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151

risks created by third parties, its power to regulate the transmission of the virus should be given broad deference by the courts.

The state's power to regulate an individual's conduct in order to protect the public health is best articulated in the landmark case, *Jacobson v. Massachusetts*,<sup>289</sup> where the Supreme Court of the United States held that it was within the state's police power to require a compulsory small-pox vaccination. The plaintiff argued that a compulsory vaccination law was arbitrary and oppressive because it was "hostile to every freeman to care for his own body and health in such a way as to him sees best . . ." <sup>290</sup> In an opinion delivered by Justice Harlan, the Court vehemently rejected the plaintiff's argument. Justice Harlan explained the philosophical and practical basis of the state's power to regulate public health and safety:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based upon the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury which may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. . . . Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others. It is, then, liberty regulated by the law."<sup>291</sup>

power of the state to quarantine individuals, see K. WING, *supra* note 285, at 41-73.

289. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

290. *Id.* at 26.

291. *Id.* at 26-27.

The idea that the state has the power to enact regulations for the common good, while every member has the duty to abide by these regulations when certain conditions are met, is the underlying concept of the state's police power.<sup>292</sup> Of course, this power is not unrestricted. The regulations must be reasonable; if they rise to the level of becoming arbitrary or unreasonable in light of the threat to public health, then the court must interfere in order to protect persons subject to the regulation.<sup>293</sup> In more recent years, the Court has refined this restriction. If a "fundamental" right is at stake, then regulations limiting these rights may be justified only by a compelling state interest and "legislative enactments must be narrowly tailored to enforce the compelling state interest."<sup>294</sup> Regulating the public health is a compelling state interest in certain circumstances.<sup>295</sup>

292. Justice Harlan, in *Jacobson*, emphasized the duty of the individual to comply with the compulsory vaccination law:

It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and public safety, confessedly endangered by the presence of a dangerous disease. *Id.* at 39.

293. *Id.* at 28, 38 (laws should not be construed to lead to injustice, oppression, or an absurd consequence). See also *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900) (quarantine invalid because discriminatory as applied); *In re Halko*, 246 Cal. 2d 553, 54 Cal. Rptr. 661 (1966) (the legislature's determination that a particular regulation is necessary to protect the public health is conclusive unless it is unreasonable, an abuse of discretion, or a violation of the individual's constitutional rights); *DeAryan v. Butler*, 119 Cal. App. 2d 674, 260 P.2d 98 (1953) (legislature determines measure necessary to protect public health unless it is unreasonable) *cert. denied*, 374 U.S. 1012 (1954); *Patrick v. Riley*, 209 Cal. 350, 287 P. 455 (1930) (the challenged regulation did not rise to an abuse of discretion by the legislature).

294. See *Roe v. Wade*, 410 U.S. 113 (1973) (the right to privacy is a fundamental right); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (establishing the constitutional right to privacy).

295. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1982) (the state's interest in health regulation becomes compelling at approximately the end of the first trimester); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (the state has important interests in safeguarding the public health, in maintaining medical standards and in protecting potential life; these interests become compelling at the point of viability of the fetus); *Morris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990) (preventing the spread of AIDS within a prison is a controlling state interest); *Fla. Women's Medical Clinic, Inc. v. Smith*, 536 F. Supp. 1048 (S.D. Fla. 1982) (prompt and proper disposal of fetal remains and tissue resulting from the abortion does rise to the level of a compelling state interest in protecting the public health).

Through the police power, the state aims to secure freedom and well-being to all its citizens. The state must have the power to compel persons to comply with certain health regulations in order to protect the health and well-being of the community. The state not only has the power to compel persons to undergo medical care in order to protect the public health, but it also has the duty to do so;<sup>296</sup> if it were otherwise, the freedom of the community would be jeopardized by the selfish actions of the few who believe their behavior is free from restraint. Pursuant to this duty to protect the public health, the government has the power to compel small pox vaccinations,<sup>297</sup> it has the power to enact municipal laws which prevent manufacturers from exposing employees to cancerous risks,<sup>298</sup> and the power to enact laws which regulate smoking in order to reduce the cancerous risk of passive inhalation to nonsmokers.<sup>299</sup> This

296. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (because society has the duty to conserve the safety of its members, the individual, with respect to his liberty, may be subject to reasonable regulations as the public safety requires); *In re Halko*, 246 Cal. App. 2d 553, 556, 54 Cal. Rptr. 661 (1966) ("[t]he preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action"); *Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) ("[t]hat the preservation of the public health is one of the duties devolving upon the State as a sovereign power will not be questioned. . . . [t]he duty to preserve the public health finds ample support in the police power, which is inherent in the State and which the State cannot surrender").

297. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

298. See Gewirth, *Human Rights and the Prevention of Cancer*, in HUMAN RIGHTS, *supra* note 279, at 181-82. "Each person has a basic human right not to have cancer inflicted on him by the action of other persons. . . . [e]ach person [also] has a right to have informed control over the conditions relevant to the possible infliction of cancer on himself." These rights are basic human rights because of their connection with freedom and well-being, the two necessary conditions of action and of successful action. *Id.* See also *Bailey v. Drexel Furniture Co.*, 295 U.S. 20 (1922) (the state has the power to regulate the employment of child labor, presumably in order to protect the interests of the child).

299. Passive smoke inhalation is associated with subsequent health problems, such as an increased incidence of lung cancer. Byrd, Shapiro & Scheidermayer, *Passive Smoking: A Review of Medical and Legal Consequences*, 79 AM J. PUB. HEALTH 209 (1989); See also Wall, Johnson, Jacob & Benowitz, *Cotinine in the Serum, Saliva, and Urine of Nonsmokers, Passive Smokers, and Active Smokers*, 78 AM. J. PUB. HEALTH 699 (1988) Cotinine is the major degradation product of nicotine metabolism. In the serum and saliva of nonsmokers who lived with smokers, the cotinine levels were the same in both the smokers and the nonsmokers. Moreover, the cotinine levels were actually . . . of the nonsmokers. *Id.* Based upon such

power should now be extended to include mandatory testing of certain high risk groups.<sup>300</sup>

reduce the risks to nonsmokers. The federal government has recently passed a permanent prohibition against smoking on all airline flights, intrastate and interstate, which are six hours or less in duration; or which are between any point in Alaska, and any point in Hawaii; or are within the state of Alaska or within the state of Hawaii. 103 STAT. 1098 (Feb. 1990). Several states have also passed legislation restricting smoking in public places. See CAL. HEALTH & SAFETY CODE § 25941 (West 1984 & Supp.); FLA. STAT. ANN. § 386.204 (West 1986); MINN. STAT. ANN. § 144.414 (West 1989); N.Y. PUBLIC HEALTH LAW § 1339-0 (McKinney Supp. 1990).

300. A related issue which is beyond the scope of this paper is whether the results of the HIV tests should be reported to the public health authorities. Several health authorities have recently come out in favor of making AIDS a reportable disease. The strongest argument against such a policy is that it will drive the disease underground. However, a recent study found that reporting the results of HIV tests to public health officials did not reduce the number of requests for voluntary testing. In another study, only one percent gave fear of disclosure as a reason to avoid testing. Archer, *supra* note 190, at 876. Universal partner notification is receiving a lot of support recently. One research group recently found that such a program is "affordable, operationally manageable, and can effectively reach high risk persons." In addition, confidentiality protections are attainable. The group concluded that partner notification should be a standard public health practice in the effort to control the spread of the HIV virus. Potterat, Spencer, Woodhouse & Muth, *Partner Notification in the Control of Human Immunodeficiency Virus*, 79 AM. J. PUB. HEALTH 874 (1989). See also, *The AIDS Plague Spreads*, *supra* note 186, at 24.

As the law presently stands, at least twelve states already require that health workers and doctors report AIDS patients to health officials. Altman, *New York Health Chief Proposes List of People Carrying the AIDS Virus*, N.Y. Times, June 6, 1989, at B5, col. 1. Some states also require tracing the infected person's sexual contacts or those with whom they have shared needles. Recently, the New York City Health Commissioner, Dr. Stephen C. Joseph, has come out in favor of confidential reporting of all AIDS patients to health authorities. The proposal is as follows: Doctors, hospitals, and clinics would report those infected with the virus to the Health Department which would use this list to reach all infected people, notify their partners and insure thorough tracing. Those who are infected with the virus would be asked to provide the names of their sexual contacts and those with whom they have shared needles, so that tracing could be carried out similarly to the tracing and contact procedure of other STDs. However, the list of HIV infected persons would be kept separate from other STD lists. Dr. Joseph said that there is not a high risk of confidentiality exposure based upon the fact that "[p]ublic health has done that [prevented confidential records from being exposed] very well historically, and there has never been a leak from the New York City Health Department on the name of any AIDS case." *Id.* Dr. Joseph emphasizes that this proposal is for the benefit of the infected because recent developments have shown that it is advantageous for those at risk of infection to be informed as early as possible so that they can obtain treatment if they

## B. Legal Considerations of Mandatory Testing

The constitutional challenges which most commonly appear in the context of AIDS testing legislation are (1) the right to equal protection under the fifth or fourteenth amendment, (2) the right to privacy under the fourth amendment, and (3) the prohibition of cruel and unusual punishment under the eighth amendment. This section of the article will begin with an overview of relevant, current AIDS legislation. It will then apply the constitutional analysis to the various AIDS issues.

### 1. Current Legislation

The federal government and a few state governments have already adopted mandatory AIDS testing legislation. At present, this legislation primarily concerns testing prisoners and those convicted of sex crimes. Both the state governments and the federal government should extend this legislation to include arrested prostitutes and drug users and to those who attend STD and drug abuse clinics.

Legislation that requires testing those arrested or convicted of prostitution for STDs has been introduced on both the state and federal level.<sup>301</sup> The American Medical Association

needs it. Therefore, we should adopt a policy towards AIDS which is similar to that of tuberculosis, syphilis, and other communicable diseases. *Id.*

For an example of a statute which authorizes reporting all HIV-infected persons to health authorities, see COLO. REV. STAT. § 25-4-1404 (1988 Supp.), which declares AIDS a communicable disease. Doctors, laboratories, hospitals, clinics, and other institutions are required to report the cases of AIDS to the local health authorities. In addition, if necessary, the public health officials have the authority to "[i]solate or quarantine persons with Acquired Immunodeficiency Syndrome or a viral infection associated therewith, but only if it is shown to be necessary to protect the public health." *Id.* § 25-4-1406.

301. H.R. 2279, 100th Cong., 1st Sess. (1987). On the federal level, Congressman Dannemeyer introduced a bill which would require mandatory testing of all arrested prostitutes.

On the state level, Florida has enacted a statute in which arrested prostitutes are tested for all STDs, including the HIV virus. FLA. STAT. ANN. § 796.08 (West Supp. 1989) (Subsec. (3): Any person convicted of prostitution or procuring another to commit prostitution with himself . . . shall be required to undergo screening for a sexually transmissible disease under direction of the Department of Health and Rehabilitation Services and, if infected, shall submit to treatment and counseling as a condition of release from probation, community control, or incarceration. . . . According to subsec. (1)(b), in determining which diseases are to be designated as sexually transmitted diseases, human immunodeficiency virus shall be considered along with many other recognized STDs.)

Although AIDS is an STD in the sense that it can be spread via sexual

intercourse, it generally is not a sexually transmitted disease, unless the statute so provides, within the meaning of public health laws.

302. JAMA Board of Trustees, *Prevention and Control of Acquired Immunodeficiency Syndrome*, 258 J. A. M. A. 208 (1987).

303. Andrus, Fleming, Knox, McAllister, Skeels, Conrad, Horan & Foster, *HIV Testing in Prisoners: Is Mandatory Testing Mandatory?*, 79 AM. J. PUB. HEALTH 840 (1989) [hereinafter Andrus & Fleming]. See, e.g., ALA. CODE § 11A-17 (1975 & Supp.); GA. CODE ANN. § 42-5-52.1 (Harrison Supp. 1989); IDAHO CODE § 39-604 (1989); R.I. GEN. LAWS § 42-56-37 (1988); TEX. GOV'T CODE ANN. § 500.054 (Vernon Supp. 1990).

304. CAL. PENAL CODE § 7501 (Deering Supp. 1989).

In order to address the public health crisis described in Section 7500, it is the intent of the Legislature to: (d) Authorize prison medical staff authorities to require tests of a jail or prison inmate under certain circumstances, if they reasonably believe, based upon the existence of supporting evidence, that the inmate may be suffering from AIDS or AIDS-related diseases and is a danger to other inmates or staff.

305. Andrus & Fleming, *supra* note 309, at 840.

306. 42 U.S.C. § 300ce-6 (West Supp. 1988).

(a) To be eligible to receive funds under this section, the chief law enforcement officer of each State shall establish a State program to provide for the confidential testing of any individual convicted under State law, of any intravenous drug or sex offense on or after November 4, 1988.

307. Equal protection is explicitly granted by the fourteenth amendment: U.S. CONST. amend. XIV, § 1: . . . "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although there is no explicit equal protection clause in the fifth amendment, the Supreme Court has read it into the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (the fifth amendment due process clause and the fourteenth amendment equal protection clause are not mutually exclusive — equal protection is tied up with the American notion of fairness found in the fifth amendment due process; therefore, the fifth amendment also guarantees equal protection).

### 2. Equal Protection

Equal protection is rooted in the fourteenth amendment where the state government is involved and in the fifth amendment where federal government is involved.<sup>307</sup> It is premised on the maxim that all persons similarly situated should be

treated alike.<sup>308</sup> Equal protection analysis is applied any time the law creates a classification under any governmental authority. There are three levels of analysis under the Equal Protection Clause: (1) heightened scrutiny, (2) intermediate scrutiny, and (3) traditional analysis. At each level there is a different standard that the regulation must meet in order to be constitutional. Those who challenge mandatory AIDS testing laws must first determine the category into which they fit and then apply the relevant standard.

The first level of analysis, heightened scrutiny, involves a fundamental right or a suspect class.<sup>309</sup> If the law distinguishes individuals on the basis of a suspect class, the state must show a substantial purpose or interest that is constitutionally permissible, and that its classification is necessary to accomplish that purpose or safeguard that interest.<sup>310</sup> Suspect classes have been limited to classifications based upon race<sup>311</sup> and alienage.<sup>312</sup>

The second level of equal protection analysis, intermediate scrutiny, includes classifications concerning illegal aliens,<sup>313</sup> gender,<sup>314</sup> and illegitimate children.<sup>315</sup> If the law treats any person within these three classes differently from others, then the state must show that the regulation is substantially related to an important state interest and that this regulation substantially advances that interest. This is a lower standard than the one set forth in the first category and, therefore, it is an easier showing for the government to make.

308. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

309. The fundamental right analysis is addressed *supra* notes 332-351 and accompanying text.

310. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

311. *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (overruling separate but equal doctrine); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (overruled regulation which was neutral on its face but discriminatory as applied).

312. *Ambach v. Norwich*, 441 U.S. 68 (1979) (alienage is a suspect class and therefore gets heightened scrutiny).

313. *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal aliens are not a suspect class because they are not in the country legally).

314. *Craig v. Boren*, 429 U.S. 190 (1976).

315. *Lalli v. Lalli*, 439 U.S. 259 (1978) (the probate statute which contained the requirements for illegitimate children to take from their fathers on intestacy was supported by an important government interest (orderly disposition of property upon death) and the statute substantially advanced the important government interest).

The third level, traditional analysis, includes economic regulations,<sup>316</sup> wealth,<sup>317</sup> and age.<sup>318</sup> If the law distinguishes upon characteristics in any of these classes, the court will only apply minimum scrutiny: the "classification challenged must be rationally related to a legitimate state interest."<sup>319</sup> The court generally defers to the experience of the legislature in such cases.<sup>320</sup>

In order for high risk groups to qualify for heightened scrutiny, they must show either (1) they are being treated differently than others to whom they are similarly situated, or (2) they are or should be labeled a suspect class. Although a mandatory testing scheme may treat high risk individuals differently than the general population, high risk groups are not similarly situated to the general public — they participate in activity which puts them at risk of becoming infected with a fatal disease. Based upon this activity, the state should treat them differently. Moreover, the Supreme Court has been unwilling to extend the protection provided to suspect classes to groups other than race and alienage. In recent years, the Court has even cut back on those groups which qualify for heightened scrutiny under the suspect class analysis.<sup>321</sup> Therefore, it is unlikely that AIDS victims will be able to qualify as a suspect class. Indeed, the few courts that have dealt with this

316. *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (the Court upheld a state statute which prohibited trucks from hiring out to advertise businesses other than their own in order to prevent traffic problems).

317. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (the Court held that wealth is not a suspect class because it has none of the indicia of suspiciousness).

318. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam) (the Court upheld a mandatory retirement law because age is not a suspect class).

319. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam) (the Court upheld a state law which allowed certain vendors in the French Quarter to remain in business while prohibiting other vendors in the French Quarter and throughout the rest of the city in order to promote tourism).

320. *Id.* The Court said that there is a presumption of rationality and almost no scrutiny of the ends. "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *Id.* at 303.

321. *Craig v. Boren*, 429 U.S. 190 (1976) (the Court overruled prior cases which held that gender was a suspect classification and moved it down to a quasi-suspect class (where it gets only intermediate scrutiny)); *See also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (the Court refused to include the mentally handicapped as a suspect class; this decision

issue in the prison context have held that AIDS victims are not a suspect class.<sup>322</sup>

The Supreme Court is not likely to extend the "suspect class" to include those who will be tested under the plan proposed in this article, namely, arrested prostitutes IV drug users, prisoners and those who attend sexually transmitted disease clinics.<sup>323</sup> These groups do not possess the typical characteristics of a suspect class because the group must be historically saddled with disabilities, the law must be the source of their disability, the condition must be immutable and not of their making, and they must be politically powerless.<sup>324</sup> Therefore, high risk groups are unlikely to qualify for extraordinary protection from the majoritarian process.

