waxman, chairman of the House Subcommittee on Health and the Environment says, "[t]he public health experts should be talking to the budget makers now to explain why we need millions for the test and preventive drugs today in order to save hundreds of

pentamidine since 1986.<sup>181</sup> As a result, pneumonia is rarely seen among HIV-infected military personnel.<sup>182</sup>

AZT, the only drug currently approved by the FDA, can prolong the lives of AIDS victims by postponing the onset of the disease. Approximately twenty-five thousand of the forty thousand patients who have full-blown AIDS are currently taking AZT,<sup>183</sup> and it is estimated that at least 600,000 infected persons could presently benefit from such treatment.<sup>184</sup> It costs approximately 2,800 to 3,750 dollars per year, and many patients may have to take this drug for years.<sup>185</sup> However, the cost of treating an AIDS patient averages 17,910 dollars per year. Hospitalization costs alone are approximately seven hundred dollars per day.<sup>186</sup> Although the cost of AZT is expensive, it is far less than the hospitalization costs. In addition, if patients are tested for the virus and receive early treatment, the burden on public hospitals would be alleviated.<sup>187</sup> Health care officials have recently supported such claims. Dr. Douglas Shenson of Montefiore, who predicts that our health care system will be thrown into chaos in two or three years when the largest number of infected people will become ill, says that "[i]f we intervene early, on an outpatient basis, we can keep people from crashing into the emergency rooms later."<sup>188</sup>

The cost of testing and treating AIDS-related illnesses today can save money in hospitalization costs tomorrow. As a general rule, outpatient care costs less than inpatient care. There is little doubt that all AIDS patients will spend time in the hospital prior to their death. However, if treatment is administered in the early stages of infection, the number of hospital visits can be reduced. More importantly, the lives of

181. *Id.*

182. *Id.*

183. Kolata, *Strong Evidence Discovered that AZT Holds Off AIDS*, N.Y. Times, Aug. 4, 1989, at A1, col. 3.

184. Hilts, *AIDS Treatment Costs Put at \$5 Billion a Year*, N.Y. Times, Sept. 15, 1989, at A18, col. 3.

185. The cost of taking a full dosage of AZT was estimated in the past to be anywhere from 5,600 dollars to 7,500 dollars. Kolata, *U.S. Halves Dosage for AIDS Drug*, N.Y. Times, Jan. 17, 1990, at B6, col. 4; Freundlich & Siler, *Now that AIDS is Treatable, Who'll Pay the Crushing Cost?*, BUS. WEEK, Sept. 11, 1989, at 115. However, the recommended dosage has recently been cut in half and, therefore, so has the cost. Kolata, *supra*, at B6.

186. *The AIDS Plague Spreads*, ECONOMIST, July 15, 1989, at 23, 24.

187. Freundlich & Siler, *supra* note 185, at 118. So far, the public hospitals have carried the burden of treating AIDS patients who have become seriously ill. The average public hospital lost more than 600,000 dollars in 1987. *Id.*

188. Hilts, *supra* note 184, at A18.

the victims can be prolonged with early treatment. Thus, both the infected and uninfected population benefit from testing and early treatment. These facts justify the cost of testing.

### 3. Mandatory Testing Will Drive the Disease Underground

Another argument against mandatory testing is that it will drive the disease underground. In other words, it will drive high risk individuals away from the health care professionals, who are precisely the people they should see in the hope that they will convince them to change their ways. Proponents of this argument assert that voluntary testing and education alone are sufficient to fight this disease. However, these two methods of control have been notoriously ineffective.

First, statistics indicate that the disease is already underground. Only five to ten percent of all HIV infected persons in the United States have been identified through voluntary testing at alternative site programs.<sup>189</sup> Thus, ninety to ninety-five percent of the infected persons are unaware of their status, are contagious to others, and continue to unknowingly spread the disease. The disease, in this sense, cannot go much further underground. Voluntary testing can hardly be claimed as a success thus far.

Second, voluntary testing is unlikely to succeed due to human nature. The argument against mandatory testing is that high risk individuals will refuse to see health care professionals because they will be required to undergo HIV testing. In other words, because they do not want to know if they are infected with a fatal disease, they will avoid health care centers. However, if this is true, then they necessarily will not submit themselves to voluntary testing. Therefore, the argument in favor of voluntary testing necessarily refutes itself. This reasoning is scientifically supported as well. A recent study found that the current policy of education, voluntary testing, and counseling does not consider the recognized psychological defense known as the "avoidance, repression, and denial [of] the knowledge that one has, or might have, a fatal disease [which is] used by a high percentage of individuals."<sup>190</sup> The study estimates that

189. Burke, *supra* note 148, at 91; Burton, *supra* note 170, at A9.

One study estimated that only 75,000 carriers had been identified through alternative site programs, while another estimate that up to 120,000 had been identified. Either way, this is a very low percentage of the estimated 1.0 to 1.5 million estimated carriers in the United States.

190. Archer, *Psychological Defenses and Control of AIDS*, 79 AM. J. PUB. HEALTH 876, 878 (1989). In a study involving 1700 high risk individuals, sixty-eight percent declined to attend a session to discover their HIV status.

over half of high-risk individuals will probably avoid testing because of the avoidance-denial mechanism. Based on this estimate, mandatory testing is likely to identify a much higher percentage of high risk individuals than is voluntary testing.<sup>191</sup>

Third, education alone is also unlikely to be successful in fighting the AIDS epidemic. Education is typically aimed at high risk groups; it tries to inform them of risk reduction methods, ultimately aiming at permanent behavior modification. So far, this approach has not been successful,<sup>192</sup> especially among IV drug users and adolescents. Drug users are the most difficult high risk group to persuade to modify their behavior. A recent study found that most teenage crack users rarely use condoms and over one-third never use them, in spite of the fact that eighty percent understood their value in preventing transmission of the HIV virus.<sup>193</sup>

Education has not been successful among non-high risk groups either. Teenagers have not significantly altered their sexual practices, regardless of their increased knowledge about AIDS.<sup>194</sup> This is true among groups with a high and low prevalence of HIV infection.<sup>195</sup> Adolescents typically deny risk

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In another group, which agreed to give blood, only twenty-six to forty-six percent failed to ask for their result. Those who did ask for their status, did so in order to modify their behavior if positive, presumably to protect others. *Id.* at 877.

