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AIDS IN CORRECTIONAL FACILITIES: A NEW FORM OF THE DEATH PENALTY?

I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS), a virus first discovered in the United States in 1981,¹ is a growing medical problem. Despite extensive research,² little is known about AIDS. The public is concerned about its spread because there is no known cure.³ Fear of infection is rampant in correctional facilities,⁴ where many inmates are at a high risk of contracting AIDS.⁵ Prison officials in the United States face serious problems associated with controlling the disease.

This Note suggests that to avoid liability, prison officials should segregate inmates with AIDS and test all incoming inmates. Section II describes the AIDS virus and its spread throughout the United States. Section III examines legal problems in housing inmates with AIDS and describes testing and screening within correctional facilities. Section III also discusses institutional liability arising from a correctional facility's disregard for prisoners' well-being. Finally, section IV advocates

1. T. HAMMETT, *AIDS IN CORRECTIONAL FACILITIES: ISSUES AND OPTIONS* ii (2d ed. 1987).

2. For the 1988 fiscal year, Congress appropriated \$950 million for AIDS research and education. The proposed amount of funds for 1989 is \$1.145 billion, an increase of 20.5% over 1988. *N.Y. Times*, Jan. 5, 1988, at 1, col. 6.

3. Maffucci, *Responding to AIDS in Prisons: The Team Approach*, *CORRECTIONS TODAY*, Dec. 1983, at 68.

4. Rowe, *Death Row: AIDS is Turning a Prison Term into a Potential Death Sentence*, *CALIF. LAW.*, Sept. 1987, at 49. Misinformed prisoners often take extreme measures to protect themselves against AIDS. The most common precautions taken are sterilizing eating utensils, checking body weight, and reporting any illness to the infirmary. *Id.*

5. *L.A. Times*, July 19, 1987, at 1, col. 2. (many prisoners are at a higher risk because they engage in homosexual acts and intravenous drug use, activities which promote the spread of the disease).

the development of uniform procedures for housing and testing to halt the spread of the AIDS virus. Such procedures will protect correctional facilities from possible liability for allowing the spread of AIDS.

II. ACQUIRED IMMUNE DEFICIENCY SYNDROME

Acquired Immune Deficiency Syndrome (AIDS) impairs the body's natural immune system.⁶ Victims of the virus usually develop opportunistic infections:⁷ pneumonia, malignancies such as sarcoma⁸ and lymphoma,⁹ and other opportunistic bacterial, fungal, viral and protozoal infections.¹⁰

A. *What Causes Aids*

There is strong evidence that a retrovirus¹¹ called Human T-cell Lymphotropic Virus Type III (HTLV-III) causes AIDS.¹² This retrovirus infects and destroys T-cells, the white blood cells vital to the immune system.¹³ When these cells are destroyed, the body becomes susceptible to infections and malignancies.¹⁴ Because the AIDS virus incorporates itself into an infected person's genetic material,¹⁵ it is classified as a retrovirus.¹⁶ Thus, the virus may take several years to multiply and manifest itself in an infected individual.¹⁷

6. *Aids in the Law*, ALI-ABA VIDEO L. REV. 586 (1986).

7. Opportunistic infections are infections which would not ordinarily affect an individual with a normal, healthy immune system. Johnson, *AIDS: Acquired Immune Deficiency Syndrome Updated*, ALI-ABA VIDEO L. REV. 605 (1986).

8. A sarcoma is a malignant neoplasm, arising in connective tissue and especially in bone cartilage or striated muscle, that spreads by extension into neighboring tissue or by way of the bloodstream. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2014 (3rd ed. 1986). The rare disease usually occurs in elderly men of Jewish or Italian descent. Johnson, *supra* note 7, at 605.

9. Lymphoma is a malignant tumor of the lymph glands. One type is Hodgkin's disease and the second type is non-Hodgkins lymphoma. J. KUNZ, THE AMERICAN MEDICAL ASSOCIATION FAMILY MEDICAL GUIDE 432 (1982).

10. Johnson, *supra* note 7, at 605.

11. See *infra* text accompanying notes 14-16.

12. Kiel, *AIDS*, CORRECTIONS TODAY, Feb. 1986, at 68.

13. Jaffe, *AIDS Education Need*, CORRECTIONS TODAY, April 1986, at 49.

14. *Id.* See *supra* notes 5-9 and accompanying text.

15. Jaffee, *supra* note 13, at 49.

16. *Id.*

17. *Id.*

B. *Classification and Transmission of Aids*

The medical profession divides AIDS patients into three categories.¹⁸ Someone who tests positive to an HTLV-III serology¹⁹ but shows no signs of the disease is in the first classification.²⁰ These individuals may never develop AIDS symptoms or end-stage AIDS, but may infect others.²¹ The second group contains those with AIDS-related complex (ARC). The National Institute of Health defines a person with ARC as one who has any two of several specified symptoms²² and any two of a number of specified laboratory abnormalities.²³ Individuals with ARC may improve, but will always remain infected.²⁴ Finally, an individual has end-stage AIDS if he is diagnosed as having an opportunistic infection²⁵ or an unusual cancer.²⁶ The Centers for Disease Control (CDC) maintains a long list of infections common to AIDS victims.²⁷

Of those who test positive to HTLV-III serology, ninety percent will be diagnosed as having ARC within five years. At least fifty percent of seropositive individuals and individuals with ARC will develop AIDS.²⁸

18. T. HAMMETT, *supra* note 1, at 4. AIDS is not a single disease, but many reactions to a specific virus. AIDS, ARC, and seropositivity describe the severity of the reaction within a certain individual. *Id.*

19. Someone who is serologically positive shows "positive results on [a] serological examination; [or] . . . a high level of antibody." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1192 (26th ed. 1974).