In the prison context, inmates have not brought successful equal protection challenges against prison policies that segregate HIV-infected prisoners from the general prison population. Because, courts have refused to label infected prisoners a suspect class,<sup>325</sup> their claims have not received heightened scrutiny. Rather, the courts have applied the lowest level of scrutiny: the state has only had to show that it had a legitimate

322. *Powell v. Department of Corrections*, 647 F. Supp. 968 (N.D. Okla. 1986) (AIDS victim in prison did not qualify for heightened scrutiny because they are not a suspect class); *Codero v. Coughlin*, 607 F. Supp. 9 (S.D.N.Y. 1984) (AIDS victims are not a suspect class; moreover, AIDS victims are not similarly situated to other prisoners and, therefore, the equal protection clause does not apply); *Marsh v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990) (AIDS victims are not a suspect class).

323. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court refused to recognize male homosexual sodomy as a protected interest (fundamental right) under the right to privacy. The Court did not address the issue of whether male homosexuals were a suspect class, which would seem to suggest that the Court would be unwilling to extend such protection to this class. This refusal is relevant to the testing issue because homosexual males are the most likely of any high risk group to be labeled a suspect class.

324. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

325. *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990) (AIDS victims are not a suspect class); *Powell v. Department of Corrections*, 647 F. Supp. 968, 971 (N.D. Okla. 1986) (the equal protection requirements will have been met if all the members of the class (HIV-infected prisoners) have been treated equally and the classification is not arbitrary; since the regulation was based on the inmate's HIV status and the inmate was not treated any differently than other infected inmates, the segregation policy did not violate the equal protection clause); *Codero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984) (the segregation policy did not violate the prisoners' constitutional right to equal protection for two reasons: (1) Although the equal protection clause requires that similarly situated persons be treated equally, this requirement did not apply to the plaintiff because AIDS victims are not similarly situated to other prisoners, and (2) Even if the equal protection clause did apply, AIDS victims are not a suspect class).

interest and that the segregation policy was rationally related to that interest.<sup>326</sup> Preventing the spread of a deadly disease within the prison walls and protecting the infected inmates from assault by other prisoners is a legitimate government interest, and segregation is rationally related to that interest.<sup>327</sup> At least one court has recently held that the state's interest in preventing the spread of a deadly disease among prison inmates and prison officials rises to the level of a "controlling" state interest.<sup>328</sup>

Prostitutes have also been unsuccessful in claiming that a state health law aimed at sex offenders violates their constitutional right to equal protection. Because prostitutes are not a suspect class, the proposed regulation should be upheld unless the Court finds it irrational or arbitrary.<sup>329</sup> In cases where the

326. *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990) (if the Equal Protection Clause does apply, the court only needs to find that there is a legitimate government end and the means are rationally related to that end); *Powell v. Department of Corrections*, 647 F. Supp. 968, 971 (N.D. Okla. 1986) (the classification is valid as long as it is not arbitrary or capricious); *Codero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984) ("... as long as there is a legitimate government interest and the means used are rationally related to that end, the Equal Protection Clause is not violated").

327. *Powell v. Department of Corrections*, 647 F. Supp. 968, 970 (N.D. Okla. 1986) (the decision to segregate was based on a legitimate objective: "to prevent the spread of a deadly infectious disease and to protect Plaintiff from assault by other inmates"); *Codero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984) (the state had a legitimate interest "to protect both the AIDS victims and other prisoners from the tensions and harm that could result from the fears of the other inmate's").

328. *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990). Courts often use the term "compelling" and "controlling" interchangeably.

329. The cases which have addressed state "hold and treat" laws (requiring that the person either take drugs for treatment of a venereal disease or be detained in jail for such treatment) or quarantine laws directed at prostitutes have not addressed the question of whether prostitutes are a "suspect class." Only one case has addressed an equal protection claim based upon this classification, *Reynolds v. McNichols*, 988 F.2d 1378, 1383 (10th Cir. 1973). In *Reynolds*, the court held that the "claim that the ordinance was enforced only against females, and not males, is, under the circumstances of this case, insufficient to invoke the equal protection provision of the Fourteenth Amendment," and "the fact that on the two occasions when the plaintiff was arrested in a hotel room the plaintiff's customer was not himself arrested and detained for examination is not significant." Therefore, although the cases involving laws aimed at prostitutes have not been analyzed on an equal protection basis (with the exception of the above case), the court has permitted reasonable classification in the exercise of the police power. See also *Zucht v. King*, 260 U.S. 174, 176-77 (1922) (the Supreme Court upheld an ordinance which forbade an unvaccinated child from attending either public or private school against an equal protection claim on the basis that in "the exercise of the police power

regulation has been aimed at prostitutes in order to protect public health, the courts have traditionally examined these regulations under the state's police power. These regulations, often referred to as "hold and treat" laws (laws which require those arrested for sex crimes to be detained in order to determine if they are infected with a venereal disease, and if so, to compel them to undergo treatment) have consistently been upheld as a valid exercise of the police power.<sup>330</sup> In addition, quarantine laws aimed at prostitutes while leaving other groups unregulated, have been upheld as a constitutional use of the state's police power.<sup>331</sup>

Even if AIDS carriers are not labeled a suspect class, they may still qualify for strict scrutiny if they can show that the law interferes with a "fundamental right." When a fundamental right is involved, the state must show that it has a compelling state interest and the regulation is narrowly tailored to meet that interest (i.e. there is no less restrictive alternative).<sup>332</sup> The Supreme Court has defined "fundamental right" as (1) those liberties that are "implicit in the ordered concept of liberty" such that "neither liberty nor justice would exist if [they] were sacrificed,"<sup>333</sup> or (2) those liberties which are "deeply rooted in

reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all embracing").

330. *Reynolds v. McNichols*, 488 F.2d 1378, 1382 (10th Cir. 1973) (the purpose of the ordinance is to bring in and treat the source of the communicable diseases, which had reached almost epidemic proportions; because it is reasonable to suspect that known prostitutes are a prime source of infectious venereal disease, the court concluded that this was a valid exercise of the state's police power); *Ex parte Woodruff*, 90 Okla. Crim. 592, 10 P.2d 191, 195 (1949) (a law which confers discretion on a local officer or board relating to police regulation for the protection of public morals, health, safety or general welfare may be constitutional; therefore, the statute requiring examination by health officials of persons arrested for sex crimes to determine whether they are infected with venereal diseases is constitutional); *Baker v. Strautz*, 386 Ill. 360, 54 N.E.2d 441 (1944) ("The power to detain a person who is suspected of having a contagious disease rests in the police power of the State. When a State employs its police power to safeguard the public health it may act in a summary manner even though the result is to deprive the citizen of liberty").

331. *Ex parte Clemente*, 61 Cal. 666, 215 P. 698 (Cal. 1923); *Huffman v. District of Columbia*, 39 A.2d 558 (D.C. 1944); *Ex parte Company*, 106 Ohio St. 50, 139 N.E. 204 (1922).

332. *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

333. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (male consensual sodomy is not a fundamental right under either definition); *Palko v.*

our nation's history and tradition."<sup>334</sup> These rights usually relate to either the democratic process or the individual's liberty interests. Those which are concerned with the democratic process include the right to vote<sup>335</sup> and apportionment cases.<sup>336</sup> Those fundamental rights concerned with an individual's liberty interest include the right to travel,<sup>337</sup> the right to a fair criminal trial,<sup>338</sup> the right to appeal in certain cases,<sup>339</sup> the right to counsel,<sup>340</sup> and the right of privacy.<sup>341</sup> The right to privacy is not a general right to privacy.<sup>342</sup> Rather, it protects certain individual decisions, such as the right to marriage and a

334. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

335. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting is a fundamental right and cannot be conditioned upon affluence).

336. *Reynolds v. Sims*, 377 U.S. 533 (1964) (that the districting scheme in a state election must be of substantial equality of population among the various districts); *Wesberry v. Sanders*, 367 U.S. 1 (1964) (the districting scheme in a federal election must be mathematically apportioned to one person one vote).

337. *Craig v. Boren*, 429 U.S. 190 (1976) (gender was a quasi-suspect class).

338. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

339. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (the Court invalidated a state law which required divorce applicants to pay court fees and costs of service of process; since the state had a monopoly on the means to dissolve a marriage, due process prohibited the State from denying the means for legally dissolving this relationship solely on inability to pay); *Douglas v. California*, 372 U.S. 353 (1963) (state must provide counsel to indigent client on his first appeal granted as a matter of right from a criminal conviction); *Griffin v. Illinois*, 351 U.S. 12 (1956) (the state must provide "adequate and effective appellate review to indigent defendants").

340. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

341. *Roe v. Wade*, 410 U.S. 113 (1973) (the right to privacy is a fundamental right); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (the Court found that the right to privacy is one of the "penumbral" rights from the constitution which create zones of privacy).

342. The Supreme Court has not recognized a general right to privacy, and the lower federal courts have not been willing to do so either. *Hanzel v. Arter*, 625 F. Supp. 1259 (E.D.N.Y. 1985); *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981). Instead, the right to privacy has been limited to protecting an individual's choice in certain personal matters.

family,<sup>343</sup> contraception,<sup>344</sup> abortion,<sup>345</sup> and childrearing and education.<sup>346</sup>

The most likely fundamental right at issue in a mandatory AIDS testing policy is the right to privacy. However, in order to qualify for strict scrutiny, the person would have to show that an individual decision, which should be protected by the right to privacy, is at issue. In other words, the person would have to prove that the right to privacy includes the right to participate in the particular high risk activity. It is very unlikely that the Court would expand the right to privacy to include IV drug use or homosexual sodomy.<sup>347</sup> However, those who attend sexually transmitted disease clinics may have more success in arguing that they have a fundamental right at issue.<sup>348</sup>

343. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (right to marry cannot be conditioned on the marriage applicant submitting proof of compliance with a state statute which requires that the applicant obtain a court order granting permission to marry if he has minor issue not in his custody and which he is under an obligation to support); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreation).

344. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (the Court invalidated the state restrictions on distribution of nonprescription contraceptives to adults); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right of privacy includes right to decide to use contraception).

345. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (the Court clarified the limits of the state's power to regulate abortions); *Roe v. Wade*, 410 U.S. 959 (1973).

346. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (the Court held that the first and fourteenth amendments prohibited the state from requiring Amish children to attend secondary school until the age of sixteen); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (although the state can compel a child to attend school, it cannot dictate whether the child goes to a public or private school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the Court held that a state statute which prohibited teaching a foreign language in schools until the ninth grade was unconstitutional).

347. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (the Court held that the right to privacy does not include consensual homosexual sodomy).

348. Because the Supreme Court has held that the fundamental right to privacy includes procreation and contraception, both of which involve heterosexual intercourse, the attendees of STD clinics may be successful in claiming that their right to privacy is intruded upon by mandatory AIDS testing. See *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (non-prescriptive contraceptives do not have to be distributed by a licensed physician); *Einstadt v. Baird*, 405 U.S. 438 (1972) (the decision to use contraceptives is protected by the right to privacy for both married and unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the decision between husband and wife to use contraception is protected under the fundamental right of privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) ("[i]n]marriage and procreation are fundamental to the very existence and survival of the race"). *Id.*

Therefore, the state will have to show that preventing the spread of AIDS is a compelling state interest and that this reasonable testing procedure is narrowly tailored to meet that interest. At least one court has held that controlling the spread of AIDS in the prison context is a compelling state interest.<sup>349</sup> There is no reason that such a finding should be confined to the prison context. Considering the number of people currently infected, the number of lives this disease will claim, and the enormous cost to society, controlling the spread of AIDS is a "compelling state interest" and should be labeled as such. This program is narrowly tailored to meet that interest because it only calls for testing those high risk groups which are within the care of the state, either on the basis of health care or punishment.<sup>350</sup> There is no less restrictive alternative available which is as effective as mandatory testing.<sup>351</sup>

### 3. Unreasonable Searches and Seizures Under the Fourth Amendment

Every citizen possess a fourth amendment right against unreasonable searches and seizures.<sup>352</sup> In criminal cases, in order for the search to be "reasonable" the state must obtain a

349. *Harris v. Thigpen*, 727 F. Supp. 1564, 1572 (M.D. Ala. 1990). The court said that the State's interest in preventing the spread of such a disease among prison inmate's and prison officials is a controlling state interest. Because the state is responsible for the care of the inmates and may be liable to healthy inmates if the disease is communicated to them, this matter concerns the health and welfare. Therefore, the court found that it is not a matter of privacy but a matter of a controlling state interest. *Id.*

350. See *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990) ("... a prisoner has entrusted his or her official care to the public by committing a crime for which he or she is convicted and he or she, therefore, becomes a public charge"). In addition, medical clinics accept public funds and therefore, those who attend the clinics are within the public care.

351. Although education and voluntary testing programs may be less restrictive, they are also relatively ineffective. See *supra* notes 192-211 and accompanying text.

352. U.S. CONST. amend. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. See *Terry v. Ohio*, 392 U.S. 1 (1968) (the right to personal security belongs to both the citizen on the street as well as the homeowner); *Katz v. United States*, 389 U.S. 347 (1967) (the fourth amendment affects persons, not places; wherever a person may have a reasonable expectation of privacy, he is entitled to be free of governmental intrusion.); *Elkins v. United States*, 364 U.S. 206 (1960) (the Constitution does not prohibit all searches and seizures, just unreasonable searches and seizures).

warrant based upon a showing of probable cause.<sup>353</sup> Probable cause typically involves individualized suspicion. However, a showing of individualized suspicion is not "an indispensable component of reasonableness in every circumstance."<sup>354</sup> In certain non-criminal search and seizure cases, the search does not have to be based on probable cause and a warrant does not need to be issued in order to be "reasonable" under the fourth amendment.

In two cases decided last term, the Supreme Court explained the analysis which should be used in a non-criminal search and seizure case.<sup>355</sup> Both cases involved mandatory drug testing of employees in certain high risk positions.<sup>356</sup> The employees challenged the drug testing policies on the basis that they violated their fourth amendment right against unreasonable searches and seizures. Although the Court recognized that such tests do constitute seizures under the Fourth Amendment,<sup>357</sup> it did not apply the traditional fourth amendment analysis used in criminal cases. Instead, the Court said that when the case involves a special government need, beyond the need for normal law enforcement, the court must balance the individual's privacy interests against the government's interests in order to determine if it is impractical to require a warrant or some degree of individualized suspicion.<sup>358</sup> The warrant requirement was excused because the Court found that it would impede the state's interest and add little protection to

353. *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *United States v. Karo*, 468 U.S. 705 (1984).

354. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989).

355. See *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

356. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989) (United States Customs Service required drug testing all employees applying for a promotion to positions involving the interdiction of illegal drugs or requiring them to carry firearms); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1412-13 (1989) (Federal Railroad Administration required drug and alcohol tests of certain employees following major train accidents or incidents). "High risk" in this context does not refer to AIDS, but rather to those positions which involve public safety or national security.

357. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1412-13 (1989).

358. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402,

the individual.<sup>359</sup> Even where the warrant requirement is excused, the search must still be "reasonable," which ordinarily requires a showing of probable cause.<sup>360</sup> However, the Court emphasized that the probable cause standard is particularly unhelpful when considering the reasonableness of "routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions."<sup>361</sup> In these cases, a showing of probable cause was not necessary because the state's interest in protecting public safety was beyond the normal law enforcement interest.<sup>362</sup> The government's need to conduct suspicionless searches (protecting the public safety) outweighed the individual's privacy interest.<sup>363</sup> In its analysis, the court emphasized two important points: First, due to the nature of the employment, the employees had a diminished right to privacy because the industries were regulated to insure safety which, in turn, depends on the health and fitness of the employees.<sup>364</sup> Second, blood tests are not a significant intrusion into the individual's privacy because they have become "routine in our everyday life."<sup>365</sup> When the government's special interest in protecting the public safety could not be served if a showing of probable cause was necessary, it may conduct a search without a showing of individualized suspicion.

Mandatory testing of high risk groups will have to be carried out without individualized suspicion. However, based on

359. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390-91 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1415-16 (1989).

360. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1391 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1416 (1989).

361. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1391-92. (1989).

362. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989) ("It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context." *Id.* at 1395 n.3); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989).

363. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1392 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. 1402, 1421 (1989).

364. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1393-94 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1418 (1989).

365. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1417 (1989) (quoting *Schmerber v. California*, 384 U.S. 757, 762 (1966)); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957)

the above cases, such a policy is not unconstitutional. These groups are known to have a high rate of infection, and they present a serious risk to the health of the community. If the government is to limit the spread of AIDS, it must be able to test on a group basis. To require individual suspicion in each case would place such a burden on the government that it would impede its ability to control the spread of the disease.

In the area of public health, the courts have permitted the testing of those within a certain class. Although fourth amendment challenges to such laws were not brought by the plaintiffs nor were they addressed by the courts, laws which mandate testing prostitutes for venereal disease have been upheld as a reasonable exercise of the state's police power. In *Ex Parte Woodruff*,<sup>366</sup> the Criminal Court of Appeals in Oklahoma upheld the statute which required examination and treatment for venereal disease of those persons arrested for sex crimes, including prostitution. The court held that these rules are "reasonable for the purpose of determining the infectivity of persons suspected of having venereal disease or diseases, and for the prevention of the spread thereof, which is in accordance with the legislative intent, and for the public welfare."<sup>367</sup> Likewise, the United States Court of Appeals for the Tenth Circuit upheld a similar statute in *Reynolds v. McNichols*.<sup>368</sup> In this case, an arrested prostitute challenged the city's "hold and treat" ordinance which required examination and treatment of one reasonably suspected of carrying a venereal disease. The purpose of the statute was to control the spread of venereal disease which "had reached virtually epidemic proportions."<sup>369</sup> The court found that the "hold and treat" ordinance was a reasonable means of bringing this problem under control: "[I]t is reasonable to suspect that known prostitutes are a prime source of infection. Prostitution and venereal disease are no strangers."<sup>370</sup> The court held that the statute was a "valid exercise of the police power designated to protect the public health."<sup>371</sup> The court relied on the frequency of infection of

prostitutes rather than on any individualized suspicion in order to justify the ordinance as "reasonable."