191. *Id.* at 878.

192. Dr. Jonathan Mann, director of the WHO global AIDS program, says that despite AIDS prevention campaigns, the virus continues to spread worldwide. Hilts, *supra* note 57, at D19.

193. Dannemeyer & Franc, *supra* note 109, at 48. This study was conducted by a San Francisco physician who studied the sexual behavior of two hundred teenagers. She found that twenty-seven percent reported having five or more sexual partners in the previous year, with twelve percent having more than ten partners. *Id.* (These research results show the lack of success of education efforts alone; these results are not to be confused with the studies cited in notes 175-176, *supra*, which refer to reported behavior modification after the individual has learned of his or her positive status.)

Although crack users do not inject drugs into their veins, an increasing number are finding (when they check into sexually transmitted disease clinics) that they are infected with the HIV virus. This is most likely due to the fact that many addicts prostitute themselves in return for crack. This theory is further supported by the fact that other sexually transmitted diseases, such as syphilis and gonorrhea, are on the rise among crack addicts. *AIDS Plague Spreads*, *supra* note 186, at 23.

194. Kolata, *AIDS is Spreading in Teenagers, A New Trend Alarming to Researchers*, N.Y. Times, Oct. 8, 1989, at 1, col. 1. Although there are AIDS programs and lectures at schools, they appear to have virtually no impact. *Id.* Teenagers who are infected said that they were not concerned about "safe sex" practices until it was too late. *Id.*

in spite of their awareness; this is amplified in the AIDS context because they rarely see someone their own age infected with the virus.<sup>196</sup> The lack of response to education is of particular concern because AIDS cases among teenagers have increased forty percent in the last two years.<sup>197</sup> Furthermore, an equal number of males and females are infected,<sup>198</sup> which indicates that the virus is spreading among the heterosexual population at a significant rate.

Education has been even less successful in reaching minority communities.<sup>199</sup> Education among the Hispanic population has largely failed due to language and cultural barriers.<sup>200</sup> Unfortunately, in this decade, AIDS is expected to become more prevalent among poor black and Hispanic heterosexuals.<sup>201</sup> The virus will spread primarily through needle sharing and sexual activity.<sup>202</sup> In New York City this trend has already manifested itself: eighty-four percent of the women with AIDS are black or Hispanic, as are ninety percent of the children with AIDS.<sup>203</sup>

Some studies indicate that education seems to have had some effect in persuading the male homosexual population to modify their behavior, although many still continue to partici-

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Irwin, *Sexually Active Adolescents and Condoms: Changes Over One Year in Knowledge, Attitudes and Use*, 78 AM. J. PUB. HEALTH 460 (1988); Jones, Waskin, Gerety, Skipper, Hull & Mertz, *Persistence of High Risk Sexual Activity Among Homosexual Men in the Area of Low Incidence of AIDS*, 14 SEXUALLY TRANSMITTED DISEASES 79 (1987); Fleming, Cochi, Steece & Hull, *Acquired Immunodeficiency Syndrome in Low Incidence Areas: How Safe Is Unsafe Sex?*, 258 J. AM. MED. A. 785 (1987).

196. Kolata, *supra* note 194, at A1.

197. *Id.* Four hundred and fifteen cases have been reported among teenagers (ages thirteen - nineteen). *Id.*

198. *Id.*

199. Dannemeyer & Franc, *supra* note 109, at 50. Since 1982, the number of AIDS cases has risen 3.8 times faster for blacks than whites. The *Journal of the American Medical Association* recently reported that "behavior has not changed much and HIV-seroprevalence has continued to climb" in San Francisco, even though public health authorities have made "strenuous educational and intervention efforts" to reach intravenous drug users. *Id.*

200. Navarro, *AIDS and Hispanic People: A Threat Ignored*, N.Y. Times, Dec. 29, 1989, at A1, col.2.

201. Haney, *Despite More Tools to Fight AIDS, Experts Fear for the Urban Poor in the '90s*, S. Bend Trib., Oct. 30, 1989, at A11, col. 1.

202. *Id.* Although the rate of infection has decreased among homosexual males, the virus continues to spread through IV drug use, especially among poor black and Hispanic males in the big cities; it is then transmitted from them to their sex partners, who are mostly women. *Id.*

pate in high risk behavior.<sup>204</sup> The discrepancy between the effect of education on the male homosexual community and IV drug users may be explained by the nature of the groups: drug users have an addictive habit which they already know may kill them, the added risk of HIV infection is not sufficient incentive to change their behavior; homosexual males, on the other hand, do not have this additional health risk and, therefore, are more motivated to undergo behavior modification.

Education's failure to convince people to modify their behavior is not unprecedented. It has not proven completely successful in other health-related areas. For example, the Surgeon General has tried to educate the public on the health problems associated with smoking. Mandatory warnings are printed on every package of cigarettes, and the scientific findings of the Advisory Committee to the Surgeon General are widely disseminated to the public through extensive press coverage.<sup>205</sup> Consequently, the prevalence of smoking has dropped approximately twenty percent among some populations.<sup>206</sup> However, in spite of the fact that smoking causes lung cancer and an increased risk of cerebrovascular disease (stroke), fifty million Americans continue to smoke.<sup>207</sup> Although education may have been successful in lowering the percentage of smokers, it has far from eliminated the problem. The NCAA's mandatory drug testing program of college athletes also illustrates that education alone is not sufficient to induce behavior modification. Many athletes continue to use steroids in spite of the fact that they can cause psychological disorders,<sup>208</sup> risk of heart disease, sexual and reproductive dis-

204. Martin, Garcia & Beatrice, *Sexual Behavior Changes and HIV Antibody in a Cohort of New York City Gay Men*, 79 AM. J. PUB. HEALTH 501, 502 (1989). The study found a 3.5 increase in risk reduction efforts over a seven year period, yet nearly twenty percent continued to engage in unprotected receptive anal intercourse. *Id.* at 502. See also Leishman, *supra* note 50, at 41. In reference to the homosexual community in San Francisco, Dr. Constance Wofsy, an infectious-disease specialist at San Francisco General Hospital and an authority on AIDS, said, "[w]ith intense education efforts and extraordinary motivation you can affect the behavior of some people — in most cases only temporarily." *Id.* Yet another study of homosexual men in San Francisco, found that eighty percent knew that condoms helped prevent the transmission of the virus, yet only six percent used them. *Id.*

205. Warner, *Smoking and Health: A 25-Year Perspective*, 79 AM. J. PUB. HEALTH 111 (1989).

206. *Id.* at 142. Smoking prevalence among men has fallen from over fifty percent in 1965 to close to thirty percent at present. *Id.*

207. *Id.* at 142.