20. Kiel, *supra* note 12, at 68.

21. Jaffe, *supra* note 13, at 49. Recent evidence suggests that all who test positive eventually develop AIDS.

22. *Id.* Symptoms include swollen lymph nodes, weight loss, and night sweats. *Id.* at 4.

23. *Id.* Abnormalities include depressed helper T-cells and a depressed helper/suppressor ratio. *Id.*

24. *Id.*

25. *See supra* note 7 and accompanying text.

26. The most widely used definition of AIDS, from the Centers for Disease Control (CDC), is: "AIDS is an illness characterized by: I) one or more opportunistic diseases that are at least moderately indicative of underlying cellular immunodeficiency, and II) absence of all known underlying causes of cellular immunodeficiency (other than HTLV-III/LAV infection) and absence of all other causes of reduced resistance." T. HAMMETT, *supra* note 1, at 4.

27. *Id.* The most common malignancies and infections are pneumocystis carinni pneumonia and Kaposi's sarcoma. *Id.*

28. T. HAMMETT, AIDS IN CORRECTIONAL FACILITIES: ISSUES AND OPTIONS 6 (3d ed. 1988).

The AIDS virus is transmitted through direct contact with contaminated blood or body fluids of an infected person,²⁹ most commonly through intimate sexual contact or the exchange of contaminated needles.³⁰ There is no evidence that AIDS is transmitted through casual contact, even to an individual who lives with an AIDS victim over an extended period.³¹

C. *Incidence of Aids*

AIDS was first recognized in the United States in 1981. Since then, more than 70,200 cases have been reported, and an estimated 39,620 people have died from AIDS.³² Ninety-three percent of all reported cases are males, primarily between the ages of 20 and 49.³³ The largest percentage of cases reported, sixty-five percent of all AIDS victims, is in homosexual and bisexual men. Intravenous drug abusers are the second-largest group at risk.³⁴ Statistics indicate that health officials will diagnose more than 270,000 new cases by 1991.³⁵

The number of AIDS victims in correctional institutions is steadily

29. Kiel, *supra* note 12, at 69.

30. AIDS may also be transmitted to a child at birth from an infected mother. T. HAMMETT, *supra* note 1, at 7.

31. Kiel, *supra* note 12, at 50. There is no evidence that AIDS is spread by sneezing, coughing, spitting, handshaking, or by the use of toilet seats, bathtubs, showers, utensils, dishes, or linens. It is also not spread through food prepared by an infected person. *Id.*

32. According to the Centers for Disease Control, 70,208 cases were diagnosed and 39,620 people had died of AIDS as of August 8, 1988. St. Louis Post-Dispatch, Aug. 11, 1988, at 5C, col. 1.

33. *Id.*

34. BREAKDOWN OF CONFIRMED AIDS CASES BY RISK GROUPS

<i>Risk Groups</i>	<i>% of All Cases</i>
Homosexual/bisexual males	66%
Intravenous drug abusers	17%
Homosexual male and IV drug abuser	8%
Transfusion recipients	2%
Hemophiliacs	1%
Heterosexuals with partner in one of above risk groups	4%
Other/unclassified	3%

T. HAMMETT, *supra* note 1, at 3.

35. Margolis, *The Aids Epidemic: Reality Versus Myth*, JUDICATURE, June-July 1988, at 58.

increasing.³⁶ Some 2,000 federal and state inmates have AIDS, according to a recent estimate.³⁷ Correctional facilities on the East Coast hold the highest number of inmates with AIDS,³⁸ while penal institutions in the Midwest have the lowest incidence.³⁹ Although the number of AIDS victims grew more slowly in prisons than in the general population,⁴⁰ prison officials are justifiably concerned. Officials face such questions as where to house AIDS patients and who to test for the AIDS virus.⁴¹ Many legal issues surround possible procedures to slow the spread of AIDS within correctional facilities.⁴²

36. *Number of Prisoners with AIDS Jumps 34% in 6 Months, to 396*, CRIM. JUST. NEWSL., Aug. 1, 1988, at 3.

37. In an October 1987 report, the National Institute of Justice found 1,964 AIDS victims in correctional institutions. *Inmate AIDS Cases Total 1,964, Up 59% in a Year, Survey Finds*, CRIM. JUST. NEWSL., Feb. 1, 1988, at 7.

38. T. HAMMETT, *supra* note 1, at xvii. New York has the nation's highest incidence of AIDS within its prison system and general population. California has the second-highest rate in the general population, but only the fifth-highest number of AIDS sufferers in prisons. Most individuals with AIDS in New York are drug abusers who often commit crimes to support their drug habits. L.A. Times, July 19, 1987, § 1, at 1, col. 4.

39. T. HAMMETT, *supra* note 1, at xvii.

REGIONAL DISTRIBUTION OF TOTAL AIDS CASES IN
STATE PRISON SYSTEMS

<i>Region</i>	<i>Cases</i>	<i>% Of Total</i>
New England	34	4.6%
Mid-Atlantic	531	71.3%
N.E. Central	19	2.6%
W.N. Central	1	0.1%
S. Atlantic	88	11.8%
E.S. Central	5	0.7%
W.S. Central	28	3.8%
Mountain	2	0.3%
Pacific	<u>37</u>	<u>5.0%</u>
TOTAL	745	100.0%

T. HAMMETT, *supra* note 1, at xvii.

40. Between October 1986 and October 1987, AIDS victims increased 59% in prisons and 61% in the general population. Research suggests that the discrepancy exists because inmates started with a higher infection rate. *Inmates AIDS Cases Total 1,964, Up 59% in a Year, Survey Finds*, CRIM. JUST. NEWSL., Feb. 1, 1988, at 7.

41. L.A. Times, July 19, 1987, § 1, at 1, col. 2. Another issue confronting prison officials is whether condoms should be issued to inmates. See generally *Vermont, New York City to Provide Inmates With Condoms*, CRIM. JUST. NEWSL., May 1, 1987, at 4.

