



**House  
Legislative  
Analysis  
Section**

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**AIDS TESTING: HIGH-RISK CRIMES**

House Bill 4008 as enrolled  
Second Analysis (1-23-89)

**RECEIVED**

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Sponsor: Rep. David Honigman  
House Committee: Public Health  
Senate Committee: Public Policy

Mich. State Law Library

***THE APPARENT PROBLEM:***

Local health departments have the authority to test people arrested and charged with prostitution-related offenses for venereal disease as a means of combating its spread to the general population. Some people have recommended that similar testing should be authorized to prevent the transmission of human immunodeficiency virus (HIV), the virus associated with acquired immune deficiency syndrome (AIDS). While AIDS is not officially classified as a venereal disease, it too is spread by intimate sexual contact (notably, but not only, by homosexual contact), and can be spread from mother to child during pregnancy or birth. It is also commonly spread by the sharing of needles by intravenous drug abusers. People cannot be protected from the AIDS virus by vaccine and there is no known cure for AIDS itself. Prevention of the spread of AIDS depends on identifying those who are carrying the virus and motivating them to change the behavior that leads to its transmission. People arrested for prostitution-related offenses, some sex offenses, and offenses related to the abuse of intravenous drugs fall into categories of individuals with a high risk of being infected with HIV, and it makes sense to provide courts and health departments with a similar kind of authority for recommending counseling and carrying out testing for the AIDS virus that now exists for venereal disease.

***THE CONTENT OF THE BILL:***

The bill would add a new section to the Public Health Code which would:

- require courts to give certain information, and to recommend voluntary counseling, about HIV infection to people arrested and charged with certain sex- and IV drug-related crimes;
- require court-ordered HIV testing and counseling for people convicted of certain sex- and drug-related crimes;
- require that test results to be given to the victims of such crimes (if they consent to be identified for purposes of notification);
- make such test results part of the court record;
- require the court to give a copy of such test results to the Department of Corrections if the defendant were placed in the latter's custody;
- require that defendants found to be HIV infected be referred for medical care, but exempt the referring agency from financial responsibility for such care.

(Note: The bill also would reinstate a section — which would be repealed by Senate Bill 1041 — which presently allows local health departments, at their discretion, to examine people arrested and charged with prostitution-related crimes for venereal disease.)

Voluntary counseling. The bill would require that when someone were arrested and charged with certain crimes at high risk for transmission of HIV, the judge or magistrate

in the case give the defendant certain information on HIV transmission and recommend that the defendant voluntarily get AIDS counseling at a local health department testing and counseling center.

The crimes at high risk for transmission of HIV would include gross indecency, prostitution-related crimes (including prostitution itself, solicitation, running a "house of ill fame," and pandering), criminal sexual conduct, and illegal intravenous drug use. The information on HIV transmission that the judge would be required to give the defendant would be the same as the information (prepared by the Department of Public Health) that county clerks would be required by Senate Bill 1041 (Public Act 491) to give to marriage license applicants.

Mandatory counseling and testing. When someone was convicted of one of these crimes at high risk for transmission of HIV, the court would be required to order the convicted person to be tested for the presence of HIV or an antibody to HIV and to receive counseling (though the court could decide that in the cases of violations of the prostitution-related crimes of "aiding and abetting," keeping a brothel, and pandering, testing was inappropriate). Testing would be done confidentially by a licensed physician or by the state or local health department, and defendants also would be required to get counseling about HIV infection, AIDS, and AIDS-related complex.

Victim notification of test results. With the consent of the victim (or person with whom the defendant had "engaged in sexual penetration" during the course of the crime), the court could give the testing agency the victim's name, address, and telephone number so he or she could be notified of the results of the defendant's HIV test. The testing agency also would be required to refer the victim for appropriate counseling.

Court record of test results. After the defendant was sentenced, test results and any other medical information obtained from the mandatory testing would be made part of the court record, with a copy sent to the Department of Corrections (if the defendant were put in the department's custody). Test results would be confidential, but would have to be given (a) to the defendant, (b) to the local health department, (c) to the Department of Public Health, (d) to the victim (or other person with whom the defendant engaged in sexual penetration), (e) to anyone else, upon written authorization of the defendant, and (f) "as otherwise provided by law." Someone who lawfully disclosed test results would not be civilly or criminally liable for making the disclosure.