208. Hartley, *NCAA Weighs Year-Round, Random Drug Testing to Halt What*

orders, liver damage, stunted growth, and premature death.<sup>209</sup> Because education and rehabilitation have proven unsuccessful on their own,<sup>210</sup> the NCAA and some universities have implemented mandatory drug testing programs for college athletes.<sup>211</sup>

Past experiences and recent studies indicate that education and voluntary testing alone are not successful in convincing those at risk to modify their behavior. Mandatory testing is likely to provide a more effective policy. Public policy should not be devoid of education and counseling all together, but it should focus on testing. An effective AIDS prevention program would incorporate all three strategies.

#### 4. Social Stigma

The final argument against mandatory testing is that it causes social stigma. Stigma is defined as a mark of disgrace or reproach.<sup>212</sup> This stigma is usually caused by other peoples' reactions to those with AIDS or those who are at risk of

*Many Call a Growing Use of Steroids*, Chron. Higher Educ., Jan. 11, 1989, at A35, col. 2.

Psychological disorders include alternate anxiety attacks and depression, an increase in sex drive, schizophrenic disorders, and an increase in aggressive behavior often leading to frenzied violence. Lamb, *The Consequences of Anabolic Steroid Use*, SCHOLASTIC COACH, February 1989, at 81.

209. Lamb, *supra* note 208, at 81. In 1985, more than fifty percent of Michigan State University's athletes tested positive for steroids. Cochran, *Drug Testing of Athletes and the United States Constitution: Crisis and Conflict*, 92 DICK. L. REV. 571, 574 n.19 (1988). In a more recent 1989 study among fifty-three varsity athletes at two institutions with major athletic teams, seventeen percent reported steroid use alone. Pope, Katz & Champoux, *Anabolic-Androgenic Steroid Use Among 1,010 College Men*, PHYS. & SPORTS MED., July 1988, at 75, 75-77. Drug abuse is also prevalent outside the college atmosphere, some studies indicate that up to fifty percent of the athletes at the Olympic games have used or do use steroids. Everson, *Ban Steroids? Ethics No, Health Yes!*, 50 MUSCLE & FITNESS 176 (1989). The professional leagues do not show any improvement. Bill Fralic, a lineman for the Atlanta Falcons who admitted using steroids while at the University of Pittsburgh, estimates that up to seventy-five percent of the league's (NFL) lineman use drugs. Lederman, *Witnesses Tell Senators Steroid Use Has Reached Epidemic Proportions Among Football Players*, Chron. Higher Educ., May 17, 1989, at A38, col. 1.

210. Beigel, *The Difficulty of Treating the Drug Abusing Athlete*, N.Y. Times, Feb. 13, 1986, at E2, col. 1.

211. NCAA, THE 1987-88 NCAA DRUG TESTING MANUAL 111 (1987) (National Collegiate Athletic Association); DEPARTMENT OF INTERCOLLEGIATE ATHLETICS, UNIV. OF CAL., LOS ANGELES, POLICY STATEMENT DRUG EDUCATION AND TESTING PROGRAM FOR UCLA STUDENT ATHLETES (1987-1988) (pamphlet).

212. WEBSTER'S NEW WORLD DICTIONARY 735 (2d concise ed. 1977).

AIDS.<sup>213</sup> In balancing the social consequences of testing stigma against the benefits of testing, the benefits clearly outweigh the burdens.

First, social stigma pales in significance to the fatal consequences of the HIV virus. Those who are aware of their seropositive status can not only save the lives of others by modifying their behavior, but they can also prolong their own lives. Without an available cure, these are the most effective means to limit the spread of the disease and to help those who are already infected.

Second, the conduct that is seen as socially stigmatizing among the high risk groups at issue is voluntary conduct. However, the lives which may be saved are often innocent, such as babies born with HIV infection and spouses who are unaware of their partner's high risk behavior.<sup>214</sup> The fact that someone within a high risk group is stigmatized is regrettable, but it is not a sufficient reason to reject a mandatory testing policy. Furthermore, public health officials can control stigma by adhering to strict confidentiality rules.

### B. Advantages of Mandatory Testing

#### 1. The Patient May Receive Treatment

Mandatory testing identifies those who are infected and enables them to take advantage of the treatment presently available. Although at one time testing may have offered nothing but fear of death to those who underwent testing, this is not the case now. There is still no cure or vaccine, but there are

213. Herek & Glunt, *supra* note 70, at 887. See also Muhammad v. Carlson, 845 F.2d 175 (8th Cir. 1988) (although the inmate was stigmatized by his confinement in the prison's AIDS unit, this stigma arose from the public fear and misunderstanding of the disease, not from the medical official's misconduct and, therefore, the stigma did not rise to an infringement on the inmate's constitutionally protected liberty interest).

214. Because female drug addicts and females who have acquired the disease through heterosexual transmission comprise an increased proportion of new AIDS patients, a growing number of children are born with HIV infection. A recent study in New York City found that one in eighty infants is born to an HIV-infected mother. Approximately one-third to one-half of those babies will be seropositive. Yarchoan & Mitsuya, *supra* note 9, at 197. See also Dannemeyer & Franc, *supra* note 109, where the authors document the fact that an increasing number of women, who are not IV drug users, are acquiring the disease from male IV drug users.

Hemophiliacs are also innocent victims who are at risk of infection. However, due to the sensitivity of the ELISA test, the blood supply is considered to be safe at this time. See *supra* notes 131-132 and accompanying

many forms of treatment available. Researchers are also developing many new forms of treatment.

Initially, many scientists thought that human retroviral infections were inherently untreatable because no antiviral therapy had ever been established for a retroviral disease such as the HIV virus.<sup>215</sup> However, in recent years various forms of retroviral treatment have become available and researchers are developing many more. This section will describe the treatment presently available as well as the treatment being developed.

