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### **Prisoners with HIV/AIDS**

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*This is Part 2 of a two-part article. To read Part 1, click [here](#).*

#### ❖ **Privacy**

Prisoners who are HIV-positive or have full blown AIDS may be subjected to discrimination, ostracism, or even physical violence by other inmates. Additionally, as the disease is often contracted by unprotected homosexual sexual relations, knowledge of a prisoner's HIV/AIDS status may be thought by many to also indicate something about their sexual orientation.

This may be mistaken, of course, as HIV/AIDS can be contracted also via unprotected heterosexual sexual relations with an infected person or the sharing of needles by intravenous drug users. So the question arises whether revealing a prisoner's known HIV/AIDS status without their consent is a violation of their right to privacy. There are a number of aspects to answer that question.

Courts have been split about whether revealing such a status violates a constitutional right to privacy. In [Sherman v. Jones](#), #02-1801, 258 Fed. Supp. 2d 440 (E.D. Va. 2003), a

Virginia prisoner filed a federal civil rights lawsuit seeking damages from a detention deputy sheriff for her action in allegedly revealing his HIV status in the presence of other inmates. He claimed that when he approached her to request receiving a “snack bag,” she responded by stating loudly, “Get away from the desk,” and “I’m not scared of you or your AIDS.”

This loud statement allegedly was overheard by other inmates in the area at the time. The prisoner’s lawsuit claimed that this violated his constitutional right to privacy. A federal trial court disagreed and has dismissed the lawsuit for failure to state a claim on which relief may be granted.

While the U.S. Supreme Court has recognized a constitutional right to privacy, the trial court stated, covering many private decisions involving marriage, procreation, contraception, abortion, child raising, and education, it “significantly” has “carefully avoided creating a broad, fundamental privacy right, noting that the matter of general individual privacy rights is an issue” that should be “left largely to the law of the individual States.”

Consistent with this principle, there was no Supreme Court declaration that an individual’s confidential medical information falls within a constitutionally protected “zone of privacy.”

There is, the trial court found, “no general fundamental constitutional right to privacy in personal medical information.” In addition to the lack of U.S. Supreme Court authority for such a right, the trial judge contended, there also was no prior case law by the U.S. Court of Appeals for the Fourth Circuit finding such a right. (Virginia is governed by the caselaw of Fourth Circuit).

The court cited *Taylor v. Best*, #83-6447, 746 F.2d 220 (4th Cir. 1984) (upholding a requirement that an inmate divulge his medical history, including his family medical history, to a prison psychologist, with any “privacy interest”--not “privacy right” being outweighed by “compelling public interests in assuring the security of prisons and in effective rehabilitation).

A prior trial court decision, *Adams v. Drew*, #2:92cv642, 906 F. Supp. 1050 (E.D. Va. 1995), also held that it did not violate the privacy rights of a pretrial detainee when he and other HIV positive prisoners had to line up for the distribution of AZT medication which is associated with HIV, rejecting the argument that this unnecessarily exposed his HIV positive status to other prisoners.

Finding that no constitutional right had been violated by the deputy's alleged conduct, the court dismissed the lawsuit.

It also commented that it “may well be sensible public policy to provide legal protection to ensure the privacy of medical records,” and noted that there were many state statutes which address issues of patient confidentiality and the privacy of the medical records, as well as the enacted privacy rule of the federal [Health Insurance Portability and Accountability Act of 1996](#) (HIPAA), Pub. L. 104-191, (effective on April 14, 2003), which creates national standards to keep individuals' medical records and other personal health information confidential.

Subsequently, in [Van Higgins v. Miller](#), #1:12-cv-297, 2012 U.S. Dist. Lexis 141448 (W.D.N.C.), the court addressed a prisoner's claim that his rights under HIPAA had been violated because a deputy and other detainees stayed within hearing range during his medical exam, thereby hearing confidential medical information. The court ruled that HIPAA does not provide for a private right of action, so that the prisoner could not pursue his claim.

The nature and scope of protection for the privacy of medical information and records, the court stated, is “more sensibly determined by elected legislators via state or federal statute, rather than by judicial stretching of the constitutional text to reach a subject not explicitly treated in the text.”

### ***Circuit Split***

The 6th, 7th and 8th circuits have said that constitutional privacy protection does not extend to an individual's HIV status. See [Tokar v. Armontrout](#), #95-2476, 97 F.3d 1078 (8th Cir. 1996) (inmates do not have a clearly established constitutional right to privacy in their HIV status), and [Doe v. Wigginton](#), #93-5801, 21 F.3d 733 (6th Cir. 1994) (there is no general constitutional right to nondisclosure of private information). A third federal appeals court commented, in statements not essential to the holding of a case, that it is not at all certain that an inmate had a constitutional right to privacy in his HIV status. See [Anderson v. Romero](#), #94-1251, 722 F.3d 518 (7th Cir. 1995).

