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At A Glance

This article outlines the legal issues affecting HIV and non-HIV-positive prisoners, a source of significant federal litigation and a matter of serious concern to prisoners, and medical and security correctional administrators alike. Topics covered include:

- health education
- testing for HIV
- housing based on HIV status
- medical care for prisoners with AIDS/HIV
- Rehabilitation Act
- Americans with Disabilities Act

Prison overcrowding and its direct consequences, including increased violence, will become more severe as a direct result of the federal crime bill and its indirect effect on state legislative initiatives. The Correctional Law Project will monitor these and other issues affecting prisoners during 1995.

The Rights of Non-HIV- and HIV-Positive Prisoners

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Prisoners and correctional administrators alike are feeling the deleterious effects of overcrowding. Prisoners are crowded together in living units designed to house far fewer persons, /1/ rehabilitation programs cannot accommodate all the prisoners jammed into correctional facilities, and important social programs in the free community -- such as education -- suffer from the siphoning into corrections a major portion of states' budgets. The issue of overcrowding was addressed in the January 1989 Clearinghouse Review article summarizing prison law developments. /2/ The article noted that "[o]vercrowding of our prisons and jails has escalated from an arcane nuisance to a national disgrace." /3/ The rush to imprison has accelerated since 1989. Overcrowding will become more severe as a direct result of the federal crime bill and its indirect effect on state legislative initiatives. However, the issue of overcrowding will not be revisited in this article. Instead, this article will focus on legal issues affecting HIV-positive and non-HIV-positive prisoners, the source of significant federal litigation and a matter of serious concern to prisoners and medical and security correctional administrators alike. /4/

I. Tensions Between Non-HIV- and HIV-Positive Prisoners

A. Health Education

HIV-positive prisoners have challenged the right of correctional administrators to segregate them from the general population, and non-HIV-positive prisoners have challenged the failure of correctional administrators to segregate HIV-positive prisoners from the general population. The fear of non-HIV-positive prisoners of contracting AIDS from sources other than from specific bodily fluids is based in large part on a lack of understanding of how HIV is transmitted. /5/ That prisoners' irrational fear of contracting AIDS has created much of this litigation argues strongly for correctional administrators to design and implement effective programs of HIV/AIDS health education, including prevention techniques. /6/ Until correctional administrators undertake effective continuing health education programs that actively involve prisoners in high-risk-behavior avoidance, litigation will continue. /7/

To assist correctional administrators design effective health education programs, the Centers for Disease Control and Prevention (CDC)'s AIDS Information Clearinghouse maintains a data base on HIV/AIDS health education materials. /8/ Because of the importance of educating prisoners about HIV/AIDS, CDC requires all health departments seeking grants for health education to include HIV/AIDS education programs for prisoners. /9/

The National Commission on Correctional Health Care (NCCHC) recently conducted three workshops on health education regarding HIV/AIDS at its national conference: (1) Inmate Health Education Programs: Identifying Key Components, (2) Developing Inmate and Staff Health Education Programs in a Time of Decreasing Resources; and (3) The Public Health Challenge of the Prison Community: Health Promotion Through Peer Education. /10/ Other workshops addressed treatment and management programs. /11/ The AIDS in Prison Project of the American Civil Liberties Union's National Prison Project has designed a brochure, entitled AIDS and Prisons: The Facts, and other material to present the facts about AIDS to prisoners and dispel the myths. /12/

With the availability of educational materials, there is no excuse for a correctional system's failure to design and implement an effective program of HIV/AIDS health education for prisoners. /13/ If the correctional system in your state or political subdivision does not offer adequate programs, identify -- or create -- an interested AIDS policymaking group in your area to assist in building a coalition of interested organizations, including but not limited to public health agencies, community treatment providers, ex-inmate groups, and legal services providers, to work with the correctional system in developing an effective education program for prisoners. /14/

Many prisoners have engaged in high-risk behavior, including the shared use of needles for the injection of drugs. Most prisoners will be returned to their communities. A health education program for prisoners on HIV/AIDS can have a significant impact on reducing the spread of HIV/AIDS both in the correctional setting and in the free community. As CDC has stated,

[c]orrectional settings provide a unique opportunity to prevent the spread of HIV through implementation of a variety of education and intervention strategies, as many inmates are at a high risk of HIV infection . . . due to risky behaviors . . . . Education and behavior change must be the primary preventive response to the HIV/AIDS epidemic . . . [until] a vaccine or cure [is found]. /15/

B. Testing for HIV and Housing Based on HIV Status

Tensions between non-HIV-positive prisoners and those who are HIV positive are apparent in recent court decisions regarding mandatory testing for HIV and segregation of HIV-positive prisoners. /16/ Sixteen states and the federal government require mandatory testing of prisoners, but only Alabama and Mississippi currently segregate all HIV-positive prisoners. /17/ The Federal Bureau of Prisons (BOP) subjects prisoners to random mandatory testing at intake and during confinement, and testing is required of all prisoners before their release to the free community. /18/ BOP and 38 states provide for voluntary testing. /19/

The United States Public Health Service recommends mandatory testing of prisoners demonstrating "high-risk" behaviors. /20/ NCCHC opposes mandatory testing and segregation of asymptomatic HIV-positive prisoners. /21/ Instead, NCCHC recommends that voluntary testing be available to all who request it and that prisoners with AIDS be provided "medical isolation for their well-being as determined by the treating physician." /22/

The issues of mandatory testing and segregation of HIV-positive prisoners have generated considerable litigation culminating in conflicting judicial decisions. The Supreme Court has not yet decided a case involving mandatory testing and segregation of HIV-positive prisoners. However, several recent Supreme Court decisions are instructive.