AZT (also known as zidovudine or azidothymidine) is an anti-retroviral drug (prevents retroviral replication) which is active against the HIV virus.<sup>216</sup> It has improved the survival rate and quality of life of HIV-infected persons.<sup>217</sup> First, it reduces the frequency and mortality of opportunistic infections and neoplasms (tumors, i.e. kaposi's sarcoma). In at least one case, AZT has been associated with, and believed to be responsible for, the regression of AIDS-related kaposi's sarcoma.<sup>218</sup> Kaposi's sarcoma is the most common malignant tumor suffered by AIDS patients.<sup>219</sup> Second, AZT improves the intellectual functioning of patients who suffer from HIV-induced dementia by slowing the course of neurological deteriora-

215. Yarchoan & Mitsuya, *supra* note 9, at 191.

216. Langtry & Campoli-Richards, *Zidovudine, A Review of Its Pharmacodynamic and Pharmacokinetic Properties, and Therapeutic Efficacy*, 37 DRUGS 408, 409 (1989).

217. *Id.* at 409. During the second phase of the initial study on AZT, a total of 282 patients with AIDS or ARC were randomly assigned to receive either AZT or placebo. Seven months later, one patient receiving AZT had died, compared with nineteen on the placebo. Those patients receiving AZT had overall better prognosis than those receiving the placebo. Yarchoan & Mitsuya, *supra* note 9, at 195-96.

218. Langford, Ruf, Kunze, Pohle & Reichart, *Regression of Oral Kaposi's Sarcoma in a Case of AIDS on Zidovudine (AZT)*, 120 BR. J. DERMATOLOGY 709 [hereinafter Langford & Ruf]. In a recent study, a case of oral Kaposi's Sarcoma (KS) regressed during therapy with AZT, which began five months after the first dermal and oral tumors were recognized. After six months of treatment with AZT, the number of T-helper cells increased and the KS lesions on the gingiva [gums], uvula, body, and the face disappeared. The KS lesion on the hard palate regressed. *Id.*

Placebo-controlled studies have shown that AZT decreases mortality and frequency of opportunistic infections in patients with AIDS or ARC. Patients on AZT had a significant improvement of their immune function. In a study of 284 patients with AIDS or ARC, KS lesions developed in sixteen. Six were patients on treatment with AZT and ten were in the placebo group. *Id.* at 712.

tion.<sup>220</sup> Finally, patients who have taken AZT have experienced an improvement in their immune system (an increase in T-4 cells), and they have shown other clinical signs of improvement, such as weight gain.<sup>221</sup>

Although AZT can cause severe side-effects, recent developments have greatly decreased the frequency in which they are likely to occur. The most common side-effect is bone marrow suppression.<sup>222</sup> Because bone marrow suppression causes anemia, many patients must have frequent blood transfusions in order to continue treatment.<sup>223</sup> Other side-effects include headaches and nausea.<sup>224</sup> For most patients, the headaches and nausea subside after the first few weeks.<sup>225</sup> The side-effects usually occur after the patient has taken AZT for several months. In the past, some patients have had to discontinue treatment all together, while others have only had to take a lower dose or discontinue treatment for a short time.<sup>226</sup> However, the severity of the side-effects may no longer pose a problem. The government has recently halved the recommended dosage of AZT, because the lower dose is just as effective and does not cause side-effects.<sup>227</sup> The Secretary of Health and Human Services, Dr. Louis W. Sullivan, said that fewer patients will have to discontinue treatment in the future due to side-effects.<sup>228</sup> Tolerance to AZT may also be improved if the patient takes the drug in the early stages of the disease rather than waiting until AIDS-related symptoms appear. A recent study found that less than five percent of those patients who

began treatment in the early stages of the disease had serious side-effects, while fifty percent of those patients who waited until they had full AIDS had to discontinue treatment due to serious side-effects.<sup>229</sup>

AZT has been effective in treating HIV-infected individuals, and provides promise for the future.<sup>230</sup> As new treatment is developed, AZT may be used in combination with other drugs, thereby reducing the frequency of its side-effects.<sup>231</sup> Through such combination therapy, some scientists believe that "it may be possible to both ameliorate HIV-related symptoms and extend the life span of infected individuals to the point that they approach those of uninfected control subjects."<sup>232</sup> Combination therapy will also prevent patients from becoming immune to AZT treatment.<sup>233</sup>

The FDA has recently approved three new drugs for marketing: ganciclovir, aerosolized pentamidine, and fluconazole. Ganciclovir is used to treat cytomegalovirus retinitis (a severe eye infection).<sup>234</sup> Approximately twenty-five percent of all AIDS patients are afflicted with this eye infection which often causes blindness.<sup>235</sup> Aerosolized pentamidine prevents pneumocystis carinii pneumonia, the major killer of AIDS victims.<sup>236</sup> Fluconazole, a new fungus-fighting drug, is successful in fighting cryptococcal meningitis and candidiasis.<sup>237</sup> Almost every AIDS patient develops a fungal infection and approximately ten percent have cryptococcal meningitis, which is a seri-

220. Langtry & Campoli-Richards, *supra* note 216, at 445; Yarchoan & Mitsuya, *supra* note 9, at 195. Evidence suggests that monocyte [white blood cell]-derived cells [i.e., T-4 cells] are the main target cells of the HIV virus. AZT's ability to protect such cells against HIV infection may be related to the improvement in dementia observed in patients who are given AZT. *Id.*

221. Yarchoan & Mitsuya, *supra* note 9, at 195-96.

222. *Id.* at 196. Bone marrow is soft fatty tissue found in bone cavities which is responsible for producing most of the blood cells; red bone marrow is responsible for producing some of the red blood cells and most of the white blood cells. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE, *supra* note 9, at 195 (1989).

223. Kolata, *supra* note 185, at B6.

224. Yarchoan and Mitsuya, *supra* note 9, at 196.

225. *Id.*

226. *Id.*

227. Kolata, *supra* note 185, at B6. A recent study sponsored by the National Institute of Allergy and Infectious Disease found that AIDS patients who took the normal twelve hundred milligram dose of AZT for the first month and then reduced their dosage to six hundred milligrams per day did just as well as those who continued to take the higher dose. *Id.*

228. *Id.*

229. Kolata, *supra* note 183, at A1.

230. AZT may also be effective as preventive medicine. Recent studies suggest that in some animals, immediate administration of AZT may prevent the development of retroviral infections. Some infected individuals have recently taken AZT in the hope that it will prevent the onset of the disease, but there is as yet no formal data to support this theory. Yarchoan & Mitsuya, *supra* note 9, at 197.