- ***The 2nd, 5th and 10th Circuits have reached a contrary conclusion.***

In [Doe v. City of New York](#), #93-7596, 15 F.3d 2264 (2nd Cir. 1994) the court said, “individuals infected with the HIV virus “clearly possess a constitutional right to privacy regarding their condition.”

In [\*A.L.A. v. West Valley City\*](#), #92-4210, 26 F.3d 989 (10th Cir. 1994) the court said, “There is no dispute that confidential medical information is entitled to constitutional privacy protection.”

More recently, in [\*Alfred v. Corr. Corp. of Am.\*](#), #09-30614, 437 Fed. Appx. 281, 2011 U.S. App. Lexis 11658 (Unpub. 5th Cir.), the court held that an HIV-positive Hepatitis-B infected inmate’s claim that the disclosure of his medical records to another prisoner violated his Fourteenth Amendment right to privacy was improperly dismissed as frivolous. The facts alleged were sufficient, if true, to prove that the defendants committed an intentional violation of his constitutional rights or fostered “an atmosphere of disclosure with deliberate indifference.”

It does not violate privacy, of course, to reveal something that is already known or obvious. In [\*Boling v. Dept. of Rehabilitation and Correction\*](#), #2005-09901, 2007 Ohio Misc. Lexis 81 and 82 (Ohio Ct. of Claims), the court concluded that because the plaintiff prisoner had already disclosed his consensual sexual relationship with another inmate, from whom he allegedly contracted an HIV infection, he could not show that prisoner personnel violated his right to privacy by disclosing that relationship to others.

Further, mental health professionals in a sexual offender program did not violate his rights or any promise of confidentiality when they disclosed his relationship to others who had a need to know. He claimed that the other prisoner did not disclose that he was HIV positive. The prisoner also had no claim against correctional officials for having contracted HIV since he consented to the conduct that resulted in it, and concealed it from prison officials.

See also [\*Clark v. Bureau of Prisons\*](#), #03-0859, 407 F. Supp. 2d 127 (D.D.C. 2005), holding that an HIV positive prisoner could not pursue a claim for damages for alleged violation of the Privacy Act, [5 U.S.C. Sec. 552a](#), based on an alleged disclosure of his medical records by a dental hygienist to another inmate, in the absence of a showing that his alleged mistreatment by other prisoners and prison staff members was caused by the disclosure. In this case, there was evidence that other prisoners knew about his HIV status already and that his HIV-positive status could have been discovered by anyone observing the medications he took, which he did not attempt to conceal.

In [\*Melendez v. Strong Memorial Hospital\*](#), 804 N.Y.S.2d 626 (Sup. 2005), the court ruled that a New York prisoner could proceed with his claim that he suffered mental, physical, and emotional harm because a hospital employee informed a correctional officer of his HIV positive status.

A hospital employee had an obligation under state law to inform an officer that unauthorized further disclosure was prohibited, and there was a factual issue as to whether

it was foreseeable that the officer would subsequently disclose the prisoner's HIV status to other non-medical personnel at the correctional facility.

The status of prisoners who test positive for HIV in federal prisons is disclosed to prison staff members for their protection under [28 C.F.R. §549.14](#) (2010).

### ❖ **Discrimination**

Prisoners who are HIV-positive or have AIDS may try to claim that they have been discriminated against on the basis of that status, and that they are disabled because of their medical condition. In [Carter v. Taylor](#), #06-561, 540 F. Supp. 2d 522 (D. Del. 2008), a prisoner with AIDS was found to have adequately alleged that the defendants were deliberately indifferent to his serious medical needs by delaying him from seeing a doctor for months, not permitting him to take his AIDS medications because of his housing assignment, and failing to provide him with medical attention on an occasion that he passed blood, as well as denying him adequate food, which affected his health.

The prisoner failed, however, to establish a viable claim under the Americans with Disabilities Act, since the mere fact that he had AIDS was inadequate, standing alone, to show that he had a disability.

Similarly, in [Lopez v. Beard](#), #08-3699, 333 Fed. Appx. 685, 2009 U.S. App. Lexis 13403 (Unpub. 3rd Cir.), a prisoner failed to show that he had been subjected to disability discrimination and violations of his First, Eighth, and Fourteenth Amendment rights because he has AIDS. While he claimed that his family was denied a contact visit because of his medical condition, that “disparaging” remarks were made about his condition, and that he was otherwise subjected to prejudice, discrimination, and retaliation, he failed to allege sufficient specifics, as opposed to “theories and conclusions” to enable a court to find actionable discrimination.