42. The remainder of this Note will discuss the legal issues surrounding AIDS in prisons.

III. ISSUES CONFRONTING CORRECTIONAL INSTITUTIONS

A. *Housing Inmates With AIDS*

Segregation of inmates with AIDS⁴³ is a widely debated issue.⁴⁴ Prisoners with AIDS claim that segregation violates their equal protection rights⁴⁵ and constitutes cruel and unusual punishment.⁴⁶ Uninfected inmates support the segregation of AIDS carriers to protect the general prison population and to slow the spread of the disease.⁴⁷ Critics of prison segregation claim that institutions would need costly new facilities to accommodate infected prisoners.⁴⁸ Proponents, however, believe that segregation is the most effective way to contain the disease.⁴⁹

Currently, several alternative housing methods are used in the na-

43. This includes the segregation of individuals who test positive for HLTV-III, those with ARC, and those with end-stage AIDS.

44. A recent survey found that 16% of state and federal prison systems isolate seropositive inmates. An additional 16% isolate inmates with ARC. Another 16% isolate only those with fully developed AIDS, and 27% do not have established guidelines for housing AIDS victims. *L.A. Times*, July 19, 1987, § 1, at 1, col. 2.

45. The equal protection clause of the fourteenth amendment states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

46. The eighth amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

47. *Inmate Says Prisons Favor Segregation of HIV-Positive*, CRIM. JUST. NEWSL., June 1, 1988, at 4. Wilbert Rideau, editor of the prison magazine *The Angolite*, reported that "[j]ust about every inmate that [he] know[s] wants those who test positive to be segregated." Rideau added, "Most prisoners also believe they have a right to be protected from fellow inmates who have AIDS, . . . even if that means that prisoners who test HIV-positive have to be segregated from the general prison population." *Id.*

48. In fiscal 1977, direct current expenditures for adult correctional facilities across the country were more than \$2.4 billion. By 1982, these costs were expected to increase to more than \$4.9 billion. These figures do not represent the total cost of incarcerating adult offenders and exclude capital and administrative costs. J. MULLEN & B. SMITH, *AMERICAN PRISONS AND JAILS, VOLUME III: CONDITIONS AND COSTS OF CONFINEMENT* 115 (1980).

Capital outlays for correctional facilities in 1977 totaled \$415 million. Most capital expenditures are attributable to the construction of new facilities. In 1978 the Federal Bureau of Prisons estimated the construction cost of a 500-bed facility to be \$35,000 per bed. *Id.* at 119.

49. *See infra* notes 121-35 and accompanying text.

tion's correctional facilities.⁵⁰ These alternatives include keeping people with AIDS within the general prison population, returning them to the general prison population during remission of the disease, administrative segregation,⁵¹ hospitalization, and a case-by-case determination of all housing problems.⁵² The four jurisdictions which contain seventy-five percent of all inmates with AIDS⁵³ segregate AIDS patients, but not inmates with ARC or seropositivity.⁵⁴ Many prisons place inmates with end-stage AIDS in medical facilities.⁵⁵ A smaller percentage of prisons place inmates with ARC in hospital facilities, and only eighteen jurisdictions house seropositive inmates in such infirmaries.⁵⁶ In short, prison systems do not have uniform procedures to combat the problem of housing inmates with AIDS.⁵⁷

Many courts agree that the segregation of people with AIDS is a

50. T. HAMMETT, *supra* note 1, at 48.

51. Administrative segregation is not based on medical need; instead, inmates are housed in a separate facility or placed in a separate cell. *Id.*

52. *Id.*

53. These jurisdictions are New York State, New York City, New Jersey, and Florida. *Id.* at 50.

54. *Id.* Coupled with their housing policy, these jurisdictions provide:

- 1) careful evaluation and ongoing monitoring of inmates suspected of having ARC or AIDS;
- 2) no mass screening; and
- 3) extensive staff and inmate educational programs. *Id.*

55. New Jersey uses community medical facilities to house AIDS victims. California and New York keep AIDS inmates in prison infirmaries. *Id.* at 52.

56. *Id.* Jurisdictions which place seropositive inmates in medical facilities include California, Utah, Washington, D.C., and Broward County, Florida. *Id.*

57. HOUSING POLICIES FOR INMATES WITH AIDS, ARC AND HLTIV-III SEROPOSITIVITY: STATE AND FEDERAL SYSTEMS*

Policy	AIDS	ARC	Seropositive
maintain in general population	4%	16%	33%
maintain in general population with special programming	4%	4%	20%
return to general population when remission	2%	8%	0%
case-by-case determination	24%	18%	14%
administrative segregation	20%	18%	10%
hospitalization	53%	35%	10%
segregation (not specified whether medical or nonmedical)	4%	2%	0%

*percentage based on 51 prison systems.

T. Hammett, *supra* note 1, at 49.

justifiable alternative to keeping the infected inmates in the general prison population. In *La Rocca v. Dalsheim*,⁵⁸ an early case addressing this issue, uninfected inmates sought an injunction to prohibit the formation of a centralized AIDS program at the prison.⁵⁹ The New York Supreme Court held not only that the state's centralized segregation plan was reasonable to prevent the spread of AIDS, but also held that the state had an obligation to provide a safe and humane place for its inmates.⁶⁰

Consistent with *La Rocca*, the New York District Court in *Cordero v. Coughlin*⁶¹ held that segregation of inmates with AIDS was valid because it furthered legitimate prison objectives.⁶² The plaintiff, an inmate with AIDS, brought an action under 42 U.S.C. section 1983⁶³ claiming that the prison violated his rights under the first,⁶⁴ eighth,⁶⁵ and fourteenth amendments.⁶⁶ The court denied the prisoner's equal protection challenge, reasoning that prisoners with AIDS are not simi-

58. 120 Misc. 2d 697, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983).