231. *Id.* at 198. "A decrease in the overall toxicity may be attained if active drugs with different toxicities are combined." *Id.*

232. *Id.* at 197.

233. *Id.* at 198. Combination treatment prevents the emergence of resistant strains to the virus. *Id.*

234. Goldsmith, *AIDS Drug Development, Availability Intensify*, 262 J. A. M. A. 452 (1989).

235. Seligman, *At Last, Quicker Access to AIDS Drugs*, NEWSWEEK, July 10, 1989, at 76.

236. Shilts, *supra* note 177, at A7. See also the previous information on aerosolized pentamidine and its success in preventing pneumonia, *supra* notes 177-182 and accompanying text.

237. Cmons, *New Drug Added to Anti-AIDS Arsenal*, L.A. Times, Jan. 30, 1990, at A6, col. 1; Kolata, *AIDS Drug is Approved After Clamor*, N.Y. Times, Jan. 30, 1990, at C5, col. 3.

ous infection on the lining of the brain.<sup>238</sup> Moreover, the drug has proven to have very few side-effects, and those that do occur are usually not severe.<sup>239</sup>

Doctors also use ritalin, a stimulant which is often prescribed for hyperactive children, to treat AIDS patients. It improves the patient's mental health and emotional symptoms.<sup>240</sup> Unlike AZT, ritalin does not fight the AIDS virus directly. Instead, it improves mood and concentration.<sup>241</sup> In a recent study, ninety-seven patients took the drug, of whom seventy-six percent displayed moderate to marked improvement in energy, vigor and mood; and sixty-seven percent improved their reaction time, information processing speed, and long-term memory.<sup>242</sup> Although this is not a cure for AIDS patients, it is a way to help them get "an edge on what they've got."<sup>243</sup>

Although they are not licensed for full use, the FDA has recently permitted expanded distribution of two new drugs, DDI (dideoxyinosine) and erythroprotein. DDI, like AZT, blocks retroviral reproduction.<sup>244</sup> It interferes with retroviral reproduction by "inhibiting the synthesis of the viral genetic material."<sup>245</sup> In recent studies, several patients exhibited more than eighty percent reduction of an AIDS virus protein in their serum concentrations.<sup>246</sup> These individuals also experienced an increase in their T-4 cell count and weight gain, a clinical sign of improvement.<sup>247</sup> Moreover, in clinical trials the drug has not produced any serious side-effects at any dosage level, which is encouraging to those patients who are unable to tolerate AZT.<sup>248</sup> The FDA has also permitted expanded distribu-

238. Kolata, *supra* note 185, at B6.

239. Cimon, *supra* note 237, at A6. Most of the side-effects are only abdominal discomfort and nausea. In rare circumstances, they have included liver damage, skin rashes, and liver failure. *Id.*

240. *Stimulant Said to Ease Problems From AIDS*, N.Y. Times, May 8, 1989, at A16, col. 2.

241. *Id.*

242. *Id.*

243. *Id.* This is the statement of Dr. William Breitbart, assistant attending psychiatrist at Memorial Sloan-Kettering Cancer Center in New York.

244. *New AIDS Test Gets the Go-Ahead*, NEWSWEEK, Oct. 9, 1989, at 40.

245. Marx, *New AIDS Drug Passes First Clinical Test*, 24 SCIENCE 353 (1989).

246. *Id.*

247. *Id.*

248. *Id.* Last fall, researchers gave DDI to 2,600 people with AIDS or ARC in formal clinical trials, provided free of charge to those who cannot tolerate AZT. Seligman, *supra* note 235, at 76. The results of the expanded

tion of erythroprotein, a reproduced form of a hormone produced by the kidneys, which is used to treat AIDS-related anemia.<sup>249</sup> The drug has proved successful in preliminary studies.<sup>250</sup>

Another new drug currently being developed is the CD4-PE40 compound. The HIV virus binds to the T-Helper cells in the immune system. This binding occurs when the viral protein, gp120, binds to the receptor on the T-Helper cell, known as CD4.<sup>251</sup> The CD4 compound prevents the virus from infecting the T-Helper cell by interfering with the binding of the HIV virus to the T-cell.<sup>252</sup> Flooding the patient's body with this compound creates a "decoy" which may prevent or reduce the spread of the virus to healthy cells.<sup>253</sup> In other words, the HIV virus attaches to the CD4 cells rather than the T cells in the immune system. Some research groups have found that this compound successfully inhibits the infection of T cells by the HIV virus at certain levels.<sup>254</sup> It is also unlikely to cause bone marrow toxicity like AZT.<sup>255</sup> In order to make this compound even more effective, scientists have attached a toxin, PE40, to the CD4 compound which selectively binds to the HIV cells and then kills them.<sup>256</sup> Thus, this compound may potentially prevent infection of healthy cells by the HIV virus as well as kill the cells already infected.

While drugs take effect after the person becomes infected with the virus, vaccines prevent infection in the first place. Dr.

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ten times that in the regular clinical trials. However, this discrepancy can be explained by the fact that those patients who take the drug on the expanded access program are much sicker than those who take the drug in the clinical trials. Most experts believe that the deaths are probably caused by the disease rather than the drug. Kolata, *Many Recommended Disputed AIDS Drug*, N.Y. Times, Mar. 19, 1990, at A13, col. 4 (national ed.).

249. Seligman, *supra* note 235, at 76.

250. Thompson, *Drugs From the Undergrounds*, TIME, July 10, 1989, at 49.

251. Mittler & Hoffmann, *Synergism Between HIV gp120 and gp120-Specific Antibody in Blocking Human T Cell Activation*, 245 SCIENCE 1380 (1989).

252. Yarchoan & Mitsuya, *supra* note 9, at 192. "In the first step in the life cycle of HIV, the virus binds to the surface of the target cell. There is substantial evidence that this usually involves the attachment of the gp 120 env glycoprotein of HIV to CD4, a glycoprotein found on certain T lymphocytes [T-4 cells of the immune system], monocytes, and other cells." There is evidence that alternate receptors may exist, but their significance is unclear at this point. *Id.* at 191.