In Wilson v. Seiter, a case challenging conditions of confinement in an Ohio correctional facility, the Supreme Court held that prisoners' complaints that they had been subjected to cruel and unusual punishment must be evaluated to determine whether there were (1) a pervasive risk of harm under existing policies (objective component) and (2) deliberate indifference to that risk by correctional administrators (subjective component). /23/ Only if both the objective and the subjective components are present may correctional administrators be found to have inflicted cruel and unusual punishment on prisoners. /24/

Subsequently, in Helling v. McKinney, a case in which a prisoner asserted a right under the Eighth Amendment to be free of environmental tobacco smoke (ETS), the Supreme Court indicated that deliberate indifference to exposure of prisoners to "a serious communicable disease" could constitute cruel and unusual punishment. /25/ The Court based its determination on the reasoning of Wilson. On remand, the Supreme Court indicated that, in order to prevail, the plaintiff would be required to prove that he has been exposed to high levels of ETS posing a serious risk of harm to his future health and that such risk is so grave it violates contemporary standards of decency (objective component)and that prison officials are deliberately indifferent to the risk. (subjective component). /26/

While Wilson and Helling are applicable to litigation challenging the failure of correctional administrators to implement a policy of mandatory testing and segregation, Turner v. Safley, is applicable to litigation challenging an affirmative policy of mandatory testing and segregation of HIV-positive prisoners. /27/ Under Turner, correctional policies that invade prisoners' constitutional rights must be reasonably related to "legitimate penological interests." /28/

1. Challenges to Mandatory Testing and Segregation Policies

In Harris v. Thigpen, a prisoner sued Alabama correctional administrators for involuntarily testing her and then segregating her from the general population when she tested positive for HIV antibodies. /29/ Other prisoners joined with her seeking class certification. Two non-HIV-positive prisoners then filed a motion to intervene as defendants. The court certified two classes of prisoners: plaintiffs who opposed mandatory testing and segregation policies of the Alabama Department of Corrections (DOC) and the defendant-intervenors who supported those policies. /30/

The court held that DOC's mandatory testing and segregation policies did not unconstitutionally invade the plaintiffs' rights to privacy, due process, and equal protection. /31/ The court agreed that prisoners have some constitutionally protected privacy interest in preventing disclosure of positive HIV status but found that the constitutional rights of prisoners "are necessarily subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and maintain institutional security." /32/ After applying the standard of review enunciated in Turner, the court accepted the rationale of the correctional administrators that the

segregation policy was necessary to reduce the spread of HIV infection and to reduce "the level of violence within the Alabama prison system." /33/ The court was aware of the controversy among public health experts as to the wisdom of mass screening and segregation and recognized Alabama's approach was a "minority position" but held that its mass screening and segregation were not "so remotely connected to the legitimate goals of reducing HIV transmission and violence" as to render those policies arbitrary, irrational, unreasonable, or exaggerated à la Turner. /34/

The Fifth Circuit also held that the mandatory testing for HIV infection and segregation of HIV-positive prisoners in the Mississippi prison system met the Turner standard because these policies serve "a legitimate penological interest." /35/ The court affirmed the dismissal of plaintiffs' claims that these policies violated their constitutional rights to privacy, due process, and equal protection. /36/

In Dunn v. White, the Tenth Circuit held that mandatory testing of Oklahoma prisoners for HIV did not violate prisoners' constitutionally protected privacy interest, which is a limited one. /37/ The court held that the policy of collecting information on HIV infection among prisoners was not so unrelated to the goal of treating and preventing AIDS "as to render the policy arbitrary or irrational." /38/

On the other hand, the Ninth Circuit held that the mandatory testing program of the Nevada state prisons did not meet the Turner standard because the correctional administrators failed to adduce any evidence as to the reason for the testing program or what use would be made of the information. /39/ The court, in reversing summary judgment for the defendant correctional administrators, stated that on remand the defendants "were not required to produce an elaborate analysis of the risk of AIDS in prisons or the benefits of AIDS testing" but merely to show the purpose of the testing and that the results would "further a legitimate penological interest." /40/

In a case arising in a New York county jail, the district court held that the jail's policy of attaching a red sticker to the paperwork, clothing, and other items of prisoners known or suspected of suffering from a contagious or infectious disease, including HIV-positive prisoners, violated both the New York Public Health Law, which requires confidentiality of medical information, and, applying the Turner standard, the jail's policy violated prisoners' constitutionally protected right to privacy. /41/ The district court also held that mandatory segregation of HIV-positive prisoners violated their right under New York law not to have confidential medical information disseminated to nonmedical personnel and their right to privacy protected under the United States Constitution because, à la Turner, the policy was not "reasonably related to legitimate penological interests." /42/