59. *Id.* at 698, 467 N.Y.S.2d at 304. The prisoners were against forming and maintaining a central AIDS facility because many healthy inmates were required to clean up AIDS victims' hospital rooms. The assignment upset many inmates, who feared contracting the virus. *Id.* at 704, 467 N.Y.S.2d at 308.

60. *Id.* at 708, 467 N.Y.S.2d at 311. The court reasoned that the problems of sexual violence, force, and intimidation in prisons made it foreseeable that AIDS would spread absent a segregation policy. The state's obligation to provide a safe and humane place of confinement originates in N.Y. CORRECT. LAW §§ 23(2), 70(2) (Consol. 1987). *Id.* at 707, 467 N.Y.S.2d at 310. See *infra* note 111 for the full text of § 70.

61. 607 F. Supp. 9 (S.D.N.Y. 1984).

62. *Id.* at 10. The state's objectives were to protect AIDS victims from harm caused by other inmates' fear of AIDS and to protect the general prison population from the spread of the disease. *Id.*

63. 42 U.S.C. § 1983 (1982) states in part: "Every person who, under color of any statute, ordinance, regulation, . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." *Id.*

64. The first amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

65. See *supra* note 46 for the text of the eighth amendment.

66. 607 F. Supp. at 10. Plaintiff argued that the state violated his first, eighth, and fourteenth amendment rights by denying him adequate social, recreational, and rehabilitative opportunities. *Id.* See *supra* note 45 for the text of the fourteenth amendment.

larly situated to other prisoners.⁶⁷ Furthermore, the court held that the state did not violate the inmate's eighth amendment right to be free from cruel and unusual punishment. The court reasoned that the eighth amendment guarantees only that prisoners receive adequate clothing and shelter, not that the state house prisoners in a manner most pleasing to them.⁶⁸ Finally, the court denied the prisoner's claim that the state violated his right to privacy, free expression, and free association. The court stated that the plaintiff had limited his first amendment rights as a prisoner and that all inmates are not entitled to identical privileges.⁶⁹

In a more recent case, *Powell v. Department of Corrections*,⁷⁰ the United States District Court for the Northern District of Oklahoma held that segregation of an inmate with AIDS did not violate his first and eighth amendment rights.⁷¹ Similar to *Cordero*, the court held that prevention of the spread of AIDS was a legitimate state objective that justified the decision to segregate the infected inmate.⁷² The court also found that the limitations placed on the prisoner did not violate his first amendment rights.⁷³ The institution met equal protection requirements because all individuals in the same class were treated equally.⁷⁴ Thus, the court held valid the prisoner's segregation from the general prison population.⁷⁵

67. 607 F. Supp. at 10.

68. *Id.* at 11. The court relied on Justice Rehnquist's statement in *Atiyeh v. Capps*, 449 U.S. 1312, 1315 (1981): "I know nothing of the Eighth Amendment which requires that [inmates] be housed in a manner most pleasing to them or considered even by most knowledgeable penal authorities to be likely to avoid psychological confrontations, psychological depression, and the like." *Id.* Prison actions constitute cruel and unusual punishment if officials fail to meet the eighth amendment's "broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

69. 607 F. Supp. at 11.

70. 647 F. Supp. 968 (E.D. Okla. 1986).

71. *Id.* at 971. Plaintiff, who tested positive for the AIDS virus, was segregated from the general prison population. He claimed the prison violated his first and eighth amendment rights by denying him the right to use fully the prison facilities. *Id.* at 969.

72. *Id.* at 970.

73. *Id.* at 971. The court stated that denying a prisoner the right to worship with the general prison population was reasonable. The court found the restriction consistent with the prison's goals of maintaining the health of the general prison population and of protecting the plaintiff from harm. *Id.*

74. *Id.* Consistent with its policy toward all inmates with AIDS, the prison segregated the plaintiff because he had tested positive. *Id.*

75. *Id.* at 971-72.

Despite the consistency of court opinions, inmates have filed many suits challenging the constitutionality of segregation.⁷⁶ State and local prison systems do not have a uniform procedure for housing inmates with AIDS, and until they do, the inmates' suits will continue.⁷⁷

B. *Testing and Screening of Inmates*

Mass screening, which involves testing all inmates for the HLTIV-III virus,⁷⁸ is a highly controversial issue. Proponents of mass screening in correctional facilities believe that it is the first step toward preventing the spread of the disease.⁷⁹ Critics argue that the high cost of testing,⁸⁰ the inability to keep test results confidential,⁸¹ and the unreliability of test results⁸² greatly outweigh the possible benefits of such a program. Another focus of debate is the proper treatment of prisoners who test

76. See, e.g., *Judd v. Packard*, 669 F. Supp. 741 (D. Md. 1987); *Foy v. Owens*, No. 85-6906 (D. Pa. March 19, 1986) (LEXIS, Genfed library, Dist. file). *Muhammad v. Frame*, No. 87-5282 (E.D. Pa. Sept. 11, 1987) (LEXIS, Genfed library, Dist. file). *Jezick v. Frame*, No. 87-5248 (D. Pa. Jan. 8, 1988) (LEXIS, Genfed library, Dist. file).

77. See *infra* notes 142-46 and accompanying text.

78. T. HAMMETT, *supra* note 1, at 33. Several antibody tests can determine whether an individual is infected. The enzyme-linked immunosorbent assay (ELISA) was developed for large-scale screening. The test employs HIV proteins grown in tissue culture. HIV antibodies added to the proteins react by producing a color. Test results are scaled according to the intensity of color detected in the proteins. The stronger the color, the more likely a positive indication of AIDS. *Id.*

The Western Blot assay can confirm ELISA tests. The Western Blot is not standardized and procedures vary. Most often, HIV proteins are made into a gel and transferred to a special paper. When a blood sample is added, the resulting complexes are detected by X-ray. "Hotspots" on X-ray film indicate the presence of the AIDS antibody. Barry, *Screening for HIV Infection: Risks, Benefits, and Burden of Proof*, 14 LAW, MED. & HEALTH CARE 259, 260 (1986).

