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AIDS LEGISLATION IN MISSOURI: AN ANALYSIS AND A PROPOSAL

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INTRODUCTION

Recently the Missouri legislature passed and the Governor signed emergency legislation dealing with AIDS issues. The major features of this legislation can be grouped into six categories: 1) HIV testing and the reporting,

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2. “HIV testing” is defined in H.B. 1151 & 1044, § 1(5) as “performing a serological test or tests upon a sample of venous blood to determine the presence of HIV or its antibodies following HIV blood sampling.” “HIV blood sampling” is defined in § 1(4) as “taking or ordering the taking of a sample of venous blood from an individual which is subjected to serological tests for the presence of HIV or its antibodies.”
confidentiality and disclosure of test results; 2) Discrimination against persons infected or believed infected with the AIDS virus; 3) Education; 4) Criminalizing certain conduct which creates a grave and unjustifiable risk of transmitting the AIDS virus to another; 5) Regulating insurers in some regards and exempting them from regulation in others; and 6) Declaring certain locations used for activities which might spread the virus to be nuisances. The purpose of this Article is to analyze this legislation.

I. TESTING

A. Regulation of those authorized to perform HIV tests.

Prior to the passage of this statute, HIV testing was not regulated in Missouri. As a result, various organizations offered “AIDS testing” without any supervision or quality control by the Missouri Department of Health or an other agency or organization. From henceforth, all testing, except that done solely for the purpose of determining one’s eligibility for insurance coverage, must be performed by physicians, hospitals or persons authorized by the Department of Health. To obtain authorization, a person or organization must provide suitable verification to the Department that the testing will be performed in accordance with departmental regulations governing the types of

3. Prior to the AIDS statute, the state did not attempt to regulate AIDS testing. However, all states receiving money from the Centers for Disease Control (“CDC”) were required to give two ELISAs and a back-up Western Blot test before declaring the testee to be HIV positive. Furthermore, public labs were required to adhere to additional quality controls to insure they were matching national standards. This condition applied to most states, including most large cities and CDC’s 63 project areas. Private labs, however, were not. Telephone interview with Tim Quinn, CDC, AIDS Division (Oct. 14, 1988).

4. H.B. 1151 & 1044, § 8.1. “No other section of this act shall apply to any insurer, health services corporation, or health maintenance organization licensed by the division of insurance which conducts HIV testing only for the purposes of assessing a person’s fitness for insurance coverage offered by such insurer, health services corporation, or health maintenance corporation . . . .” Section 8.4 does require that HIV testing done for insurability purposes be done in a laboratory: certified by the U.S. Department of Health and Human Services under the Clinical Laboratory Improvement Act of 1967, permitting testing of specimens obtained in interstate commerce, and which subjects itself to ongoing proficiency testing by the College of American Pathologists, the American Association of Bio Analysts, or an equivalent program approved by the Centers for Disease Control . . . .

Id. This, however, does not require that any particular test or series of tests be performed. Of the tests currently available, the least expensive by far is the ELISA. This is the test used to screen donated blood. It is highly sensitive, i.e., very few samples that are in fact positive for HIV antibodies would escape detection. However, it is much less specific, i.e., it produces a relatively high number of false positives. See infra note 6. A positive test result would likely result in a denial of life or health insurance coverage. Consequently, use of the ELISA test for insurability purposes would result in denial of insurance to a substantial number of people not infected with HIV.
tests performed and the manner in which they are performed. Licensed hospitals are, however, deemed to be in compliance. The Act also mandates continued compliance monitoring.6 This is significant because the quality of the test results is heavily dependent on which tests are performed and how they are performed.6 Whether the regulation required here will ensure high quality test results will have to await actual implementation and the test of time. The President's Commission on HIV Epidemic recommends that a model state laboratory licensing law be developed and adopted by the states.7

In addition, all HIV blood sampling,8 again with the exception of that performed solely for insurance purposes,9 must be accompanied by consultation with the person to be tested prior to being tested and during the reporting of the test results to him.10 The term “consultation” is not defined in the statute. This omission is unfortunate. Thorough counseling is extremely important in view of the serious psychological and public health ramifications of HIV testing, even if the test results are accurate.13 Perhaps the Department of Health will issue regulations or guidelines for these consultations. The

5. Presumably, Department regulations would be such as to minimize inaccuracies in the test results. See infra note 6.
6. Meyer & Pauker, Screening for HIV: Can We Afford the False Positive Rate, NEW ENG. J. MED., July 23, 1987, at 238; see also Okie, Study Faults Labs Accuracy In Testing for AIDS Infection, Washington Post, Oct. 27, 1987, at 25 (“Laboratories testing blood for evidence of AIDS have such a high error rate that in some low-risk groups, nine out of ten positive findings would probably be wrong, a new government analysis [by the Office of Technology Assessment] has found.”).
7. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, recommendation 6-33, at 80 (June 1988) [hereinafter PRESIDENTIAL COMMISSION].
8. H.B. 1151 & 1044, § 1(4) provides that HIV blood sampling is the “taking or ordering the taking of a sample of venous blood from an individual which is subjected to serological tests for the presence of HIV or its antibodies.”
10. H.B. 1151 & 1044, § 2.3.
11. Schultz, AIDS: Public Health and the Criminal Law, 7 ST. LOUIS U. PUB. L. REV. 65, 113 (1988) [hereinafter Schultz]. A positive test result can be devastating to the recipient. Persons who test positive must be presumed to be infectious. See Krim, AIDS, The Challenge to Science and Medicine, 15 HASTINGS CENTER REP. 2, 5 (Supp. Aug 1985). Infectiousness greatly affects potential parenthood and the safety with which one may engage in sexual and other activities. See Schultz, supra, at 81 n.86 and accompanying text. In addition, a substantial percentage of HIV infected persons, perhaps 50% or more, will develop full-blown AIDS, from which no one is known to have recovered. See id. at 68 nn.16-18 and accompanying text. Persons being tested should also be advised of the possibility of inaccurate test results and how to deal with that possibility. See supra note 6. Those tested should also be prepared for the fact that persons who are, or are believed to be, HIV infected may be discriminated against in educational opportunities, employment, housing and a variety of other ways. For a discussion of antidiscrimination provisions, see infra text accompanying notes 97-111. Even a negative result is not without serious potential consequences. There are frequent reports of persons being denied insurance even though they tested negative because the insurer apparently felt that the individual would not have been tested if there were not some danger of being infected or becoming infected.
counseling that testees are given should be a major element in the fight against this disease. Virtually all authorities agree that education and counseling are two very important weapons we have.  

B. Reporting of HIV test results.

Section 2.3. of the AIDS bill requires, with two exceptions, that all physicians, hospitals or other persons who perform or conduct HIV blood sampling shall report to the Department of Health the identity of any individual confirmed to be infected with HIV. One exception excludes testing for insurance purposes and the other provides for anonymous testing.

Section 8, the first exception, concerns insurers, health services corporations and health maintenance organizations which perform HIV testing solely for the purpose of determining insurability. These groups are to report confirmed positive results to the Department of Health only if the person tested has not designated a physician to whom the results are to be reported. The effect of this provision is that some physicians will be presented with test results whether they want them or not. Having received these results, the physicians are presumably expected to report them to the Department of Health as well as to the testee, in conjunction with the consultation requirements mentioned earlier. However, the statute itself requires only that the physician report to the Department of Health if the doctor performed or authorized the HIV blood sampling. This would not ordinarily be the case where a person is tested by an insurance company which then forwards the results to the physician. Department of Health regulations require reporting HIV infection without specifying which physician must make such reports. It is not clear how these regulations will mesh with the new AIDS statute. Read literally, the regulations would require physicians, as well as insurers and their agents, to report communicable diseases to the Department of Health. The AIDS statute exempts insurers only from the requirements of the statute itself.


13. H.B. 1151 & 1044, § 3.4 provides for another exception: "The identity of any individual participating in a research project approved by an institutional review board shall not be reported to the department of health by the physician conducting the research project." The reason for this exclusion is to encourage participation in research projects.

14. See H.B. 1151 & 1044, § 2.3.

The fact that insurers are relieved of any duty to inform persons of HIV test results may have the benefit of shifting that task to a person or agency better trained to do so. However, it could also shift liability to the designated physician or the Department of Health for untoward consequences resulting when the individual is notified. In Tarasoff v. Regents of the University of California, the California Supreme Court found the defendant therapists liable to the plaintiffs for the wrongful death of their daughter who had been killed by her ex-boyfriend. The ex-boyfriend had been under psychiatric care of a defendant's psychiatrist. During the course of his treatment the patient had confided to the psychiatrist his plan to kill the deceased, a plan he carried out. The court found that the psychiatrist had breached his duty to warn the victim.

Other courts have expanded the principle of this case to include a potential victim class. No case has yet gone so far as to hold an insurance company liable for failure to notify identifiable potential victims of persons infected with the AIDS virus, but the analogy is clear. If an insurance company has no duty to even report test results to an insurance applicant, there is, perhaps, little basis to hold the insurer liable for injury to a third person. The designated doctor to whom the insurer is required to report a positive HIV test result may have a duty under a current Department of Health regulation requiring "attending physicians" to notify household members of a patient's contagious disease and how to avoid contracting it. Although a "designated physician" is not, ipso facto, an "attending physician," there appears to be no public health reason to make a distinction.

It is also unclear how broadly "household members" will be interpreted. Would it, for example, include a homosexual live-in lover, or a heterosexual lover not living on the premises? In any event, while it is important to protect the public, it is not clear that placing this burden on the physician is the wisest policy. Doing so may lead physicians to refuse to treat persons infected with HIV. Perhaps the regulation should be revised to make notification of third parties by the physician optional and to clarify that if the physician reports the patients' HIV status to the department of health the physician could not then be held liable on a Tarasoff theory.

The second exception to the reporting requirements is contained in

17. Id. at 21, 551 P.2d at 341, 131 Cal. Rptr. at 433.
18. Id.
19. The court found that a therapist owes a legal duty not only to his patient, but also to his patient's would-be victim. Id. at 25-26, 551 P.2d at 345-46, 131 Cal. Rptr. at 439.
22. See PRESIDENTIAL COMMISSION, supra note 7, at 128-29 (especially recommendation 9-40 which supports this approach).
Section 13. of the Act. That section requires that the Department of Health designate one HIV testing site in each the St. Louis, the Kansas City, and the Springfield areas where persons who are not required by law to undergo HIV testing may be tested anonymously. The rationale for this exception is to encourage the testing of those who would not otherwise be tested for fear that the fact of testing or the results of testing might be used against them by the government, or fall into private hands and result in various types of discrimination. Some who claimed that name reporting is necessary for public health reasons vehemently opposed this provision. They asserted that the statutory provisions requiring that test results be kept confidential and prohibiting discrimination against infected persons would satisfy any concern about the misuse of test results. The confidentiality and anti-discrimination provisions are discussed later. The public health arguments are discussed in the notes.  

23. As this author understands the position of those who are opposed to anonymous testing, it can be summarized as follows:

1) The Department of Health needs the names of persons testing positive for HIV so that these persons can be contacted when necessary. Such contact might be necessary if a person tests positive but neglects or refuses to learn the results of the test. If the Department possesses identifying information it could attempt to contact that individual to deliver the results, to counsel that individual on the implications of the results and to solicit the person's cooperation in so-called contact tracing, the process of notifying persons whose contact with the infected person may mean that they, too, are infected with HIV.

Those in favor of anonymous testing have responded by arguing, among other things, that although it may be true that anonymous testing would prevent locating these individuals, the argument depends on the assumption that these infected persons have voluntarily come in, identified themselves accurately and been tested. That assumption, it is argued, is critically defective because many of those most likely to be infected will not voluntarily be tested if that requires that they identify themselves. This is so, it is said, because many of those most at risk of being infected have spent a substantial portion of their lives hiding their status as IV drug users, gays or bisexuals and are not going to jeopardize their anonymity by putting their name on a government list because loss of anonymity would almost certainly carry with it a number of disastrous consequences including social disgrace, family embarrassment, loss of job and job-related health and life insurance, even criminal prosecution. They cite first-hand experience in counseling such persons as well as evidence that penalizing homosexual conduct results in poorer reporting and treating of sexually transmitted diseases. Ostrow & Aitman, Sexually Transmitted Diseases and Homosexuality, 10 SEXUALLY TRANSMITTED DISEASES 208, 212 (1983); see also Schultz, supra note 11, at 79 and sources cited. Only if persons most at risk of being infected are willing to come to a test site is there an opportunity to test, to counsel and to seek cooperation in contact-tracing programs.