2. Challenges to a Lack of Mandatory Testing and Segregation Policies

Prisoners challenging the lack of mandatory testing and segregation of HIV-positive prisoners ordinarily bring their claims under the Eighth Amendment, which prohibits correctional administrators from inflicting cruel and unusual punishment. In Glick, the Eighth Circuit found that "if [the plaintiff] could show that there is 'a pervasive risk of harm to inmates' of contracting the

AIDS virus and if there is 'a failure of prison officials to reasonably respond to that risk,'" plaintiff would present at least a colorable claim that the correctional officials' failure to require mandatory testing and segregation of HIV-positive prisoners violated their constitutional rights. /43/ However, because the plaintiffs' fears of contamination through means other than the exchange of specific bodily fluids were deemed "unsubstantiated fears unrecognized by the mainstream medical community," the court found that the correctional administrators' decision not to implement mandatory testing and segregation was not unreasonable. /44/ As the court stated, "[i]t is the rare case in which a court . . . should establish medical procedures and guidelines in an area where the medical profession has not yet been able to ascertain what they should be. . . . this case does not present such a situation." /45/

In Myers v. Maryland Division of Corrections, the district court recognized that there are two schools of thought regarding prevention of HIV and AIDS in prison: "mandatory testing and segregation versus voluntary testing and education." /46/ Maryland correctional administrators implemented a policy that provides for "extensive education," voluntary testing on admission and during confinement, and mandatory testing of prisoners found guilty of violating a regulation causing "potential exposure to the HIV virus." /47/ Applying the Wilson two-part test for evaluating prisoners' complaints that they have been subjected to cruel and unusual punishment, the court found that the evidence showed a pervasive risk of harm of becoming infected with HIV, specifically a 1 in 200 chance of being infected during incarceration. /48/ However, the court found that the policy of the correctional officials in dealing with HIV did not manifest deliberate indifference to the risk of infection but rather conformed to community standards established in consultation with experts. /49/ The court found that correctional administrators had made a "reasoned choice between alternative approaches . . . [which] is all that can be expected . . . and [their] decision must be given deference." /50/

In a challenge to the refusal of South Carolina correctional administrators to remove prisoners with AIDS from the general population, the district court cited with approval the administrators' policies regarding HIV and AIDS. /51/ At intake, prisoners are given a blood test for HIV "when medically indicated," that is, homosexual history, drug user, positive tuberculosis test, and those receiving a recent blood transfusion. /52/ According to one defendant, the chief of medicine of the South Carolina Department of Corrections, AIDS is not spread by casual contact and therefore separation of non-HIV- and HIV-positive prisoners is not medically indicated. /53/ Prisoners receive information about "high-risk" behaviors and about how these behaviors violate institutional rules. /54/ The court found that "prisoners who follow the rules are not in significant danger of contracting the disease," and therefore the decision not to implement mandatory testing and segregation of HIV-positive prisoners does not constitute deliberate indifference. /55/

BOP responded to the "AIDS crisis" by implementing a policy of mandatory segregation of HIV-positive prisoners "when there is reliable evidence that the inmate may engage in conduct posing a health risk to another person." /56/ A non-HIV-positive federal prisoner filed a mandamus action against the BOP demanding immediate removal of all prisoners who are HIV positive or have AIDS. /57/ The court, in denying the petition, found that segregation of HIV-positive persons and those with AIDS "is not a remedy available to the general public, and has not been found generally available to prisoners in the courts." /58/ The court also found that BOP's policy "is consistent with the general medical understanding that AIDS is not spread through casual contact." /59/

In several cases, non-HIV-positive prisoners have not asserted a right to mandatory segregation of all HIV-positive prisoners but rather a right not to be celled with an HIV-positive prisoner. Plaintiffs have been unsuccessful in these cases. For example, in Welch v. Sheriff, Lubbock County, Texas, a prisoner initiated litigation against the Lubbock county jail for celling him with a prisoner who might have AIDS. /60/ The court entered summary judgment on behalf of defendants for several reasons, including its finding that medical evidence indicated that the AIDS virus is spread principally through sexual contact and through sharing needles. /61/ The court determined that there was no evidence of sexual contact or shared needles between the plaintiff and his cellmate or any other activity posing a serious risk of transmission. /62/

In Deutsch v. Federal Bureau of Prisons, plaintiff initiated litigation including a Bivens claim seeking significant money damages for celling him with an HIV-positive prisoner. /63/ Once again, the court affirmed the BOP policy of medical screening, counseling, prohibiting high-risk behavior, limiting access to information about HIV test results, and removing HIV-positive prisoners from the general population only when "their conduct may pose a health risk to other inmates." /64/ In Deutsch, the court based its decision to dismiss the action on its finding that the plaintiff had not alleged any facts showing that defendants knew that plaintiff's "cellmate might violate prison rules and engage in high risk behavior, or that they condoned or allowed a violation of these rules." /65/ Unstated by the court is the obverse, which is that if the defendants knew of the cellmate's propensity for high-risk behavior and failed to segregate him or somehow condoned or allowed violations of rules prohibiting high-risk behavior, plaintiff would have satisfied the deliberate-indifference prong of Wilson.