79. T. Hammett, *supra* note 1, at 33. Proponents believe that mass screening will allow prison officials to provide better medical care, better supervision of infected inmates, and better education on prevention of the disease. *Id.* at 37. Supporters also believe that testing will better inform the public about the true incidence of AIDS in prisons. Currently, the general public perceives prisons as a breeding ground for AIDS. Increased education should correct public misconceptions about AIDS in prisons. *Id.* at 36.

80. The ELISA test costs six to ten dollars per person. If the ELISA test is positive, a second ELISA test is performed, followed by a Western Blot. The average cost of a Western Blot test is \$75. *Id.* at 36.

81. *Id.* at 33. Publicizing test results may increase fear among inmates and undermine the purpose of AIDS education. *Id.* at 36.

82. *Id.* at 35. According to the Centers for Disease Control, the ELISA test has an accuracy rate between 93% and 99%; however, these tests cannot predict who will develop AIDS or ARC. *Id.*

positive.⁸³

State testing procedures vary widely. Only four state prison systems conduct mass screening.⁸⁴ In all other states, prison officials apparently believe that the disadvantages of mass screening outweigh its advantages.⁸⁵ Some states, however, do test on a limited basis.⁸⁶

In June 1987, former United States Attorney General Edwin Meese announced that prison authorities must test all incoming and outgoing federal inmates for AIDS.⁸⁷ Meese saw mass screening as a "reasonable and compassionate approach to this serious health problem."⁸⁸

83. Supporters of mass testing believe that test results will allow officials better to segregate AIDS victims. The federal system transfers and houses male inmates who develop AIDS-related diseases at Springfield, Missouri. Female inmates are sent to Lexington, Kentucky. *Tests Show Few Federal Inmates Have Been Exposed to AIDS Virus*, CRIM. JUST. NEWSL., Sept. 1, 1987, at 4.

84. T. Hammett, *supra* note 1, at 33. Nevada is the only state to test all inmates. Colorado, Iowa, and Missouri test all incoming inmates. Nebraska has postponed the implementation of its policy. *Id.*

85. *Id.* Mass screening is impossible in states such as California and Wisconsin, where laws require inmate consent prior to AIDS testing. *Id.*

86. *Id.* at 38. Different levels include testing to diagnose AIDS or AIDS-related complex, testing on inmate request, screening high risk inmates, and testing in response to specific incidents. *Id.*

HIV SCREENING/TESTING POLICIES FOR INMATES
STATE/FEDERAL PRISON SYTEMS

<i>Policy Category</i>	<i>Number of Prisons</i>
mass screening of all or new inmates	13
screening of risk groups*	16
testing of any inmate on request	25
testing risk-group members on request	27
testing when clinically indicated	37
testing in response to incident	15
testing for epidemiological studies	13
no testing	0
TOTAL	146

*Risk group testing includes testing homosexuals, intravenous drug abusers and prostitutes.

T. HAMMETT, *supra* note 28, at 71.

87. Prisoners were to be tested 30 days prior to discharge. *All Inmates Entering or Leaving Federal Prisons to Get AIDS Test*, CRIM. JUST. NEWSL., June 15, 1987, at 1.

88. *Id.* Meese endorsed mass testing as the most effective way to measure the scope of the AIDS epidemic. Routine testing is intended to give officials an estimate of the number of inmates with AIDS and increase awareness of the problem. *Id.* at 2.

Updated⁸⁹ procedures now test a random five percent of all new inmates,⁹⁰ current prisoners who exhibit promiscuous or predatory behavior are also tested.⁹¹

Prisoners' rights groups have criticized the federal testing procedure. Of primary concern is the former Attorney General's suggestion that inmates who test positive may be denied parole.⁹² To date, such prisoners have not been denied parole, and the United States Parole Commission is looking for alternatives to deal with infected inmates.⁹³

The issue of testing has seldom reached the courts. Prior to the AIDS epidemic, the Court of Appeals for the Second Circuit in *Lareau v. Manson*⁹⁴ held that failure to screen incoming inmates for communicable diseases violated the current prisoners' due process rights.⁹⁵ The court stated that the risk of contracting diseases threatened the well-being of all prisoners.⁹⁶ The court then held that the unjustified failure to test inmates constituted 'punishment' under the due process clause of the fourteenth amendment.⁹⁷ The court required the implementation of screening procedures and the isolation of inmates with communicable diseases,⁹⁸ despite lack of evidence that disease had spread within the prison.⁹⁹

89. The testing program was updated in November 1987. *3% of Federal Inmates Tested Show Exposure to AIDS Virus*, CRIM. JUST. NEWSL., Nov. 2, 1987, at 5.

90. These inmates are to be chosen at random and retested after three months in prison and every six months thereafter. *Id.*

91. Inmates in this group include those with a history of homosexuality or drug abuse. Those who test positive will be placed in single cells and segregated from the general prison population during meals and recreation times. *Id.*

92. *Id.* Alvin J. Bronstein, executive director of the American Civil Liberties Union's National Prison Project, stated that it would be unconstitutional to deny parole because of a positive AIDS test. *Id.* at 2. Prisoners could argue that denial of parole violates substantive due process and equal protection rights.

93. *Tests Show Few Federal Inmates Have Been Exposed to AIDS Virus*, CRIM. JUST. NEWSL., Sept. 1, 1987, at 4. The alternatives include requiring disclosure to wives, fiancés, and sexual partners of paroled inmates. The Commission has discussed possible disclosure to public health agencies. *Id.*

94. 651 F.2d 96 (2d Cir. 1981). Inmates brought a complaint under 42 U.S.C. § 1983 claiming that the prison was overcrowded. They claimed there were inadequacies in health care, sanitation, food, heating, recreation, counseling, and safety. *Id.* at 98.