In [Sain v. Wood](#), #06-3919, 512 F.3d 886 (7th Cir. 2008), a court rejected an HIV-positive detainee's claims that his conditions of confinement violated his rights and that the denial of his requests to be transferred from an old to a new building in the facility constituted deliberate indifference to those conditions. While the detainee claimed that his cell in an older building was hot, had a foul odor, and had bugs and paint chips, a number of reasons were set forth for the denial of the transfer request, including his failure to participate in sex-offender treatment, his HIV-positive status, and his past sexual interactions with other prisoners.

The court ruled that the transfer requests were properly denied, and also that the conditions of the detainee's confinement could not reasonably be found to be serious enough to establish an Eighth Amendment violation.

### ❖ **Protection from Assault**

Some prisoners with HIV/AIDS have alleged that prison officials have failed to adequately protect them against assault by other prisoners. In [Wayne v. Jarvis](#), #97-9152, 197 F.3d 1098 (11th Cir. 1999), a prisoner who was assaulted three times by other inmates after assignment to a medium security housing unit when he stated that he was a bisexual failed to show that county jail had a policy or custom of assigning homosexual, bisexual or HIV-positive prisoners to medium-security unit regardless of their violent propensities.

- Correctional officials should be aware of the possibility that prisoners with HIV/AIDS may be attacked by others, and take adequate measures to prevent such attacks. Discussions about possible liability for failure to take preventative steps are contained in [Civil Liability for Prisoner Assault by Inmates](#), 2007 (5) AELE Mo. L.J. 301 and [Transsexual Prisoners: Protection From Assault](#), 2009 (7) AELE Mo. L. J. 301.

### ❖ **Claims by other Prisoners**

In a small number of cases, other prisoners, presumably not HIV-positive, have filed lawsuits concerning the actions of HIV prisoners towards them and the alleged inaction of prison officials, for example, in reacting to the allegedly threatening behavior engaged in.

In [Nei v. Dooley](#), #03-3261, 372 F.3d 1003 (8th Cir. 2004), for instance, three South Dakota inmates sued their warden and a number of other prison officials, claiming that their Eighth Amendment rights not to be subjected to cruel and unusual punishment were violated by alleged exposure to an HIV-positive prisoner who they said assaulted them and threatened to “infect them.”

This prisoner engaged in behavior, while assigned to clean the prison restrooms, such as urinating on the floor, spitting in the sinks and water fountain, and smearing fecal matter on the floor. The prisoner also allegedly engaged in fights with other prisoners, doing things like spitting in their face, or exposing them to his blood from a cut on his lip.

The plaintiff prisoners allegedly complained about this and one obtained signatures from several inmates to try to initiate a class action lawsuit, and was accused by two of the

defendants of initiating an illegal “petition drive.” Two of the plaintiff prisoners also claimed that two of the defendants retaliated against them for bringing the lawsuit by placing them in segregation and that all three of them were denied access to the prison law library in retaliation. Two of them were placed in segregation two days after the prison received a file stamped copy of their lawsuit.

The trial court declined to grant motions by the defendant prison officials for summary judgment on the basis of qualified immunity. A federal appeals court upheld this result. It found that there were factual issues as to whether the defendant officials knew that the inmate who allegedly attacked other prisoners and fouled up the restrooms was AIDS infected and threatened to infect other inmates, and subsequently failed to respond to this risk in a reasonable manner. There was also a factual issue, the appeals court found, as to whether the defendants, or some of them, improperly retaliated against the plaintiffs for filing their lawsuit.

In [\*Jacob v. Clarke\*](#), #04-2559, 129 Fed. Appx. 326, 2005 U.S. App. Lexis 7093 (8th Cir. 2005), a prisoner who failed to allege any actual injury or pervasive risk of injury was not entitled to an injunction against a prison policy allowing inmates infected with HIV or Hepatitis B or C to work in the prison food services. The inmate had sought to change the policy or to require mental screening of infected inmates to prevent acts of “intentional food contamination,” as well as seeking damages for the cost of purchasing food from the prison canteen since he stopped eating food from the kitchen when the policy was announced.

Prisoners are justifiably concerned about access to health care and to HIV testing in order to know their status and start treatment as soon as possible if necessary. In [\*Picquin-George v. Warden, FCI-Schuylkill\*](#), #06-2850, 200 Fed. Appx. 159, 2006 U.S. App. Lexis 25557 (3rd Cir.), cert. denied, #06-9595, 549 U.S. 1312 (a federal appeals court upheld the rejection of a prisoner’s claim that prison violated his rights by denying his demands that he obtain more extensive HIV testing, including testing of his urine and semen). Blood testing for HIV was the recognized standard, and the failure to test his urine and semen, if it occurred, did not constitute deliberate indifference to the prisoner’s serious medical needs.