3. Universal Precautions

In preference to mandatory testing and segregation of HIV-positive prisoners, CDC recommends that correctional administrators implement a policy of "universal precautions." /66/ Universal precautions are applicable to all settings, including hospital emergency rooms and schools as well as correctional facilities. Universal precautions treat all persons as infected and requires avoiding unprotected contact with specific bodily fluids, principally blood and semen. /67/ CDC reports that many of the country's correctional systems have implemented a policy of universal precautions. /68/ Obviously, education and training of both staff and prisoners are essential if a policy of universal precautions is to succeed in preventing the spread of HIV infection and AIDS.

According to the correctional administrators' medical expert,. Ford Brewer, in Feigly v. Fulcomer, universal precautions are essential both because it is impossible to separate from the general population all HIV-positive prisoners and because negative antibody screening tests create the illusion of noninfection: antibodies may not develop for months, so that infection control measures, while essential, are not taken. /69/ Dr. Brewer recommended against using HIV status for "housing, security, programming, or treatment decision." /70/ His approach represents the majority view adopted by most correctional administrators.

II. Medical Care for Prisoners with HIV/AIDS

Correctional administrators are required, under Estelle v Gamble, to provide prisoners with medical care for serious illnesses and injuries. /71/ The deliberate indifference of correctional administrators to the serious medical needs of prisoners violates the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. /72/ The requirement arises because a prisoner "must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." /73/ However, prisoners are not entitled to "unqualified access to health care." /74/ Inadvertent failures to provide adequate medical care, including negligent diagnosis and treatment, do not rise to the level of deliberate indifference. /75/

In Harris, the court held that health care for HIV-positive prisoners provided by correctional administrators must meet constitutional minima only. /76/ Correctional administrators are not required to provide "perfect, the best obtainable, or even very good" medical care. /77/ The court found that at worst the complaints of the HIV-positive prisoners that they were receiving inadequate medical and psychiatric care amounted only to "isolated incidences of medical malpractice" /78/ and did not rise to the level of "gross incompetence" manifesting deliberate indifference. /79/ The court did, however, reject the suggestion that state fiscal constraints could justify withholding medical treatment from an HIV-positive prisoner. /80/

As to specific medications for HIV-positive persons, the court in Hawley v. Evans, refused to order correctional administrators to provide AZT to asymptomatic HIV-positive prisoners. /81/ The policy of the correctional administrators of providing AZT only to symptomatic HIV-positive prisoners was found to conform to "currently accepted medical practice," although the International AIDS Conference had confirmed the effectiveness of AZT for asymptomatic patients two months before the court reached its decision. /82/ The court indicated that it was unwilling to involve itself in "the intricacies of modern medicine" or make medical decisions about the use of "experimental" drugs. /83/

In Nolley v. County of Erie, the court stated that "AZT is an absolutely vital medication for HIV[-positive] persons because it is the only medication known to slow the advance of the disease." /84/ Withholding AZT from HIV-positive prisoners, therefore, violated the objective prong of the Wilson standard. However, the court found that the correctional administrators had not violated the subjective prong of the Wilson standard because late or nondelivery of prescribed AZT amounted not to deliberate indifference but only to negligence. /85/

In both Harris and Nolley, the court found only negligence, not culpable deliberate indifference, in the failures of correctional administrators to deliver adequate care. However, the courts did not apply the standard enunciated in Bishop v. Stoneman, to plaintiffs' complaints. /86/ In Bishop, the Second Circuit held that either a series of negligent incidents closely connected in time or a medical care system so wholly inadequate that "suffering would be inevitable" could amount to deliberate indifference. /87/ In future litigation, repeated complaints of inadequate medical care whether by individual prisoners or groups of prisoners should be evaluated to determine if, when considered together, these complaints rise above negligence to the level of deliberate indifference.

Many experts have found that health care for prisoners, particularly the health care provided for HIV-positive prisoners, is "totally inadequate." /88/ Courts as well as correctional administrators struggle to determine what level of health care must be provided. For the courts, the issue is what constitutes "adequate" health care; for prisoners and, one hopes, for the medical providers, the issue is what constitutes "high-quality" care. /89/

III. Rehabilitation Act and Americans with Disabilities Act

Both Section 504 of the Rehabilitation Act /90/ and Title II of the Americans with Disabilities Act of 1990 (ADA) /91/ are implicated when HIV-positive prisoners are prohibited by correctional administrators from participating in programs. These two statutes may well provide for prisoners relief not available under other constitutional or statutory provisions. Section 504 is applicable to federal fund recipients, including state and local correctional systems. Title II of the ADA is applicable to prisoners confined in state and local correctional facilities without regard to the source of funding. /92/

In Farmer v. Moritsugu, the court rejected an HIV-positive plaintiff's claim that he had been denied the equal protection of the law because he was prohibited from working in the prison's food services program by virtue of his HIV status. /93/ The court was aware of the evidence that HIV cannot be transmitted through casual contact with food or persons but acknowledged that many persons remain unconvinced. /94/ The court was persuaded by the defendant correctional administrators' assertion that prisoners, no matter that their fears were unfounded, would engage in disruptive behavior if HIV-positive prisoners were allowed to handle food, causing a serious threat to institutional safety and security. /95/ Plaintiff had made no claim under Section 504 of the Rehabilitation Act. /96/