253. *Scientists Developing Potential AIDS Drug*, S. Bend Trib., June 8, 1989, at C1, col. 6.

254. Yarchoan & Mitsuya, *supra* note 9, at 192.

255. *Id.*

Jonas Salk, who developed the polio vaccine, is presently developing an AIDS vaccine. He proposes to inject an inactivated HIV virus into the system of an infected patient in the hope that it will bolster their immune system, thereby preventing the person from developing full blown AIDS.<sup>257</sup> In studies which he and his colleagues have performed with chimpanzees, two of the three were able to clear the virus from their system completely.<sup>258</sup> In a recent study with nineteen ARC patients injected with the inactivated virus, only two have developed full-blown AIDS within one year of injection.<sup>259</sup> The immune responses of these patients have improved.<sup>260</sup>

A recent study reported the preliminary success of another vaccine. This vaccine protected eight of nine monkeys against the simian AIDS virus, a virus related to the AIDS virus.<sup>261</sup> Each monkey was given three injections of the vaccine. Four monkeys were injected with the virus one month later. Three of the four showed no sign of infection; the fourth became infected but showed no symptoms. Thirteen months later, another five monkeys were given the vaccine followed by an injection of the virus. These five monkeys remained uninfected. Seventeen monkeys who did not receive the vaccine, but were injected with the virus, died within seven months.<sup>262</sup> Although more research must be done before it can be used on humans, the preliminary results are very promising.

Finally, doctors at Johns Hopkins School of Medicine recently reported that they had actually cured one AIDS patient of the virus, although he died later of cancer.<sup>263</sup> The patient was suffering from lymphoma which is a common immune system cancer among AIDS patients.<sup>264</sup> First, the patient underwent chemotherapy, which kills nearly all of the immune cells in the body. The patient was later given a bone marrow transplant and AZT at the same time. As a result, the AZT prevented the few infected immune cells which did survive the chemotherapy from replicating the virus.<sup>265</sup> Approximately

257. Goldsmith, *supra* note 234, at 453.

258. *Id.*

259. *Id.*

260. *Id.*

261. Hiltz, *Tests of a Vaccine on Monkeys Offer New Hope in AIDS Fight*, N.Y. Times, Dec. 8, 1989, at A1, col. 1.

262. *Id.*

263. Kolata, *Physicians Rid a Man's Body of AIDS Virus in Experiment*, N.Y. Times, Dec. 19, 1989, at A1, col. 4.

264. *Id.*

265. *Id.*

one month later, the virus was not present in either the patient's blood or bone marrow. The disadvantages of this treatment are that (1) it is extremely expensive (approximately \$100,000 to \$200,000 per transplant), and (2) it is difficult to find bone marrow donors who match the tissue of the patient (approximately twenty-five percent chance of matching a sibling and a twenty percent chance of matching a donor).<sup>266</sup> However, this is the only case in which the virus has been completely removed from a patient's body. After further research has been conducted, the procedure may become less expensive.

It is becoming increasingly advantageous for HIV carriers to know their status as early as possible. Although some drugs are not fully developed, there is treatment which is presently available for many AIDS-related illnesses. These include aerosolized pentamidine, treatment for pneumonia; AZT, which prolongs the life of the patient; ganciclovir, which treats cytomegalovirus; fluconazole, which treats meningitis and candidiasis; and ritalin, which improves AIDS patient's mental capabilities. As researchers develop these various forms of treatment, they will be able to combine these drugs into a form of therapy which may be superior to any single drug used alone. Scientists have already devised certain combinations which include AZT as one of the ingredients. They hope that those patients who are unable to take large doses of AZT will be able to tolerate it at a reduced level. It is advantageous for patients to know their status as early as possible because some forms of treatment, such as AZT, are more effective if taken early in the course of the disease. Early diagnosis also alerts doctors to look for certain opportunistic infections which are common in AIDS patients, such as tuberculosis or kaposi's sarcoma. If these infections are recognized early, the physician is able to administer immediate treatment which will prolong the life of the patient. Due to the new forms of treatment, many experts have recognized that it is advantageous to HIV carriers to know their status as early as possible.<sup>267</sup>

266. *Id.*

267. Altman, *Experts on AIDS, Citing New Data, Push for Testing*, N.Y. Times, April 24, 1989, at A1, col. 1.

After interviewing various AIDS experts, the authors summarized their comments and explanations:

Many experts are coming to believe that for people who carry the AIDS virus, but have not yet developed symptoms, treatment administered at the moment the immune system first shows signs of failure can delay the onset of symptoms. A positive test for HIV

## 2. Epidemiological Data

Mandatory testing will help provide reliable epidemiological data. In order to plan rationally for the incidence of disease, it is necessary to know the magnitude of the problem. The more the public officials know about the spread of the disease, the easier it is to raise and distribute funds and to prepare hospitals and health care professionals for managing this devastating virus.

In sum, arrested prostitutes and IV drug users, prisoners, and those who attend sexually transmitted disease and drug abuse clinics should be tested for the HIV virus because the advantages outweigh the disadvantages. Mandatory screening will help reduce the spread of AIDS and prolong the lives of the victims. When a known HIV carrier develops AIDS symptoms, that person can be promptly diagnosed and treated. Early diagnosis is advantageous since some forms of treatment are more effective in the early stages of the disease. Moreover, it is efficient to test these high risk populations because they are already within the health care system. Because each of the high risk groups is attainable and early treatment is to the advantage of both the healthy and the infected, it is practical to compel them to undergo HIV testing.

## IV. LEGAL AND ETHICAL CONSIDERATIONS OF MANDATORY TESTING

This section will examine the constitutional and ethical considerations of mandatory testing. The constitutional issues include the fifth and fourteenth amendment right to equal protection and the fourth amendment right to privacy; in the prison context, the eighth amendment right against cruel and unusual punishment is also an issue. The ethical inquiry is whether the state can compel an individual to undergo mandatory testing, and if so, what duty does the individual have to comply with such a law.

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would signal doctors that they should closely monitor the status of the immune system.