Non-consensual, group-based testing has also been upheld in the prison context. Prison policies which require mandatory testing for communicable diseases, including HIV, do not violate the fourth amendment right against unreasonable searches and seizures.<sup>372</sup> In the two cases which involve mandatory HIV testing, the courts held that the prison's need to test all prisoners in order to limit the spread of the disease in prisons and to protect the healthy inmates outweighed the prisoner's diminished right to privacy.<sup>373</sup> In addition, the state had to show that the means (the regulation) used to attain this need, were "reasonably related to legitimate penological interests."<sup>374</sup> The court found that the method of testing was a "sufficiently productive mechanism to justify intrusion upon Fourth Amendment interests."<sup>375</sup> Therefore, this "search," which lacks individual suspicion, is reasonable under the fourth amendment.<sup>376</sup>

372. *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989) (the court upheld mandatory HIV testing of all prisoners); *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990) (the court upheld the mandatory HIV testing of all prisoners); *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980), *aff'd in part, modified in part on other grounds and remanded*, 651 F.2d 96 (2d Cir. 1981) (the prison must screen all prisoners for communicable diseases).

373. *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990). The court said that "[t]he case necessarily involves a balance of rights and duties to affected inmates with those of unaffected inmates and with the State's rights and duties to effect reasonable penological administration." *Id.* at 1567. It is well-established that prisoners have a decreased expectation of privacy. *Id.* at 1568. The court found that the healthy inmates' right not to be exposed to a fatal disease and the prison's interest in controlling the spread of the fatal disease outweighed the plaintiff's privacy interest. *Id.* at 1583. The court found added support in the fact that the Supreme Court has held that a state's statutory authority permits it to order an examination, including blood tests, where the condition of a person in its custody is in controversy. *Id.* at 1571. *See also Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989) (The court concluded that in light of the seriousness of the disease, the prison's legitimate interest outweighed the prisoner's diminished right to privacy. *Id.* at 1195. Incarceration reduces the prisoner's privacy expectation in his body, quoting *Bell v. Wolfish*, 441 U.S. 520 (1979)); *See also Camden & Suburban Ry. Co. v. Stetson*, 177 U.S. 172 (1900).

374. *Dunn v. White*, 880 F.2d 1188, 1194 (10th Cir. 1989) (quoting *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)).

375. *Id.* at 1196 (quoting *Delaware v. Prouse*, 440 U.S. 648, 658-59 (1979)).

376. *Dunn v. White*, 880 F.2d 1188, 1193-96 (10th Cir. 1989) (quoting *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989)). *See also Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

366. 90 Okla. Crim. 59, 210 P.2d 191 (1949).

367. 210 P.2d at 197.

368. 488 F.2d 1378 (10th Cir. 1973).

369. *Id.* at 1381.

370. *Id.* at 1382.

371. *Id.* at 1382. The court also noted that similar statutes and ordinances had been upheld by numerous state courts. *See, e.g. City of Little Rock v. Smith*, 204 Ark. 692, 163 S.W.2d 705 (1942); *Varholly v. Sweat*, 153 Fla. 571, 15 So. 2d 267 (1943); *People v. Strautz*, 386 Ill. 360, 54 N.E.2d 441 (1944); *Welch v. Shepard*, 165 Kan. 394, 196 P.2d 235 (1948); *Ex parte Fowler*, 85 Okla. Crim. 64, 184 P.2d 814 (1947).

#### 4. Cruel and Unusual Punishment

Testing and segregating prisoners does not rise to the level of cruel and unusual punishment under the eighth amendment.<sup>377</sup> The eighth amendment only guarantees that prisoners receive "adequate food, clothing, shelter, sanitation, medical care and personal safety."<sup>378</sup> Some courts rely on Chief Justice Rhenquist's dictum in *Atiyeh v. Capps*,<sup>379</sup> where he said:

[i]n short, nobody promised them [prison inmates] a rose garden; and I know of nothing in the eighth amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression and the like. They have been convicted of a crime and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.<sup>380</sup>

Furthermore, if the prison does not test all prisoners for HIV infection, it may violate the eighth amendment rights of the uninfected prisoners. At least one court has held that failure to screen prisoners for communicable disease violates constitutional rights of other prisoners.<sup>381</sup> Other courts have suggested that failure to protect healthy inmates from those infected with AIDS may rise to the level of violating their

377. *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989); *Codero v. Coughlin*, 607 F. Supp. 9 (S.D.N.Y. 1984).

378. *Codero v. Coughlin*, 607 F. Supp. 9, 11 (S.D.N.Y. 1984) (quoting *Wolf v. Levi*, 573 F.2d 118, 125 (2d Cir. 1978)).

379. 449 U.S. 1312 (Rehnquist, Circuit Justice 1981).

380. *Id.* at 1315-1316 (cited in *Codero v. Coughlin*, 607 F. Supp. 9, 11 (S.D.N.Y. 1984)).

381. *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980), *aff'd in part, modified in part on other grounds and remanded*, 651 F.2d 96 (2d Cir. 1981). The court said:

[T]he defendants have failed adequately to screen newly arrived inmates in order to identify and segregate from other inmates persons carrying communicable diseases. The threat posed to all HCCC [Hartford Community Correction Center] inmates by this practice is obvious. A medical 'screening' examination shortly after admission to a correctional facility is therefore widely recognized to be essential to the health of the inmates. . . . [T]he resulting threat to the well-being of the inmates is so serious, and the record so devoid of any justification for the defendants' policy, that . . . this practice constitutes "punishment" in violation of due process.

eighth amendment rights.<sup>382</sup> The court in *Thigpen* used stronger language: "The Eighth Amendment provides inmates with the right to a safe and secure environment. Allowing inmates with AIDS to be introduced into the general population may be violative of the general population inmates' Eighth Amendment right."<sup>383</sup> Moreover, allowing the infected inmates into the general prison population may amount to cruel and unusual punishment to the uninfected because they may receive a punishment which is not in proportion to their crime. In other words, they may receive a punishment which amounts to a death sentence.<sup>384</sup> The court concluded that segregation was an appropriate measure to protect the constitutional rights of the healthy prisoners.<sup>385</sup>

In coming to the conclusion that mandatory testing of all prisoners does not violate the inmate's constitutional rights, the court in *Thigpen* said that although it is regrettable that these inmates are infected with a fatal disease, it does not mean that the plaintiffs can selfishly claim a right that would expose other inmates to their problems independent of any rights of the other inmates to be protected from the disease.<sup>386</sup> The court said that it must consider the rights of the general prison population in order to determine if the policies in question were permissible.<sup>387</sup> These considerations should not be limited to the prison context. The rights of the general population to be free of a deadly disease justify the establishment of mandatory testing policies for other high risk groups. Mandatory testing is justifiable in the AIDS context because certain groups are known to be at high risk of carrying the disease. Based upon this knowledge, the state has a duty to protect others not within those classes.<sup>388</sup>

#### V. CONCLUSION

An efficient and effective mandatory testing policy includes testing arrested prostitutes and IV drug users, prisoners, and

382. *Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989); *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988).

383. *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990).

384. *Id.* at 1572.

385. *Id.*

386. *Id.*

387. *Id.*

388. See *Lareau v. Manson*, 507 F. Supp. 1177, 1195 n.22 (D. Conn. 1980); (failure to screen prisoners for communicable disease violates constitutional rights of other prisoners), *aff'd in part, modified in part on other*

those who attend sexually transmitted disease and drug abuse clinics. The identifiable high risk groups render an organized testing scheme efficient, and the certain fatality of the disease makes testing necessary. These groups are already within the public health care system and, therefore, are reachable. It is effective because it is advantageous to both the infected and the uninfected. First, it protects third parties from infection, thereby slowing the spread of the disease. Indeed, among some high risk groups testing is associated with a reduction in high risk activity.<sup>389</sup> Second, testing is advantageous to the community because providing treatment in the early stages of the disease saves money in the long run. Third, it provides reliable epidemiological data so that the health care system can provide and plan for the incidence of this disease. Testing is advantageous to those who are at high risk of infection, because health care professionals can identify the infected individuals and give them treatment. In light of the recent advances in treatment for HIV infection, it is to the advantage of the infected person to know his or her status. Early diagnosis is also advantageous since some forms of treatment are more effective if the patient receives them before the onset of the symptoms. Finally, health care professionals know to whom they should direct counseling and other support services in the hope that it will lead to permanent behavior modification, and in the hope that it will help the person to cope with the disease.

These groups are not only at a high risk of infection, but they pose a serious risk to the health of the community. They are likely to transmit the disease to innocent, healthy members of society. Although those who are infected with the virus have rights, the state also owes a duty to those who are not infected. The state is obligated to protect the health and welfare of all its citizens. With almost every other contagious disease in history the government has acted in a more aggressive manner than it has with respect to the AIDS epidemic.<sup>390</sup> Because the state

389. See *supra* notes 175-176 and accompanying text.

390. In the past, public health officials have treated contagious diseases in the following way: locate the carriers, inform those who may have been exposed, offer counseling to prevent further transmission, and ensure that infected persons stop all activity which spreads the disease. Those who continue to spread the disease have been incarcerated. These procedures are followed in nearly every state with regard to such STDs as syphilis and gonorrhea. Dannemeyer & Franc, *supra* note 190, at 47. For an example of legislation which treats other communicable diseases as reportable diseases and which enable public health authorities to quarantine an infected person should their behavior threaten the public, see ALA. CODE § 22-11A-3 (1987),

and federal governments have not adequately moved against the HIV virus, they have not fulfilled their obligation to protect the public health. One group of people should not be permitted to exercise their rights to the detriment of others. So far, most states have exempted high risk groups from reasonable regulation, thereby allowing them to exercise their rights to the detriment of the community.

CAL. HEALTH & SAFETY CODE § 3123 (West 1988), DEL. CODE ANN. tit. 16, § 505 (1983), and KAN. STAT. ANN. § 65-128 (1985).

**FISCAL NOTE**

**STATE OF ALASKA**  
**1992 LEGISLATIVE SESSION**

Bill No. CSHB 24

Revision Date: 01/21/92 Department Affected: Alaska Court System  
 Title: An Act relating to blood tests BRU: Trial Courts  
for persons charged with violating laws Components: \_\_\_\_\_  
 Sponsor: Sharp  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 

000   000	000   768
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**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0
<b>CAPITAL</b>						
<b>REVENUE</b>						

**FUNDING: (Thousands of Dollars)**

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0


**POSITIONS:**

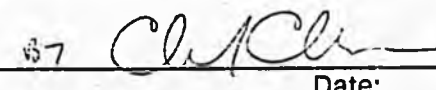
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

**ANALYSIS: (Attach a separate page if necessary)**

No fiscal impact.

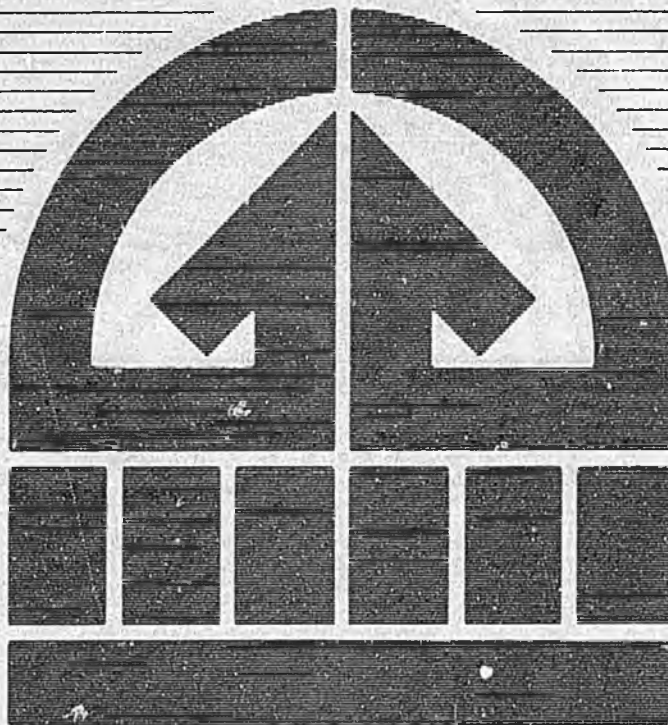
Prepared by: C. S. Christensen III, Staff Counsel  Phone: 264-8228  
 Division: Alaska Court System Date: 01/21/92

Approved by: Arthur H. Snowden, II, Administrative Director  Date: 01/21/92  
 Agency: Alaska Court System

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

# STATE LEGISLATIVE REPORT

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## TESTING SEX OFFENDERS FOR HIV

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An Information Service of the National Conference of State Legislatures  
1560 Broadway, Suite 700, Denver, Colorado 80202. William T. Pound, Executive Director

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## TESTING SEX OFFENDERS FOR HIV

"The public good to be achieved must be balanced against the costs of the policy."  
Larry Gostin, *The Politics of AIDS*, 1989

### INTRODUCTION

In the United States each year between 1973 and 1987 some 155,000 women reported they had been raped. (1, p. 7) Although rape is not solely a crime against women, national statistics on homosexual rape are not available. All victims of sexual assault (or survivors, the term some advocacy groups such as the Center for Women Policy Studies prefer) suffer physical and emotional trauma. (2) When the fear of being infected with the human immunodeficiency virus (HIV) is added, the emotional burden increases. Because the victims not only have been assaulted but also possibly threatened with a deadly disease, they often want to know if their assailant is infected with HIV, and public sentiment tends to support requiring the accused to undergo HIV testing.

States feel pressure to respond with legal remedies. One option is to require offenders to be tested for HIV infection (the presence of HIV antibodies) so that victims may have the information. Federal legislation passed in 1990, the Martin amendment to the Comprehensive Crime Control Act of 1990 (P.L.101-647), pressures states to require HIV testing of convicted sex offenders at the victim's request or lose 10 percent of their victim's assistance funds.

Still, questions exist about the usefulness of testing and the legality of mandatory testing. Being infected with HIV is not a crime; infection only becomes relevant to criminal proceedings in the cases involving reckless endangerment, such as assault with intent to infect or deliberate transmission of the virus.

The states have the task of balancing the rights of victims and defendants. To do so, legislators need to conduct careful research about the issues and involve rape victim assistance groups, other relevant community organizations and public health agencies, as well as legal counsel. As Larry Gostin, executive director of the American Society of Law and Medicine, asserts, "The public good to be achieved must be balanced against the costs of the policy [including] . . . the invasion of human rights, the financial cost or the practical burdens of the policy." (3, p. 1020) This report examines some of those policy costs, focusing on issues for legislators to consider regarding HIV testing. The issues include both practical and legal questions about requiring HIV tests for sex offenders.

### PRACTICAL CONSIDERATIONS ABOUT HIV TESTING

Tests for HIV infection screen for antibodies produced by the immune system's response to HIV, not for the virus itself. The usual testing procedure is to screen with the ELISA (enzyme-linked immunosorbent assay) and then to confirm positive results with the more labor intensive Western blot test. (4, p. 261-2) Testing sex offenders for HIV raises a number of questions, including the small risk of transmission, the reliability of the tests, the usefulness of the information and the cost.

The risk of transmission of HIV from a single sexual assault. HIV is transmitted through the transfer of body fluids such as semen and blood. The risk of HIV transmission from a single sexual encounter is relatively low. Currently available data suggest at most a 1-in-500 chance of

infection from a single male-to-female exposure if the male is infected. (5, p. 2429 and 6) Risk may be somewhat higher if tissue damage occurs, as may be likely in cases of forcible rape. Of those who died from AIDS-related illness between 1981 and 1990, only 3.6 percent (3,587) were infected through heterosexual contact. (7) The most recent Centers for Disease Control data attribute 10,011 (6 percent) of all known AIDS cases in the United States to heterosexual contact. (8) No cases of HIV transmission from rape have been reported in the United States and only one in Great Britain. (9, p. 36 and 10, p. 2)

Reliability of HIV tests. Most individuals with detectable antibodies are assumed capable of transmitting infection. Current tests are quite reliable, but no test is 100 percent so. (4, p. 260) Especially in low-risk populations, there are significant problems with false positive results (positive tests when the virus is not present) and false negative results (negative tests when the virus is actually present). (4, p. 263) Test results vary among laboratories and are vulnerable to subjective interpretation. Most infected people test HIV-positive within four to six weeks after exposure, but some may not test positive for up to six months, possibly longer, because tests monitor antibodies produced in response to the virus rather than the actual presence of the virus. There is hope for more reliable tests in the future.

Usefulness of testing information. Sexual assault victims might want information about the accused offender's HIV status for two primary reasons: concern for their own health and concern for the health of their sex partners. The victims and their sex partners would be relieved to know if the offender did not test HIV-positive. If the offender tested HIV-positive, victims would want to know quickly to initiate preventive medical action and to protect their partners. A pregnant woman or a woman considering pregnancy has a particularly compelling need to know the offender's HIV status so she can make informed decisions about the health of her future children. Testing the victim will not give useful, reliable information immediately after the assault, because the virus can have an incubation period of six months or more.

A victim might request treatment with AZT (zidovudine), which is used to delay the progression from HIV infection to full-blown AIDS and to increase the length and quality of life of infected patients. Some physicians recommend immediate administration of AZT as a prophylaxis to healthcare workers who have been exposed to HIV, but no studies to date have proven the effectiveness of AZT as a preventive measure. The U.S. Public Health Service recommends that physicians and exposed individuals (but not specifically victims of sexual assault) make decisions about the use of AZT based on risk of infection, time elapsed since exposure, and counseling about the risk of toxicity and the uncertainty about the effectiveness of the medication as a preventive measure. (11, p. 7)

Time also is an issue. Because early intervention may be more effective (if AZT intervention is beneficial at all), testing and communication of test results to the victim need to be completed as quickly as possible after the assault. Waiting until conviction, which can take up to three years, decreases the usefulness of the information to the victim. Testing all accused offenders may solve this problem but raises legal questions. If the offender is not tested promptly, then testing the victim provides at least as much useful information to the victim, because it may show the actual presence or absence of the virus. (12, p. 264)

Cost and payment of mandatory or court-ordered testing. Testing costs vary widely, depending on whether testing is done in bulk, as through a state health department, or individually, by private physicians. Costs also depend on the number of tests required, determined by preliminary test results and the individual's risk factor(s). Costs for tests in bulk are estimated at \$3 to \$15 for the ELISA and \$25 to \$40 for the Western blot assay. Individual tests are substantially more expensive, averaging \$50 to \$75, and can cost as much as \$200.