In Casey v. Lewis, an Arizona Department of Corrections' policy prohibited HIV-positive prisoners from food service jobs. /97/ In this case, unlike Farmer, plaintiff did assert a claim under Section 504. The court first agreed that persons who are HIV positive are handicapped persons to whom Section 504 applies. /98/ The court then reasoned that a significant risk that HIV-positive persons could transmit the virus to others would justify excluding them from jobs for which they were otherwise qualified, but that medical evidence showed no significant risk of transmission of HIV except through sexual contact, shared needles, or perinatal exposure from infected persons. /99/ As a result, the blanket prohibition against assigning HIV-positive prisoners to food service was inconsistent with Section 504. The court put the burden on the defendant correctional administrators to demonstrate that HIV-positive prisoners represented a significant risk of transmission and that they could not reasonably accommodate those prisoners to reduce the risk of transmission to an insignificant level. /100/ Defendants were enjoined from denying food-service jobs to HIV-positive prisoners absent a determination that the prisoners were not "otherwise qualified" to perform the jobs. /101/

However, the Ninth Circuit, which includes Arizona, recently resolved the issue left open in Casey -- whether or not prisoners with HIV were "otherwise qualified" to perform food service jobs. In Gates v. Rowland, the circuit court found that the issue is not the physical impairment of HIV positive prisoners but rather the contagious effect of the HIV virus. /102/ Consequently, the court,

which had earlier decided Chalk, /103/ determined that for purposes of section 504, no differences exist between persons who are HIV positive but asymptomatic and those in whom the HIV virus has developed into AIDS. /104/

While the Gates correctional administrators and plaintiffs' witnesses agreed that the risk of HIV positive food handlers infecting others was slight, the correctional administrators claimed that the threat perceived by non-HIV positive prisoners could lead to violence or riots. /105/ Plaintiffs, on the other hand, maintained that education about HIV transmission would remove the perceived risk. /106/ However, the court was persuaded by the correctional administrators' concern that "many members of the general prison population are not necessarily motivated by rational thought and frequently have irrational suspicions or phobias that education will not modify." /107/ Applying the Turner standard, /108/ the court held that denying HIV positive prisoners food service jobs was reasonably based on legitimate penological concerns. /109/

Title II of the ADA also protects prisoners from discrimination on the basis of disability. /110/ The remedies, procedures, and rights of Section 504 of the Rehabilitation Act are the remedies, procedures, and rights of Title II of the ADA. /111/ Under Title II of the ADA, a prisoner who is a "qualified individual with a disability" may not be denied or excluded from services, programs, or activities. /112/ The determination whether one is a "qualified individual" must be made prior to any consideration of whether modification of rules, policies, or practices or environmental barriers or the provision of auxiliary aids are necessary to accommodate the individual. /113/

Complaints of discrimination under the ADA must be filed within 180 days from the date of the alleged discrimination. /114/ Administrative complaints should be filed with the U.S. Department of Justice. /115/ Attorney fees are available to the prevailing party in administrative as well as in judicial proceedings under the ADA. /116/

Asymptomatic HIV-positive status is a disability within the meaning of the ADA. /117/ Therefore, HIV-positive prisoners are entitled to the protections of the ADA. The ADA requires that a determination be made whether an HIV-positive prisoner is "qualified" for a service or program. If the prisoner is "qualified," then correctional administrators must make reasonable modifications to prevent discrimination against the disabled prisoner unless they can show that "making the modifications would fundamentally alter the nature of the service, program, or activity." /118/ The ADA should serve as a powerful tool to protect HIV-positive prisoners from being routinely excluded from prison programs.

IV. Conclusion

HIV/AIDS will continue to create issues and concerns for prisoners and medical and security correctional administrators alike. Most experts agree that HIV-positive prisoners should be integrated into the general population and their HIV status kept confidential. Treatment should be as state-of-the-art as is available to persons in the free community regardless of the Constitution's tolerance for a lesser standard of care. If correctional systems discriminate against HIV-positive prisoners, a variety of legal strategies can remedy the discrimination.

Footnotes

/1/ The horrific health consequences of this overcrowding are of great concern to the medical profession. See, e.g., Charles W. Hoge et al., An Epidemic of Pneumococcal Disease in an Overcrowded, Inadequately Ventilated Jail, 10 New Eng. J. Med. 643 (1994).

/2/ Ruthanne DeWolfe, Our Jails Runneth Over: Prison Law 1988, 22 Clearinghouse Rev. 994 -- 1004 (Jan. 1989).

/3/ Id. at 995.

/4/ This article will review only federal litigation due to time and space limitations.

/5/ See, e.g., Theodore M. Hammett et al., 1992 Update: HIV/AIDS in Correctional Facilities 31 (Jan. 1994) [hereinafter HIV/AIDS in Correctional Facilities].

/6/ See id.; Glick v. Henderson, 855 F.2d 536, 539 -- 40 (8th Cir. 1988) (fear of contracting AIDS through sweat, mosquito bites, food, and cell furnishings "are unsubstantiated fears unrecognized by the mainstream medical community").