Opponents of anonymous testing respond by simply denying that name reporting will drive any significant number of people away from testing. They believe that few would risk their health by not being tested and that statistics show that ever larger numbers of persons are being tested.

Proponents of anonymous testing retort that the fact that more people may be being tested tells us little about whether the people at high risk are being tested. They argue that even if it is true that only a few would risk their health rather than be tested, that “truth” amounts to a false dichotomy. The medical evidence shows that
Anonymous testing in one form or another has been adopted in a substantial number of states. Though the programs are not identical they share a common trait in allowing a person to use a code rather than a name when infected persons may experience no symptoms for five or more years after infection. As a result, many will perceive no need for health care for years during which time they are themselves infectious. The argument continues that even if a person is concerned about his HIV status, he may perceive no obvious connection between being tested and being treated as there is no recognized cure for HIV infection as such. On the other hand, to the extent that a person is significantly concerned about his health, what is likely to seem important is keeping his job, home and health insurance. Non-anonymous testing, it is claimed, is perceived as an unacceptable threat to all of these. In short, proponents claim that anonymous testing will make public health programs more effective by greatly increasing the number of persons in high risk groups who come in to get tested and, in the process, subject themselves to counseling and contact tracing programs.

2) It is argued that identifying information is necessary in order to efficiently notify infected persons about new treatment possibilities. This seems weak. Any new treatments for AIDS or HIV infection will be major news. Moreover, persons at risk of being infected are likely to pay very close attention to news of possible treatments. Their health is at stake.

3) It is argued that the Department of Health might receive a report that an identifiable person is acting unsafely. If the Department has a list of persons who have tested positive for HIV, the list could be consulted to determine if that person’s name appeared on it. If so, the argument runs, the Department could contact this person to counsel him about the dangers of his conduct. The implication is that the Department would not contact an identifiable person whose name was not on the list. But why not? Most persons who are infected will not have been tested at any given time. The fact that a person’s name is not on the list is no assurance that the person is not infected. By hypothesis, the Department has received information that the person is acting unsafely. Ought not the Department look into such allegations in any event?

These arguments cannot be fully resolved in empirical terms.

One of your authors has testified before various committees of the Missouri legislature in favor of anonymous testing and firmly believes on the basis of his research and experience in counseling gay men that anonymous testing is very important to an effective AIDS control program. One final argument that has been made against anonymous testing that has no basis in fact is that such a program will jeopardize federal funding. No support has been offered for this assertion. Our investigations have produced repeated assurances that no such danger exists. Numerous other states have such programs and have reported no difficulty receiving federal funding.

24. All but one or two states permit AIDS anonymous testing in some form in at least one clinic in the state. Telephone interview with Tim Quinn, CDC, AIDS Division (Oct. 14, 1988). For example, as of December 1987, Alaska, California and Texas had only anonymous testing while Mississippi, Hawaii and Alabama allowed either anonymous or confidential testing. Connecticut provides for voluntary anonymous testing of methadone patients. Telephone interview with Ron Sanders, CDC, AIDS Division (Oct. 14, 1988). Furthermore, many states do not require any identification prior to testing. This implies additional testing is being performed under false names, which is essentially anonymous. For example, “Ronald Reagan” was tested ten times in one week at one clinic. Telephone interview with Tracey Hooker, National Conference of State Legislators, AIDS Division (Oct. 6, 1988).
being tested for HIV.\textsuperscript{25} Generally, the code is a number which cannot be linked to the identity of the individual, but which is unique and which the individual can reconstruct should recalling the number be difficult. For example, the code might consist of the individual’s birth date and the last four digits of the social security number. Such a system would not preclude the collection of non-identifying data such as age, sex, race, residence zip code, sexual orientation and IV drug use. Nor would it preclude counseling or participation in contact-tracing programs.

As noted earlier, the new law requires that anyone who seeks testing be counseled prior to testing and at the time the results are given.\textsuperscript{26} It further requires that contact notification be initiated at all test sites when submitting test results to anyone who has requested anonymous testing and has tested positive.\textsuperscript{27} Presumably that would include counseling the infected individual as to the importance of informing persons with whom he or she has shared IV drug apparatus or with whom the individual has had sex of the possibility that they may also be infected. These individuals may then seek medical advice and counseling. In cases where the infected person does not wish to do the notifying personally, the test cite should offer the services of trained public health personnel to make these contacts without divulging the identity of the infected person, if he or she so desires.\textsuperscript{28}

C. \textit{Mandatory Testing}

The new AIDS statute requires that all individuals delivered to the Department of Corrections and Human Resources and all individuals released or discharged from any institution operated by that Department shall undergo HIV testing without any right of refusal before their release.\textsuperscript{29} This policy is contrary to the recommendations of the United States Surgeon General and several other authorities.\textsuperscript{30} The statute does not specify how the resulting in-

\begin{itemize}
  \item \textsuperscript{25} H.B. 1151 \& 1044, § 13.3. “A coded system that does not link individual identity with the request or result shall be used to report the results of such testing to the department of health.” \textit{Id.}
  \item \textsuperscript{26} See \textit{supra} text accompanying note 10.
  \item \textsuperscript{27} H.B. 1151 \& 1044, § 13.4.
  \item \textsuperscript{28} Not all persons will be willing to participate in contact tracing. In such cases coercion is not likely to be effective. Loss of memory can be genuine or feigned. In some cases, investigation might reveal an at-risk partner, but such investigations are not likely to remain secret. For someone unwilling to have his partners contacted, knowledge that an investigation to which consent was not given might be launched or that penalties might be applied for failure to cooperate would be a powerful incentive not to be tested in that jurisdiction. At least with an anonymous testing program there is a better chance that these people will come in to be tested, thus providing an opportunity to explain the importance of voluntary participation.
  \item \textsuperscript{29} H.B. 1151 \& 1044, § 4. This section also permits the Department to test persons who are required to undergo annual or biannual physical examinations.
  \item \textsuperscript{30} 1986 \textit{Surgeon General’s Report on Acquired Immune Deficiency Syndrome} 33; \textit{see also} \textit{Confronting AIDS}, \textit{supra} note 12, at 15, 130.
\end{itemize}
formation may be used. Prisoners have already sued Missouri, claiming their isolation because of being HIV positive is unlawful.31

Other important questions are whether test results will be considered in determining a prisoner’s eligibility for work release and parole, and if so, whether that use is lawful. In most cases a prisoner’s HIV status would have no rational relationship to the offense for which he was convicted nor to any rehabilitation for that offense.32 Another possibility might be to fashion special conditions of parole for persons who test positive. Again, it is unlikely that such a special condition would have any rational relationship to rehabilitation for the offense for which the person’s liberty was taken. Some courts have held that the lack of any rational connection to a legitimate rehabilitation goal renders a condition of parole unlawful.33

The statute also provides that the Department of Mental Health may perform HIV testing “without the right of refusal” in two situations.34 The first concerns those participating in a methadone treatment program who have refused to undergo such testing when there are “reasonable grounds to believe that the individual is infected with HIV and is a reasonable (sic) health threat to others.”35 Since the statute does not mandate the testing of all those in methadone treatment programs, the legislature apparently contemplated evidence of something more than IV drug use as a basis of the reasonable belief that one is infected. The second half of the standard is confused, but probably should be read as requiring “reasonable grounds to believe that the individual presents an unreasonable health threat to others.”36 The “reasonable grounds” standard employed here may be constitutionally required in that the extraction of blood constitutes a fourth amendment intrusion.37 The statute does not, however, provide that a warrant be obtained prior to the intrusion, as would ordinarily be required. Nor do these circumstances fall comfortably into any recognized exception to the warrant requirement.38

32. The Missouri legislature has authorized the Board of Probation and Parole to condition a prisoner’s release upon avoidance of other crimes and any additional requirements believed to be necessary in assisting the prisoner in leading a law-abiding life. Mo. REV. STAT. § 558.011.4(2) (1986). Missouri courts uphold all conditions imposed by the Board which are not illegal, immoral or impossible to perform. See, e.g., State v. Brantley, 353 S.W.2d 793, 796 (Mo. 1962).
34. H.B. 1151 & 1044, § 5.
35. Id.
36. Id.
38. There is no danger of the evidence disappearing as there was in Schmerber. The search of a student by a school official, New Jersey v. T.L.O., 469 U.S. 325
The Department of Mental Health also is authorized to test persons under its care and custody applying the same "reasonable grounds" standard as discussed for persons in methadone treatment programs, unless such testing "is otherwise prohibited by law." In both cases test results need not be reported to the Department of Health if such reporting is prohibited by federal law.

Under section 9 of the statute, the Department of Health may seek a court ordered HIV test of an individual after reasonable efforts have been made to obtain informed consent to the testing. The request will be granted if the Department can show that "there are reasonable grounds to believe that an individual is infected with HIV and there is clear and convincing evidence of a serious and present health threat to others posed by the individual if infected." This section mandates a two-pronged standard for obtaining court ordered HIV testing. Reasonable grounds must be shown to believe that a person is infected with HIV. But these grounds must be combined with clear and convincing evidence that the person presents a serious and present danger to others. In view of the fact that the Department is required to make reasonable efforts to obtain informed consent prior to seeking a court order, the hearing on the order is presumably not meant to be an ex parte proceeding. Nonetheless, the statute ought to make this clear and as well require state-paid counsel for those who are indigent. One of your authors had a hand in drafting this provision (with procedural safeguards). At the time, it was offered as a substitute for all other mandatory testing provisions. The legislature, however, did not see fit to use the provision in this way, and its purpose is now unclear. Perhaps it would be used as a prelude to an attempt to isolate a person under the public health statute; but the isolation provision is of doubtful validity because it provides no procedural safeguards. Alternatively, it might be used in

(1985), or of an employee's desk by an employer, O'Connor v. Ortega, 480 U.S. 709 (1987) may furnish closer precedent. However, neither of these cases involved intrusion into the body. Under these cases a balancing test is used. The statute does not state the purpose of testing persons in methadone programs, nor is any apparent. Surely all addicts ought to be counseled concerning the danger of passing HIV infection. It might be argued that the intrusion is minimal since participation in the program is voluntary. If that is good constitutional law, it nevertheless seems bad public health policy as it would tend to drive away the very people who ought to be in the program.

39. H.B. 1151 & 1044, § 5.1(2). Arguably, there is less of a fourth amendment problem here since the persons to be tested are in the care and custody of the Department which must decide what sort of living arrangements are appropriate for the person in question.

40. Id. § 5.2.

41. Id. § 9.

42. Mo. Rev. Stat. § 192.020 (1986) gives the Department of Health the power to make rules to prevent the spread of communicable diseases. This authorization is utilized in Mo. Code Regs. tit. 13, § 50-101.050(2)(g) (1984) which allows the Department of Health to quarantine persons infected with communicable diseases. While no procedural safeguards are provided by the state regulation, the Constitution would require due process. As in cases where the state seeks to involuntarily commit someone
conjunction with statutory civil commitment.43 Finally, the statute permits the Department of Health to promulgate rules providing for mandatory premarital HIV testing "if the Centers for Disease Control so indicates."44 What that indication might be is not specified, but for now at least premarital testing is not required.48

D. Confidentiality of Test Results

Virtually all reputable authorities recommend that the results of HIV testing should be kept confidential. The reasons cited include the general interest in the privacy of personal information, the need to prevent misuse of the information and the need to allay fears that the information will be misused.46 However, the term "confidential" is hardly self-defining. It goes without saying that if records which link the identity of persons tested with the test results are to be kept at all, the real questions are who will have authorized access to this information, under what conditions and what remedies are available for unauthorized disclosure. The legislature attempted to answer these questions, but was not entirely successful.

The relevant provisions of the new statute begin with a broad declaration of confidentiality and a prohibition against disclosure of "all information . . . held . . . by any person . . . concerning an individual's HIV infection status . . . ."47 The term "confidential" is not defined. Presumably, it connotes some effort to prevent disclosure or dissemination. The term "disclose" is defined in the broadest terms.48 Together, these provisions prohibit any transfer by and to any person of all information about anyone's HIV status or test results, except as provided in the exceptions.

The first exception covers, "Public employees within the agency, department, or political subdivision who need to know to perform their public

for mental care, the state would presumably be required to develop a procedure to determine whether an individual is dangerous to self or others. O'Connor v. Donaldson, 442 U.S. 563 (1975); see generally J. NOWAK, R. ROTUNDA & J. YOUNG, Constitutional Law § 13.9, at 500-03 (3d ed. 1986).