Only a few states have laws that provide for paying for testing, and none unconditionally pays for a victim's testing. Florida draws on general revenue funds. Kansas, Ohio, South Carolina and Virginia demand repayment from the convicted offender, either directly or as part of the court's judgment. If the defendant is indigent, then the state, municipality or county pays. Oregon uses Crime Victim Compensation funds. Missouri's Department of Health pays for the victim's test if the defendant tests HIV positive, and Idaho pays only to the extent that the Legislature appropriates specific funds.

## LEGAL CONSIDERATIONS ABOUT HIV TESTING

The Fourth and Fourteenth Amendments to the U.S. Constitution raise two major issues concerning mandatory testing of offenders and non-voluntary disclosure of test results to victims and others. The Fourth Amendment guarantees protection of the individual from unreasonable searches and seizures and requires that search warrants be based on probable cause. The Fourteenth Amendment is concerned with personal liberty, restrictions on state action and the right to privacy.

Reasonable search. Obtaining a blood sample for HIV testing is a "search" under federal law. The U.S. Supreme Court's interpretation is that the reasonableness of a search is determined "by balancing the government's need to conduct the search against the invasion which the search entails." (13) Warrantless administrative searches may be allowed in non-criminal proceedings when the government's interest in protecting public safety outweighs the individual's privacy interest. (14) The uncertainty surrounding HIV test accuracy and the decreasing usefulness of the offender's test results over time may weaken the case that testing protects public safety in terms of sexual assault victims.

Privacy. Discrimination against HIV-infected individuals is a serious problem. There are concerns about fairness of trials and treatment in correctional facilities. Knowledge that an individual was tested, regardless of the results, can be damaging. Perhaps more important, if the defendant is tested before conviction, it may prejudice the presumption of innocence. On the other hand, if testing is restricted only to convicted sex offenders, it fails to allow for early medical intervention and provides little physical or emotional benefit to the victim.

Court-ordered testing. If a court receives the defendant's written, informed consent to test, or if a court weighs the need for testing against the right of the defendant and finds cause to test, then there are fewer constitutional constraints on testing. A Connecticut law (S.B. 812, 1989), although not specifically directed at sex offenders, is an example of legislation that balances public need and legal protection. Before a court may issue an order for testing, it must find clear and imminent danger to the public health or the health of another person. In addition, the person requesting testing must demonstrate a compelling need that cannot be met by other means. To assess "compelling need," the court must weigh the need for the test result against the test subject's privacy interests and the public interest, which may be poorly served by involuntary testing. (15, p. 61) The problem with these procedures is how long they take.

## OPTIONS OTHER THAN HIV TESTING OF THE OFFENDER

The Presidential Commission on the HIV Epidemic and others concerned with the needs of assault victims have recommended focusing on the victim's needs and health status, providing HIV and rape counseling, and making medical care available. (2,16,17,18)

When reason exists to suspect HIV transmission from an assault, testing the victim, and retesting over the period of incubation, is the most reliable source of information. (19, p. 1632) In

addition, the victim may better benefit from an immediate assessment of the risk status of the accused offender, with or without HIV testing, to the extent possible within the legal limits of confidentiality. The victim also needs to know the latest information about preventive measures, such as AZT treatment.

The Centers for Disease Control recommend that pre-test counseling include information about:

- ▶ The risk of infection;
- ▶ The limitation of the test results;
- ▶ The consequences of a positive test result, such as concerns about insurance, employment and housing discrimination; and
- ▶ Measures to prevent the spread of the virus.

## STATE RESPONSES

As of May 1991, at least 23 states had passed laws concerning HIV testing of sexual offenders. In addition, at least 70 bills about this issue were proposed in 26 states during the 1991 legislative sessions.

States have taken different approaches to concerns about sex assault. Some have emphasized the rights of victims, others the rights of defendants. California's and New York's laws tend to illustrate the range.

**California** (S.B. 1007, 1988 and S.B. 2643, 1989) places greater emphasis on victims' rights. One law mandates HIV testing of convicted sex offenders. Another requires the court to issue a search warrant to obtain a blood sample for HIV testing from a person charged with sexual assault when there is probable cause to believe there was a transfer of body fluids. Counseling for both the victim and the accused is required. If the test is positive and confirmed, the victim is notified. The victim is immune from civil liability for disclosing the information as necessary to protect the health and safety of self, sex partner(s) and family. (12, p. 244 and 16, p. 1625)

**New York's AIDS Testing and Confidentiality Law** [NY PUB. HEALTH LAW 2781.1], which does not specifically address testing sex offenders, protects the rights of the defendant while weighing the needs of the victim. It does not give the victim the right to have the defendant tested. The person to be tested must give written, informed consent unless the test is authorized by law. The court must weigh the victim's needs against the defendant's privacy interests and find "clear and imminent danger" to the victim's life or health before ordering testing or disclosure of test results to the victim. Any further disclosure or redisclosure is prohibited. (12, p. 259 and 16, pp. 1627-29)

The Appendix contains a chart of state laws concerning HIV testing of sex offenders and their provisions on the issues addressed in this report. The following is a summary of the provisions:

- ▶ **Testing Requirements:** fourteen states (CO, FL, ID, IL, IN, MS, MO, NV, ND, OH, OR, SC, TN, WV) require testing for convicted or, in some cases, charged sex offenders; 11 states (AK, AZ, CA, FL, GA, KS, MI, OR, TX, VA, WA) require a court order, some only after failure to get the accused's consent.

- ▶ **Timing :** At least nine states (CA, CO, FL, GA, ID, NV, OH, TX, VA) allow testing at the time of arrest or after charges have been filed, as opposed to after conviction. Four of them require the victim to first request the testing.
- ▶ **Access to Test Results:** Almost all states with testing laws make results available to the victim and the accused as well as to public health authorities. In some states the court and penal system also have access to the results.
- ▶ **Penalties for Unauthorized Disclosure:** Three states (AZ, KS, OR) consider it a misdemeanor to reveal test results to anyone not legally authorized to have access. Penalties include fines.
- ▶ **Counseling:** Laws in 14 states (AK, AZ, CA, FL, GA, IN, KS, MI, MN, OH, OR, VA, WA, WV) include provisions for counseling the victim and/or the accused.
- ▶ **Funding:** Nine states (FL, GA, ID, KS, MO, OH, OR, SC, VA) have included methods of paying for testing in their laws. In Ohio and South Carolina the accused is charged for testing; Kansas and Virginia pay for testing and then include restitution through the convicted person's court costs. Florida draws on general revenue funds, and Oregon uses crime victim compensation funds.

Legislation proposed in 1991 continued to focus on mandatory testing for convicted sex offenders and mandatory or permitted testing of individuals arrested for sex offenses. Other issues under consideration included victim counseling and methods of paying for testing and counseling.

## COURT RESPONSES

State laws concerning HIV testing of sex offenders are relatively new and have undergone little court scrutiny. Michael Stoy, Idaho deputy attorney general, says of his state's law that requires testing of anyone charged with a sex offense, "I keep waiting for our own law to be challenged constitutionally . . . but there has not yet been a definitive nationwide statement as to whether someone can be tested against their will. It's a Fourth Amendment privacy right balanced against a public health situation." (9, p. 38)

## CONCLUSION

Requiring HIV testing is one highly visible legislative response to the problems of sexual assault and AIDS. State policymakers are faced with constitutional issues of balancing both the rights of victims and defendants and with practical concerns about risks, reliability, usefulness and costs of testing. So far, at least 23 states have responded with a variety of legislative provisions concerning testing: mandatory vs. court ordered, before or after conviction, with or without compulsory counseling, and with various notification procedures. Testing, by itself, may not best serve policymakers' intent to assist victims. It may provide some relief to victims, but programs that include counseling, monitoring of victims' own health status, and emphasis on their own well-being may generate greater long-term benefits. States will continue to be involved in addressing this highly emotional and legally difficult issue. Legislators may want to consult with legal counsel, rape victim assistance groups, other relevant community organizations and public health personnel when considering appropriate responses.

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APPENDIX

State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
<b>Arizona</b> 1990, Chap. 335 (HB 2173)		✓ (1)			✓	* Victim * Accused * Dept. of Health Services	Class 3 misdemeanor (Fine ≤ \$5,000)	* Victim * Accused	
<b>Arkansas</b> 1989, Act 614 (HB 1496)		✓				* Victim		* Victim	
<b>California</b> 1989, Chap. 1360 (SB 2643) [Penal Code 1524.1] 1988, Chap. 1597 (SB 1007) 1988, Chap. 1582 (AB 3255)	✓	✓ (1)		✓	✓	* Victim * Accused * Those victim "deems necessary"	\$1,000 - \$10,000	* Victim * Accused	
<b>Colorado</b> 1988, Act 18-3-415 (SB 8)	✓			✓ (2)		* Victim (1) * Court			
<b>Florida</b> 1990, Chap. 90-210 (HB 1115)	✓ (5)	✓ (1)		✓	✓	* Victim (1) * Accused * Dept. of Health & Rehab.		* Victim * Accused	General Revenue Fund
<b>Georgia</b> 1988, Act 1440 (HB 1281) 1991, Act 411 (HB 554)		✓ ✓ (1) ✓ (15)			✓ (3) ✓	* Victim * Court * Penal Facility * Dept. of Human Res.		* Victim	Victim or arrested person, at court's discretion

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
- (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
- (13) After conviction if HIV positive
- (14) Within 15 days
- (15) If defendant does not consent
- (16) Sentencing judge
- (17) After indictment

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	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
<b>Idaho</b> 1988, Chap. 45 (HB 432)  1990, Chap. 310 (HB 638)	✓			✓		* Victim (1) * Public health authorities (5) * Court * Victim (5)			State (4)
<b>Illinois</b> 1987, P.A. 85-935 (HB 2044)	✓				✓	* Judge			
<b>Indiana</b> 1988, P. Law 88-123 (SB 9)	✓				✓	* Victim * Accused * Probation Officer * Board of Health		* Victim * Accused	
<b>Kansas</b> 1988, Chap. 230 (HB 2659)		✓			✓ (6)	* Victim * Accused * Victim's health care provider * Secty. of Health & Env. * Secty. of Corrections	Class C Misdemeanor	* Victim	State (7)
<b>Michigan</b> 1988, P.A. 471 (HB 4008)  1988, P.A. 488 (HB 5189)		✓			✓	* Victim * Accused * Corrections Department * Health Department	\$1,000 - \$5,000	* Accused * Victim, after test	
<b>Minnesota</b> 1990, Chap. 436 (SB 2046)								* Victim	

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
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	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Mississippi 1991, Chap. 425 (HB 492)	✓				✓	* Rape victim & spouse * Accused & spouse			
Missouri 1989, Section 191.226 (SB 138)	✓ (8)				✓				Department of Health (9)
Nevada 1989, Chap. 138 (SB 73)	✓			✓		* Victim		(10)	
North Dakota 1989, Chap. 181 (SB 2048)	✓				✓				
Ohio 1989, Vol. 143 (SB 2)	✓			✓	✓ (6)	* Accused * Victim (1) * Penal facility * Court		* Anyone tested	Accused (11)
Oregon 1989, Chap. 568 (HB 2030)		✓ (12)	✓		✓ (6)	* Victim * Accused * Victim's health care provider * Health Division	Class C Misdemeanor	* Victim * Accused, at arrest (13)	Crime Victim Compensation
1987, Chap. 600 (HB 2067)	✓				✓				
South Carolina 1988, Ratification No. 547 (HB 2807)	✓				✓ (14)	* Victim * Accused * Department of Health			* Accused (11)
Tennessee 1991, Public Chap. 25 (HB 52)	✓ (1)				✓	* Victim			

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
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- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
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	Mandatory	Court Order	Consent Of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Texas 1987, Chap. 55 (SB 66-XX)		✓ (1)		✓ (17)		* Victim * Local Health Authority			
Virginia 1990, Chap. 957 (HB 815)		✓ (15) ✓	✓	✓	✓	* Victim * Accused * Department of Health		* Accused	State (7)
Washington 1988, Chap. 206 (SB 6221)		✓ (16)			✓			* Accused, pre- and post-test	
West Virginia 1988, Chap. 16 (HB 303)	✓				✓	* Victim (5)		* Accused	

- |  |  |  |   |
|--|--|--|---|
| (1) At request of victim/guardian                                    | (5) By court order   | (8) All prisoners                                      | (12) If defendant does not consent and after victim has been tested |
| (2) After preliminary hearing  | (6) And 6 months later if first test HIV negative (in some cases 3-6 months later) | (9) For victim if defendant tests HIV positive         | (13) After conviction if HIV positive                               |
| (3) Within 45 days of guilty verdict, guilty plea or no contest plea | (7) Restitution by convicted offender (court costs)                                | (10) Treatment of accused required                     | (14) Within 15 days   |
| (4) Only to extent of funding and appropriations                     |  | (11) If indigent, then municipality or county or state | (15) If defendant does not consent                                  |
|  |  |  | (16) Sentencing judge   |
|  |  |  | (17) After indictment   |

Source: Intergovernmental Health Policy Project, George Washington University:  
*A Synopsis of State AIDS Laws Enacted During the 1983-1987 Legislative Sessions.*  
*A Summary of AIDS Laws from the 1988 Legislative Sessions.*  
*A Summary of AIDS Laws from the 1989 Legislative Session.*  
*A Summary of the HIV/AIDS Laws from the 1990 State Legislative Sessions.*  
 Preliminary 1991 information as of May 30, 1991.



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September, 1991

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The National Conference of State Legislatures (NCSL) is pleased to send you a copy of the HIV/AIDS Project's most recent State Legislative Report (SLR), *Testing Sex Offenders for HIV*.

The project would like your feedback to determine if this publication is useful in developing HIV and AIDS policies and programs in your state. Your evaluation is greatly appreciated and will assist us in producing future publications that explore HIV-related issues.

Please mail the completed form to: Tracey Hooker, Health Services Program, NCSL, 1560 Broadway, Suite 700, Denver, Colorado 80202

Position (state senator, state representative, legislative staff, state agency official, etc.) and committee membership or organization: \_\_\_\_\_

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1. Has your knowledge increased as a result of the information presented in this publication?

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In what respect? \_\_\_\_\_

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\_\_\_\_\_

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\_\_\_\_\_

6. Any further comments? \_\_\_\_\_

\_\_\_\_\_

-- NCSL State Legislative Report --12

## HIV/AIDS Information and Education Project for State Legislators

For the third year, NCSL will work in partnership with CDC to educate and inform state legislatures on HIV and AIDS trends. Continued funding from the CDC enables NCSL's HIV/AIDS Project to serve legislators and their staff as an information resource and a forum to communicate with legislative colleagues, experts, and government officials around the country.

Legislators and legislative staff of the nation's 50 states, its commonwealths and territories are encouraged to request assistance from NCSL's HIV/AIDS Project. The following services are available at no cost to legislators and staff:

- o information clearinghouse
- o technical assistance
- o publications
- o meetings and workshops

The project is funded through a cooperative agreement with the U.S. Centers for Disease Control. For further information contact Tracey Hooker, policy specialist, at NCSL's Health Services Program (303/830-2200).

### The Difference Between HIV and AIDS

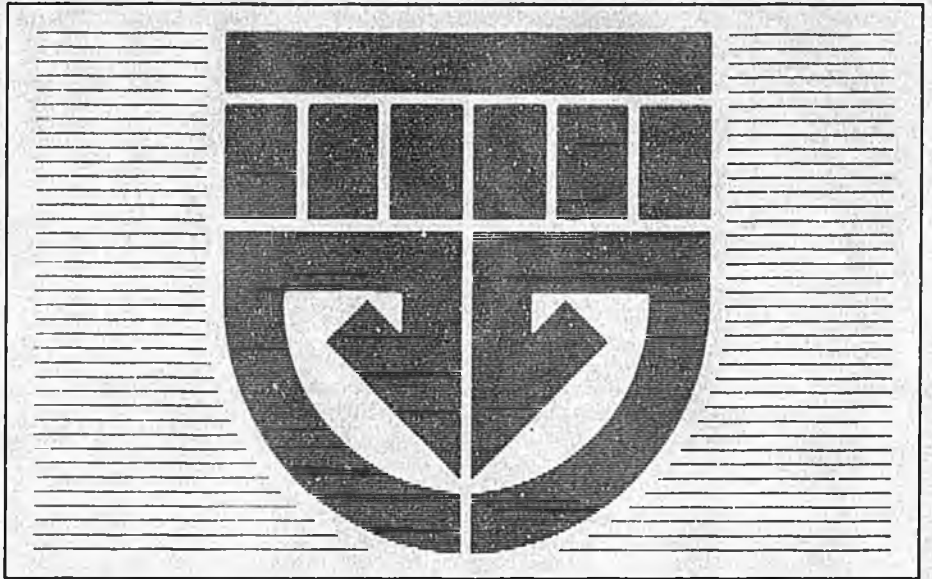
It is important for legislators to understand the distinction between the terms "HIV" and "AIDS" when they formulate policies. There is an immense difference between being infected with HIV and being diagnosed as having AIDS.

HIV is the term for the virus that damages the immune system and may eventually cripple the body's ability to fight disease. AIDS is the end result of HIV infection. People infected with HIV are diagnosed as having AIDS if they develop certain serious diseases or conditions, such as Kaposi's sarcoma (a rare skin cancer), pneumocystis carinii pneumonia, or HIV dementia.

Many more people are infected with HIV than have developed AIDS. An estimated one million individuals are believed to be infected. Many HIV-infected people experience no symptoms of illness for up to 10 years or more. "HIV infection" more correctly defines the scope of the public health problem that legislators face today.