/7/ A state-of-the-art education program to halt the spread of HIV among prisoners, virtually all of whom will return to the free community, is, of course, the principal reason for such a program.

/8/ To order a copy of the data base, contact the AIDS Information Clearinghouse at (800) 458-5231.

/9/ HIV/AIDS in Correctional Facilities, supra note 5, at 32.

/10/ National Conference on Correctional Health Care to Address HIV/AIDS and Inmate Health Education, 8 CorrectCare 5 (Aug. 1994).

/11/ Id. Information on ordering relevant materials from the conference may be obtained by contacting the National Commission on Correctional Health Care (NCCHC), 2105 N. Southport Ave., Chicago, IL 60614.

/12/ These materials are available from the National Prison Project, 1875 Connecticut Ave NW, Suite 410, Washington, D.C. 20009. The National Prison Project also distributes an educational pamphlet for inmates and officers entitled TB & Prisons: The Facts.

/13/ In developing an HIV/AIDS health education program, attention must be paid to content, timing, and providers. Peer education must be included. Peer educators are both content effective and cost effective. HIV/AIDS in Correctional Facilities, supra note 5, at 38.

/14/ In Illinois, the AIDS Foundation of Chicago is taking a leadership role in bringing concerned organizations together toward the goal of improving HIV/AIDS health education services in the Illinois, Cook County, and federal correctional systems located in Illinois.

/15/ HIV/AIDS in Correctional Facilities, supra note 5, at 31. Prevention strategies, including condom distribution to prisoners, are not uniform across correctional systems. Because the sexual liaison of prisoners violates institutional rules, most correctional administrators refuse to make condoms available to prisoners, albeit condoms are effective in preventing the transmission of HIV. The NCCHC position statement provides: "[W]hile the Commission clearly does not condone illegal activity by inmates, the terminal absoluteness of this disease[,] coupled with the potential for catastrophic epidemic, require[s] (consistent with security) the unorthodox conduct of making available to inmates whatever appropriate protective devices can reduce the risk of contagion." NCCHC, Position Statement Regarding the Administrative Management of HIV in Corrections 3 [hereinafter NCHHC Position Statement], as amended Sept. 25, 1994. Only six correctional systems in the United States make condoms available: Mississippi, Vermont, New York City, San Francisco, Philadelphia, and the District of Columbia Jail. HIV/AIDS in Correctional Facilities, supra note 5, at 46. Condoms are also available in Canadian prisons. Id. The John Howard Association has concluded that policies about condom distribution in correctional facilities should be made by medical and not security staff. John Howard Association, Policy Statements 6 (May 1993). No correctional system provides prisoners with clean needles. HIV/AIDS in Correctional Facilities, supra note 5, at 47.

/16/ In Diaz v. Romer, 961 F.2d 1508 (10th Cir. 1992), which is part of the ongoing Ramos v. Lamm litigation (485 F.Supp. 122 (D. Colo. 1979), aff'd in part and set aside in part, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)), the district court certified two subclasses of plaintiffs in 1989: HIV-positive and non-HIV-positive prisoners. The court took this action a decade after certifying the original plaintiff class in recognition of potential conflicts between plaintiffs based on HIV status in their response to a proposed policy of mandatory testing and mandatory segregation of HIV-positive prisoners. Ultimately, the district court refused to approve the proposed policy because "it was not fair to all prisoners." Id.

/17/ HIV/AIDS in Correctional Facilities, supra note 5, at 49, 59.

/18/ 28 CFR Sec. 549.16 (a) (1), (2), (c).

/19/ HIV/AIDS in Correctional Facilities, supra note 5, at 51 -- 52. E.g., Illinois provides for prerelease testing of prisoners with documented histories of drug use, but only with the prisoner's consent. If prisoners are tested, the Illinois Department of Corrections (IDOC) must provide posttest counseling. However, IDOC is not required to provide either testing or counseling if the General Assembly fails to appropriate the funds necessary to cover fully the costs of the program. 730 ILCS 5/3-6-2 (i) (1994). Kentucky's policy of testing on request only those prisoners "with a strong likelihood of [HIV] infection" was upheld in Doe v. Wigginton, 21 F.3d 733, 738 (6th Cir. 1994).

/20/ HIV/AIDS in Correctional Facilities, supra note 5, at 51.

/21/ NCCHC Position Statement, supra note 15, at 1 -- 2.

/22/ Id.

/23/ Wilson v. Seiter, 501 U.S. 294, 298 (1991). In Farmer v. Brennan, 114 S. Ct. 1970 (1994), the Supreme Court extended Wilson to Eighth Amendment cases challenging the failure of prison administrators to protect prisoners from harm inflicted by other prisoners.

/24/ Id.

/25/ Helling v. McKinney, 113 S. Ct. 2475, 2480 (1993).