For example, Dr. Jonas A. Shulman, an AIDS expert in Atlanta, said that "[w]e've come a long way since the conventional wisdom three or four years ago, of what a difference it is going to make to get tested." This message was also supported by Dr. Anthony S. Fauci, the director of the Federal National Institute of Allergy and Infectious Diseases, who said that there is "no question" that it is advantageous for people to know whether they are infected with the AIDS virus, because in some cases the patients may benefit from early treatments that could ward off infections and other complications as

### A. Ethical Considerations — the Power of the State to Regulate Public Health and the Duty of the Individual to Comply

The state traditionally has the right to regulate public health through its police power, which is reserved to the state under the Tenth Amendment to the United States Constitution.<sup>268</sup> The state's police power includes the power to regulate public health and safety.<sup>269</sup> Pursuant to this power, the state legislature has the power to pass laws which improve the health and well-being of its citizens.<sup>270</sup> In addition, the federal government has the power to enact regulations which are necessary to prevent the spread of diseases across state or national borders.<sup>271</sup>

Is the state's power to compel an individual to undergo mandatory testing pursuant to its police power an unethical denial of individual freedom or is it the ethical promotion of the common good? The issue in this inquiry involves the relationship between individual freedom and the common good.

There are many different definitions of freedom.<sup>272</sup> They range from the natural rights definition of freedom as self-

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268. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the States respectively, or to the people"; *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (the state did not surrender its police power when it became a member of the Union under the Constitution).

269. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("[a]ccording to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety").

270. *Kleid v. Board of Fulton, Ky. Indep. School Dist.* 406 F. Supp. 902 (W.D. Ky. 1976).

271. Public Health Service Act, 42 U.S.C. § 264 (West 1982) ("The Surgeon General . . . is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession"). See *Siegel v. Shinnick*, 219 F. Supp. 789 (E.D.N.Y. 1963) (the court found that it was necessary to isolate the individual in order to determine if he was infected with smallpox; this decision was based on the fact that he was probably exposed to the disease overseas and his vaccination was unsuccessful). To date, the federal government has not included AIDS on the list of communicable diseases which provides for apprehension, detention, or conditional release of afflicted individuals. However, under the power granted by the Immigration and Nationality Act, 8 U.S.C. § 1182 (1970 & Supp. 1986), the federal regulations provide for the denial of a visa if the visa applicant tests positive for the HIV virus. 42 C.F.R. § 34.2(b) (1987).

272. See M. ADLER, *THE IDEA OF FREEDOM* (1961). The author analyzes the five definitions of freedom: Self-realization, self-perfection, self-

perfection to libertarian definition of freedom as self-realization. This article will use the broad libertarian definition of freedom, because it tolerates the fewest restraints on individual behavior. In other words, it will be more difficult to justify restrictive legislation under this definition of freedom and, therefore, is the highest standard that a mandatory testing scheme would have to meet.<sup>273</sup>

The libertarian idea of freedom, which is popular in the American tradition, is the "circumstantial freedom of self-realization."<sup>274</sup> This type of freedom is defined as that "which is possessed by any individual who, under favorable circumstances, is able to act as he wishes for his own good as he sees it."<sup>275</sup> This freedom is circumstantial because it is wholly dependent on favorable circumstances, i.e. those which will allow individuals to act as they please for their own good.<sup>276</sup> Acting as one wishes or doing as one pleases expresses self-realization when the individual's wish is translated into action, and the individual's own good, as he or she sees it, is achieved by the action performed.<sup>277</sup> In other words, individuals achieve self-realization when they are permitted to act as they please.

When freedom is defined in terms of self-realization in the political arena, the government tolerates a wide variety of behavior. However, the libertarian idea of freedom does not sanction absolute individual liberty. Although one may start with the basic assumption that every individual may act as he or she pleases in order to achieve personal development, living in a society still places an obligation upon each person to observe a certain standard of conduct toward the other members of society.<sup>278</sup> This standard mandates that each person not interfere with the rights of others, and that each person bear his or her share of the labors and sacrifices necessary in order to defend society or its members from injury or molestation.<sup>279</sup> When an individual's action does prejudicially affect the rights of others, society has jurisdiction over it and may limit it.<sup>280</sup> However, society only has such control over individual action when it affects the rights of other members of the community, otherwise the individual should be free to do the action and accept the consequences.<sup>281</sup>

Although this concept of freedom tolerates a wide variety of human actions, it still does not tolerate that which interferes with the rights of others. When a person exercises his or her freedom to the detriment of others, the government has the power to interfere with individual autonomy. Members of high risk groups must not be permitted to exercise their freedom to the detriment of others by voluntarily participating in high risk activity, making large claims upon society's resources, and then arguing that they have no moral obligation to promote the common good of the community by submitting to reasonable

273. For example if freedom were defined as self-perfection for the purposes of this paper, mandatory testing would be legitimate. Freedom as self-perfection is a "freedom which is possessed by those . . . who, only through acquired virtue or wisdom, are able to will or live as they ought in conformity to the moral law or an ideal befitting human nature." M. ADLER, *supra* note 272, at 6. This freedom is acquired by those whose state of mind or character enables them to will as they ought (i.e. in accord with the moral or natural law). *Id.* The idea of freedom as the right to achieve self-perfection must be distinguished from the idea of freedom as license. Individual freedom cannot be equated with the power to pursue any desire, for a desire may be right or wrong depending on the extent to which it fulfills a natural need. M. ADLER, *TEN PHILOSOPHICAL MISTAKES* 123-25 (1985). Humans by nature need those conditions which are necessary for them to achieve self-perfection. *Id.* All human beings naturally desire good health and need an environment free of contagious, non-curable disease in order to be free. Since these natural needs are the basis of natural rights, legislation reasonably designed to promote public health is valid. Mandatory testing of certain high risk groups for the HIV virus would promote the public health.

Although freedom as self-perfection may be the better view with regard to personal morality, this article must address the reality that a mandatory testing proposal must go through the political machinery in order to be enacted. Therefore, it must deal with freedom in the contemporary American tradition, which is the libertarian definition of freedom.

274. M. ADLER, *supra* note 272, at 5.

275. *Id.*

276. *Id.* at 5-6.

277. *Id.* at 6.