95. *Id.* at 109. See *supra* note 45 for the text of the fourteenth amendment.

96. 651 F.2d at 109.

97. *Id.*

98. *Id.*

99. *Id.* The court reasoned that the failure to screen incoming inmates creates a

In *La Rocca v. Dalsheim*,¹⁰⁰ an early case related to AIDS testing, the New York Supreme Court denied inmates' requests to screen all incoming and outgoing prisoners.¹⁰¹ The court held that testing was not feasible because there is no known cure for AIDS and no effective way to detect the disease.¹⁰² Until an acceptable AIDS test was developed, the court refused to force the prison facility to screen inmates.¹⁰³

In *Davis v. Stanley*¹⁰⁴ the United States District Court for the Northern District of Alabama held that it was more reasonable to enforce prison rules against homosexual activities and intravenous drug use than to implement an AIDS testing program for incoming inmates.¹⁰⁵ The prisoner in this case, who was housed with an inmate with AIDS, brought an action under 42 U.S.C. section 1983,¹⁰⁶ claiming that the institution negligently failed to test inmates for AIDS.¹⁰⁷ The court dismissed the claim for failure to state a cause of action.¹⁰⁸

threat to all prisoners. When a threat to prisoners' well-being exists, there is no need to present evidence that the disease has spread within the institution. Failure to screen incoming prisoners threatened all inmates; thus all were afforded a remedy under the due process clause. *Id.* The court also stated that the failure to screen was an inadequate medical practice which violated the eighth amendment. The institution's inaction "represent[ed] an omission sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (infliction of unnecessary suffering by failing to treat a prisoner's medical needs violates the eighth amendment); *Smith v. Sullivan*, 553 F.2d 373 (5th Cir. 1977) (allowing inmates with communicable diseases to be housed with other inmates, without adequate medical care, violates prisoners' eighth amendment rights).

100. 120 Misc. 2d 697, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983).

101. *Id.* at 708, 467 N.Y.S.2d at 311.

102. *Id.* At the time, an effective AIDS test did not exist. The only way to detect AIDS was through low lymphocyte counts, but this type of test was inconclusive. The only way to detect AIDS was to wait for the development of symptoms. *Id.*

103. *Id.* The court emphasized that mass testing and isolation were not permitted in the general population. *Id.*

104. Nos. 87-G-1227-W, 87-G-1228-W, (N.D. Ala, Nov. 6, 1987) (LEXIS Genfed Library, Dist. file).

105. *Id.* The court reasoned that because the disease is typically transmitted through sexual contact or shared needles, the prison should enforce its existing prohibition on these activities to minimize the transmission of AIDS. *Id.*

106. See *supra* note 63 for text of 42 U.S.C. § 1983.

107. *Id.* The plaintiff's claim was based on the institution's negligence in failing to test for AIDS. *Id.*

108. *Id.* The Court held that negligence is not a sufficient degree of culpability to uphold a § 1983 cause of action. See *Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986) (section 1983 claim may not be predicated upon mere lack of due care).

C. *Institutional Liability*

Prisoners are guaranteed suitable living quarters and fair treatment while in a correctional facility. The United States Constitution, as well as federal and state statutes, requires prison officials to provide adequate living essentials to inmates.¹⁰⁹ Under 18 U.S.C. section 4042, the Bureau of Prisons must provide suitable living quarters, protection, and discipline to all who have been convicted of a crime.¹¹⁰ Most states have similar statutes providing for the safety of state prisoners.¹¹¹ The first, fifth, eighth, and fourteenth amendments also protect prisoners' rights.¹¹²

Several courts have held prison officials liable for breach of duty in denying prisoners' rights. In *Estelle v. Gamble*,¹¹³ the Supreme Court held prison officials liable under section 1983.¹¹⁴ The Court found the

109. See *infra* notes 110-12 and accompanying text.

110. 18 U.S.C. § 4042 (1982). The statute states in part:
The Bureau of Prisons, under the direction of the Attorney General shall . . .

- (2) provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
- (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
- (4) provide technical assistance to State and local governments in the improvement of their correctional systems.

Id.

111. See N.Y. CORRECT. LAW § 70 (Consol. 1987). This statute states in part:

2. Correctional facilities shall be used for the purpose of providing places of confinement and programs of treatment for persons in the custody of the department. Such use shall be suited, to the greatest extent practicable, to the objective of assisting sentenced persons to live as law abiding citizens. In furtherance of this objective the department may establish and maintain any type of institution or program of treatment, not inconsistent with other provisions of law, but with due regard to:

. . . .

- (b) The right of every person in custody of the department to receive humane treatment; and
- (c) The health and safety of every person in the custody of the department.

Id.

112. Prisoners rely on the fifth amendment to protect their due process rights. The first amendment provides a prisoner's right to freedom of association and privacy. See *supra* note 64 for text of first amendment. The eighth amendment protects a prisoner from cruel and unusual punishment. See *supra* note 46 for text of eighth amendment. The fourteenth amendment protects the prisoner's right to equal treatment under the laws. See *supra* note 45 for text of fourteenth amendment.

113. 429 U.S. 97 (1976).