/26/ Id. at 2482. It seems unlikely that failure to implement a policy of mandatory testing and segregation of HIV-positive prisoners would be found to be "contrary to current standards of decency." Helling, 113 S. Ct. at 2482. Most experts oppose mandatory testing and segregation of HIV-positive prisoners, including the NCCHC (NCCHC Position Statement) and the World Health Organization (Global Programme on AIDS, World Health Organization, WHO Guidelines on HIV Infection and AIDS in Prisons, Mar. 1993, cited in HIV/AIDS in Correctional Facilities, supra note 5, at xi). Furthermore, in Farmer, the Supreme Court determined that prison administrators who respond "reasonably" to a substantial known risk of harm inflicted by prisoners on other prisoners will not be found liable under the Eighth Amendment "even if the harm ultimately was not averted." Farmer, 114 S. Ct. at 1982 -- 83. A decision not to implement a program of mandatory testing and segregation of HIV-positive prisoners would not be found "unreasonable" given the virtually unanimous opinion of experts who oppose such programs. However, failure to implement an educational program and universal precautions might well be found an unreasonable response to a known risk of harm.

/27/ Turner v. Safley, 482 U.S. 78 (1987).

/28/ Id. at 89.

/29/ Harris v. Thigpen, 941 F.2d 1495, 1512 (11th Cir. 1991).

/30/ Id. at 1500.

/31/ Id. In Doe, 21 F.3d at 740, the Sixth Circuit rejected plaintiff's claim that a security staff member violated plaintiff's constitutional right to privacy by looking in plaintiff's medical file and discovering that plaintiff was HIV positive. The court declined to infer a constitutional right to privacy protecting against such a disclosure of information because no right to privacy is specifically expressed in the constitution.

/32/ Harris, 941 F.2d at 1513 -- 14.

/33/ Id. at 1516. The Alabama correctional administrators testified that release of HIV-positive prisoners into the general population would result in violence against these prisoners by both non-HIV-positive prisoners and guards. Id. at 1518. Since the Alabama policy of mandatory testing and

mandatory segregation of HIV-infected prisoners was a minority position (only Mississippi also has a mandatory testing and segregation policy), one must question the ability of Alabama's correctional administrators to operate that state's prison system: they seem to have admitted that they cannot control the behavior of either the prisoners or the guards.

/34/ Id. at 1517, 1519.

/35/ Moore v. Mabus, 976 F.2d 268, 271 (5th Cir. 1992).

/36/ Id.

/37/ Dunn v. White, 880 F.2d 1188, 1194 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990). The prison system did not segregate prisoners identified through the mandatory testing program as HIV positive. Id. at 1196.

/38/ Id. at 1196 (quoting Turner, 482 U.S. at 89 -- 90.).

/39/ Walker v. Sumner, 917 F.2d 382 (9th Cir. 1990).

/40/ Id. at 388.

/41/ Nolley v. County of Erie, 776 F.Supp. 715 (W.D.N.Y. 1991).

/42/ Id. at 734, 736.

/43/ Glick, 855 F.2d at 539 -- 40 (quoting Martin v. White, 742 F.2d 469 (8th Cir. 1984)).

/44/ Id. at 540.

/45/ Id. at 541.

/46/ Myers v. Maryland Division of Corrections, 782 F. Supp. 1095. 1096 (D. Md. 1992) (quoting Harris, 941 F.2d at 1519).

/47/ Id.

/48/ Id. In Goss v. Sullivan, 839 F. Supp. 1532, 1537 (D. Wyo. 1993), the district court applied the Wilson standard and held that plaintiff had failed to adduce facts showing he was at risk of contracting AIDS from "HIV positive inmates, if any, who have stated their intention to infect other inmates." Allegations of a generalized fear of contracting AIDS from allegedly aggressive HIV-positive inmates were insufficient to prevent dismissal of plaintiff's action.

/49/ Id.

/50/ Id. at 1097.

/51/ Portee v. Tollison, 753 F. Supp 184 (D.S.C. 1990), aff'd, 929 F.2d 694 (4th Cir. 1991).

/52/ Id. at 186.

/53/ Id.

/54/ Id.

/55/ Id.

/56/ Muhammad v. United States Bureau of Prisons, 789 F. Supp. 449, 450 (D.D.C. 1992) (quoting BOP Program Statement No. 5214.3, Oct. 2, 1987).

/57/ Id.

/58/ Id.

/59/ Id.

/60/ Welch v. Sheriff, Lubbock County, Tex., 734 F. Supp. 765 (N.D. Tex. 1990).

/61/ Id. at 768.

/62/ Id.

/63/ Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261 (S.D.N.Y. 1990), aff'd, 930 F.2d 909 (2d Cir. 1991). Plaintiff sought $100 billion in compensatory damages as well as punitive damages, treble antitrust damages, and attorney fees. Id. at 264.

/64/ Id. at 267. See also Johnson v. United States, 816 F. Supp. 1519 (N.D. Ala. 1993) (holding that the BOP's housing a prisoner dying of AIDS who did not exhibit high-risk behavior with plaintiff did not subject plaintiff to a high risk of contracting AIDS).

/65/ Deutsch, 737 F. Supp. at 268.

/66/ HIV/AIDS in Correctional Facilities, supra note 5, at 45. NCCHC "supports and recommends strict compliance" with this CDC policy. NCCHC Position Statement, supra note 15, at 2.

/67/ Id. OSHA regulations now require employers to implement universal precautions in the workplace. 29 C.F.R. Sec. 1910.1030 (d)(1) (1993).

/68/ HIV/AIDS in Correctional Facilities, supra note 5, at 46.