#### Some of the most regularly misunderstood phrases related to HIV:

Misleading	More Accurate
Infected with AIDS .....	HIV infection
AIDS virus .....	HIV (human immunodeficiency virus)
HIV virus .....	HIV
AIDS test .....	HIV antibody test
AIDS antibodies .....	HIV antibodies
Positive AIDS test .....	Positive test for HIV antibodies
AIDS transmission .....	HIV transmission
AIDS victim .....	PWA (person with AIDS) or PLWA (person living with AIDS)
High risk groups .....	High risk behaviors



STATE  
LEGISLATIVE  
REPORT

National Conference  
of State Legislatures  
1560 Broadway, Suite 700  
Denver, Colorado 80202

Non-Profit Organization  
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Denver, Colorado  
Permit No. 3533

Honorable Dave Donley  
State Representative  
House of Representatives  
PO Box V  
Juneau, AK 99811-

**THE FOLLOWING DOCUMENT(S)  
MAY NOT FILM LEGIBLY BECAUSE OF  
THE POOR QUALITY OF THE ORIGINAL**

11

# "American Red Cross Women, sex and aids"

is the best way to...

Yes. The most common screening test is called ELISA (enzyme-linked immunosorbent assay). This test is now considered to be better than 99 percent accurate when testing people who have antibodies to the AIDS virus (HIV). In all cases, another more specific test, such as the Western blot, should be performed to confirm the accuracy of reactive ELISA test results.

If your test result is negative, a repeat test, at a later date, may be recommended because of the time it takes the body to form antibodies.

**If you are thinking**

about getting tested...

here are some things to...

keep in mind...

➤ Make certain that HIV/AIDS counseling is provided both before and after the test. Fear and worry about the test are very common feelings, both before the test and while waiting for the result. Counseling is important for a clear understanding of what your test result means.

➤ In all states, your test result is kept confidential and will not prevent you from legally getting married. In some states, your test result must be reported to the public health department. Ask your doctor or *someone at the testing center you select* about the rules on reporting test results in your area.

➤ Some test sites do not keep your name on file and *only* release your test result to you in person.

- A positive HIV antibody test in your medical/dental record may need to be confirmed, possibly preventing you from obtaining a new individual health insurance policy.

- **DO NOT donate blood in order to be tested.** If you believe you may be infected, do not donate blood, plasma, body tissue, or organs.

Contact your local public health department, AIDS service organization, Red Cross chapter, or

doctor's office for  
and HIV/AIDS  
available for per  
AIDS or HIV-rel

They can

**Know the facts**  
and AIDS. Use

yourself. Teach  
about HIV/AIDS

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#2

# Acquired Immunodeficiency Syndrome

## State Legislative Activity

Hilary E. Lewis, JD

MORE than 450 bills have been introduced in state legislatures in 1987, on the subject of acquired immunodeficiency syndrome (AIDS). This flurry of legislative activity reflects the serious public health concern raised by this disease in every part of the country (see "References").

State statutes relating to the subject of AIDS were first enacted in 1983. Most of the early laws created statewide task forces to inform and educate the public. Since that time, statutes have been enacted on a wide variety of AIDS-related topics. The information included herein based on a review through Oct 6, 1987, focus on ten major subject areas that have become matters of state law (Table). The categories highlighted, as well as examples of states that have enacted laws on each of these issues, are (1) antibody testing, (2) blood and blood products, (3) confidentiality, (4) employment, (5) housing, (6) informed consent, (7) insurance, (8) marriage, (9) prison population, and (10) reporting.

It should be noted that state regulation constitutes another means by which policymakers have responded to the AIDS crisis. This is particularly true with respect to regulations developed by state insurance commissioners and state public health department reporting requirements. Such regulations usually carry with them the force of law.

### ANTIBODY TESTING

A number of states have legislated on the issue of antibody testing. In Illinois, a bill was sent to the governor that would have required health care workers with a diagnosed case of AIDS or AIDS-related complex (ARC), or one who tests positive for the antibody, to notify their employers. Failure to notify the employer would have constituted grounds for loss of licensure. The bill was amendatorily vetoed by the governor.

Other state laws that deal with antibody testing have been enacted on the following issues:

1. Requiring blood banks, hospitals, and other storage facilities to test for the AIDS antibody (California, Illinois, Oklahoma, Tennessee, Texas, and Wisconsin).

2. Establishment of alternative testing sites for voluntary serologic testing (California and Florida).

3. Requiring surgeons, physicians, funeral directors, and blood banks, etc, when authorized to remove organs for donation, or to receive semen for artificial insemination purposes, to test for the presence of the AIDS antibody in the donated organ or semen (Delaware, Idaho, Illinois, Rhode Island, Virginia, and Wisconsin).

4. Requiring individuals convicted of prostitution to be screened for sexually transmitted diseases (STDs) and permitting anyone arrested for prostitution to request screening for STDs, including presence of the AIDS antibody (Florida).

5. Authorizing the secretary of the state board of health or a local health official who believes that an individual may have a communicable or other disease that is a danger to health, to ask the individual for written informed consent to be examined to prevent the transmission of the disease to others. If the individual, when requested, refuses such an examination, the examination may be compelled only on a court order based on clear and convincing evidence of a serious and present health threat to others posed by the individual (Indiana).

6. Directing the state department of health to provide confidential screening and confirmatory testing at the request of "persons at high risk," ie, homosexuals, bisexuals, and intravenous drug users, of contracting AIDS, by contract with private physicians, alternate screening sites, or clinical laboratories (Iowa).

7. Permitting the director of the local or state department of health who knows or has reason to believe, through medical or epidemiologic information, that a person is infected with the AIDS virus and is a danger to the public, to issue an order requiring such a person to be examined and tested to determine whether he or she is so infected (Colorado).

8. Empowering the director of the state department of health to promulgate rules and regulations that require the testing for AIDS, without written permission, in the case of a

From the Department of State Legislation, Division of Legislative Activities, American Medical Association, Chicago.  
Reprint requests to Department of State Legislation, Division of Legislative Activities, American Medical Association 535 N Dearborn St, Chicago, IL 60610 (H.E. Lewis).

Legislation Specifically Addressing AIDS\*

State	Category									
	Antibody Testing	Blood	Confidentiality	Employment	Housing	Informed Consent	Insurance	Marriage	Prison Population	Reporting
Alabama										
Alaska										
Arizona										
Arkansas										
California	X	X	X	X	X	X	X	X		X
Colorado	X		X			X				X
Connecticut					X					
Delaware	X									
District of Columbia							X			
Florida	X	X	X	X			X		X	X
Georgia		X								X
Hawaii			X	X	X		X			
Idaho	X									X
Illinois	X	X	X					X		X
Indiana			X							X
Iowa	X		X						X	X
Kansas										
Kentucky			X							X
Louisiana								X		X
Maine			X				X			
Maryland			X							X
Massachusetts			X	X		X				
Michigan										X
Minnesota										
Mississippi										X
Missouri										
Montana										
Nebraska										
Nevada									X	X
New Hampshire										
New Jersey										
New Mexico										
New York			X							
North Carolina										X
North Dakota			X							
Ohio										
Oklahoma	X	X								
Oregon			X				X		X	
Pennsylvania								X		X
Rhode Island	X		X							X
South Carolina										
South Dakota		X								
Tennessee	X	X								X
Texas	X		X					X		X
Utah								X		
Vermont										
Virginia	X							X		
Washington										
West Virginia							X			
Wisconsin	X		X	X		X	X			X
Wyoming										

\*The information contained in this chart refers only to legislation and not to administrative regulations. AIDS indicates acquired immunodeficiency syndrome.

newborn child when there is a high index of medical suspicion by history or physical examination that the child may have contracted the human immunodeficiency virus infection in utero or at birth (Rhode Island).

**BLOOD**

In the overwhelming majority of states, processing, storage, and distribution of blood constitutes a service and not a

sale. Thus, implied warranties of fitness and merchantability do not apply, and liability is imposed primarily where negligence exists on the part of the processor or distributor. (It is necessary to examine each state's law to determine if the immunity covers the blood bank, hospital, physician, etc.) Other state legislation concerning blood has been enacted on the following issues:

1. Allowing a parent to designate his or her donated blood



Department of Health and Social Services  
Theodore A. Mala, MD, MPH, Commissioner

Division of Public Health  
Al Zangri, Acting Director

Section of Epidemiology  
John Middaugh, MD, Editor

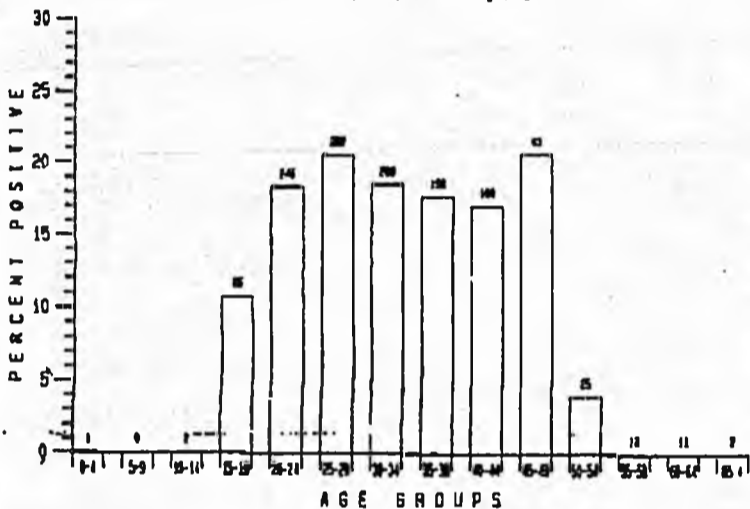
3601 'C' Street, Suite 576, P.O. Box 24-0249, Anchorage, Alaska 99524-0249, (907) 581-4405

Bulletin No. 4 January 23, 1991

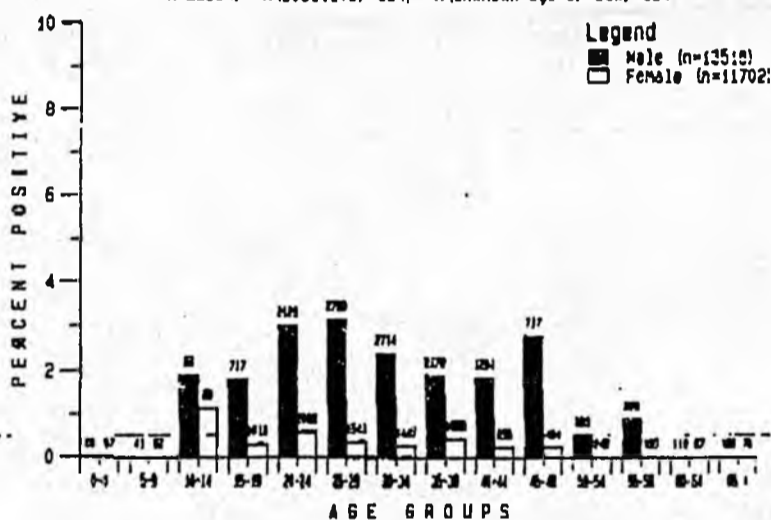
## HIV IN ALASKA, 1985-1990

Through December 31, 1990, 364 of 25,384 (1.4%) individuals tested at the Section of Laboratories, Division of Public Health, were positive for HIV infection. Of 13,523 males tested, 319 (2.4%) were positive and of 11,708 females tested, 41 (0.4%) were positive for HIV infection. Of 4,419 Alaska Natives tested, 34 (0.8%) were positive for HIV infection.

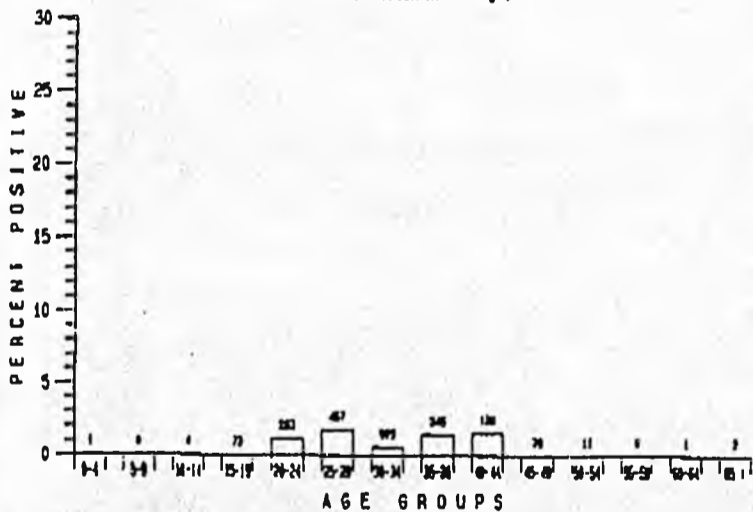
Homosexual and Bisexual Males by Age Group  
N=1219, N(unknown age)=1



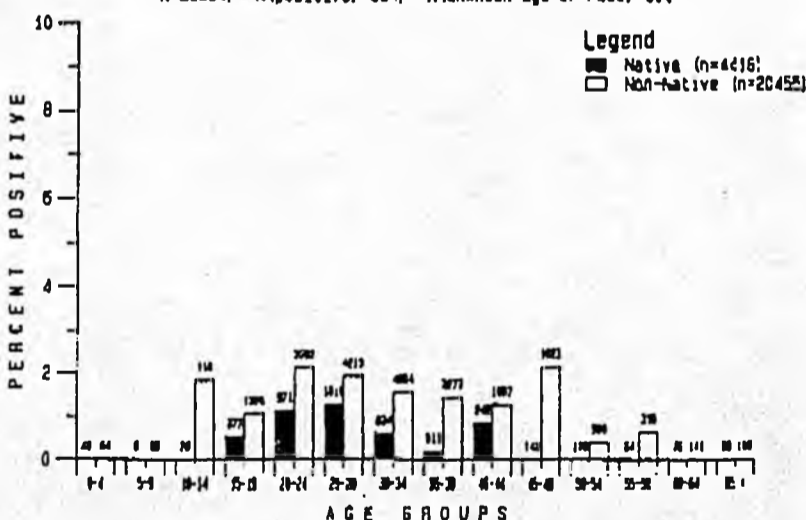
All Individuals by Age Group and Sex  
N=25384, N(positive)=364, N(unknown age or sex)=164



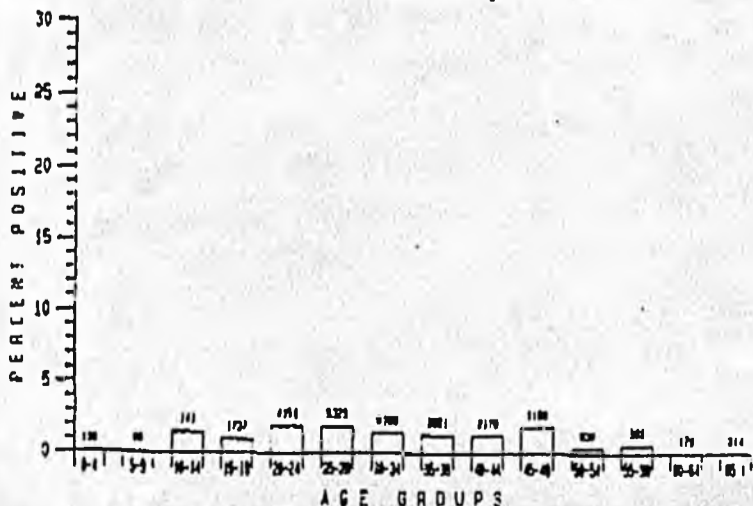
IV Drug Users by Age Group  
N=1844, N(unknown age)=1



All Individuals by Age Group and Race  
N=25384, N(positive)=364, N(unknown age or race)=511



All Individuals by Age Group  
N=25384, N(unknown age)=1



Risk Category	Positive/Native Tested (%)		
	Non-Native	Native	Total*
Homosexual/Bisexual Male	202/1972 (10.0)	13/134 (9.7)	216/2106 (10.3)
IV Drug User	21/1549 (1.4)	0/273 (0)	21/1822 (1.2)
Intersexual Contact of Person with/or at Risk of AIDS	7/1560 (0.4)	2/290 (0.7)	9/1850 (0.5)
Menopausal	7/13 (53.0)	0/0 (0)	7/13 (53.0)
Transmission with Blood/Blood Products	6/762 (0.8)	1/167 (0.6)	7/929 (0.8)
All Others	84/13421 (0.6)	10/2599 (0.4)	94/16020 (0.6)
Total	327/25425 (1.3)	34/4419 (0.8)	361/29844 (1.2)

\*Total includes unknown race



Department of Health and Social Services  
Theodore A. Mala, MD, MPH, Commissioner