43. The Mental Health Commissioner may detain persons who present the likelihood of harming self or others upon reasonable cause that such person is mentally disordered under Mo. Rev. Stat. § 632.300.2 (1986). Such individuals may be held under certain circumstances for one year thereafter according to Mo. Rev. Stat. § 632.355 (1986).

44. H.B. 1151 & 1044, § 12.

45. Mandatory pre-marital testing is not recommended by authorities in the field. See PRESIDENTIAL COMMISSION, supra note 7 (mandatory pre-marital testing not included in list of over 600 recommendations); CONFRONTING AIDS, supra note 12, at 14-15; 1986 Surgeon General's Report on Acquired Immune Deficiency Syndrome 33.

46. See, e.g., CONFRONTING AIDS, supra note 12, at 129-30; PRESIDENTIAL COMMISSION, supra note 45, at 126-27.

47. H.B. 1151 & 1044, § 3.1(1).

48. Id. § 1(1).
duties."\(^{49}\) This applies to any governmental agency. Although "need to know" may be workable if suitably limited, it is a less than perfect limit on dissemination.\(^{50}\) There will be disagreements as to who, in fact, needs to know. For example, does an employee of the Department of Health assigned to notify contacts of those testing positive need to know?\(^{51}\) Passing that, it seems clear that some persons may have a legitimate need to know the results of HIV tests, but not the identity of the persons involved. An example might be a statistician in the Department of Health. Does the need to know standard require separating identity from result in these cases? Another problem is that the statute does not specify who is to decide the issue of who needs to know. That omission raises the question of how the need to know limitation is to be enforced. In this vein, California's statute ensures enforcement by prohibiting disclosure except under court order after an adversary hearing.\(^{52}\)

The second exception is much broader in allowing disclosure to "Public employees of other agencies, departments, or political subdivisions who need to know to perform their public duties."\(^{53}\) Again, what constitutes a need to know and who will decide? Questions will arise involving police, firemen, emergency personnel, prosecutors, probation and parole officers, public schools and hospitals and others. Does a prosecutor need to know the HIV status of a person who has been charged with intentional transmission of the AIDS virus?\(^{54}\) Do parole officers need to know the HIV status of their charges?\(^{55}\) Do public (mental) hospital officials ever need to know?\(^{56}\) Do they always need to know? Which officials? Is a concern about protecting oneself from HIV infection enough to qualify as a need to know? Does any need disappear if the concerned individual could take precautionary measures? These and other cases must either be dealt with specifically under the statute or a decision maker must be identified and fair procedures specified if the statute is to provide any

\(^{49}\) Id. § 3.1(1)(a).

\(^{50}\) PRESIDENTIAL COMMISSION, supra note 7, at 127. "Health care systems have not been inclined to define narrowly 'need to know' of identifier-linked information, resulting in a system where safeguards against disclosure are difficult to maintain." Id.

\(^{51}\) The Director of the Department of Health has stated that knowledge of the identity of persons tested is necessary to a contact tracing program. Since the contact would not have to be told the source of his potential infection, it is not clear why anyone needs to know that person's identity. See St. Louis Post-Dispatch, June 12, 1988, at 2B, col. 1. But see PRESIDENTIAL COMMISSION, supra note 7, at 127 ("Many persons do not understand that it is possible to warn someone about an exposure to HIV without revealing the name or exact identity of the source of the exposure.").

\(^{52}\) CAL. HEALTH & SAFETY CODE § 199.20 (West 1986).

\(^{53}\) H.B. 1151 & 1044, § 3.1(1)(b).

\(^{54}\) The California statute has been held to prohibit disclosure to a prosecutor for purposes of prosecution. Barlow v. Superior Court, 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987).

\(^{55}\) An earlier bill required such disclosure. But the need for such disclosure in cases where the offense is not related to HIV infection seems questionable at best.

\(^{56}\) See H.B. 1151 & 1044, § 5, which allows the Department of Mental Health to test for HIV without right of refusal under some circumstances.
semblance of confidentiality.

The third exception covers "Persons other than public employees who are entrusted with the regular care of those under the care and custody of a state agency, including but not limited to operators of day care facilities, group homes, residential care facilities and adoptive or foster parents." Here there is no limitation to those who need to know, perhaps because the legislature felt that anyone entrusted with the regular care of those under the care and custody of the state have a sufficient need by virtue of their position.

The statute provides a further series of "exceptions" "[a]s authorized by subsection 2 of this section." These will be discussed below. First, a curious second subdivision to subsection 1 must be addressed. The subdivision provides: "(2) Further disclosure by public employees shall be governed by subsection 2 and 3 of this section. Public employees violating such requirements may be subject to civil actions brought under subsection 4 [sic] of this section." Both sentences apply only to public employees. Thus, it would seem, further disclosure by persons other than public employees is not governed by subsections 2 and 3. Logically, then, others are governed by the general prohibition against disclosure. But if a person who is not a public employee violates that prohibition, is there a remedy?

The second sentence quoted above tells us that if public employees violate the requirements relating to "further disclosure" they may be the subject of civil actions brought under subsection 4 [sic] of this section. This language appears to exclude non public employees from such civil actions. If so, the statute provides no remedy for unlawful disclosure by a private person. Perhaps a remedy would lie in a common law tort action for breach of the right of privacy. Or, perhaps the legislature felt that only public employees should be

57. H.B. 1151 & 1044, § 3.1(1)(d).
58. Id. § 3.1(1)(d)-(2).
59. Id. § 3.1(2). It should be noted that the reference to subsection 4 should be a reference to subsection 6.
60. See H.B. 1151 & 1044, § 3.6. Presumably, the reference to subsection 4 is a mistake because that subsection does not deal with civil violations. The proper reference would be to subsection 6.
61. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942), creates a right to privacy action when the court determines the disclosed matter to be outside the scope of public interest and the interference to be serious, unreasonable, unwarranted and offensive. Plaintiff must then prove that defendant acted with malice and should have realized the disclosure would be offensive to a person with ordinary sensibilities. The Barber court upheld the plaintiff's award of damages as appropriate. In that case, the defendant magazine had published an article about plaintiff's hospitalization for an eating disorder. The Barber court further noted that doctor-patient confidentiality is a necessity which deserves protection. See Barber, 348 Mo. at 1199, 159 S.W.2d at 295.

A later decision extended the Barber rationale to include cases against private persons. Biederman's, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959). The Wright court noted that an oral publication must be communicated to a large number of persons, not just a few individuals. 322 S.W.2d at 898. In that case, defendant's harassment of the plaintiff while she worked was deemed to constitute a sufficient violation of privacy to
subject to the possibility of having to pay attorney's fees and exemplary damages. However, from the point of view of the person injured by the disclosure, the source of the disclosure is not likely to be significant. A better reading is that this provision limits the statutory remedies for breaches by public employees, but does not address the statutory remedies available when a person other than a public employee violates this statute.

Another problem with the wording of this subdivision is that it may imply that public employees are subject to the statutorily provided remedies only for disclosures not authorized under subsection 2 and 3. That would leave no statutory remedy for disclosures violating subsection 1, unless they also happened to violate subsection 2 or 3. Of course, it can be argued that the remedies section is drafted broadly enough to cover any injury resulting from a violation of any of the confidentiality provisions, but to conclude that any violation of the confidentiality provisions is covered, the second sentence of this subdivision must be ignored. The statute ought to clearly provide remedies for any breach of its provisions by any person.

We turn, then, to subsection 2, where liability for disclosure may ensue only if "the person acted in bad faith or with conscious disregard ..." The problem here is that the statute specifies no referent. For example, a person who acts in bad faith or with conscious disregard and discloses an individual's HIV status to the Department of Health, is not exempted from liability for "violating any duty or right of confidentiality established by law ..." Bad faith with respect to what? Conscious disregard of what? No sensible interpretation of this provision comes to mind. In other words, it is not clear under what circumstances, if any, a person may be liable for disclosing another's HIV status to the Department of Health.

Perhaps some meaning can be ascribed to the statutory language if we assume that it is a mistake of fact with respect to which a person must act in bad faith or conscious disregard in order to be liable for disclosure. For example, under the statute one is exempt from liability if there is no action in bad faith or conscious disregard when disclosing an individual's HIV status "(b) To health care personnel working directly with the infected individual who have a reasonable need to know the results for the purpose of providing direct patient health care." Assume the person disclosing the information is establish a claim. Thus, if the courts determined that an individual's HIV status is beyond the scope of public interest and the disclosure is a serious, unreasonable, unwarranted and offensive interference, a right to privacy action could be maintained against a private individual. If the plaintiff could also demonstrate that the defendant had either written or orally communicated plaintiff's HIV status to a large number of persons, the plaintiff would be entitled to a favorable verdict.

62. See H.B. 1151 & 1044, § 3.6 which allows for both exemplary damages and attorney's fees.
63. H.B. 1151 & 1044, § 3.6.
64. Id. § 3.2(1).
65. Id. § 3.2(1)-(1)(a).
66. Id. § 3.2(1)(b).
mistaken and there is no "reasonable need to know"? It could be argued that there is nonetheless protection from liability unless the "mistake" was made in bad faith or with conscious disregard of an unacceptable risk that there was no such reasonable need. If so, the wording of this subsection could have been much clearer. Mistake of fact is not mentioned. Nor is there any mention of "risk." Still, what other meaning can reasonably be given to this language?

Assuming the correctness of the above interpretation, one may disclose another's HIV status in several other circumstances without liability, even if the actor is mistaken concerning some aspect of relevant fact, unless there is a bad faith or conscious disregard of an unacceptable risk by the actor that he is mistaken. These are:

(c) Pursuant to the written authorization of the subject of the test result or results;
(d) To the spouse of the subject of the test result or results;
(e) To the subject of the test result or results;
(f) To the parent or legal guardian or custodian of the subject of the testing, if the subject is an unemancipated minor.67

Negligent disclosure would not be covered. Given these problems, section 3.2(1) should be clarified or eliminated.

The next subdivision of this subsection (section 3.2(2)), is apparently a response to Tarasoff v. Regents of the University of California, discussed earlier.68 It provides that paragraphs (b) and (d) do not create a duty to disclose HIV test results to persons potentially exposed to the virus.69 As noted earlier, Missouri Department of Health regulations impose a duty to disclose to household members on attending physicians.70

Section 3.2(3) prohibits further disclosure of test results by those who received such results under paragraphs (b) and (c).71 The implication is that a spouse, parent or legal guardian may further disclose test results. That implication may be at odds with subdivisions (1) and (2) of subsection 1, discussed above.72

The next subdivision, section 3.2(4), represents a change from an earlier bill which required that HIV test results be kept in a separate part of a person's medical record accessible only to physicians and mental health personnel on the basis of need to know.73 HIV test results are now to be treated as other information in a person's health record.74 This type of treatment will result in broader dissemination than is necessary. For example, it is not uncommon for insurance companies to request all medical records for a given period as a

67. Id. § 3.2(1).
68. See supra text accompanying notes 16-19.
69. H.B. 1151 & 1044, § 3.2(2).
70. See supra note 21 and accompanying text.
71. H.B. 1151 & 1044, § 3.2(3).
72. See supra note 47 and accompanying text.
74. H.B. 1151 & 1044, § 3.2(4).
condition of paying a claim. If not clearly necessary and relevant to the matter at hand, a positive HIV test result delivered to a health or life insurer may well result in unwarranted attempts by the insurance company to terminate the policy, to “investigate” claims interminably, to challenge claims unreasonably or otherwise to stall and harass the insured.\textsuperscript{76} Moreover, medical records such as hospital charts are frequently available to persons who have no need to know, and sometimes no business knowing, another’s HIV status. Any hospital visitor knows that charts are frequently available in a patient’s room, where cleaning personnel and the idly curious may have easy access. These disclosures may result in just as much injury to the patient as any other, yet they are not guarded against.