/69/ Feigly v. Fulcomer, 720 F. Supp. 475, 479 (M.D. Pa. 1989).

/70/ Id. at 482.

/71/ Estelle v. Gamble, 429 U.S. 97 (1976).

/72/ Id. at 104.

/73/ Id. at 103.

/74/ Hudson v. McMillan, 112 S. Ct. 995, 1000 (1992).

/75/ Estelle, 419 U.S. at 105.

/76/ Harris, 941 F.2d at 1504, 1507.

/77/ Id. at 1510 (quoting Brown v. Beck, 481 F. Supp. 723 (S.D. Ga. 1980)). In reminding the parties that plaintiffs are prisoners as well as patients, the court quoted Chief Justice Rehnquist's aphorism in Atiyeh v. Capps, 449 U.S. 1312 (1981), that "nobody promised [prisoners] a rose garden." Id. at 1511 n.24.

/78/ Id. at 1506.

/79/ Id. at 1509.

/80/ Id.

/81/ Hawley v. Evans, 716 F. Supp. 601 (N.D. Ga. 1989).

/82/ Scott Burris, Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars, 47 U. Miami L. Rev. 291 (1992). Hawley, 716 F. Supp. at 603.

/83/ Hawley, 716 F. Supp. at 603 -- 4. Federal regulations severely limit the use of prisoners in clinical trials to evaluate the effectiveness of experimental medication. 45 C.F.R. Secs. 46.301 -- 46.306.

/84/ Nolley, 776 F. Supp. at 740. NCCHC recommends treating pregnant HIV-positive prisoners with AZT to reduce the likelihood of transmitting "the virus to their newborn." NCCHC Position Statement, supra note 15, at 2.

/85/ Id.

/86/ Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974).

/87/ Id. at 1226.

/88/ HIV/AIDS in Correctional Facilities, supra note 5, at 67.

/89/ See id. Persons who are HIV positive and therefore "immunocompromised" are at serious risk of developing tuberculosis (TB). HHS, TB and the HIV Connection 5 (Sept. 1993). A serious outbreak of multidrug resistant TB is occurring, especially among HIV-positive persons: the mortality rate for those infected with multidrug resistant TB ranges from 72 percent to 89 percent, with death occurring in the range of 4 to 16 weeks. Id. at 11. Treating prisoners with TB and controlling the spread of TB to prisoners and staff are matters of serious concern to medical and security correctional administrators. See, e.g., Barbara A. Nadel, Architectural Group Addresses State's TB Problem, 7 CorrectCare 4 (July 1993); NCCHC Position Statement, supra note 15, at 4.

/90/ Rehabilitation Act, 29 U.S.C. Sec. 794.

/91/ Americans with Disabilities Act of 1990, 42 U.S.C. Secs. 12131 -- 34.

/92/ Id. Sec. 12131.

/93/ Farmer v. Moritsugu, 742 F. Supp. 525 (W.D. Wis. 1990).

/94/ Id. at 527 -- 28.

/95/ Id.

/96/ In Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988), an HIV-positive teacher who had been removed from his teaching position filed for a preliminary injunction under Section 504 to return him to the classroom. The appellate court, in ordering the lower court to issue the injunction restoring him to his teaching position, stated that "there is no evidence of any significant risk to children or others at the school. To allow the court to base its decision on the fear and apprehension of others would frustrate the goals of section 504." Id. at 711.

/97/ Casey v. Lewis, 773 F. Supp. 1365 (D. Ariz. 1991).

/98/ Id. at 1370.

/99/ Id. at 1371.

/100/ Id. at 1372.

/101/ Id.

/102/ Gates v. Rowland, 63 U.S.L.W. 2318 (9th Cir. Nov. 22, 1994).

/103/ Chalk, 840 F.2d at 701.

/104/ Gates, 63 U.S.L.W. at 2318.

/105/ Id. at 2319.

/106/ Id.

/107/ Id. The cynicism of the California correctional administrators about the utility of programs of HIV health education for prisoners defies the experience and recommendations of major professional organizations concerned with prevention of communicable diseases, all of which recommend educational programs for prisoners.

/108/ The court found "the applicable standard for review of the statutory rights of prisoners in a prison setting to be equivalent to the review of constitutional rights in a prison setting, as outlined in Turner v. Safley, 482 U.S. 79 (1987)."

/109/ Gates, 63 U.S.L.W. at 2319. HIV positive prisoners in California prison are eligible for all program assignments that are available to other general population prisoners except for food service worker.

/110/ 42 U.S.C. Sec. 12131.

/111/ Id. Sec. 12133.

/112/ Id. Sec. 12132.

/113/ Id.

/114/ 28 C.F.R. Sec. 35.170 (b).

/115/ Id. Sec. 35.190 (b)(6).

/116/ Id. Sec. 35.175.

/117/ Doe v. Kohn Nast & Graf PC, 63 U.S.L.W. 2105 (Aug. 23, 1994); see also Doe v. District of Columbia, 796 F. Supp. 559, 567 (D.D.C. 1992) (asymptomatic HIV-positive status is a "handicap" under Section 504 of the Rehabilitation Act).

/118/ 28 C.F.R. Sec. 35.130 (b)(7).