Division of Public Health  
Al Zangri, Acting Director

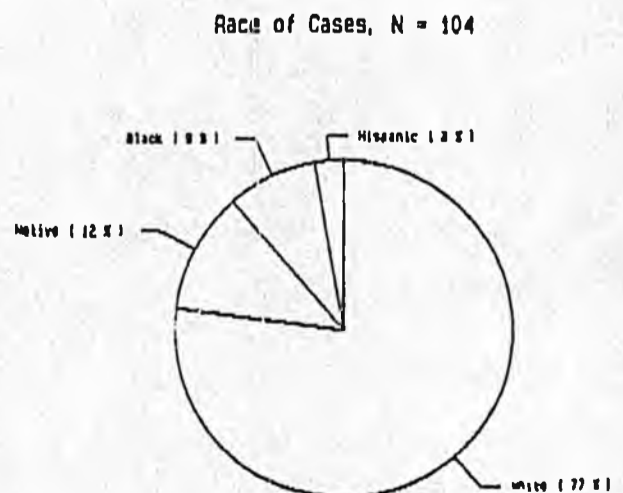
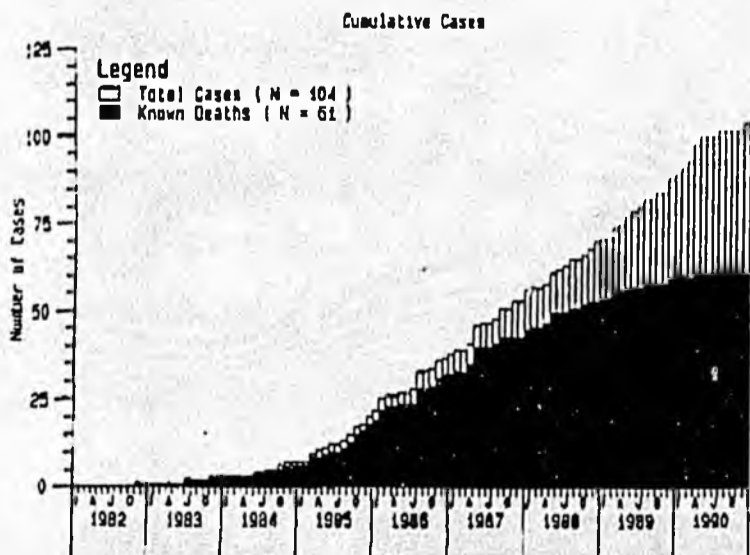
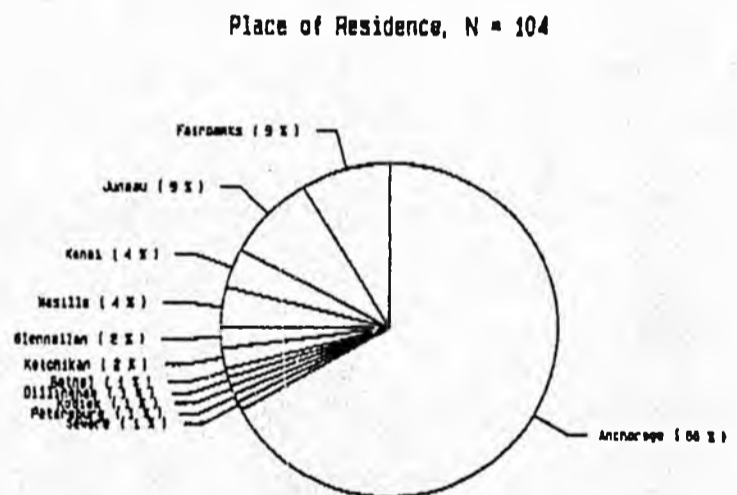
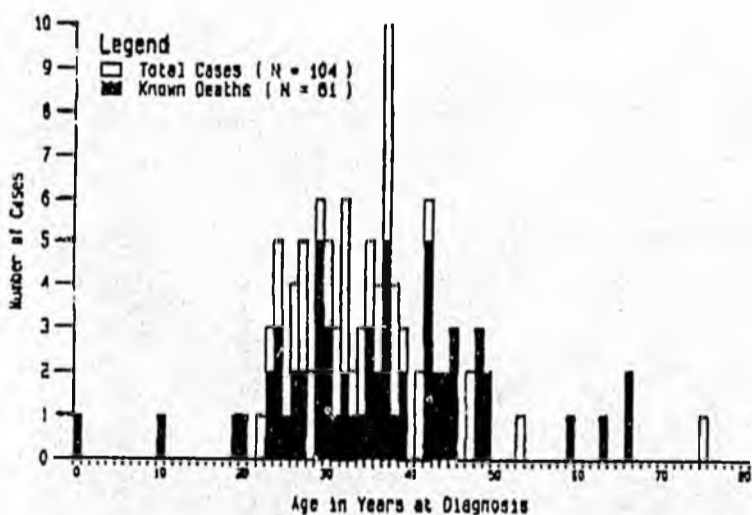
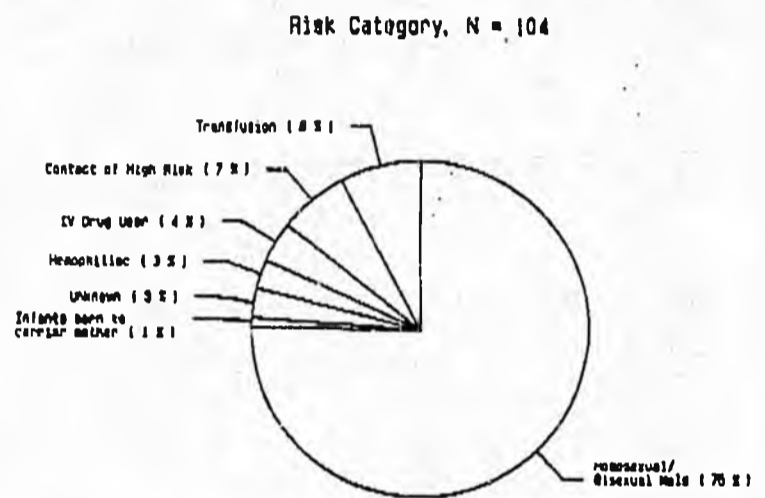
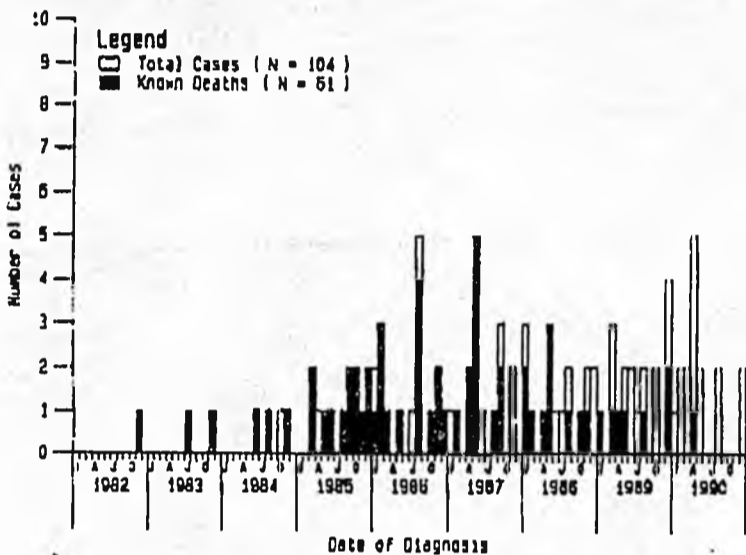
Section of Epidemiology  
John Middaugh, MD, Editor

3601 'C' Street, Suite 578, P.O. Box 24-0249, Anchorage, Alaska 99524-0249, (907) 581-4406

Bulletin No. 3 January 22, 1991

## AIDS - ALASKA

Through December 31, 1990, 104 Alaskans have been confirmed to have AIDS, and 61 are known to have died. Of the 104 AIDS cases, 88 are in males and 6 in females. All persons with AIDS in Alaska can be classified into standard risk categories.



HB

27

# HOUSE COMMITTEE REPORT

(7)

Date Referred: March 1, 1991

FURTHER REFERRALS:

Finance

Date of Committee Action: 3-25-91

The JUDICIARY Committee considered:

SSHB 27

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 27

DRUG & ALCOHOL USE BY MINORS/SCHOOL ZONES

"An Act relating to the possession of controlled substances and imitation controlled substances, to misconduct involving controlled substances and imitation controlled substances by minors, and to the provision of information that appries students about controlled substances and the penalties applicable to misconduct involving controlled substances; and requiring installation of signs in the vicinity of schools declaring the areas to be drug-free school zones ; and providing for an effective date."

RECOMMENDATIONS:

be replaced with \_\_\_\_\_

CSSSHB 27 (Hess)

the same title

a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(s): \_\_\_\_\_ (Dept)

APPROVES PREVIOUS: \_\_\_\_\_ (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) Education - 3-1-91

zero fiscal note \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Terry Maston</i>	<input checked="" type="checkbox"/>				
<i>Mark Kenley</i>	<input checked="" type="checkbox"/>				
<i>Kevin Pad Parnell</i>	<input checked="" type="checkbox"/>				
<i>H. Ellis</i>					
<i>W. Kenley</i>	<input checked="" type="checkbox"/>				
<i>J. Shrenberg</i>	<input type="checkbox"/>				
<i>Mike Miller</i>	<input checked="" type="checkbox"/>				

*Gene Kenley*  
 \_\_\_\_\_  
 CHAIRMAN'S SIGNATURE

**STATE OF ALASKA**  
**1991 LEGISLATIVE SESSION**

**BILL NO. HB27**

Revision Date: \_\_\_\_\_ Department Affected: Education  
 Title: Delivery and possession of controlled substances... 'drug free school zones' BRU: Executive Administration  
 Component: Executive Administration  
 Sponsor: Bettye Davis  
 Requestor: House HESS COMPONENT SERIAL NO. 

--	--	--	--

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	12.7	11.5	11.5	11.5	11.5	11.5
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>12.7</b>	<b>11.5</b>	<b>11.5</b>	<b>11.5</b>	<b>11.5</b>	<b>11.5</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	12.7	11.5	11.5	11.5	11.5	11.5
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>12.7</b>	<b>11.5</b>	<b>11.5</b>	<b>11.5</b>	<b>11.5</b>	<b>11.5</b>

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.) This fiscal analysis assumes distribution of the information pamphlet to 112,200 students in the 54 public school districts in the state. Four versions of the pamphlet will be developed, targeting grades K-12, 3-5, 6-8, 9-12.

Prepared By: Mary Hakala Phone: 465-2800  
 Division: Commissioner's Office Date: 2/27/91  
 Approved by Commissioner: Steve Holt, Acting Commissioner  
 Agency: Education Date: 2/27/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

HB 27: Delivery and possession of controlled substances and imitation controlled substances, to misconduct involving controlled substances, imitation controlled substances, and alcohol by minors, and to the provision of information that includes penalties applicable to misconduct involving controlled substances; and requiring installation of signs in the vicinity of schools declaring the areas to be 'drug-free school zones'

Fiscal Note Analysis  
February 27, 1991  
Page 2 of 2

Cost estimate for production of information pamphlet required in section 8:

Year 1:

Graphics/design/typesetting	\$1,200
Printing	10,000
Postage/handling	1,500
	-----
Total	\$12,700

Years 2-5:

Printing	10,000
Postage/handling	1,500
	-----
Total	\$11,500

STATE OF ALASKA  
Department of Corrections  
LEGISLATIVE POSITION PAPER  
Lloyd Hames, Commissioner

P.O. Box 77, Juneau, AK 99811-2000 (907) 466-8876

Carl Michel, Legislative Liaison

February 26, 1991

SPONSOR SUBSTITUTE HOUSE BILL NO. 27

"An act relating to the delivery and possession of controlled substances....installation of signs in the vicinity of schools....  
"drug-free school zones.

The Department of Corrections supports SSHB No.27. The bill fundamentally addresses the national effort to protect young people and to encourage a drug free school environment.

SSHB No.27 does not have a fiscal impact on Corrections.

FISCAL NOTE:

ZERO  
ATTACHED



APPROVED:

L.H. by Carl Michel  
Commissioner

DATE: 2-26-91

FISCAL NOTE

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

BILL NO. SSHB #27

Revision Date: 2-26-91 Department Affected: Corrections  
 Title: An act relating to..drug-free zones BRU: \_\_\_\_\_  
 Component: \_\_\_\_\_  
 Sponsor: Rep. B. Davis  
 Requestor: Rep. B. Davis COMPONENT SERIAL NO. 

--	--	--	--

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Thomas Sutton, Director *Tom Sutton* Phone: 465-3376  
 Division: Administrative Services Date: 2-26-91

Approved by Commissioner: Lloyd Hames  
 Agency: Dept. of Corrections Date: \_\_\_\_\_

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

This is the same analysis that was proposed for last year's HB 391

There is no way to make an actual inventory of signed school locations without considerable effort. However, there are 660 schools, and it can reasonably be assumed that at least half are on or near the state system (including municipal arterials), and are marked as schools by school speed zones, marked crosswalks, or advance school warning signs.

Furthermore, where schools are signed there would rarely be less than two marked locations (one in each direction on one road) and probably rarely more than four (one in each direction on two roads) for an average of 3 per school. This amounts to 330 schools X 3 signs per school average = 990 signs total.

Large signing contracts average approximately \$50 per square foot for installed signs. The required sign size for legibility and consistency would be about two square feet. However, such smaller signs have much the same mounting, labor and equipment costs as those several times larger. Including the need to locate the signs rather accurately, the estimated cost per sign is conservatively \$150 each.

This results in an estimated initial cost of \$148,500 in 1990 dollars.

The sign life due to deterioration, accidental destruction, and the high vandalism target value cannot be expected to exceed about five years with, for all causes, 10% loss the first year, 20% the second through the fourth years, and 30% the last year when deterioration sets in, and about 20% per year average thereafter.

This results in maintenance as follows (in 1990 dollars):

1st year	$0.10 \times \$150K = \$15,000$
2nd thru 4th years	$0.20 \times \$150K = \$30,000$ per year
5th year	$0.30 \times \$150K = \$45,000$
thereafter	$0.20 \times \$150K = \$30,000$ per year

There is no way to accurately speak for the municipalities for the costs on their road system.

**FISCAL NOTE**

Revision Date: 1/21/91

Department Affected:

DOT&PF

Title: " An Act relating to the Delivery and possession of controlled substance BRU:

Maintenance &  
Operations

Sponsor:  
Requestor:

Component:  
Component Serial Number:

Central, Northern & S. E.  
564, 584, 587, 590, & 603

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY92	FY93	FY94	FY95	FY96	FY97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
<b>TOTAL OPERATING:</b>	0	0	0	0	0	0

CAPITAL	148.5	15.0	30.0	30.0	30.0	45.0
---------	-------	------	------	------	------	------

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

**FUNDING: (Thousands of Dollars)**

GENERAL FUNDS	148.5	15.0	30.0	30.0	30.0	45.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
<b>TOTAL FUNDING:</b>	148.5	15.0	30.0	30.0	30.0	45.0

**POSITIONS**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)  
See Attached.

Prepared by: Jeffery C. Ottesen, Director

Phone: 465-2951

Division: Engineering and Operations Standards

Date: Feb 26, 1991

Approved by Commissioner: Frank G. Turpin

Phone: 465-3900

Agency: Department of Transportation and Public Facilities

Date: Feb 26, 1991

Distribution By Preparer: Legislative Finance, Legislative Sponsor, Requestor, OMB, Impacted Agency(ies).

# ALASKA STATE LEGISLATURE

Office of Majority Whip

3111 C STREET  
ANCHORAGE AK 99503

PO BOX V  
JUNEAU AK 99811  
(907) 465-3875/4894



VICE CHAIR  
HEALTH, EDUCATION  
& SOCIAL SERVICES

COMMUNITY AND  
REGIONAL AFFAIRS

INTERNATIONAL TRADE  
AND TOURISM

CHAIR  
CHILDREN'S CAUCUS

**REPRESENTATIVE BETTYE DAVIS**

DISTRICT 14 SEAT B • EAST ANCHORAGE • MULDOON

## M E M O R A N D U M

TO: REPRESENTATIVES DAVE DONLEY, CHAIRMAN  
FROM: REPRESENTATIVE BETTYE DAVIS *BD*  
DATE: MARCH 7, 1991  
RE: CS FOR SSHB 27 - DRUG-FREE SCHOOL ZONES

\*\*\*\*\*

I am writing to request that the Judiciary Committee schedule a hearing on CS for SSHB 27, relating to conviction for possession, delivery, and use of controlled substances in school, on or near school grounds, and on school buses.

Criminal justice, education, and substance abuse prevention leaders unanimously agree that the only possible resolution to the current drug epidemic lies in successful reduction of the demand for illegal drugs, particularly among our nation's youth. Of all known drug reduction strategies, the Drug Free School Zones initiative is perhaps the most promising systemic demand-reduction innovation. Drug-Free School Zones can unite community leaders in partnerships with criminal justice, education, and prevention efforts to protect children and enhance the school learning environment by constricting the supply and lessening the demand for drugs. Conceptually, Drug-Free School Zones are designed to create drug-free "safe havens" within geographic zones surrounding schools.

Recognizing the need for greater legislative innovation the following organizations strongly supported the development of drug-free school zones: National School Boards Association, National Association of Secondary School Principals, National Association of Elementary School Principals, National Association of Partners in Education, National School Safety Center, National Association of State Alcohol and Drug Abuse Directors, Council of State Governments, National Council of Juvenile and Family Court Judges, National Association of Chiefs of Police, and the National Association of Attorneys General.



As of June 1990 forty-two (42) States plus the District of Columbia have institute Drug-Free School Zones. It has been recognized by the National Coalition for Drug-Free School Zones that Alaska already has incorporated the concept of Drug Free-School Zone in its laws. What we hope to do is enhance the law by doing the following.

(1) amends certain criminal law provisions applicable to possession of controlled substances and imitation controlled substances on or near school grounds and on school buses;

(2) requires the State Board of Education to initiate certain activity apprising the state's public and private Students about controlled substances and the criminal penalties applicable to them;

(3) directs the state and municipalities to install "drug-free school zone" signs near schools.

The Association of Alaska School Boards, Alaska Council of School Administrators, NEA-Alaska, Departments of Corrections, Education, Health and Social Services, and Public Safety all support this bill.

Thank you for hearing this bill.

**NATIONAL COALITION FOR DRUG-FREE SCHOOL ZONES**  
**State Legislation**  
**June 1990**

One of the goals of the National Coalition for Drug-Free School Zones is the passage of state drug-free school zone legislation. This goal is being achieved. To date 42 states plus the District of Columbia have state legislated Drug-Free School Zones. Five states have proposed or pending legislation (i.e., Nebraska, North Carolina, South Dakota, Texas, and Wyoming). Only three states remain without Drug-Free School Zones laws (i.e., Idaho, Montana, and Tennessee).

As each state has adopted unique DFSZ legislation, this legislation brief has been prepared to bring together all of the variations of DFSZ laws nationwide. It is hoped that this material will prove useful to leaders and legislators as they move to improve their DFSZ laws. The following are excerpts of state legislation for Drug-Free School Zones.

## **Alabama**

### *Division 4.*

#### *Sale on or Near School Campus.*

**§ 13A-12-250. Additional penalty if unlawful sale on or near school campus.**

In addition to any penalties heretofore or hereafter provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years incarceration in a state corrections facility with no provision for probation if the situs of such unlawful sale was on the campus or within a three-mile radius of the campus boundaries of any public or private school, college, university or other educational institution in this state. (Acts 1987, No. 87-610, p. 1060; Code 1975, § 20-2-79; Acts 1988, 1st Sp. Sess., No. 88-918, p. 512, § 2; Acts 1989, No. 89-950.)