114. *Id.* at 104. Plaintiff was injured while on a prison work assignment. He

officials had violated the eighth amendment,¹¹⁵ stating that deliberate indifference for a prisoner's illness constituted cruel and unusual punishment.¹¹⁶

The District Court for the Eastern District of Michigan also held prison officials liable in *Redmond v. Baxley*.¹¹⁷ An inmate who was raped while in the prison infirmary brought charges against the prison. The evidence showed that the prison director had sufficient knowledge of possible rape, but failed to take any action to prevent it.¹¹⁸ The court used the 'deliberate indifference' standard set forth in *Estelle* to find that the director's inaction deprived the inmate of his eighth amendment rights.¹¹⁹ Courts in similar cases have imposed liability on correctional institutions.¹²⁰

IV. PRISON GUIDELINES AS A SOLUTION TO AIDS ISSUES

A. *Housing Inmates*

Correctional facilities throughout the United States use a variety of

brought an action under 42 U.S.C. § 1983 claiming that the treatment he received after his injury was inadequate and thus constituted cruel and unusual punishment. *Id.* at 101.

115. *Id.* at 104.

116. *Id.* Later cases define deliberate indifference to mean intentional deprivation or reckless disregard for a prisoner's rights. See *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984) (intentional deprivation or reckless disregard); *Whithers v. Levine*, 615 F.2d 158, 162 (4th Cir. 1980) (intentional deprivation). Although liability may be based on deliberate indifference for a prisoner's rights, a § 1983 claim may not be based on mere negligence. See *Davis v. Stanley*, Nos. 87-G-1227-W, 87-G-1228-W (N.D. Ala. Nov. 6, 1987) (LEXIS, Genfed library, Dist. file); *Leite v. City of Providence*, 463 F. Supp. 585 (D.R.I. 1978); *Penn v. Oliver*, 351 F. Supp. 1292 (E.D. Va. 1972).

117. 475 F. Supp. 1111 (D. Mich. 1979).

118. *Id.* at 1120. Although the director had been informed about the problem of homosexual rape at the prison through several complaints and a report, he failed to take any preventive steps. He did not train nurses, place guards on the infirmary floor, or inform new inmates of possible rape. *Id.* at 1120-21.

119. *Id.* at 1117. The court also held that the failure to protect a prisoner on a single occasion gives rise to a constitutional claim for deprivation of the inmate's civil rights. *Id.*

120. See also *Thomas v. Booker*, 762 F.2d 654 (8th Cir. 1985) (prison officials may be liable even when they do not possess specific knowledge of clear and present danger); *Saunders v. Chatham County Bd. of Comm'rs*, 728 F.2d 1367 (11th Cir. 1984) (officials knew prisoner was violent, did not segregate him, and thus were liable for injuries to other prisoners); *Garrett v. United States*, 501 F. Supp. 337 (N.D. Ga. 1980) (prison officials who negligently caused prisoner's injury held liable under Federal Tort Claims Act).

methods to house people with AIDS.¹²¹ Correctional institutions should select the best of these methods and establish uniform guidelines. Uniform guidelines would substantially slow the spread of AIDS in prisons and reduce potential institutional liability.¹²² A favorable solution is to segregate inmates with end-stage AIDS in a central medical facility and house together seropositive and ARC prisoners.¹²³

This solution is optimal for several reasons. First, completely segregating inmates with end-stage AIDS in medical facilities would improve their chances of receiving adequate medical treatment. Also, this solution reduces the chance of the disease spreading to the general prison population and avoids the added costs of single-celling prisoners.

Critics of single-celling and segregation argue that neither is needed because AIDS is transmitted only through means which are illegal in prison.¹²⁴ Although AIDS is not transmitted through casual contact,¹²⁵ it is transmitted through contaminated blood or body fluids.¹²⁶ Segregating inmates with AIDS would reduce the chance of transmitting contaminated blood.¹²⁷ The federal prison system's policy is to

121. See *supra* notes 51, 54, and 57 and accompanying text for a description of these housing alternatives.

122. The CDC issues nonmandatory uniform guidelines for prisons. These guidelines recommend special housing for AIDS victims only if there are clear medical reasons for segregation. The guidelines are intended primarily to protect the patient, not the general prison population. T. HAMMETT, *supra* note 1, at 51. Although the tenth amendment reserves a state's right to control its prisons, the federal government may intervene when a constitutional violation is present. See Ware, *Federal Intervention in State Prisons*, 19 HOUS. L. REV. 931, 946 (1982). The federal government could impose guidelines to prevent the spread of AIDS in state prisons. See 18 U.S.C. § 4042 (1968) (Bureau of Prisons should provide technical assistance to state and local governments to improve correctional facilities). See *supra* note 110.

123. Prisoners with AIDS would be housed in the same cells within the general prison population. They could occupy a certain section of the general dining facility and use the recreational and shower facilities at times apart from the rest of inmates. The prison would not have to build separate facilities for these prisoners.

124. Homosexual behavior and intravenous drug use are both illegal in prisons. See *supra* notes 104-08 and accompanying text. Critics note that segregation is only effective to the extent that seropositive and ARC inmates are recognized through a mass screening program. See *infra* note 135-41 and accompanying text.

125. See *supra* notes 29-31 and accompanying text.

126. See *supra* notes 104-08 and accompanying text.

127. Many misinformed individuals fear contracting AIDS. This fear often leads to violent behavior threatening the well-being of infected inmates and the spread of the disease to others. T. HAMMETT, *supra* note 1, at 53.

move all inmates with AIDS to one prison.¹²⁸ State prison systems should implement similar procedures to protect inmates.¹²⁹

Other critics argue that single-celling and segregation are too costly. Many institutions do not have adequate housing and must build costly facilities to accommodate inmates with AIDS. These critics believe other methods like educational programs are a better response to the AIDS problem.¹³⁰ Prisons incur substantial costs by completely isolating seropositive, ARC, and end-stage AIDS prisoners.¹³¹ Housing seropositive and ARC inmates in the same cells, however, would substantially reduce costs. Institutions can use existing facilities to avoid construction costs in implementing a segregation plan.¹³² States can designate already existing medical infirmaries as AIDS units for fully developed AIDS cases.¹³³

Some state prisons decide how to deal with AIDS patients on a case-by-case basis. While this method allows flexibility in responding to each inmate's medical needs, the development of uniform housing guidelines would alleviate many problems associated with case-by-case analysis.¹³⁴ Officials may be charged with an equal protection violation for failing to treat similarly situated inmates equally.¹³⁵ A uniform system would provide equal treatment for all inmates with AIDS and would therefore decrease the institution's potential liability under the equal protection clause.