Subsection 3 (or section 3.3) provides: “All communications between the subject of HIV testing and a physician, hospital, or person authorized by the department of health to perform or conduct HIV testing shall be privileged communications.”\textsuperscript{76} Several aspects of this provision are of note. First, it applies to communications between the named parties without limitation. Read literally, it would cover discussion of social plans or even plans to rob a bank. Presumably, the legislature intended to cover only conversations in some way related to health matters. But without statutory specification, how narrowly will the protection be read? Second, it is not clear why the protection should be limited to persons who have received Department of Health authorization to perform HIV blood sampling. Why should the patient be left unprotected if the health care professional has not been certified? Finally, the statute makes covered conversations “privileged” rather than confidential. Neither term is defined in the statute, but a privilege frequently refers to a right to prevent testimony in court, whereas confidentiality may apply to any kind of communication.\textsuperscript{77} If such a distinction was intended here, it is not clear why. It would be much better to define such important terms.\textsuperscript{78}

Subsection 5, (or section 3.5) on the other hand,\textsuperscript{79} requires anyone who tests positive for HIV to disclose that result to any health care professional before receiving services from that professional.\textsuperscript{80} Though it is clear that this provision is designed to protect health care professionals, it is loosely drawn. “Health care professional” is not defined. Nor is there any limitation of the

\textsuperscript{75} Benjamin Schatz, Director of the National Gay Rights Advocates (“NGRA”) alleges that the insurance industry, “engages in widespread anti-gay discrimination, and frequently discriminates against policy-holders with AIDS through delaying tactics, unfair exclusions, and denial of claims.” NGRA Newsletter, Summer 1988. In response, the NGRA has filed several complaints against a number of insurance companies. NGRA Newsletter, Spring 1987.

\textsuperscript{76} H.B. 1151 & 1044, § 3.3.

\textsuperscript{77} 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286 (McNaughton ed. 1961).

\textsuperscript{78} See supra note 52.

\textsuperscript{79} Subsection 4 is noted as part of the discussion of reporting requirements. See supra note 13.

\textsuperscript{80} H.B. 1151 & 1044, § 3.5.
required disclosure to situations where the virus could be transferred. Even though broadly drafted, this provision is not likely to be effective. Many will be unaware of it. Even if aware, some may not disclose their HIV status if they believe disclosure will result in denial of services, which is not an uncommon scenario.

Subsection 6 (section 3.6) provides that:

Any individual who is injured as a result of a violation of this section may bring a civil action for damages. If it is found in a civil action that:

1. A person has negligently violated this section, the person is liable for:
   a. Actual damages; and
   b. Court costs and reasonable attorney's fees incurred by the person bringing the action; or

2. Any person who demonstrates a conscious disregard or has willfully violated this section, is liable for:
   a. Actual damages;
   b. Exemplary damages; and
   c. Court costs and reasonable attorney's fees incurred by the person bringing the action.

Thus, a plaintiff must show at least negligence in violating the provisions of Section 3 to make the conduct actionable under this subsection. Further, as discussed earlier, the disclosures enumerated in Section 3.2 cannot result in liability unless the person acted "in bad faith or conscious disregard . . . ." Consequently, the only remedy provided is found in subsection 6.(2), which requires a showing of conscious disregard or willfulness. Also, as discussed earlier, there is some question whether the legislature intended to impose any penalty on the general public for disclosure of another's HIV status. Beyond these caveats, these statutory remedies are designed to be effective enforcement measures in that court costs and reasonable attorney's fees are available to victorious plaintiffs. A further obstacle could have been eliminated by setting statutory minimum damages, but this option was not taken.

Subsection 7 (section 3.7) provides broad civil immunity for health care providers who report the identity of a person to the Department of Health who they reasonably believe to be HIV positive. The Act also grants them immunity for good faith cooperation in Department of Health investigations to

81. *Id.* It is generally accepted that transmission requires that some bodily fluid of the infected person enter the blood stream of another for transmission to be possible. See Schultz, supra note 11, at 67.
82. *See, e.g., Presidential Commission, supra* note 7, at 126.
83. *H.B. 1151 & 1044, § 3.6.*
84. *See supra* note 64 and accompanying text.
85. *See supra* note 61 and accompanying text.
86. *H.B. 1151 & 1044, § 3.7.*
determine whether a person should undergo mandatory testing and in judicial
proceedings arising out of such investigations. Few would deny that some sort
of civil immunity is necessary to obtain the cooperation of health care provid-
ers in such activities. The more basic issues are whether the Department of
Health needs the authority to seek mandatory testing and whether the policy
such authority reflects is sufficiently important to override confidentiality inter-
ests. The legislature has answered both in the affirmative. Presumably, the
Department will use this authority judiciously. There should be very few cases
where mandatory testing is warranted in that mandatory testing of this sort is
generally associated with other coercive measures to protect the public health,
such as isolation or quarantine. It should also be pointed out that this statute
does not authorize coercive "judicial proceedings" beyond obtaining an order
to test, though an earlier bill did.87

The last subsection of Section 3 (section 3.8) requires that a "licensed facili-
ty"88 notify the employer of a firefighter, police officer or "emergency
medical person"88 that such person has been "exposed" to a patient during
rescue, treatment or transportation who is diagnosed as having a "reportable
infectious or contagious disease as defined by the department of health."89 It
further requires the facility to notify mortuary personnel involved in removal
of a deceased patient who was so diagnosed. Notification is to be done in a
manner that protects the confidentiality of both patient and employee. The
subsection directs the employer to request the employee to contact the licensed
facility to receive appropriate medical direction.

By this provision the legislature undertook to notify certain persons of
their exposure to certain transmissible infections,91 including HIV, while also
protecting confidentiality. However, the provision is both overbroad and under-
inclusive. It is overbroad, or at least vague, in that the term "exposed" is not
defined. Transmission of HIV, for example, may be accomplished only when
the bodily fluid of an infected person enters the blood stream of another.92

Assembly (1988).
88. H.B. 1151 & 1044, § 3.8(1)(b) defines "Licensed facility" as "a facility li-
censed under chapter 197, RSMo, or a nursing home licensed under chapter 198,
RSMo."
89. Id. § 3.8(1)(a) provides:
"Emergency medical person", any person trained and authorized by law or
rule to render emergency medical assistance or treatment such as but not
exclusively limited to emergency first responders, ambulance attendants and
attendant-drivers, emergency medical technicians, mobile emergency medical
technician, emergency medical technician-paramedics, registered nurses, or
physicians. . .
90. Id. § 3.8(2).
91. The requirement is not limited to HIV infection, but rather includes the en-
tire list of diseases contained in Mo. Code Regs. tit. 13, § 50-101.020 (1983) as modi-
92. See Schultz, supra note 11, at 67 n.12; see also ALI-ABA, AIDS AND THE
LAW 8 (1986); 1986 Surgeon General's Report on Acquired Immune Defi-
https://scholarship.law.missouri.edu/mlr/vol53/iss4/2
Reading exposure more broadly will include cases where no danger of transmission exists. In such cases, the patient’s confidentiality will be needlessly breached. Further, at least in the case of possible HIV infection, there is no currently accepted medical treatment for someone who has been recently infected. In the future there may be one or more treatments. At that time there would be a better case for early notification.

The provision is also arguably underinclusive because it does not cover ordinary citizens who engage in rescue operations or other activities comparable to those covered by the statute. If and when effective early treatment becomes available, there would be a strong case for notification of anyone truly in danger of having been infected. This “problem” of notification may become less of an issue if tests become available which will reveal whether a person has been infected almost immediately after the suspected incident.

Section 15 of the statute contains a conditional mandatory notification of school officials. Under this section the Department of Health as well as the parent or guardian of a child must notify the superintendent of the relevant school district or the chief administrative official of a non-public school of a student’s positive HIV status. However, this is required only after the school has adopted a policy consistent with the recommendations of the Centers for Disease Control on school children who test positive for HIV. The superintendent or chief administrator may, in turn, notify those persons:

(a) who are designated by the school district to determine the fitness of an individual to attend school;

(b) who have a reasonable need to know the identity of the child in order to provide proper health care.

This section is an improvement over earlier versions in several ways. First, disclosure is conditioned on adopting CDC recommendations which follow generally accepted medical principles concerning transmissibility of the virus. Generally, these recommendations favor keeping a child in school unless there is evidence of some peculiar risk to the child or others. Secondly, although clause (b) above may be difficult to interpret and is, perhaps, subject to some abuse; it is more tightly drawn than an earlier version.

II. ANTIDISCRIMINATION

Both the Presidential Commission and the prestigious Institute of
Medicine of the National Academy of Sciences, among others, strongly favor legislation prohibiting discrimination against persons infected with HIV in housing, employment, public accommodations and the delivery of social services. Such discrimination is not justified, whether based on fear of contagion or dislike for the groups most affected by the disease. Fear of discrimination is also a substantial barrier to effective public health measures which depend on persons coming forward for testing, counseling, treatment and epidemiological purposes.

One of your authors observed a number of the legislative hearings on the various bills which ultimately resulted in the current AIDS statute. An unscientific opinion based on these observations is that the great majority of witnesses favored antidiscrimination legislation. The legislature responded with the following provision:

Provisions of chapter 213, Revised Statutes of Missouri, shall apply to individuals with HIV infection, acquired immunodeficiency syndrome and acquired immunodeficiency syndrome related complex; provided that such protection shall not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of their employment.

This provision came to its present form via amendment on the floor of the House. That amendment added the language following the semicolon and deleted language which would have allowed a person aggrieved by unlawful discrimination to choose between filing a Human Rights Commission complaint with the Human Rights Commission or filing suit in circuit court. Chapter 213 requires a person to file a complaint first and allows the filing of a law suit only if the Commission fails to act within one-hundred and eighty days. Giving an aggrieved person a choice of remedy was designed by the author of the pre-amendment version (one of your authors) to reduce the drain on the resources of the Commission while at the same time allowing for a choice of strategy in the hope that this would increase the effectiveness of the provision. As written, less enforcement seems inevitable. Less enforcement, or concern about it, can only undercut efforts to have persons tested and to get them to participate in contact tracing. Thus the amendment runs counter to the public health interests of the state.

The other amendment tracks the language of the Harkin-Humphrey amendment to the federal Civil Rights Restoration Act. It appears merely

98. Confronting AIDS, supra note 12, at 135.
99. See, e.g., id. at 125; see also Presidential Commission, supra note 7, at 119.
102. Presidential Commission, supra note 7, at 122:
to restate legal principles embodied in chapter 213 prohibiting discrimination against the handicapped in housing, employment and public accommodations. The original provision was designed to bring AIDS, ARC (AIDS related complex) and simple infection with HIV within the definition of handicap contained in chapter 213. However, prohibiting discrimination does not mean prohibiting any and all distinctions. Discrimination is defined as "any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment or handicap." The term "unfair" is not defined in the statute, but ordinarily, unfair treatment connotes treatment based on considerations not related to the merits of the matter at hand. Thus, it seems unlikely that a valid claim exists under chapter 213 based on action taken against the complainant where that action was a reasonable way of preventing "a direct threat to the health or safety of other individuals." Similarly, a person who is "unable to perform the duties of [his/her] employment" would have no claim to retain that employment under chapter 213. In neither case would the action constitute unfair treatment, i.e., discrimination. In short, the amendment to Section 6, does not conflict with or change chapter 213, but rather reaffirms its basic principles.

Looking at HIV infection specifically, the medical evidence is strong that one who is infected does not pose a "direct threat to the health or safety" of others in most everyday situations. The transmission of the virus can occur only when the blood or other bodily fluids of the infected person enter the blood stream of another. Denying a person infected with HIV housing, employment or public accommodation because of fear of contagion constitutes prohibited discrimination in most situations because it has no justification in

A recently enacted provision of law (the Harkin-Humphrey amendment to the Civil Rights Restoration Act) was intended to clarify the application of Section 504 (of the Rehabilitation Act of 1973) in the employment context in terms of persons with contagious diseases. It states that "for the purposes of Sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job." It appears that this amendment is in concert with the Arline, (School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987)) decision and codifies the existing standards applicable to Section 504. Section 504 prohibits discrimination against persons with disabilities by entities receiving federal financial assistance. The Arline decision held that a person with a contagious disease could be protected by section 504 as a handicapped person.

104. Id. § 213.010(2) (emphasis added).
106. Id.
108. See Schultz, supra note 11, at 67 n.12.
medical fact. There is no direct threat to others.\textsuperscript{109}

It is also a medical fact that persons infected with HIV are usually as mentally and physically fit as they were before infection for an extended period of time, frequently in excess of five years.\textsuperscript{110} During that period, it could not be said that such a person "by reason of the currently contagious disease or infection, is unable to perform the duties of their employment."\textsuperscript{111}

III. Education

Section 7 of the Act contains a broad directive to the Departments of Health and of Elementary and Secondary Education to prepare educational programs "regarding means of transmission and prevention and treatment of the HIV virus."\textsuperscript{112} Subsection 2 (section 7.2) mandates that none of the programs or materials "promote behavior that is an offense" under state laws prohibiting sex or drug offenses and state or local law prohibiting prostitution or patronizing prostitution. There is an obvious potential conflict since transmission is accomplished mainly by sexual conduct and the sharing of intravenous drug paraphernalia. The question may arise as to the appropriate place instruction on the function and use of condoms plays in these educational programs and materials. Questions may also arise with respect to materials and programs designed to reach specific audiences. For example, a program designed to reach drug addicts might look quite different from one designed to reach high school students. It is important that the best advice available be used in developing these educational materials. They are useless unless the designated audiences actually learn from them. While advocating or actively promoting crime is an inappropriate educational goal, prevention of the spread of disease is a most appropriate and important goal. The statute sets up no mechanism for resolving differences on this issue. The statute is, however, quite specific on the minimum content of the educational programs and materials.\textsuperscript{113} A reading of these requirements demonstrates that more than

\textsuperscript{109} Of course, one could always imagine the transmission of the virus through a bizarre set of circumstances. But to allow such imagined dangers to be characterized as a "direct threat" would, it is submitted, do violence to the plain meaning of the language.