## **Alaska**

**Sec. 11.71.030. Misconduct involving a controlled substance in the third degree.**

(3) being 18 years of age or older, possesses any amount of a schedule IA or IIA controlled substance within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school.

(b) It is an affirmative defense to a prosecution under (a)(3) of this section that at the time of the possession the school was closed to any organized activity involving persons under 18 years of age. [Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.]



ANCHORAGE  
SCHOOL DISTRICT

4600 DeBarr Avenue  
P.O. Box 196614  
Anchorage, Alaska 99519-6614  
AREA CODE [907] 333-9561

February 27, 1991

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Thomas C. O'Rourke

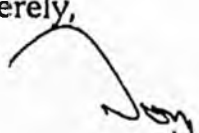
The Honorable Bettye Davis  
House of Representatives  
P.O. Box V  
Juneau, AK 99811

Dear Bettye:

Per your request, the administration reviewed the contents of Sponsor Substitute for House Bill No. 27, and believes that it supports the existing philosophy and practice of the School District relating to the possession of controlled substances and/or imitation controlled substances involving students in our schools. Our current School Board Policy 451.4 - Illegal Drug/ Alcohol (see attached), is but one example of our practice in dealing with this topic.

Because we are an educational institution, we believe we have an obligation to take a strong position on the use, sale, and possession of controlled substances by students in our schools and, where possible, provide appropriate education through regular and optional programs to those students impacted. As an educational organization, we would participate with the intent of drug free school zones.

Sincerely,

  
Thomas C. O'Rourke  
Superintendent

mt

cc Carl LaMarr, Deputy Superintendent

Attachment: School Board Policy 451.4



# NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

## ANCHORAGE REGIONAL OFFICE

1411 W. 33RD AVENUE  
ANCHORAGE, ALASKA 99503  
(907) 274-0536  
FAX: (907) 274-0551

## JUNEAU OFFICE

105 MUNICIPAL WAY, SUITE 302  
JUNEAU, ALASKA 99801  
(907) 586-3090  
FAX: (907) 586-2744

## FAIRBANKS REGIONAL OFFICE

2118 CUSHMAN STREET  
FAIRBANKS, ALASKA 99701  
(907) 456-4435  
FAX: (907) 456-2159

February 26, 1991

To: **Representatives Carney and Lincoln, Co-Chairs  
Members, House HESS Committee**

Re:

**HB 27: "An Act relating to the delivery and possession of controlled substances and imitation controlled substances, to misconduct involving controlled substances, imitation controlled substances, and alcohol by minors, and to the provision of information that includes penalties applicable to misconduct involving controlled substances; and requiring installation of signs in the vicinity of schools declaring the areas to be "drug-free" school zones; and providing for an effective date."**

NEA-Alaska strongly supports and encourages your favorable consideration of HB 27.

Public schools through-out our nation, unfortunately, have become focal points for those who would encourage illegal and inappropriate use of drugs and alcohol. The eventual solution to the myriad of attendant problems will happen only when the collective conscience of society is raised to such a level that alcohol and substance abuse is unacceptable behavior.

HB 27 properly increases penalties and, even more importantly, defines a process for raising an awareness of them. It is appropriate for the board of education to have a greater responsibility in providing students with specific information about controlled substances.

The creation of "drug-free" school zones is a positive step and represents a statement of public policy that it is time for all of us to deal with this problem.

Thank you for your consideration of our position.

Respectfully submitted,

Bob Manners  
Executive Director

Don Oberg  
President

cc: **Representative Bettye Davis**

# ASSOCIATION OF ALASKA SCHOOL BOARDS

316 West 11th Street, Juneau, Alaska 99801-1510 • Tel. (907) 586-1083 • Fax (907) 586-2995

*Serving Alaskan Education*



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**EXECUTIVE  
DIRECTOR**  
Carl F.N. Rose

## POSITION PAPER HB 27

### IN SUPPORT OF LEGISLATION CREATING A DRUG-FREE SCHOOL ZONE

The Association of Alaska School Boards endorses and supports legislation, such as HB 27, creating a drug free school zone and urges quick passage of such legislation by the Alaska Legislature. At least 23 other states have enacted such legislation with resulting decreases in drug related activity in and around schools.

The Association of Alaska School Boards has a strong commitment to a drug-free school environment in the State of Alaska. However, current Alaska law does not dictate increased penalties associated with possession of drugs on school grounds, or with delivery of, or possession with intent to deliver on school grounds.

AASE also endorses allowing the extent of the zone to be decided by local schools. A flexible boundary zone, decided upon by local schools or a school district, would grant the necessary latitude for districts to determine an effective drug-free school zone and would recognize the differences between Alaska's very small rural villages and larger communities.

2/1/91

BILL NO: SSHB 27

DATE: 2/27/91

TITLE: "An Act relating to . . .  
drug free School zones . . ."

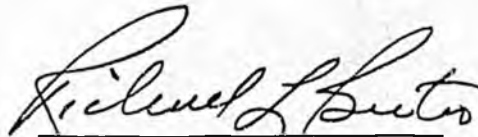
CONTACT: Gayle A. Horetski  
Deputy Commissioner  
465-4322

DEPARTMENT OF  
PUBLIC SAFETY

The Department of Public Safety supports SSHB 27, which amends present criminal laws regarding possession of controlled substances and imitation controlled substances on or near school grounds or on a school bus. The Department recommends two changes in the present version of the bill, however.

First, Section 2 of the bill (page 2, line 12) contains a reference to "(a)(4)(A) of this section". As far as we can tell, there is no such subsection, so this reference should be deleted.

Secondly, this bill (in sections 2 and 4) repeals and reenacts "affirmative defense" provisions contained in existing law. As presently drafted, these reenacted sections do not indicate what happens if the defendant establishes such a defense. We assume that the bill's sponsors did not intend that an offender who establishes the affirmative defense escape prosecution entirely. Rather, he or she should be subject to prosecution under other applicable statutes. The Department of Public Safety strongly recommends that the language in existing law be retained. This could be accomplished by adding the language: "Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter." to sections 2 and 4 (page 2, line 15 and page 4, line 4).



Richard L. Burton  
Commissioner

# ALASKA STATE LEGISLATURE

Office of Majority Whip

3111 C STREET  
ANCHORAGE AK 99503

PO BOX V  
JUNEAU AK 99811  
(907) 465-3875/4894



VICE CHAIR  
HEALTH, EDUCATION  
& SOCIAL SERVICES

COMMUNITY AND  
REGIONAL AFFAIRS  
INTERNATIONAL TRADE  
AND TOURISM

CHAIR  
CHILDREN'S CAUCUS

**REPRESENTATIVE BETTYE DAVIS**

DISTRICT 14 SEAT B • EAST ANCHORAGE • MULDOON

## M E M O R A N D U M

TO: REPRESENTATIVES CARNEY AND LINCOLN, CO-CHAIR  
HOUSE COMMITTEE ON HEALTH, EDUCATION & SOCIAL SERVICES

FROM: REPRESENTATIVE BETTYE DAVIS *BjD*

RE: SSHB 27 - DRUG-FREE SCHOOL ZONES

DATE: FEBRUARY 27, 1991

\*\*\*\*\*

Criminal justice, education, and substance abuse prevention leaders unanimously agree that the only possible resolution to the current drug epidemic lies in successful reduction of the demand for illegal drugs, particularly among our nation's youth. Of all known drug reduction strategies, the Drug Free School Zones initiative is perhaps the most promising systemic demand-reduction innovation. Drug-Free School Zones can unite community leaders in partnerships with criminal justice, education, and prevention efforts to protect children and enhance the school learning environment by constricting the supply and lessening the demand for drugs. Conceptually, Drug-Free School Zones are designed to create drug-free "safe havens" within geographic zones surrounding schools.

Recognizing the need for greater legislative innovation the following organizations strongly supported the development of drug-free school zones: National School Boards Association, National Association of Secondary School Principals, National Association of Elementary School Principals, National Association of Partners in Education, National School Safety Center, National Association of State Alcohol and Drug Abuse Directors, Council of State Governments, National Council of Juvenile and Family Court Judges, National Association of Chiefs of Police, and the National Association of Attorneys General.



As of June 1990 forty-two (42) States plus the District of Columbia have insititute Drug-Free School Zones. It has been recognized by the National Coalition for Drug-Free School Zones that Alaska already has incorporated the concept of Drug Free-School Zone in its laws. What we hope to do is enhance the law by doing the following.

(1) amends certain criminal law provisions applicable to possession of controlled substances and imitation controlled substances on or near school grounds and on school buses;

(2) requires the State Board of Education to initiate certain activity apprising the state's public and private Students about controlled substances and the criminal penalties applicable to them;

(3) directs the state and municipalities to install "drug-free school zone" signs near schools.

The Association of Alaska School Boards, Alaska Council of School Administrators, NEA-Alaska, Departments of Corrections, Education, Health and Social Services, and Public Safety all support this bill.

Thank you for hearing this bill.

STATE OF ALASKA  
Department of Corrections  
LEGISLATIVE POSITION PAPER  
Lloyd Hamee, Commissioner

P.O. Box 'T', Juneau, AK 99801-2000 (907) 486-8678

Carl Michel, Legislative Liaison

February 26, 1991

SPONSOR SUBSTITUTE HOUSE BILL NO. 27

"An act relating to the delivery and possession of controlled substances....installation of signs in the vicinity of schools....  
"drug-free school zones.

The Department of Corrections supports SSHB No.27. The bill fundamentally addresses the national effort to protect young people and to encourage a drug free school environment.

SSHB No.27 does not have a fiscal impact on Corrections.

FISCAL NOTE:

ZERO  
ATTACHED



APPROVED:

L.H. by Carl Michel  
Commissioner

DATE: 2-26-91

FISCAL NOTE

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

BILL NO. SSHB #27

Revision Date: 2-26-91 Department Affected: Corrections

Title: An act relating to..drug-free zones BRU: \_\_\_\_\_

Component: \_\_\_\_\_

Sponsor: Rep. B. Davis

Requestor: Rep. B. Davis

COMPONENT SERIAL NO. 

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-

<b>CAPITAL</b>	-0-	-0-	-0-	-0-	-0-	-0-
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<b>REVENUE</b>	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Thomas Sutton, Director *Tom Sutton* Phone: 465-3376

Division: Administrative Services Date: 2-26-91

Approved by Commissioner: Lloyd Hames

Agency: Dept. of Corrections Date: \_\_\_\_\_

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

**FISCAL NOTE**

Revision Date: 1/21/91

Department Affected:

DOT&PF

Title: An Act relating to the Delivery and possession of controlled substance

BRU:

Maintenance & Operations

Sponsor:

Component:

Central, Northern & S. E.

Requestor:

Component Serial Number:

564, 584, 587, 590, & 603

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY92	FY93	FY94	FY95	FY96	FY97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
<b>TOTAL OPERATING:</b>	0	0	0	0	0	0

CAPITAL	148.5	15.0	30.0	30.0	30.0	45.0
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REVENUE	0	0	0	0	0	0
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**FUNDING: (Thousands of Dollars)**

GENERAL FUNDS	148.5	15.0	30.0	30.0	30.0	45.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
<b>TOTAL FUNDING:</b>	148.5	15.0	30.0	30.0	30.0	45.0

**POSITIONS**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)  
See Attached.

Prepared by: Jeffery C. Ottesen, Director

Phone: 465-2951

Division: Engineering and Operations Standards

Date: Feb 26, 1991

Approved by Commissioner:

*Frank G. Turpin*  
Frank G. Turpin

Phone: 465-3900

Agency: Department of Transportation and Public Facilities

Date: Feb 26, 1991

Distribution By Preparer: Legislative Finance, Legislative Sponsor, Requestor, OMB, Impacted Agency(ies).

Department of Transportation and Public Facilities

Fiscal Note Analysis: House Bill No. 27

2/25/91

This is the same analysis that was proposed for last year's HB 391

There is no way to make an actual inventory of signed school locations without considerable effort. However, there are 660 schools, and it can reasonably be assumed that at least half are on or near the state system (including municipal arterials), and are marked as schools by school speed zones, marked crosswalks, or advance school warning signs.

Furthermore, where schools are signed there would rarely be less than two marked locations (one in each direction on one road) and probably rarely more than four (one in each direction on two roads) for an average of 3 per school. This amounts to 330 schools X 3 signs per school average = 990 signs total.

Large signing contracts average approximately \$50 per square foot for installed signs. The required sign size for legibility and consistency would be about two square feet. However, such smaller signs have much the same mounting, labor and equipment costs as those several times larger. Including the need to locate the signs rather accurately, the estimated cost per sign is conservatively \$150 each.

This results in an estimated initial cost of \$148,500 in 1990 dollars.

The sign life due to deterioration, accidental destruction, and the high vandalism target value cannot be expected to exceed about five years with, for all causes, 10% loss the first year, 20% the second through the fourth years, and 30% the last year when deterioration sets in, and about 20% per year average thereafter.

This results in maintenance as follows (in 1990 dollars):

1st year	0.10 X \$150K = \$15,000
2nd thru 4th years	0.20 X \$150K = \$30,000 per year
5th year	0.30 X \$150K = \$45,000
thereafter	0.20 X \$150K = \$30,000 per year

There is no way to accurately speak for the municipalities for the costs on their road system.

BILL NO: CSSSHB 27(HESS)

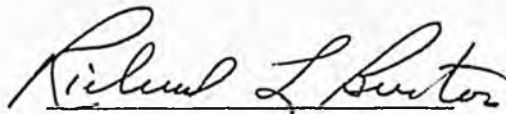
DATE: 3/07/91

TITLE: "An Act relating to . . .  
drug free School zones . . ."

CONTACT: Gayle A. Horetski  
Deputy Commissioner  
465-4322

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The Department of Public Safety supports CSSSHB 27(HESS), which amends present criminal laws regarding possession of controlled substances and imitation controlled substances. The bill establishes a "drug-free zone" on or near school grounds or on a school bus. This is one more tool that will be used by law enforcement officers attempting to prevent youngsters from being exposed to illicit drugs.



Richard L. Burton  
Commissioner

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HB

29

# HOUSE COMMITTEE REPORT

(9)

Date Referred: February 19, 1991

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 5/17/91

The RESOURCES Committee considered:

SSHB 29

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 29 SUITS TO ENFORCE ENVIRONMENTAL LAWS

"An Act authorizing suits to enforce environmental laws; and having the effect of amending Rules 24 and 82 of the Alaska Rules of Civil Procedure."

**RECOMMENDATIONS:**

be replaced with CS SSB 29 (RES)  the same title  
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S):

(Dept)

APPROVES PREVIOUS:

(Dept/Date)

fiscal impact Dept. of Law

fiscal note(s) \_\_\_\_\_

zero fiscal note \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

	Check appropriate column:	Do Not Pass	No Rec	Amend
<u>Cliff Davidson</u> DAVIDSON	<u>[Signature]</u> ZUAW	<input checked="" type="checkbox"/>		
<u>[Signature]</u> FINKELSTEIN				
<u>[Signature]</u> MOBER	<u>[Signature]</u> CAENEY	<input checked="" type="checkbox"/>		
	<u>[Signature]</u> LEMAN			<input checked="" type="checkbox"/>
	<u>[Signature]</u> ZAWACK	<input checked="" type="checkbox"/>		
	<u>[Signature]</u> LINCOLN			<input checked="" type="checkbox"/>

[Signature]  
Chairman's Signature

FISCAL NOTE

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

BILL NO. HB 29

Revision Date: \_\_\_\_\_ Department Affected: Department of Law  
 Title: "An Act authorizing suits to enforce environmental laws..." BRU: Legal Services  
 Component: Operations  
 Sponsor: Representative Koponen  
 Requestor: Governor's Office/OMB COMPONENT SERIAL NO. 

		9	3
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	****	****	****	****	****	****
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

POSITIONS:

FULL-TIME	****	****	****	****	****	****
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Date: May 9, 1991  
 Approved by Commissioner: Charles E. Cole, Attorney General  
 Agency: Department of Law Date: May 9, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29

This bill amends the state's environmental conservation laws (Title 46) to provide that a private party or person may bring a law suit against a person (including the state) alleged to be in violation of a law, regulation, permit, plan, or order established under the state's general statute governing air, water, energy, and environmental conservation (AS 46.03); the state's specific statute governing oil and hazardous substance control (AS 46.04); and the state's specific statute governing hazardous substance release control (AS 46.09).

The bill would also authorize a person to bring a law suit against the commissioner of the Department of Environmental Conservation, where a failure of the commissioner to perform a nondiscretionary act or duty specified under AS 46.03, AS 46.04, or AS 46.09 is alleged. The bill specifies that the decision or duty of the commissioner to bring an enforcement action against a person alleged to be in violation of a law, regulation, permit, plan, or order established under the foregoing statutes is a discretionary act or duty.

A person would not be permitted to file a law suit under these provisions until sixty days after the person has given notice of the violation to the person alleged to be violation, or if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding to require compliance. A person filing a civil action against the commissioner would also have to give sixty days prior notice to the commissioner before such an action could be filed. The sixty day notice provisions would not apply if the violation involved a hazardous waste under AS 46.03.900, a hazardous substance under AS 46.03.826 or AS 46.09.900, or a hazardous air pollutant under 42 U.S.C. 7412. In such an event, a civil action could be filed immediately after giving notice to the person alleged to be in violation.

Although these provisions would seem to preclude a person from bringing an action, if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding, the bill adds a new subsection to AS 46.03.870, (i), giving a person thus precluded the right to intervene in an action or proceeding brought by the commissioner.

Finally, the bill has the effect of changing Alaska Rule of Civil Procedure 24 by limiting the court's control over intervention of parties, and it has the effect of changing Alaska Rule of Civil Procedure 82 by revising the standards for award of attorney fees and costs. In this latter regard, the bill provides that a court may award the costs of litigation, including reasonable attorney and expert witness fees to a substantially prevailing plaintiff, or to a defendant if the court finds that the plaintiff's action was wholly frivolous.