128. See *supra* note 83 and accompanying text. The federal prison system places seropositive inmates in single cells and isolates them from the general prison population during meals and recreation periods. *3% of Federal Inmates Tested Show Exposure to AIDS Virus*, CRIM. JUST. NEWSL., Nov. 2, 1987, at 5.

129. A policy within each state could not be as broad as the federal system's because of the limited number of state prisons. State institutions could segregate AIDS victims in different areas of the same prison or transfer all AIDS victims to an established AIDS unit in one state prison.

130. T. HAMMETT, *supra* note 1, at 51.

131. Many prison facilities are inadequately equipped to segregate completely all inmates, so new facilities would be needed. T. HAMMETT, *supra* note 1, at 51.

132. *Id.*

133. The state could designate either a prison infirmary or a community hospital as the AIDS medical facility.

134. This Note defines a prison that uses case-by-case analysis as one that does not have uniform guidelines for dealing with AIDS victims. New York and Minnesota currently use case-by-case analysis. T. Hammett, *supra* note 1, at 53.

135. See *supra* note 45 for the text of the fourteenth amendment. Under the equal protection clause, AIDS victims may be similarly situated, and AIDS victims who are not treated equally may have a cause of action under 42 U.S.C. § 1983. See *supra* notes 109-20 and accompanying text.

B. *Testing and Screening of Inmates*

A uniform procedure of testing all incoming inmates would be the most accurate means of discovering infected inmates.¹³⁶ It would protect states and the federal government against liability for the spread of AIDS.

Screening incoming inmates is necessary to target prevention measures¹³⁷ and to implement a segregated housing program. Critics argue that mass testing will cause housing problems if a large number of inmates test positive.¹³⁸ The failure to test, however, could result in undiscovered inmates with AIDS contaminating others. If there is a high incidence of seropositive inmates, then correctional facilities should institute programs to contain the disease. Prison officials should not close their eyes to a problem of epidemic proportions.

Critics also argue that mass screening is too costly.¹³⁹ They claim that administering the test and implementing a program to handle seropositive inmates would be an economic burden on correctional facilities. An initial screening test, called an ELISA test, costs six to ten dollars per person,¹⁴⁰ a small expense when human lives are at stake. Educational programs, which should be implemented along with mass testing, could prove to be cost-effective in the long run. Finally, the cost of testing is minimal compared to the potential liability for allowing the disease to spread.¹⁴¹

136. T. HAMMETT, *supra* note 1 at xx. Currently, state testing procedures lack uniformity. Of the four jurisdictions which account for 70% of all inmates with AIDS, none has implemented mass screening. In New York State and New York City, prison officials test no inmates. Florida officials test inmates only when clinically necessary, and New Jersey officials test inmates with clinical indications of the virus and pregnant women believed to be at risk. *Id.*

137. T. Hammett, *supra* note 1, at 37.

138. T. Hammett, *supra* note 1, at 34. John Raba, medical director of Cook County Correctional Facility, stated: "Isolating those persons found to have AIDS would present a logistical nightmare for corrections officials. Already strapped for space, they would be forced to find space to segregate those prisoners." *St. Louis Post-Dispatch*, March 3, 1988, at 3A, col. 5.

139. *See supra* notes 78-99 and accompanying text for a discussion of these arguments.

140. *See supra* note 80 and accompanying text. Although testing is costly, prisons must incur these costs to control the spread of the disease.

141. *See infra* notes 142-46 and accompanying text. One obstacle to uniform testing is the issue of consent. Some states, such as California and Wisconsin, require consent for AIDS testing. *See supra* note 85 and accompanying text.

C. *Institutional Liability*

No inmate has yet filed a suit claiming he contracted AIDS in a correctional facility. Because it takes several years for the manifestation of any symptoms of the virus, it is difficult to link transmission to a specific episode.¹⁴² As AIDS testing becomes more prevalent in prison systems, inmates may be able to trace the transmission of the disease.

Inmates who contract AIDS in prison may bring suit under section 1983, claiming a deprivation of their constitutional rights.¹⁴³ To hold the correctional facility liable the prisoner must prove that he contracted AIDS as a result of behavior that was under the prison's control¹⁴⁴ and that officials acted with 'deliberate indifference' for the prisoner's well-being.¹⁴⁵

Correctional facilities can limit liability by taking precautions to protect all inmates. If a correctional facility segregates those with AIDS, it would be difficult for an inmate to prove that the institution demonstrated reckless disregard for his well-being.¹⁴⁶ Since many correctional institutions are taking affirmative steps to halt the spread of AIDS, courts may hold liable those prisons that do not test inmates. An infected inmate could argue that the prison acted with 'deliberate indifference' for his well-being if it failed to provide some protection from the disease.

V. CONCLUSION

Segregating inmates with AIDS in medical infirmaries and housing seropositive and ARC inmates together provides protection to all inmates. Mass AIDS testing would allow prison officials to develop appropriate housing policies and prevention measures. The federal government should enact nationwide uniform procedures for states in both of these areas. Correctional institutions implementing such uniform policies will take a first step in preventing the further spread of AIDS and will reduce potential institutional liability.

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142. T. HAMMETT, *supra* note 1, at 62.

143. *See supra* note 63 for text of 42 U.S.C. § 1983.

144. T. HAMMETT, *supra* note 1, at 62.

145. *See supra* notes 113-16 and accompanying text.

146. *See supra* notes 113-20 and accompanying text.

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