\textsuperscript{110} See ALI-ABA, AIDS AND THE LAW 108, 586 (1986); cf. 1986 SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 12.

\textsuperscript{111} H.B. 1151 & 1044, § 6.

\textsuperscript{112} Id. § 7.

\textsuperscript{113} Id. The Bill states:

1. The department of health shall prepare public education and awareness plans and programs for the general public, and the department of elementary and secondary education shall prepare educational programs for public schools, regarding means of transmission and prevention and treatment of the HIV virus. The plans and programs shall include, but not be limited to:

(1) Medically correct, age specific, transmission and prevention programs for use at the discretion of the public schools beginning with students at the sixth grade level. The educational programs shall stress moral responsibility in
preaching abstinence was contemplated with respect to educating people on the "means of transmission and prevention" of transmission of the virus in the community.

IV. (NON)Regulation of Insurers

Section 8 provides that "No other section of this act shall apply to any insurer, health services corporation, or health maintenance organization licensed by the division of insurance which conducts HIV testing only for the purposes of assessing a person's fitness for insurance coverage . . . ." There is only one exception. The antidiscrimination provisions apply to these organizations in their capacity as employers. This is most extraordinary, as there is no obvious reason why a blanket exception ought to be granted to the provisions of a statute which attempts to deal comprehensively with a grave public health problem.

The AIDS statute mandates state approval and regulation of laboratories allowed to do testing for HIV, except when the testing is done for insurance purposes. The statute requires reporting of positive test results to the

and restraint from sexual activity and avoidance of controlled substance use whereby HIV can be transmitted;

(2) Risk reduction programs for specific populations at high risk of HIV infection;

(3) Educational programs on transmission and prevention of HIV infection in the work place for use by employers;

(4) Personal protection procedures for use by health care providers and others in close contact with potentially infected individuals;

(5) General public information programs and circulars containing factual information that will allow the public at large to assess its risk and develop informed individual judgment and behavior. The department shall prepare for free distribution among the residents of the state printed information concerning the means of transmission of the HIV virus, the dangers from HIV infection, means of prevention, and the necessity for testing; and

(6) Develop presentations for community service and school organizations describing the medical and psychosocial aspects of HIV infection, including information on how infection is transmitted and can be prevented.

2. None of the plans, programs or printed information prepared or provided under this section shall promote behavior that is an offense in violation of chapter 566, RSMo, concerning sexual offenses; is an offense involving the use of a controlled substance as defined in chapter 195, RSMo; is an offense in violation of section 568.020, RSMo, concerning incest; or is an offense in violation of any city, county or state law prohibiting prostitution or patronizing prostitution.


115. Id.

116. Having been exempted from § 2 of the Act which subjects other HIV testing to Department of Health quality controls (H.B. 1151 & 1044, § 2), testing by insurance companies is relegated to the general requirements of the federal Clinical Laboratory Improvement Act of 1967 and the general proficiency testing of named professional organizations or the Centers for Disease Control (H.B. 1151 & 1044, § 8.4).
Department of Health, except when the results were obtained for insurance purposes. The statute contains elaborate confidentiality requirements with special statutory remedies, but not for insurance organizations. Instead there is a simple mandate of non-disclosure except as authorized by the person in question. One seeking insurance may find it very difficult to insist on non-disclosure. If an insurance company breaches a duty of confidentiality, the injured party may not make use of the statutory remedies to file suit for damages. Rather, such breach is treated as an unlawful trade practice to be dealt administratively by the Department of Insurance. Whereas other individuals and businesses may not unfairly discriminate against a person infected with HIV in the provision of public accommodations (services offered to the public), the insurance industry is exempted.

As to HIV testing, Section 8.3. states that “The director of the division of insurance shall establish by regulation standards for the use of HIV testing by insurers, health services corporations and health maintenance organizations. Important issues lurk here. Three jurisdictions have legislatively prohibited the use of HIV testing for the purposes of determining insurance coverage. If HIV testing is to be allowed, what tests will be required? The inexpensive test, known as the ELISA test, can return as many as nine false positives for every true positive when administered to low risk populations, especially when there is less than strict quality controls. Yet when exclusion of risky applicants is the goal, there is little incentive to go beyond the initial, inexpensive ELISA test.

V. CRIMINAL PROHIBITIONS

Section 10 makes it a class D felony to:
(1) Be or attempt to be a blood, organ, sperm or tissue donor except as deemed necessary for medical research; or
(2) Deliberately create a grave and unjustifiable risk of infecting another with HIV through sexual or other contact when an individual knows that he is creating that risk.

117. H.B. 1151 & 1044, § 8.5, provides in part: Such result or results shall however, be disclosed to a physician designated by the subject of the test. If there is no physician designated, the insurer, health services corporation, or health maintenance organization shall disclose the identity of individuals residing in Missouri having a confirmed positive HIV test result to the department of health.
118. Id. § 8.3.
There is likely to be little disagreement with subsection (1). By now, anyone who knows they are infected with HIV is almost certain to be aware of the grave danger of infecting others through donating body parts or fluids. Such danger, culpably created, surely warrants criminal sanction as a deterrent.

It might be argued, however, that it is unlikely that anyone would actually be infected in such circumstances because tests would be run on the donated material to determine HIV status. Thus the donor many actually have acted believing that this conduct would endanger no one and therefore no real criminal culpability is shown. There is some force to this argument. Theoretically, an infected blood donor might be making the donation solely to obtain payment for the blood believing that the blood would be thrown out after being tested. But it seems unlikely that a person who would so carefully calculate would overlook the possibility that the blood would somehow not be discarded.

If there is genuine doubt about a person's culpability, it is more likely to be on the issue of whether that person in fact knew he was infected with HIV. Of course, there would be no problem if there was good evidence that the person in question had been tested and informed of the positive test results. In the absence of such evidence, or of an admission, there may not be good evidence of the person's knowledge. An attempt to infer knowledge from evidence of life style should be avoided here. For example, it might be argued that evidence that a person is an intravenous drug abuser tends to prove circumstantially that such people know their HIV status. But the inference is, at best, very weak, while the potential for prejudice is extremely high. The problem could be avoided by making notification of test results an element of the offense, as was done in one piece of model legislation.123

The second subdivision may prove to be more controversial. It criminalizes certain risky conduct by one knowing he is infected with HIV even though that conduct does not injure anyone.124 It is, in short, an inchoate offense like attempt or reckless driving. The rationales which typically underlie such offenses posit that conduct that creates a grave risk of injury ought to be deterred whether it happens to result in injury or not.125 There is an obvious appeal to this logic. In fact, the Missouri Criminal Code provides: "A person commits the crime of assault in the third degree if: . . . (4) He recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person. . . ."126 This offense provides misdemeanor penalties

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124. "These offenses take on particular importance in the context of the discussion here [AIDS], because proving that the conduct of a particular actor caused another person to become infected with the AIDS virus may be difficult or impossible in many situations." Schultz, supra note 11, at 98 and accompanying notes.
125. Id. at 97 n.161 and accompanying text.
for essentially the same type of conduct covered by the provision now considered.127 One of your authors testified before legislative committees considering this legislation that additional criminal provisions were unnecessary, but that advice was not accepted.

As enacted, the new provision is designed to clarify and narrow the language of an earlier version which made it an offense to deliberately "expose" another to infection with HIV when the actor knows another person could "potentially" be infected.128 These terms are so broad that almost any conduct by anyone who is aware of their HIV infection might come within its sweep. For example, it might be argued that infected persons would be guilty under this section if they were to ride a bus. In so doing they are "deliberately exposing" others to the "known potential" danger of becoming infected, if the bus were to crash and somehow, in the process, the blood of the infected party were to enter the bloodstream of another passenger. Of course, given what we know about the transmissibility of HIV, the likelihood of this scenario ever coming to pass is essentially zero. But if the language is so broad, it offers little guidance in more realistic cases. This is particularly critical in situations such as those involving the AIDS virus because there is widespread misunderstanding about the circumstances under which the virus can be transmitted.129 Also, there is near hysteria about the disease in some quarters130 and many of those infected are or are believed to be members of very unpopular minorities.131 This creates grave danger of overbroad application of such statutes.132

In order, then, to minimize the chance of overly broad application, the statutory language was revised by one of your authors to require that the state prove that the actor deliberately created a grave and unjustifiable risk of

127. Id. § 565.070.2 (1986). Why then a special provision? It is, of course, impossible to divine the collective reasoning of the legislature. But at least some of the history is objectively determinable. An early bill provided that: "It shall be unlawful for any individual knowingly infected with HIV to . . . [d]eliberately expose another individual with the danger of being infected with HIV through sexual contact or otherwise when such individual knows that he could potentially communicate HIV to another individual through his activity." H.B. No. 1044, § 6.3. Asked to review the bill, this author (Schultz) felt that this provision swept much too broadly and was unnecessary in view of the assault provision noted above. In discussions with other persons interested in the legislation it appeared, however, that it was likely that a bill would pass and would contain criminal sanctions for conduct risking transmission of HIV. Thus, a revised provision was prepared which became part of a substitute bill. H. COMM. SUBST. H.B. Nos. 1151 & 1044, § 17.1(3). The language of this provision was carried over into the Bill, as enacted, but without the following exclusion: "However, this provision shall not be construed to prohibit conduct between consenting adults where the infected party has disclosed any danger of infecting the other of which he is aware and has obtained an agreement from the other to the conduct."

128. Id. 129. See Schultz, supra note 11, at 104 n.187.
130. See id. at 89 n.122.
131. See id. at 109 nn.210-211.
132. See id. at 108-10.

https://scholarship.law.missouri.edu/mlr/vol53/iss4/2
infecting another knowing that the risk is created. This is not an offense that can be committed negligently. The actor must be shown to have been subjectively aware of the grave risk that was created and nevertheless went forward and ran that risk. More specifically, the actor must be shown to have known his HIV status and that the conduct created a grave and unjustifiable risk of infecting another. And for good reason. For example, there is a high probability that a person who regularly shares IV drug paraphernalia with others may be infected. If such persons are unaware of the risk of being infected or are unaware that they may transmit such an infection through unprotected intercourse, criminal penalties will do nothing to deter such conduct. On the other hand, if the actor knows the grave and unjustifiable risk involved and goes ahead anyway, he or she has demonstrated the type of conduct that ought to be deterred, even if no one is injured by it on that particular occasion.

This leaves the question of the nature of the risk of which the actor must be aware. The statute describes it as “grave and unjustifiable.” It has been demonstrated that HIV can be transmitted through unprotected vaginal and anal intercourse and by the infusion of infected blood into the bloodstream of another. Other conduct might, theoretically, transmit the virus, but has not been shown to do so. Furthermore, the degree of risk may vary widely depending on the conduct involved. There may, for example, be a substantial difference in risk created by a kiss and a bite. From what we know, however, it is submitted that the risk associated with either is minimal to non-existent and therefore would not be considered “grave,” and thus would not support criminal liability under this provision.

Finally, the risk must have been unjustifiable. This requirement was taken from the concept of recklessness in the Model Penal Code and the Missouri Code. But the idea has deeper roots. It can be forcefully argued that the degree of risk creation that warrants criminal liability cannot adequately be evaluated without considering the purpose of the conduct and the circumstances known to the actor. For example, exceeding the posted speed limit where there is heavy pedestrian traffic might be viewed as reckless driving if

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133. See id. at 67 n.12.
134. Id.
135. The concentration of HIV in saliva is very low, making the likelihood of transmission in that way very remote. See id. at 67 n.12. In fact, preliminary research conducted by the National Institute of Dental Research indicates that saliva may actually prevent the AIDS virus from infecting cells. Thus, the lack of HIV cases transmitted through kissing and biting is understandable. State AIDS Reports #3, May-June 1988, at 4, col. 2.
done for thrills, but as within acceptable risk creation if done to bring a critically injured person to the hospital. Similarly, if a person infected with HIV were to disclose his condition and the nature of the risk involved in sexual intercourse to his partner and obtained the partner's consent before engaging in intercourse, the risk run might well be considered justifiable.\textsuperscript{139} Certainly, it could be more readily justified than if there had been no disclosure.