In sum, all of these provisions will have a dramatic and far-reaching impact on how the state's environmental laws are enforced and who will do the enforcement. In effect, nearly any person or entity could assume the duties of the attorney general to enforce state environmental laws. The state would become a defendant in actions brought under the bill in respect to the construction, maintenance and operations of its transportation and all other public facilities.

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29

The nondiscretionary duties of the Department of Environmental Conservation, particularly those involving permitting processes and state regulation of federally-mandated environmental rules, would be subject to repeated attack in court. Moreover, the state's prosecution of violations would become far more complicated due to the intervention of third-parties. In addition to state government concerns, the bill is so broad that it could even be used by one corporation against another for purely corporate purposes.

The changes to Rule 82 unnecessarily expose the state to the payment of excessive attorney and expert witness fees, and set up the state and other potential defendants as ultimate deep pockets. Requiring that a court find that a plaintiff's action was "wholly" frivolous, before a defendant can be awarded fees and costs, will probably assure that a defendant who prevails in court will never be awarded costs and fees. Under current rules, courts rarely find a plaintiff to be even simply frivolous. It is inconceivable that a court could find a plaintiff to be "wholly" frivolous, whatever the phrase may mean. This requirement will undoubtedly establish an incentive to file law suits, because it totally eliminates any monetary constraints from doing so and, indeed, could provide a subsidy for doing so.

Under these circumstances, it is impossible to predict the amount of legal work, and the consequent cost to the Department of Law, if the bill is approved. It is simply too far-reaching. There will obviously be a high, fiscal impact for the state's legal services. At this stage, we cannot say whether we will need four, six, or even ten additional attorneys, but the cost could easily exceed \$1,000,000 per year. There is also no way to predict or calculate the cost to other state programs, industry, private parties, or the economy as a whole if non-governmental entities are permitted to execute the state's environmental laws, as authorized by the bill.

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Revision Date: March 9, 1992

Department Affected: Department of Law

Title: "An Act authorizing suits to enforce environmental laws."

BRU: Legal Services

Sponsor: Representative Koponen

Component: Operations

Requestor: Office of the Governor

COMPONENT SERIAL 

		9	3
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	45.0	45.0	45.0	45.0	45.0	45.0
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>45.0</b>	<b>45.0</b>	<b>45.0</b>	<b>45.0</b>	<b>45.0</b>	<b>45.0</b>

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	45.0	45.0	45.0	45.0	45.0	45.0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
<b>TOTAL</b>						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

*Richard I. Peques*

Prepared by: Richard I. Peques, Director

Phone: 465-3672

Division: Administrative Services

Date: March 9, 1992

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law

Date: March 9, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis Ofc., & Impacted Agency(ies).

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29 (Judiciary Committee Work Draft)

The House Judiciary Committee Work Draft for HB 29, dated 2/21/92, adopts some, but not all of the changes recommended by the Department of Law for this bill, which authorizes third party intervention in state environmental enforcement actions. Despite these changes, the bill will still have a fiscal impact on the state. The Department of Law's comments, revised to reflect the Work Draft version of the bill, are provided below.

This bill amends the state's environmental conservation laws (Title 46) to provide that a private party or person may bring a law suit against a person (including the state) alleged to be in violation of a law, regulation, permit, plan, or order established under the state's general statutes governing air, water, energy, and environmental conservation (AS 46.03); the state's specific statutes governing oil and hazardous substance control (AS 46.04); and the state's specific statute governing hazardous substance release control (AS 46.09).

The bill would also authorize a person to bring a law suit against the commissioner of the Department of Environmental Conservation, where a failure of the commissioner to perform a nondiscretionary act or duty specified under AS 46.03, AS 46.04, or AS 46.09 is alleged. The bill specifies that the decision or duty of the commissioner to bring an enforcement action against a person alleged to be in violation of a law, regulation, permit, plan, or order established under the foregoing statutes is a discretionary act or duty.

A person would not be permitted to file a law suit under these provisions until sixty days after the person has given notice of the violation to the person alleged to be in violation. In addition, a law suit would not be permitted if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding to require compliance. A person filing a civil action against the commissioner would also have to give sixty days prior notice to the commissioner before such an action could be filed. The sixty day notice provisions would not apply if the violation involved a hazardous waste under AS 46.03.900, a hazardous substance under AS 46.03.826 or AS 46.09.900, or a hazardous air pollutant under 42 U.S.C. 7412. In such an event, a civil action could be filed either 10 days after notice, or immediately after giving notice if the action involved an imminent and substantial endangerment to health or the environment.

Although the bill prohibits a person from bringing an action if the commissioner "has commenced and is diligently prosecuting a civil action or administrative penalty proceeding,"

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29 (Judiciary Committee Work Draft)

in practice this exception would be an extremely narrow one. First, most DEC enforcement actions involve compliance orders by consent (COBCs) or, less frequently, administrative compliance order proceedings. Although both of these actions usually involve some form of administrative adjudication, neither COBC actions nor mandatory compliance order actions fall within the exception currently provided in the bill. Second, the phrase "administrative penalty proceeding" is meaningless under current DEC statutes because DEC does not have administrative penalty authority. The narrow nature of this exception invites third party intrusion into a wide variety of DEC enforcement actions because, under current law, intervention could occur unless the commissioner had gone to the extreme step of bringing a law suit. The department therefore strongly recommends substituting "administrative penalty proceeding" with "administrative adjudication proceeding."

The Work Draft provides some restrictions on the type or amount of relief the court can impose against the state. Although this is an improvement from earlier versions, further improvement is recommended. The bill provides that in an action against the state "the court may issue an injunction or other relief." We recommend that the ending of this phrase be revised to read "other equitable relief." This will give a court the flexibility to order correction of a pollution problem, rather than serve as a device to seek monetary damages. The Work Draft version of this section also states, "Nothing in the section authorizes a court to award damages to a party in an action brought under this section." Although this new language is helpful, we believe that the section would be far clearer with the inclusion of "equitable relief", because nothing in the section prohibits award of monetary damages.

Furthermore, the bill will result in costs and attorney fees awards against the state. In most cases, third parties will be able to recover full reasonable costs and attorney fees against the state because such parties usually qualify as public interest litigants. This status has been broadly defined in Alaska, and our courts have usually been generous in awarding costs and fees to public interest litigants. Hence, the bill will continue to provide an economic incentive for third parties to sue the state. In situations where the non-state violator has limited assets, the incentive to search for an underlying "non-discretionary duty" as a basis for a suit against the state increases.

In sum, these provisions could have a far-reaching impact on how the state's environmental laws are enforced and who will do the enforcement. In effect, a private person or entity could assume the duties of the attorney general to enforce state environmental laws. The nondiscretionary duties of the Department

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29 (Judiciary Committee Work Draft)

of Environmental Conservation, particularly those involving permitting processes and state regulation of federally-mandated environmental rules, would be subject to attack in court. In addition to state government concerns, the bill could be used by one corporation against another for purely corporate purposes.

Over the past several years, the state has paid an average of \$31,964.11 per year in costs and attorney fees in cases where it was a defendant in environmental suits. Because it encourages litigation, we believe that this bill will cause new, additional costs greater than this amount, even if our recommended changes are adopted. This cost estimate is based on the bill causing just one or two additional law suits each year, where the state does not fully prevail. The amount is based upon judgments paid in nine suits which have occurred over the past seven years. This is a very conservative estimate, and the actual cost could easily be much higher. Moreover, some of the time of our department's attorneys, now being spent enforcing the state's environmental laws, will be lost whenever they have to stop to defend the commissioner of environmental conservation against allegations of inaction. Last, we cannot predict the cost to industry, private parties, or government programs if non-governmental entities are permitted to enforce the state's environmental laws. Nonetheless, this could represent a substantial cost to the state's economy on the whole.

FISCAL NOTE

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

BILL NO. CSSSHB 29 (RES)

Revision Date: January 23, 1992 Department Affected: Department of Law  
 Title: "An Act authorizing suits to enforce environmental laws." BRU: Legal Services  
 Component: Operations  
 Sponsor: Representative Koponen  
 Requestor: House Judiciary Committee COMPONENT SERIAL NO. 

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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>

CAPITAL						
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REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	****	****	****	****	****	****
FEDERAL FUNDS						
OTHER FUND SOURCE:						
<b>TOTAL</b>						

POSITIONS:

FULL-TIME	****	****	****	****	****	****
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Date: January 23, 1992  
 Approved by Commissioner: Charles E. Cole, Attorney General  
 Agency: Department of Law Date: January 23, 1992

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No.       CSSSHB 29 (RES)      

The Resources Committee Substitute for SSHB 29 omits a prior provision in the original bill authorizing third party intervention in state environmental enforcement actions. It also omits the prior provision that expressly authorized awards of attorney fees and costs against the state. Despite these changes, however, the bill would still have a significant adverse fiscal impact on the state. The Department of Law's comments, revised to reflect the Resources Committee Substitute, are provided below.

This bill amends the state's environmental conservation laws (Title 46) to provide that a private party or person may bring a law suit against a person (including the state) alleged to be in violation of a law, regulation, permit, plan, or order established under the state's general statutes governing air, water, energy, and environmental conservation (AS 46.03); the state's specific statutes governing oil and hazardous substance control (AS 46.04); and the state's specific statute governing hazardous substance release control (AS 46.09).

The bill would also authorize a person to bring a law suit against the commissioner of the Department of Environmental Conservation, where a failure of the commissioner to perform a nondiscretionary act or duty specified under AS 46.03, AS 46.04, or AS 46.09 is alleged. The bill specifies that the decision or duty of the commissioner to bring an enforcement action against a person alleged to be in violation of a law, regulation, permit, plan, or order established under the foregoing statutes is a discretionary act or duty.

A person would not be permitted to file a law suit under these provisions until sixty days after the person has given notice of the violation to the person alleged to be in violation. In addition, a law suit would not be permitted if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding to require compliance. A person filing a civil action against the commissioner would also have to give sixty days prior notice to the commissioner before such an action could be filed. The sixty day notice provisions would not apply if the violation involved a hazardous waste under AS 46.03.900, a hazardous substance under AS 46.03.826 or AS 46.09.900, or a hazardous air pollutant under 42 U.S.C. 7412. In such an event, a civil action could be filed either 10 days after notice, or immediately after giving notice if the action involved an imminent and substantial endangerment to health or the environment.

Although the bill prohibits a person from bringing an action if the commissioner "has commenced and is diligently

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSSHB 29 (RES)

prosecuting a civil action or administrative penalty proceeding," in practice this exception is an extremely narrow one. First, most DEC enforcement actions involve compliance orders by consent (COBCs) or, less frequently, administrative compliance order proceedings. Neither COBC actions nor mandatory compliance order actions fall within the exception. Second, the phrase "administrative penalty proceeding" is meaningless under current DEC statutes because DEC does not have administrative penalty authority. The narrow nature of this exception invites third party intrusion into a wide variety of DEC enforcement actions. Such intervention has the potential to interfere with DEC's establishment of its enforcement priorities and with the DEC's selection of particular enforcement tools in specific cases.

The present bill's omission of the costs and attorney fees provision will not significantly reduce cost and attorney fees awards against the state. In most cases, third parties will remain able to recover full reasonable costs and attorney fees against the state because such parties qualify as public interest litigants. This status has been broadly defined in Alaska, and our courts have usually been generous in awarding costs and fees to public interest litigants. Hence, even without the cost and attorney fees provision, the bill will continue to provide a strong economic incentive for third parties to sue the state. In situations where the non-state violator has limited assets, the incentive to search for an underlying "non-discretionary duty" as a basis for a suit against the state increases.

Furthermore, the bill appears to place no restrictions on the type or amount of relief the court can impose against the state. The bill provides that in an action against the state "the court may issue an injunction and order other relief." This language could be interpreted as authorization for a court to award damages against the state. Damage awards in environmental cases may be highly speculative and difficult to prove (the dispute over damage amounts encountered in the recent EXXON VALDEZ litigation provides an example). In addition to the actual damage awards, the state can expect to incur the significant legal costs involved in disproving and defending against such alleged damages. Note that the amount of damage awards often hinges upon the sort of fact specific disputes that result in expensive jury trials and in the use of cost-consuming expert witnesses.

The restriction on the use of settlement proceeds seems unclear and may have little practical effect. The restriction does not apply to court-approved settlements. One would expect that in most actions brought under the bill the parties (at least the defendant) would want to have the settlement approved by the court.

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSSHB 29 (RES)

In addition, the restriction allows third parties to use the settlement proceeds to fund attorney fees and costs. Hence, the bill provides both public interest and private law firms with an economic incentive to threaten or file law suits under the bill.

In sum, all of these provisions will have a dramatic and far-reaching impact on how the state's environmental laws are enforced and who will do the enforcement. In effect, nearly any person or entity could assume the duties of the attorney general to enforce state environmental laws. In addition, the state would become a defendant in actions brought under the bill in respect to the construction, maintenance and operations of its transportation and all other public facilities, and many other government activities. The nondiscretionary duties of the Department of Environmental Conservation, particularly those involving permitting processes and state regulation of federally-mandated environmental rules, would be subject to repeated attack in court. In addition to state government concerns, the current version of the bill remains so broad that it could even be used by one corporation against another for purely corporate purposes.

Under these circumstances, it is impossible to predict the amount of legal work, and the consequent cost to the Department of Law, if the bill is approved. It is simply too far-reaching. There will obviously be a high fiscal impact for the state's legal services and for the amount the state may eventually have to pay to public interest litigants. At this stage we cannot say what that cost will be, but it could easily exceed \$1,000,000 per year. There is also no way to predict or calculate the cost to other state programs, industry, private parties, or the economy as a whole if non-governmental entities are permitted to execute the state's environmental laws, as authorized by the bill.

**HOUSE COMMITTEE REPORT**

(7)

Date Referred: May 20, 1991

FURTHER REFERRALS:

Date of Committee Action: 3-13-92

The JUDICIARY Committee considered:

SSHB 29

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 29 SUITS TO ENFORCE ENVIRONMENTAL LAWS

"An Act authorizing suits to enforce environmental laws; and having the effect of amending Rules 24 and 82 of the Alaska Rules of Civil Procedure."

**RECOMMENDATIONS:**

be replaced with CS HB 29 (JUD)  the same title

a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact Law (1123)

fiscal note(s) \_\_\_\_\_

zero fiscal note DEC (1128)

zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>J. Ellis</i>		<i>Max Gumenberg</i>		-	
		<i>Dave Dingle</i>		X	
		<i>Kevin P. Powell</i>			✓

*Dave Dingle*  
 \_\_\_\_\_  
 CHAIRMAN'S SIGNATURE

# Alaska State Legislature

Legislative Research Agency



P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 165-3991  
Fax: (907) 163-3351

March 15, 1991

## MEMORANDUM

TO: Representative Niilo Koponen

FROM: Glenn T. Gray<sup>GTG</sup>  
Legislative Analyst

RE: Litigation Resulting From Citizen Suit Laws in Other States  
Research Request 91.181

You requested information about states with statutes that permit citizen law suits against polluters or against persons that degrade the environment. These laws often include a notification period where the business may respond to the problem before the law suit is initiated. You asked us to contact several different states to find out the number of cases that make it to the notification stage, the number of court cases filed, the number of cases dismissed as frivolous, and the total number of civil cases.

We contacted attorneys general in seven states to inquire about citizen law suit statutes: Connecticut, Florida, Indiana, Michigan, New Jersey, South Dakota, and Wyoming. Statutes from each of these states are attached (Attachment A). Few of the attorneys we contacted were able to provide precise statistics about the number of cases filed using these laws.

### Connecticut

Assistant Attorney General Joe Rubin said that people rarely use the Connecticut statute that authorizes citizen suits about environmental matters. Mr. Rubin said that he did not know why the statute is not used more often, but he speculated that citizens do not use it because the state responds quickly to resolve pollution problems. The law empowers any person to sue another person "for protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction" (CS 22a-16). The Connecticut statute does not require a notification period before a citizen can initiate a suit.

### Florida

Jeff Peters, chief of the Environmental Litigation Section for the Florida Attorney General's Office, stated that citizens may receive injunctive relief against private companies or government agencies by initiating an action against the state. The citizen initiates an action under the premise that a

Representative Koponen  
March 15, 1991  
Page 2

state agency is not properly enforcing state law. After a citizen initiates an action, the state has 30 days to respond. If the state takes no action by the end of the 30 days, the citizen may initiate a law suit against the state. Mr. Peters said that it may be possible to add other parties, such as private companies, to the complaint at that time.

The Florida Environmental Protection Act gives standing to any citizen to initiate a law suit if an activity has "the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resource of the state" (FS 403.412). Officials from the Attorney General's Office or the Department of Environmental Regulation were not able to estimate the number of court cases initiated using the act, but no one thought that it was used often. A bill currently before the Florida State Legislature expands the authority of citizens to initiate law suits (attached).

#### Indiana

According to Chief Counsel Jack Watson of the Indiana Attorney General's Office, between ten and fifteen notices are served each year using the state's citizen law suit provision. Some years a greater number of proceedings are initiated. The statute requires a 90-day waiting period where state agencies attempt to resolve the problem. A citizen may initiate a court action on behalf of the state only if state agencies fail to resolve the problem by the end of the 90-day period. Law suits may be initiated "for the protection of the environment of Indiana from significant pollution, impairment, or destruction" (IC 13-6-1). Most of these actions are resolved administratively without the need to go to court. Mr. Watson said about two or three suits make it to the courts each year, and he did not know of any of cases that have been dismissed as frivolous.

#### Michigan

The Michigan State Legislature passed one of the earliest statutes that permits citizens to initiate law suits against polluters or those who degrade the environment. A provision in the 1970 Michigan Environmental Protection Act (MEPA) gives standing to individuals to sue polluters, but persons named in the suit have 28 days to respond to the complaint. According to Steve Chester, an assistant attorney general, initial predictions that citizens would flood the courts with frivolous cases never materialized. State and local governments initiate most of the cases under this law. During recent years, however, the state often uses more specific laws to stop pollution (e.g., statutes concerning hazardous waste, clean water, air quality, and the state superfund).

Mr. Chester knows of no recent statistics quantifying the number of cases initiated under this statute. The attached 1985 article from the *Environmental Law Quarterly* states that during the first few years after the