Referral for medical care. If a defendant was infected with HIV, the agency providing the counseling or testing would be required to refer the defendant for medical care, but would not be financially responsible for such care.

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**Definitions.** The bill would define "sexual penetration" to mean "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

**Tie-bar.** The bill is tie-barred to four other AIDS bills: House Bill 4103, House Bill 5026, House Bill 5189, and Senate Bill 1041, which deal, respectively, with contact tracing, recalcitrant AIDS carriers, informed consent prior to HIV testing, and responsibility for expense of care.

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## **FISCAL IMPLICATIONS:**

According to the House Fiscal Agency, there would be costs to the state, since the bill would mandate counseling and testing for people convicted of certain crimes, as well as provide for voluntary counseling for those arrested and charged with certain crimes. But at this time these costs are unknown. (11-30-88)

## **ARGUMENTS:**

### **For:**

The bill would mandate the counseling and testing of people with a high risk of being infected with the virus associated with acquired immune deficiency syndrome (AIDS) when they were convicted of violating any of a number of sex-related and intravenous drug-related laws. This parallels the authority available to public health officials now for venereal disease testing. Although AIDS is not officially classified as a venereal disease, it too can be spread by intimate sexual contact, and certainly there is as much justification for protecting the public against the spread of this frightening, new fatal disease as there is for combating the spread of venereal disease.

The bill is narrowly drawn to target high risk groups: the categories of offenses to which the bill applies correspond to certain categories of high-risk individuals. (Among those identified as high-risk by health officials are: homosexual-bisexual men, intravenous drug users, children of infected women, and the heterosexually promiscuous.) Since neither immunization nor cure is available, the control of AIDS requires that high risk people be identified and be made aware of the changes they need to make in their behavior in order to prevent the transmission of the AIDS virus. Testing and education are essential. Yet many high risk people who are infected with the HIV virus do not know it, and some might not respond to general educational efforts encouraging them to be tested.

The bill provides health officials with an opportunity to reach some people in high risk populations. The value of this opportunity to reach intravenous drug abusers is underscored by press accounts that quote a new federal Public Health Service report on AIDS as saying: "intravenous drug abusers serve as the major reservoir for transmission of infection to heterosexual adults and their infants, as well as among themselves."

The bill represents a reasonable approach; it does not aim to harass or intimidate anyone. It does not mandate testing for those arrested and charged with certain high risk crimes, but does encourage them to obtain potentially life-saving counseling. It does mandate both testing and counseling for those convicted of these crimes, but it

preserves the confidentiality of information derived from tests and examinations.

### **Against:**

Testing and counseling people with a high risk of developing AIDS or related conditions or of transmitting HIV (the AIDS virus) is important, but effective education and counseling that motivates those at risk to change their behavior is best done through voluntary programs in clinical settings and not through mandatory efforts in criminal justice settings. Unlike the testing authorized for venereal disease (which is rarely done and is itself considered of little practical value), testing for HIV infection does not lead to treatment or cure, because no treatment or cure exists.

The prevention of the spread of HIV infection depends upon the cooperation of those infected or at risk of being infected, and this cooperation is less likely when testing is carried out in the context of a criminal proceeding. It does no good to force people to learn the results of tests performed on them if nothing can be done to treat or cure the infection, and such coercion might prove counterproductive to AIDS prevention efforts if the fear and mistrust generated by the bill force high-risk individuals underground and makes them unreceptive to public health counseling efforts.

In any case, the testing proposed under the bill would reach only a small proportion of those in high-risk groups, and the resources it would involve could be put to better use as part of large-scale voluntary testing and counseling programs that addressed themselves to the particular needs and interests of the high-risk populations.

**Response:** Surely even if mandatory counseling is not as effective as voluntary counseling, and even if such counseling reaches only a small proportion of people engaging in these high risk, nevertheless the nature of AIDS is so serious that even less than optimal results are well worth while. In the second place, the proposed testing is for public health purposes and not to assist in criminal prosecutions, and there is certainly a compelling state interest in preventing the transmission of HIV infection.