Thus, a "grave and unjustifiable" risk requires consideration of not only the magnitude of the risk, but also the nature of the injury risked and the social value of the conduct. This is the jury's task, assuming a submissable case is made. Prosecutors and judges will have to take special care here, as some conduct which may risk transmission of HIV, particularly sexual conduct, may be viewed as having very different "social value" by various groups in the community.\textsuperscript{140} Negative reactions may run so high in some instances that careful attempts to apply the prescribed legal standard may give way to irrational fears and personal prejudices.\textsuperscript{141} Prosecutions tainted in this way would not only be unjust but also would be counterproductive, as they would drive risky conduct further underground.

Criminal sanctions ought not to be viewed as a weapon of first resort in the fight against the spread of this disease (or any other). Rather they should be reserved for those cases where the evidence of criminal intent is strong.

\textsuperscript{139} See Schultz, supra note 11, at 105-08. The legislature deleted the following language contained in House Committee Substitute for H.B. Nos. 1151 & 1044, § 17.1(3): "However, this provision shall not be construed to prohibit conduct between consenting adults where the infected party has disclosed any danger of infecting the other of which he is aware and has obtained an agreement from the other to the conduct." That deletion may be viewed as disapproving a formal defense of consent. It does not, however, change the fact that the risk run must be proved to be unjustifiable to support a conviction. Whether the defendant disclosed the risk involved is logically relevant to this issue. To arbitrarily exclude such relevant evidence could only discourage conduct we should be seeking to encourage in the interest of public health, as disclosure would likely lead to the taking of precautions to prevent transmission.

\textsuperscript{140} See, e.g., P. Blumstein \& R. Schwartz, \textit{American Couples} 193, 201 (1983):

Sexuality is an important element in the lives and relationships of all four types of couples [married and unmarried heterosexual couples and gay and lesbian couples]. For all four kinds of couples, sex functions as a complex bond between the partners, and for all "a good sex life is central to a good overall relationship." Married or not, heterosexual or homosexual, having sex is an act that is rarely devoid of larger meaning for a couple, it always says something about partners' feelings about each other, what kind of values they share, and the purpose for their relationship.

\textit{Id.; see also} Amicus Curiae brief of the Presbyterian Church (U.S.A.), The Philadelphia Yearly Meeting of Friends, The American Friends Service Committee, The Unitarian Universalist Association, Office for Church Society of the United Church of Christ, The Right Reverend Paul Moore, Jr., at 10, Bowers v. Hardwick, 478 U.S. 186 (1986) ("There is no contemporary consensus about the objective morality of sexual unorthodoxy.").

\textsuperscript{141} See Schultz, supra note 11, at 136 n.134 and accompanying text.
enough to minimize the possible influence of personal prejudice and to maximize the support of all responsible segments of the community. That support is essential to ensure that those at risk of being infected with HIV will come forward and be tested, treated and counseled.\footnote{142} Virtually all public health authorities agree that voluntary cooperation and education are our best weapons against the spread of this virus.\footnote{143}

VI. NUISANCE ABATEMENT

Section 14.4 of the Missouri AIDS legislation gives the Department of Health the power to bring an action to enjoin and abate certain operations declared to be nuisances under that section. The statute addresses any place "used for the purpose of lewdness, assignation, or illegal purpose involving sexual or other contact through which transmission of HIV infection can occur." A business meeting these standards may be shut down for up to one year under section 14.3.\footnote{144}

Prior to this statute, local governing bodies possessed the general ability to enact ordinances declaring structures to be nuisances when deemed to be detrimental to residents' health, safety or welfare.\footnote{145} Further provisions permit the closing of certain specific nuisances such as gambling houses,\footnote{146} prostitution houses,\footnote{147} and places used for the illegal sale or usage of drugs.\footnote{148} Cities and towns also have the power to enact "health laws to prevent the spread of venereal diseases."\footnote{149} Presumably, then, the authority which Section 14 purports to give is currently enjoyed without its specific grant. This legislation merely standardizes the power within one body—the Department of Health. It also gives a direct grant of the power to declare as nuisances any operations where AIDS could be transmitted, rather than requiring reliance on authority given indirectly by the already existing statutes. It is generally assumed that section 14 is designed to give the Department of Health the authority to shut down gay bathhouses.\footnote{150} However, many experts believe that closing bathhouses will not significantly reduce the transmission of the AIDS virus.\footnote{151}

\footnote{142}{\textit{Id.} at 151 n.223 and accompanying text.}
\footnote{143}{\textit{Id.} at 78 n.65 and accompanying text.}
\footnote{144}{H.B. 1151 & 1044, § 14.3.}
\footnote{145}{MO. REV. STAT. § 67.400 (1986) gives cities, towns, and villages the power to institute vacation or demolition of buildings deemed to be detrimental to citizens' health, safety or welfare. The local governments are required to codify what conditions constitute a "nuisance" in an ordinance by MO. REV. STAT. § 67.410 (1986).}
\footnote{146}{MO. REV. STAT. § 572.090 (1986).}
\footnote{147}{\textit{Id.} § 567.080.}
\footnote{148}{\textit{Id.} § 195.130.}
\footnote{149}{\textit{Id.} § 569.090.}
\footnote{150}{\textit{Cf.} Hillen, \textit{City Sees State Pressure to Close Gay Bathhouse}, Kan. City Times, April 9, 1988, at C-1, col. 1.}
\footnote{151}{During telephone interviews with health officials in 22 different cities, 19 responded that, "closing bathhouses would not significantly reduce the transmission of AIDS." Hillen, \textit{supra} note 150, at C-1, col. 2, C-6, col. 1. Furthermore, Dr. Richard}
Aside from the fact that the state's aim of limiting HIV transmission may not be furthered by closing bathhouses as nuisances, there are other reasons why such an action could even hinder this goal. For example, because bathhouses are locations where homosexual men meet, they are also places where contact could be maintained with these individuals. It is argued that safe sex educational materials can be distributed or even mandated in the bathhouses. This was the rationale of California Superior Court when it reopened bathhouses closed by the health department. This action was allowed with the proviso that patrons of the clubs be heavily monitored, that doors to individual rooms be removed and preventative AIDS education be provided.

In the wake of cases like Bowers v. Hardwick and State v. Walsh it is unlikely that a court would find any constitutional barrier in the way of closing gay bathhouses for health reasons. Section 14, however, is drafted so broadly that ordinary hotels, nightclubs and even hospitals might fall within its definition of "nuisance." Although it is unlikely that the Department of Health would attempt to enforce this provision to its fullest against "legitimate" businesses, bars and clubs catering to gay clientele may not be so fortunate. The Department need show only "illegal purpose involving sexual or other contact through which transmission of HIV infection can occur." Could kissing between same sex partners be considered to involve an "illegal purpose" when part of an invitation to spend the night, in view of the fact that Missouri prohibits sex between partners of the same gender? Might not some authorities be unwilling to say that transmission of HIV cannot occur via kissing? Were the statute applied in this way it might well be unconstitutional. Yet the legal battle could be more costly than some businesses could

Biery, the Kansas City Health Director, claims that no sexually transmitted diseases have been found to originate from bathhouse encounters in the last several years. Id. Also, although incomplete when reported, one study purports to show that bathhouse sex has no significant correlation to the spread of AIDS. Comment, Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis, 15 GOLDEN GATE U.L. REV. 301, 313 (1985) (citing Bay Area Reporter, Oct. 11, 1984, at 1, col. 1).

152. According to Marji Datwyler, AIDS program manager for the Kansas City Department of Health, the Department contacts with the local gay bathhouse is one of the Department's strongest links to the gay community. Closing it would disrupt this contact. Hillen, supra note 150, at C-6, col. 1.


155. 713 S.W.2d 508 (Mo. 1986) (en banc) (Missouri statute which prohibits same-sex consensual sexual activity does not violate federal constitutional guarantees of equal protection and privacy).

156. MO. REV. STAT. §§ 566.090.1(3), .010.1(2).

157. Schultz, supra note 11, at 67 n.12.

158. Public health regulations must be reasonable and not overly broad. See gen-
VII. CONCLUSION

AIDS is a deadly disease with the potential for far reaching affects on everyone’s life. It was appropriate and commendable for the Missouri legislature to deal with this problem and produce an emergency statute. However, the statute includes many ambiguities and some unwise provisions which ought to be remedied when the statute is replaced upon expiration of the current law at the end of 1989. In the Appendix to this Article is a revision of the current Missouri AIDS legislation which your authors believe meets many of the criticisms we have levelled against the current statute.
Relating to public health and the human immunodeficiency virus that causes acquired immunodeficiency syndrome, with penalty provisions and an emergency clause.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI AS FOLLOWS:

Section 1. As used in this act, the following terms mean:

1. “Disclose, to release, transfer, transmit, disseminate or otherwise communicate all or any part of any communication, note, record, or recorded data in whatsoever form maintained either orally, in writing, or by electronic means to any person or entity [;] as defined herein;

2. “HIV”, the Human immunodeficiency virus that causes acquired immunodeficiency syndrome;

3. “HIV Infection”, the pathological state of the human body in response to HIV;

4. “HIV Blood sampling”; taking or ordering the taking of a sample of venous blood from an individual which is subjected to serological tests for the presence of HIV or its antibodies;

5. “HIV testing”, performing a serological test or tests upon a sample of venous blood [to] which will determine the presence of HIV or its antibodies following HIV blood sampling;

6. “Person,” private individuals and private and public bodies politic and corporate, partnerships, joint ventures, trusts, and unincorporated associations and [their] any officer[s], agent[s], or employee[s] or any of the foregoing.

7. “Health care professional” includes those professionals regulated by chapters 330, 332, 334 and 335 RS Mo..

Section 2. 1. No person shall perform or conduct [HIV testing] any test which has as a primary or ancillary purpose the detection of HIV or its antibodies testing except physicians, hospitals, and those persons authorized by the department of health. No person shall be authorized by the department of health to perform or conduct HIV testing unless such person provides suitable verification to the department that such testing shall be performed in accordance with departmental regulations governing the types of tests performed and the manner in which they are administered. The department [may] shall monitor the continued compliance of such persons with department regulations. Hospitals licensed pursuant to chapter 197, RSMo. shall be deemed to be in compliance with departmental regulations governing HIV testing.

** This suggested bill is based on the current Missouri statute, H.B. 1151 & 1044, 84th General Assembly. Brackets [ ] indicate material to be deleted; underlining indicates material to be added.
2. No person shall perform an HIV-related test without first receiving the written, informed consent of the subject of the test or the subject’s legal guardian. Any person who obtains the written informed consent shall certify that informed consent has been received prior to ordering testing by a laboratory or other facility. This provision is subject to the exception of bona fide medical emergencies where consent cannot be obtained for an HIV-related test or any other medical procedure.

3. No person shall be deemed “HIV-positive” until that person has tested positive under two distinct HIV tests, both of which have been approved by the department of health. All HIV testing shall be performed in accordance with the department rules governing HIV testing procedure.

[3.] 4. Except as provided in section 8 and 12 of this act, all physicians, hospitals, or other persons authorized by the department of health who perform or conduct HIV blood sampling shall provide consultation with the subject prior to taking the sample and during the reporting of the test results and shall report to the department of health the identity of any individual confirmed to be infected with HIV.

5. The term “consultation” as used in subsection (4) shall include, but not be limited to:

(a) an explanation of the test, including its purposes, potential uses, limitations and the meaning of its results;

(b) an explanation of the procedures to be followed including that the test is voluntary; if such is the case, that consent may be withdrawn at any time, and that the test can be obtained anonymously if the subject wishes. Any person or entity that does not provide HIV-Related tests on an anonymous basis shall refer any person desiring an anonymous test to a test site which does provide anonymous testing;

(c) an explanation of the nature of AIDS and ARC and the relationship between the test result and those conditions;

(d) counseling for coping with the emotional consequences of learning the test result or make referrals for counseling for coping with the emotional consequences of learning the test results;

(e) information about behaviors or activities known to pose risks for the transmission of HIV infection;

(f) an explanation of the importance of informing persons who may have become infected with HIV through contact with the subject, should the subject have been tested positive, including information that the department of health is available to contact those persons should the subject prefer not to.