### ❖ Some Suggestions

From the case law presented in this two part article, it is clear that the presence of prisoners with HIV/AIDS in jails and prisons results in a number of multifaceted challenges that corrections personnel must cope with. There are a number of competing interests that must be taken into account in developing appropriate policy and procedure, including the

medical and program needs of prisoners who are HIV positive, the interest in slowing the spread of the disease to the non-infected inmate population, and the interest in protecting staff members against infection.

Developing appropriate policy and procedure in this area requires taking into account legal, medical, and practical considerations.

1. From a legal standpoint, both federal and state laws and regulations must be examined on such issues as the privacy of medical information, disability discrimination, and the protection of both prisoners and staff members against assault. Management of jails and prisoners should attempt to be proactive and discuss what can be done to anticipate problem and best balance competing needs.
2. From a policy standpoint, because of a circuit split, corrections management should be wary of relying on case law that does not recognize an inmate's right to HIV status and medical privacy. Internal policies and regulations should provide that protection.
3. From a medical standpoint, HIV testing programs must be carried out, as having information concerning which prisoners are infected is literally a matter of life or death. As better treatment alternatives have developed over time, catching the inception of an HIV infection early and treating it aggressively can make a huge difference both in prolonging life and enhancing the quality of life of those impacted.
4. Education and training programs for staff members are essential. Important topics include how to address possible exposure to blood and other bodily fluids and the need for universal precautions in a variety of situations.
5. While institutional policy understandably must be to discourage and sanction sexual activity between prisoners, the practical reality is that it does occur. Some public health writers have suggested that condoms should be made available in correctional facilities to attempt to stop or slow the spread of this deadly disease. The issue should, in any event, be openly discussed, and conscious choices arrived at. The spread of HIV/AIDS in the prison population can exacerbate the already difficult problem of limited budgets at a time when public spending is generally overstretched.

## ❖ Resources

The following are some useful resources related to the subject of this article.



- [AIDS Related](#). AELE Case Summaries.
- Bureau of Justice Statistics: [HIV In Prisons And Jails](#) (16 publications).
- Federal Bureau of Prisons. [Program Statement 5214.04](#). HIV-Positive Inmates Who Pose Danger to Other, Procedures for Handling (Feb. 4, 1998).
- [HIV Transmission and Prevention in Prisons: Related Resources](#).
- [A Jailhouse Lawyer's Manual. Chapter 26: Infectious Diseases: AIDS, Hepatitis, Tuberculosis and MRSA in Prisons](#). (Columbia Human Rights Law Review. Ninth Edition 2011).
- [Infectious diseases within American prisons](#). Wikipedia article.
- [Prisoners and HIV/AIDS](#). Avert: AVERTing HIV and AIDS.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Civil Liability for Prisoner Assault by Inmates](#), 2007 (5) AELE Mo. L.J. 301.
- [Homosexual or Bisexual Prisoners](#), 2009 (6) AELE Mo. L. J. 301.
- [Transsexual Prisoners: Protection From Assault](#), 2009 (7) AELE Mo. L. J. 301.
- [Transsexual Prisoners: Medical Care Issues](#), 2009 (8) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. [HIV Care in Correctional Settings](#) by Minda Dwyer, Douglas G. Fish, Abigail V. Gallucci, and Sarah J. Walker (January 2011).
2. [AIDS/HIV+ Inmates: A New Standard to House Infected Inmates Based on Objective, Proactive Criteria That Balances The Needs of the Infected Inmate While Protecting Non-Infected Inmate and Prison Staff](#), by Mark Velez, 41 Southwestern Law Review 171-210 (2011).
3. [Access to condoms in U.S. prisons](#), by Megan McLemore, 13 HIV/AIDS Policy and Law Review No. 1, 20-24 (July 2008).
4. HIV/AIDS and Other Infectious Diseases Among Correctional Inmates: Transmission, Burden, and an Appropriate Response, by Theodore M. Hammett, 96 (6) Am J Public Health. 974-978 (Jun. 2006) [Abstract](#).
5. Comment: Liabilities Associated with HIV/AIDS in Jail Settings: Balancing Offender Legal Protections with Concerns for Public Safety, 34 S.U.L. Rev. 1

(2007).

6. The Privacy Standards under the Health Insurance Portability and Accountability Act: A Practical Guide to Promote Order and Avoid Potential Chaos, 106 W. Va. L. Rev. 709 (2004).

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