### **Against:**

Although the bill appears to focus impartially on "high risk" crimes, it really is yet another attempt to punish the gay community for "deviant" behavior, as can be seen by the bill's focus on "sexual penetration" (and its provision, included in the penal code's sodomy section, that "emission of semen is not required" for the definition of sexual penetration). If the gay community were not the real target of the bill, then the victim notification section of the bill would not have focused exclusively on people "with whom the defendant engaged in sexual penetration during the course of the crime." Surely the needle-sharing partners of illegal IV drug users are at least as much at risk of being exposed to HIV infection as sexual partners are, and yet the bill does not provide for notification of the needle-sharing partners of defendants convicted of illegal IV drug use. If the bill really was concerned only with lessening the risk of transmission of HIV and not with punishing the gay community it would refer to all people exposed to the risk of HIV infection during a crime, including the needle-sharing partners of people convicted of illegal IV drug use.

**Response:** The bill focuses on one of the major transmission routes for HIV infection, namely, sexual contact involving exchange of bodily fluids. This sexual

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contact obviously can be either homosexual or heterosexual. The bill's reference to sexual penetration in the course of a crime certainly applies to heterosexuals as well as homosexuals, while the list of crimes referred to in the bill include not only gross indecency (between males, between females, and between males and females), it also includes rape and prostitution (including soliciting, aiding and abetting, pandering, and keeping a house of ill-fame) — all of which crimes can be committed by heterosexuals as well as by homosexuals. Also, while it is possible for some innocent person to have been sexually penetrated by someone committing a crime, needle-sharing partners of someone convicted of illegal drug use are themselves likely to be engaging in illegal IV drug use.

### ***Against:***

The bill does not go far enough. Under the bill, the only people required to be tested for HIV infection are those convicted of certain sex- and drug-related crimes, while those merely charged with such crimes only receive some information on AIDS and are told they should get counseling. These people, too, should have to undergo testing, just as people now arrested and charged with prostitution-related offenses now can be tested for venereal disease at the discretion of the local health department. In addition, this would "capture" many people who committed more serious offenses but who plea-bargained their way down to lesser offenses (such as, for example, "disorderly conduct" instead of one of the targeted crimes). People aren't suspected of criminal activity without good reason.

***Response:*** As was noted above, a major difference between testing for VD, which can be treated, and testing for HIV, which cannot, is this very absence of treatment or cure. What is more, under our system of justice, people are innocent until found guilty. Requiring people to undergo HIV testing without having first established that they committed a crime that put them at risk for getting or transmitting HIV infection is an unwarranted intrusion of privacy. Besides, even if people are in fact found to be guilty of certain crimes, this doesn't mean that if they turn out to be HIV-infected they then should be considered to somehow be "guilty" for this devastating infection, however they acquired it.

### ***Against:***

The bill puts a very vulnerable population at great risk of being discriminated against even further because of the great potential for disclosure under the bill's provisions of the identities of HIV-infected people. Given the severity of public backlash against people who have been revealed to be HIV-infected, people convicted of these "high risk" crimes perhaps need to have the confidentiality of their test results protected even more carefully than those of the general population. And yet the potential for unauthorized disclosure is tremendous. Not only will the testing agency staff (physician, local health department, or the Department of Public Health) know when someone has positive test results, so will the court, the local health department and the DPH (if they don't already know because of having administered the test), possibly the Department of Corrections, possibly the victim (if any, and if he or she agrees to be identified for purposes of notification) or other "person with whom the defendant engaged in sexual penetration during the course of the crime," presumably anyone the victim (or "other person") chooses to tell, and anyone who reads the court record.

The bill does not even provide sanctions for someone who violates the confidentiality of test results. While there may be legitimate needs to know when a convicted defendant has tested positive for HIV, the bill falls far short of providing defendants' rights to privacy and may result in more harm than good to the individuals in question. Greater protection for the confidentiality of HIV test results should be required, including possibly closing court hearings and sealing court records in cases requiring mandatory HIV testing.