Section 3.[1. (1) All information and records containing any information held or maintained by any person, agency, department, or political subdivision of the state concerning an individual’s HIV infection status or the results of any individual’s HIV testing shall be strictly confidential and shall not be disclosed except to:

(a) Public employees within the agency, department, or political subdivi-
sion who need to know to perform their public duties;

(b) Public employees of other agencies, departments, or political subdivisions who need to know to perform their public duties;

(c) Persons other than public employees who are entrusted with the regular care of those under the care and custody of a state agency, including but not limited to operators of day care facilities, group homes, residential care facilities and adoptive or foster parents;

(d) As authorized by subsection 2 of this section:

(2) Further disclosure by public employees shall be governed by subsection 2 and 3 of this section. Public employees violating such requirements may be subject to civil actions brought under subsection 4 of this section.

2. (1) Unless the person acted in bad faith or with conscious disregard, no person shall be liable for violating any duty or right of confidentiality established by law for disclosing the results of an individual's HIV testing;

(a) To the Department of health;

(b) To health care personnel working directly with the infected individual who have a reasonable need to know the results for the purpose of providing direct patient health care;

(c) Pursuant to the written authorization of the subject of the test result or results;

(d) To the spouse of the subject of the test result or results;

(e) To the subject of the test result of results;

(f) To the parent or legal guardian or custodian of the subject of the testing, if he is an unemancipated minor.

(2) Paragraphs (b) and (d) of subdivision (1) of this subsection shall not be construed in any court to impose any duty on a person to disclose the results of an individuals's HIV testing to a spouse or health care professional or other potentially exposed person, parent or guardian.

(3) No person to whom the results of an individual's HIV testing has been disclosed pursuant to paragraph (b) and (c) of subdivision (1) of this subsection shall further disclose such results.

(4) When the results of HIV testing, disclosed pursuant to paragraph (b) of subdivision (1) of this subsection, are included in the medical record of the patient who is subject to the test, the inclusion is not a disclosure for purposes of such paragraph so long as such medical record is afforded the same confidentiality protection afforded other medical records.

(3) All communications between the subject of HIV testing and a physician, hospital, or other person authorized by the department of health who performs or conducts HIV blood sampling shall be privileged communications.

(4) The identity of any individual participating in a research project approved by an institutional review board shall not be reported to the department of health by the physician conducting the research project.

(5) The subject of HIV testing who is fund to have HIV infection shall
disclose such information to any health care professional from whom such person receives health care services. Said notification shall be made prior to receiving services from such health care professional.

(6) Any individual who is injured as a result of a violation of this section may bring a civil action for damages. If it is found in a civil action that:

(1) A person has negligently violated this section, the person is liable for:
   (a) Actual damages; and
   (b) Court costs and reasonable attorney’s fees incurred by the person bringing the action; or

(2) Any person who demonstrates a conscious disregard or has willfully violated this section, is liable for:
   (a) Actual damages;
   (b) Exemplary damages; and
   (c) Court costs and reasonable attorney’s fees incurred by the person bringing the action.

7. No civil liability shall accrue to any health care provider as a result of making a good faith report to the department of health about a person reasonably believed to be infected with HIV, or cooperating in good faith with the department in an investigation determining whether a court order directing an individual to undergo HIV testing will be sought, or in participating in good faith in any judicial proceeding resulting from such a report or investigations and any person making such a report, or cooperating with such an investigation or participating in such judicial proceeding shall be immune from civil liability as a result of such actions so long as taken in good faith.

8. (1) As used in this subsection, the following terms mean:

(a) “Emergency medical person,” any person trained and authorized by law or rule to render emergency medical assistance or treatment such as but not exclusively limited to emergency first responders, ambulance attendants, and attendant-drivers, emergency medical technicians, mobile emergency medical technicians, emergency medical technician-paramedics, registered nurses, or physicians;

(b) “Licensed facility”, a facility licensed under chapter 197 RSMo, or a nursing home licensed under chapter 198, RSMo.

(2) A licensed facility that receives a patient who is subsequently diagnosed as having a reportable infectious or contagious disease as defined by the department of health shall notify:

(a) The employer of any firefighter, police officer, or emergency medical person that such firefighter, police officer, or emergency medical person has been exposed to such patient during emergency rescue operations, medical treatment, or transportation of such facility; or

(b) Mortuary personnel involved in the removal of such deceased patient from such facility or the care of such deceased patient thereafter.

The notification shall be made as soon as possible after the HIV infectious or
contagious disease has been confirmed as such. The employer shall request such person to contact the licensed facility to receive the appropriate medical direction. Notification shall be conducted in a manner that protects the confidentiality of the patient and the firefighter, police officer, or emergency medical technician.] No person shall disclose or be compelled to disclose the identity of any person upon whom an HIV-Related test has been performed, or the results of such a test in any manner which permits identification of the subject of the test, except to the following persons:

(1) The subject of the test or the subject’s legal guardian.

(2) Any person who secures a legally effective release of the test results executed by the subject of the test or the subject’s legal guardian.

(3) An authorized agent or employee of a health facility or health care provider if the health facility or health care provider itself is authorized to obtain the test results, any agent or employee who provides patient care or handles or processes specimens of body fluids or tissues, and the agent or employee has a medical need to know such information.

(4) Licensed medical personnel providing care to the subject of the test, when knowledge of the test results is necessary to provide appropriate emergency care or treatment.

(5) The Missouri department of health or the Centers for Disease Control of the United States Public Health Service in accordance with reporting requirements for a diagnosed case of AIDS, or a related condition.

(6) A health facility or health care provider which procures, distributes or uses:

(i) A human body part from a deceased person; or

(ii) semen provided prior to the effective date of this Act for the purpose of artificial insemination.

(7) Health facility staff committees or accreditation on oversight review organizations which are conducting program monitoring, program evaluation or service reviews.

(8) A person allowed access a test record by a court order, No order of any court shall issue permitting access to any of the records referred to in this subsection unless it is issued in compliance with the following provisions:

(i) No court of this State shall issue an order permitting access to test results unless the court finds that the person seeking the disclosure of the test results has demonstrated a compelling need for the disclosure of the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest which may be diserved by disclosure which deters testing or which may lead to discrimination.

(ii) Pleadings pertaining to disclosure of test results shall substitute a pseudonym for the true name of the subject of the test. The disclosure to the parties of the subject’s true name shall be communicated confidentially, in no court of this state shall issue an order permitting access to test results unless...
documents not filed with the court.

(iii) Before granting any such order, the court shall provide the individual whose test result is in question with notice and a reasonable opportunity to participate in a hearing upon the issue if he or she is not already a party.

(iv) Any Court proceedings regarding the disclosure of HIV test results shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court makes a specific determination that a public hearing is necessary to protect the public safety and the proper administration of justice.

(v) Upon the issuance of an order requiring the disclosure of test results, the court shall impose appropriate safeguards against an authorized disclosure, which shall specify the persons who may have access to the information, how the information shall be used, and appropriate prohibitions on

(vi) No person to whom the results of an HIV-related test have been disclosed pursuant to Section 3 of this Act may disclose the test results to another person except as authorized by Section 3.

(vii) Whenever test results are disclosed pursuant to this Act it shall be accompanied by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from records whose confidentiality is protected by State law. State law prohibits you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is NOT sufficient for this purpose." An oral disclosure shall be accompanied by such a notice within 10 days of any oral disclosures.

2. Any person aggrieved by a violation of this Act shall have a civil cause of action. Any such action may be brought in the Circuit Court of the County of the aggrieved person or in the County where the cause of action arose. Anyaggrieved person may recover for each violation:

(1) Against any person who negligently violates a provision of this Act, liquidated damages of $1000 or actual damages, whichever is greater.

(2) Against any person who intentionally or recklessly violates a provision of this Act, liquidated damages of $5000 or actual damages, whichever is greater.

(3) Reasonable attorney fees, including costs of the action.

(4) Such other relief, including an injunction or other equitable relief, as the court may deem appropriate.

3. Any action under this Act is barred unless the action is commenced within three years after the cause of action accrues.

4. Nothing in this Act is intended to nor shall it be construed to limit the rights of the subject of an HIV-related test to recover damages or obtain other relief under any other applicable law or at common law.

5. Nothing in this Act shall be construed to impose civil liability or crim-
nal sanctions for disclosure of an HIV-related test result in accordance with any reporting requirement for a diagnosed case of AIDS or a related condition by the department of health or the Centers for Disease Control of the United States Public Health Service.

6. Nothing in this Act shall be construed to impose civil liability or criminal sanctions for failure to disclose the results of any individual’s HIV testing to a spouse or health professional or other potentially exposed person, parent or guardian, or other person or entity.

7. All communications regarding health matters between the subject of HIV testing and any health care provider, hospital, or other person authorized by the department of health to perform or conduct of who requires HIV blood sampling shall be confidential and privileged communications.

8. The identity of any individual participating in any research project approved by an institutional review board shall not be reported to the department of health by the health care provider conducting the research project or by any other person.

9. Any person who has the HIV infection shall disclose such condition to any health care professional from whom the person receives health care services. For the purposes of this section, a “health care professional” shall mean any person licensed or regulated by the provisions of chapters 330, 332, 334 and 335, including a student whose professional responsibilities involve contact with a person’s blood or other bodily fluids in a health care setting. The notification provided for in this Section shall be made prior to receiving professional services from the health care professional. After disclosure by the patient, no health care professional may refuse to treat the patient because of the disclosure of HIV infection.

10. Any health care professional, as that term is defined in this Act, who, after disclosure has been made by a patient of HIV infection, refused to treat the patient for any reason related to the patient’s health care needs, shall be held to have committed an act of unprofessional conduct and an act violative of the professional trust and confidence required of health care professionals as these terms are used in Sections 330.160, 332.321, 334.100 and 335.066 RSMo.

Section 4.1. All [individuals] persons who are [delivered] committed to the department of corrections and human resources and are confined in a correctional institution of the state and all individuals who are released or discharged from any institution operated by the department of corrections and human resources[.] and before such individuals are released or discharged, shall undergo HIV testing without the right of refusal[.] if the crime for which the individual was convicted posed some risk of infection to another person. In addition, the department of corrections and human resources may perform or conduct HIV testing on all individuals required to undergo annual or biannual physical examination by the department of examinations[.] if the department has reasonable cause to believe an individual is infected with HIV. The Department of corrections and human services shall provide HIV testing to any
person in its care and custody who requests such testing.

2. The provisions of this Act regarding dissemination of test results, informed consent, and confidentiality shall apply to any tests performed by the department of corrections and human services.

Section 5. 1. The department of mental health may perform or conduct HIV testing or HIV sampling without the right of refusal [on:] after obtaining an order from the proper probate court, and pursuant to Section 3 of this Act in any of the following circumstances:

(1) Any individual participating in a methadone treatment program for the treatment of intravenous drug abuse [and who] when the person has refused to undergo such testing [whenever] provided there are reasonable grounds other than the individual's intravenous drug use to believe that the individual is infected with HIV and [is a reasonable health threat to others] the individual poses an unreasonable danger to the health of himself for others:

(2) Any individual under the care and custody of the department of mental health who has refused to undergo testing whenever there are reasonable grounds other than the individual's mental incapacities to believe that the individual is infected with HIV and [is a reasonable] the individual poses an unreasonable danger to the health [threat] to himself or to others, unless such testing is otherwise prohibited by law.

2. The department of mental health shall not report to the department of health the identity of any individual for whom HIV testing pursuant to this section confirms HIV infection if such reporting is prohibited by federal law or regulation.

Section 6. 1. [Provisions of chapter 213, RSMo., shall apply to individuals with HIV infection, acquired immunodeficiency syndrome and acquired immunodeficiency syndrome related complex; provided that such protection shall not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of their employment.] Unless a demonstrated bona fide health risk or occupational qualification exists, it shall be an unlawful discriminatory practice for any person to discriminate against any individual, solely on the grounds that such individual has HIV infection, in the following areas:

(1) To deny such individual the full and equal enjoyment of, or to impose different terms and conditions on the availability of, any facility, service, assistance, or benefits of any city, county or state agency or political subdivision thereof; or any governmental, political or quasipolitical entity in this state.

(2) For an employer, as that term is defined in subdivision (5) of section 213.010, RSMo., to fail or refuse to hire, or to discharge, or to fail to promote or who demotes an individual, or to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, unless
the individual's HIV infection renders the person medically unable to perform the duties of the employment position or a clear public health danger would result from the individual's employment.

3. To interrupt, terminate, or fail or refuse to initiate or conduct any transaction involving real property with an individual, including but not limited to the rental thereof, or to require different terms or conditions for any transaction;

4. To deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business or establishment or accommodation open to the public.