278. J. MILL, *On Liberty*, in *THE GREAT LEGAL PHILOSOPHERS* 380, 393 (C. Morris ed. 1985).

279. *Id.* at 393. This duty not to interfere with the rights of others rises to the level of a moral principle. Those acts which injure others by encroaching on the rights of others, damaging the rights of others, falsely dealing with them, using unfair or ungenerous advantages over them, or selfishly abstaining from protecting them against injury are all morally reprehensible actions and, in grave cases, should be subject to moral retribution and punishment. *Id.* at 394. See also A. GEWIRTH, *Human Rights and the Prevention of Cancer*, in *HUMAN RIGHTS* 181 (1982). Gewirth argues that all persons have the right not to have cancer inflicted upon them by the actions of others. This assertion is based upon a moral principle which is at the basis of a civilized society: "This is the principle of mutual trust, of mutual respect for certain basic rights: that persons will not, in the normal course of life, knowingly inflict physical harm on one another, that they will abstain from such harms insofar as it is in their power to do so, insofar as they can informedly control their relevant conduct." *Id.* at 185.

280. J. MILL, *supra* note 278, at 393.

281. *Id.*

testing procedures. In examining the public health questions, the courts have traditionally chosen to apply this line of reasoning.

The state's power to regulate public health is not questioned. Courts have held that of all the duties the state has, none is more important than the protection of public health.<sup>282</sup> Judicial decisions concerning the power to regulate public health grant considerable deference to the state.<sup>283</sup> Moreover, courts have interpreted the state's power to regulate public health broadly.<sup>284</sup> The state's power to regulate public health is usually justified in one of two ways: (1) The state has a legitimate interest in protecting the health, safety, and welfare of the community, which includes protecting society from the harm of an individual and preventing any member of society from becoming a burden on others; or (2) The state has a legitimate interest in protecting the health, safety, and welfare of any one individual, which includes protecting the individual from self-imposed harm.<sup>285</sup>

The state's police powers have been the most broadly interpreted in the cases where the state is protecting third parties from risks created by individual conduct.<sup>286</sup> In such cases, almost all courts have deferred to the state legislature.<sup>287</sup>

282. *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719, 724 (1967); *Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922).

283. *Derrick v. Ontario Community Hosp.*, 47 Cal. App. 3d 145, 151-52, 120 Cal. Rptr. 566, 570 (1975) ("[t]he local public health officer is vested with considerable discretion as to what actions he should take to control the spread of an infectious disease"); *In Re Halko*, 246 Cal. App. 2d 553, 557, 54 Cal. Rptr. 661, 664-65 (1966) (the "[l]egislature is vested with broad discretion in determining what are contagious diseases and in adopting means for preventing the spread thereof" and, therefore, "the court should give it broad and liberal construction"); *Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) (the courts will not interfere with the discretionary power of the state to enact public health regulations unless they are arbitrary, oppressive or unreasonable).

284. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Justice Harlan said that the state may enact "health laws of every description." "[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactments as will protect the public health and the public safety". *Id.* at 25.

285. K. WING, *THE LAW AND THE PUBLIC'S HEALTH* 20 (1985).

286. *Id.*

287. *Id.* at 25-26. See also *In re Halko*, 246 Cal. App. 2d 553, 556, 54 Cal. Rptr. 661, 663 (1966) (the court upheld the mandatory quarantine provision for all tuberculosis patients as a legitimate exercise of its police power; it emphasized that in the area of public health, the courts must defer to the legislature in the area of public health regulations: "It is also the province

Therefore, the state can compel an individual suspected of carrying a contagious disease to undergo medical examination, quarantine, and treatment.<sup>288</sup> Because the AIDS issue also involves the state protecting healthy individuals against the

measures are necessary for the protection of such interests"); *Barmore v. Robertson*, 302 Ill. 422, 427, 134 N.E. 815, 817, (1922) (In reference to a state quarantine law, the court said that each state has the power to pass public health laws and "such laws must be submitted to by individuals for the good of the public").

288. K. WING, *supra* note 285, at 25-26. For example, the state can compel children to undergo medical examinations or vaccinations before attending school, and it can require marriage license applicants to undergo certain medical examinations. *Id.* Some states require those convicted of sexual offenses or prostitution to undergo HIV antibody testing. *E.g.*, CAL. PENAL CODE § 1202.1 (West Supp. 1989) (persons convicted of a sexual offense must submit to a court ordered blood test for AIDS); FLA. STAT. ANN. § 796.08 (West Supp. 1989) (requires all arrested prostitutes to undergo screening for a sexually transmitted disease, as defined by the statute, which may include AIDS if the health department deems it necessary). See also *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967) (it is within the state's police power to compel prisoners to undergo X-ray examination in order to determine if they have a communicable, contagious, or infectious disease, as long as there is a sound reason for such examination).

The state can compel treatment in certain situations. See *Breithaupt v. Abram*, 352 U.S. 432 (1957) (giving a blood test to drunk driver without his consent while unconscious is constitutional); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989) (non-consensual AIDS testing does not violate prisoner's constitutional rights); *Reynolds v. McNiciols*, 488 F.2d 1378 (10th Cir. 1973) ("hold and treat" laws which require arrested prostitutes either to take drugs for treatment of venereal diseases or be detained in jail for such treatment are constitutional); *Ex parte Woodruff*, 90 Okla. Crim 59, 210 P.2d 191 (1949) (statute requiring examination and treatment of persons arrested for sex crimes for venereal diseases is upheld as constitutional).

When a person infected with a contagious disease endangers the health of the community, many state legislatures permit the health authorities to quarantine the individual. *E.g.*, CAL. HEALTH & SAFETY CODE § 3186 (West Supp. 1987) ("[a]ny state agency conducting a public hospital shall admit acute venereal disease cases, when, in the opinion of the state or local health officer having jurisdiction, persons infected with venereal disease may be a menace to public health"); CAL. HEALTH & SAFETY § 3053 (West Supp. 1987) ("Upon being informed by a health officer of any contagious, infectious, or communicable disease the state department may take such measures as are necessary to ascertain the nature of the disease and prevent its spread. To that end, the state department may, if it considers it proper, take possession or control of the body of any living person, or the corpse of any deceased person"). See also MINN. STAT. ANN. § 144.12(7) (West Supp. 1987); N.Y. PUB. HEALTH LAW § 2100 (Consol. 1986); OHIO REV. CODE ANN. § 3703.07 (Baldwin 1982). These laws have been upheld as constitutional. See *In re Halko*, 246 Cal. App. 2d 553, 54 Cal. Rptr. 661 (1966) (court upheld statute which provided that those with pulmonary tuberculosis, an infectious and communicable disease, may be quarantined by health officials pursuant to a