5. To deny admission to, or impose different terms or conditions on admission, any individual to a public educational institution or any education institution receiving public funds.

2. Subsection 1 of this section shall not mean, nor be construed to mean that any action taken by the Missouri commission on human rights prior to the effective date of this act concerning discrimination against any individual on the basis that such individual has HIV infection or is perceived to have HIV infection to be an improper exercise of authority by the commission.

3. No third person shall be liable for the transmission of HIV from one person to another solely on the basis that the third person knew that the person who transmitted the HIV infection was infected with HIV.

Section 7[1] The department of health shall prepare public education and awareness plans and programs for the general public, and the department of elementary and secondary education shall prepare educational programs for public schools, regarding means of transmission and prevention and treatment of the HIV virus. The plans and programs shall include, but not be limited to:

(1) Medically correct, age specific, transmission and prevention programs for use at the discretion of the public schools beginning with students at the sixth grade level. The educational programs shall stress moral responsibility in and restraint from sexual activity and avoidance of controlled substance use whereby HIV can be transmitted:

(2) Risk reduction programs for specific populations at high risk of HIV infection:

(3) Educational programs on transmission and prevention of HIV infection in the workplace for use by employers;

(4) Personal protection procedures for use by health care providers and others [in close] whose contact with potentially infected individuals[;] may pose a demonstrable risk of infection;

(5) General public information programs and circulars containing factual information that will allow the public at large to assess its risk and develop informed individual judgments and behavior habits. The department shall prepare for free distribution among the residents of the state printed information concerning the means of transmission of the HIV virus, the dangers from HIV infection, means of prevention, and the benefits and limitations of tests for
HIV antibodies, and the availability of testing, including the existence and location of anonymous testing sites; and

(6) Develop presentations for community service and school organizations describing the medical and psychosocial aspects of HIV infection, including information on how infection is transmitted and how its transmission can be prevented.

(7) General information programs and circulars and programs tailored to specific groups designed to describe and inform all citizens of the provisions in this act and promote the public awareness of these provisions.

[2. None of the plans, programs or printed information prepared or provided under this section shall promote behavior that is offense in violation of chapter 5566, RSMo., concerning sexual offenses; is an offense involving the use of a controlled substance as defined in chapter 195, RSMo.; is an offense in violation of section 568.020, RSMo., concerning incest; or is an offense in violation of any city, county or state law prohibiting prostitution of patronizing prostitution.]

Section 8. 1. No other section of this Act but sections 2, 3 and 6 shall apply to any insurer, health services corporation, or health maintenance organization licensed by the division of insurance which conducts HIV testing or which requires HIV testing only for the purpose of assessing a person’s fitness for insurance coverage offered by such insurer, health services corporation, or health maintenance corporation, except that nothing in this section shall be construed to exempt any insurer, health services corporation or health maintenance organization in their capacity as employers from the provisions of section 6 of this act relating to employment practices.

2. Upon renewal of any individual or group insurance policy, subscriber contractor health maintenance organization contract covering medical expenses, no insurer, health services corporation or health maintenance organization shall deny or alter coverage to any previously covered individual who has been diagnosed as having HIV infection or any HIV related condition [during the previous policy or contract period only] solely because of such diagnosis, nor shall any such insurer, health services corporation or health maintenance organization exclude or limit coverage for treatment of such infection or condition with respect to any such individual.

3. The director of the division of insurance shall establish by regulations not inconsistent with the provisions of this Act, standards for the use of HIV testing by insurers, health services corporations and health maintenance organizations.

4. A laboratory certified by the U.S. Department of Health and Human Services under the Clinical Laboratory Improvement Act of 1967, permitting testing of specimens obtained in interstate commerce, and which subjects itself to ongoing proficiency testing by the College of American Pathologists, the American Association of Bio Analysts, or an equivalent program approved by the Centers for Disease Control shall be authorized to perform or conduct
HIV testing for an insurer, health services corporation or health maintenance organization pursuant to this [section] Act.

5. The result or results of HIV testing of an applicant for insurance coverage shall not be disclosed by an insurer, health services corporation or health maintenance organization, except as specifically authorized by such applicant in writing. Such result or results shall however been disclosed to a physician designated by the subject of the test. If there is no physician designated, the insurer, health services corporation, or health maintenance organization shall disclose the identity of individuals residing in Missouri having a confirmed positive HIV test result to the department of health. Provided, further, that no such insurer, health services corporation or health maintenance organization shall be liable for violating any duty or right of confidentiality established by law for disclosing such identity of individuals having a confirmed positive HIV test result to the department of health. [Such] Disclosure to the department of health shall be in the manner that ensures the confidentiality of the applicant. Disclosure of test results in violation of this section shall constitute a violation of sections 375.390 to 375.948, RSMo., regulating trade practices in the business of insurance. Nothing in this subsection shall be construed to foreclose any remedies existing under any statute or at common law on the effective date of this act.

Section 9. 1. The department of health may seek in its own name in a court of competent jurisdiction a court order directing an individual to undergo HIV testing without the right of refusal after reasonable efforts have been made by the department to obtain the informed consent of the individual to HIV testing. The court shall grant such order whenever there are reasonable grounds to believe that an individual is infected with HIV which belief is substantiated by medical documentation and there is clear and convincing evidence of a serious and present health threat to others posed by the individual if it is determined that the individual is infected.

2. If the department commences any proceeding authorized by this section, any individual who is the subject of the action shall have a right to an adversarial proceeding, together with the right to counsel. If the individual cannot afford counsel, one shall be provided. To the extent practicable the provisions of section 3(8) of this act shall apply to any proceeding brought pursuant to this section. [2.

3. The record of any suit filed pursuant to this section shall be closed to the public and, at the request of the individual, any hearing shall be held in camera.

Section 10. 1. It shall be unlawful for any individual knowingly infected with HIV to:

(1) Be or attempt to be a blood, organ, sperm or tissue donor except as deemed necessary for medical research; or

(2) Deliberately [create a grave and unjustifiable risk of infection] infect or attempt to infect another with HIV through sexual or other contact [when an individual knows that he is creating that risk] involving a substantial risk of infusing bodily fluid of an infected person into the bloodstream of another.
1988] 

AIDS ANALYSIS AND PROPOSAL 641

However, this provision shall not be construed to include circumstances where the risk has been disclosed by the infected person to the other person prior to the exposing act.

2. To establish a violation of this provision, it must be shown that the individual was tested for HIV and informed of the positive result prior to the commission of the exposing act.

[2.] 3. Violation of the provisions of subsection 1 of this section is a class D felony.

[3.] 4. The department of health shall have sole responsibility for the enforcement of subsection 1 of this section. The department of health may file a complaint with the prosecuting attorney of any county, or with the attorney general requesting that such official file an action in a court of competent jurisdiction alleging that an individual has violated a provision of subsection 1 of this section. The department of health shall assist the prosecuting attorney or the attorney general as the case may be, in preparing [such] the prosecution of the case.

Section 11. The department of health shall regularly report to the appropriate committees of both houses of the general assembly:

[(1) The number of individuals with HIV infection for whom a health care plan has been developed detailing the form and impact of such health care plans in a manner that does not identify or provide identifying characteristics of an individual infected with HIV:]

[(2)] (1) The nature and extent to which the department has utilized judicial proceedings provided for by this act in a manner that does not identify or provide identifying characteristics of any individual subject to such proceedings;

[(3)] (2) The form and extent of the handling of federal funds available to the department of health for disbursement for implementing this act;

[(4)] (3) The form and extent of programs and efforts funded by state funds for implementing this act; and

[(5)] (4) Any other information such committees shall seek[.] the disclosure of which does not violate any provision of this act.

Section 12. [The department of health may promulgate rules providing for mandatory premarital HIV testing if the Centers for Disease Control so indicates.]

1. Any person seeking an HIV-related test who wishes to remain anonymous shall have the right to do so, and have the right to provide written, informed consent through use of a coded system with no linking of individual identity to the test request or results.

[Section 13. 1] 2. The department of health shall designate one HIV testing site in the St. Louis area, one in the Kansas City area, and one in the Springfield area where those persons not required to undergo HIV testing without the right of refusal may be tested anonymously. The department of health shall designate such other numbers of test sites as to make anony-
mous testing readily available and reasonably accessible to all residents of this state.

[2.] 3. All physicians, hospitals, or other persons authorized by the department of health who perform or conduct HIV blood sampling may refuse to perform or conduct anonymous HIV blood sampling for an individual and may refer such person to the designated HIV testing sites.

[3.] 4. A coded system that does not link individual identity with the request or result shall be used to report the results of such testing to the department of health.

[4.] 5. All designated HIV testing sites shall be required to initiate contact notification when submitting test results to individuals who request anonymous testing and who test positive for HIV infection.

[Section 14. 1 1. Any person who shall erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or illegal purpose involving sexual or other contact through which transmission of HIV infection can occur is guilty of maintaining a nuisance.

2. The building, structure, or place, or the ground itself, in or upon which any such lewdness, assignation, or illegal purpose is conducted, permitted, carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as provided in subsection 3 of this section.

3. If the existence of a nuisance is admitted or established in an action pursuant to this section or in a criminal proceeding in any court, an order of abatement shall be entered as part of the judgement in the case. The order shall direct the effectual closing of the business for any purpose, and so keeping it closed for a period of one year.

4. The department of health shall file suit in its own name in any court of competent jurisdiction to enforce the provisions of this section.]

Section [15.] 13. 1. Only after [a] elementary or secondary school has adopted a formal policy consistent with the recommendations for the Centers of Disease Control on school children who test positive for HIV shall the department of health give prompt and confidential notice of the identity of any child reported to the department to have HIV infection and the parent or guardian of any child confirmed by the department of health standards to have HIV infection shall also give prompt and confidential notice of the identity of such child to the superintendent of the school district in which the child resides attends school, and if the child attends a nonpublic elementary or secondary, to the chief administrative officer of such school.

2. The superintendent or chief administrative officer of any elementary or secondary school may disclose the identity of an infected child to those person:

(a) who are designated by the school district to determine the fitness of an
(b) who have a reasonable need to know the identity of the child in order to provide proper health care at the school.

[Section 16. This act shall expire on December 31, 1989.]

Section [17.] 14. 1. No rule or portion of a rule promulgated under the authority of this act shall become effective under a public hearing has been held as provided by chapter 536 RSMo., and it has been approved by the joint committee on administrative rules. Upon filing any proposed rule with the secretary of state, the department of health shall concurrently submit such proposed rule to the committee which may hold hearings upon any proposed rule and may disapprove any proposed rule or portion thereof at any time. In the event the committee disapproves any proposed rule or portion thereof, the committee shall notify the department of health and the secretary of state. If any proposed rule or portion thereof is disapproved by the committee, the secretary of state shall publish in the Missouri register, as soon as practicable, an order that such rule or portion thereof has been disapproved.

2. The department of health shall not file any final order of rule making with the secretary of state until twenty days after such final order of rule making has been received by the committee. The committee may hold one or more hearings upon such final order of rule making during the twenty day period. If the committee neither approves or disapproves any order of rule making within the twenty day period, the department of health may file such order of rule making with the secretary of state and the order of rule making shall be deemed approved, subject to subsequent suspension by the committee. In the event the committee disapproves any order of rule making or portion thereof, the committee shall notify the department of health and the secretary of state. If any final order of rule making or portion thereof is disapproved by the committee, the department of health shall not file any disapproved provision in an order of rule making and the secretary of state shall not publish any disapproved provision in the Missouri register.

3. Any rule or portion of a rule promulgated under this authority of this act may be suspended by the committee at any time after a hearing has been conducted thereon. If any rule or portion of a rule is suspended by the committee, the secretary of state shall publish in the Missouri register, as soon as practicable, an order withdrawing the rule or portion of a rule.

4. [No other provision of chapter 536, RSMo., regarding notice, publication or nonjudicial review of any rule promulgated by the department of health shall be applicable to such rules.] The provisions of chapter 536 RSMo. to the contrary notwithstanding any person seeking judicial review of any such rule promulgated pursuant to this act shall be deemed to have exhausted all administrative review procedures. Notwithstanding the provisions of section 1.140 RSMo., the provisions of this section are nonseverable and the grant of rule making authority of this act is essentially dependent on the review power vested with the committee. If the reviewer power is held unconstitutional or invalid, the grant of rule making authority and any rule promulgated under such rule making authority shall also be invalid or void.
Section A. Because immediate action is necessary in order to contain the spread of acquired immunodeficiency syndrome, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.