HUMAN RIGHTS WATCH

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Ensure Access to Condoms in US Prisons and Jails

Introduction

The management of infectious disease in prisons is a human rights imperative as well as a matter of public health. Given the high level of HIV infections among those who enter prison, making condoms readily accessible to inmates is an effective and inexpensive measure that corrections officials should take to limit the spread of infection. Line officers and senior corrections officials who have had experience with condom distribution in prison have reported no adverse security consequences.

Infectious Disease in Prisons

More than 2.2 million persons are currently incarcerated in US prisons and jails.[1] Prisoners retain fundamental rights to health and health care, and prisoners and prisons are part of the larger community. Thus, the management of infectious disease in prison is both an issue of human rights and a matter of public health.

Incarcerated individuals bear a disproportionate burden of infectious diseases, including Hepatitis B virus (HBV), Hepatitis C virus (HCV), and HIV/AIDS. Although inmates comprise 0.8 percent of the US population, it is estimated that 12-15 percent of Americans with chronic HBV infection, 39 percent of those with chronic HCV infection, and 20-26 percent of those with HIV infection pass through a US correctional facility each year.[2] The HIV prevalence in state and federal prisons is more than 3 times higher than in the general population.[3] The prevalence of HCV among prisoners approaches 40 percent. Co-infection is also a concern: although data is scarce, a significant number of HIV-positive inmates are also infected with HCV.[4]

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[1] US Department of Justice, Bureau of Justice Statistics Corrections Report, 2005.

[2] C. Weinbaum et al, "Hepatitis B, Hepatitis C, and HIV in Correctional Populations: a Review of Epidemiology and Prevention," *AIDS*, vol. 19 (3) (October 2005), p. 41.

[3] 51 of every 10,000 inmates is HIV positive, compared to 15 of every 10,000 non-incarcerated persons. National Minority AIDS Council, *African Americans, Health Disparities and HIV/AIDS*: *2006 Report*, p.8.

[4] A. Spaulding et al, "A Framework for Management of Hepatitis C in Prisons," 144 *Annals of Internal Medicine,* vol. 144 (10) (May 2006) p. 763; S. Allen et al, "Hepatitis C Among Offenders- Correctional Challenge and Public Health Opportunity," *Fed. Probation*, vol. 67 (22), (Sept. 2003), p. 22.

Although the majority of inmates infected with HBV, HCV and HIV acquired the infection outside of prison, the transmission of infectious disease in prison is increasingly well documented.[5] Targeted interventions to reduce the risk of HIV transmission in prison, such as the provision of condoms, methadone maintenance treatment, and supplying bleach to clean needles and syringes, have proven highly effective in preventing HIV transmission in prisons, just as they have been when implemented outside. Often referred to as "harm reduction," these approaches have been endorsed by the World Health Organization, the Joint United Nations Programme on HIV/AIDS (UNAIDS), and the UN Office of Drugs and Crime (UNODC) as an integral part of HIV prevention strategies, including in prison.[6] Government failure to ensure access to harm reduction services puts inmates at unnecessarily increased risk of infection.

Regardless of institutional regulations, sexual activity, both consensual and coerced, is common in prisons and jails.[7] Sex among inmates has been documented extensively not only in academic studies and by human rights organizations, including Human Rights Watch, but by correctional systems themselves in the form of individual grievances and disciplinary actions against inmates engaging in prohibited behavior.[8] Recent federal legislation found that an estimated 13 percent of US prisoners had been sexually assaulted in prison and called for research into its

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[5] See, e.g. CDC Morbidity and Mortality Weekly Report (MMWR), "HIV Transmission among Male Inmates in a State Prison System- Georgia 1992-2005", April 21, 2006, vol.55, no. MM15, p. 421. For a review of HBV, HCV and HIV transmission studies for both international and US prisons, see R. Jurgens, "HIV/AIDS and HCV in Prisons: A Select Annotated Bibliography," *International Journal of Prisoner Health*, vol. 2 (2) (June 2006), p. 131. For a review of the US literature in this area see T. Hammett, "HIV/AIDS and Other Infectious Diseases Among Correctional Inmates: Transmission, Burden and an Appropriate Response," *American Journal of Public Health* , vol. 96 (6) (June 2006), p. 974.

[6] See, e.g. United Nations Office on Drugs and Crime, "HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response" (New York: United Nations, 2006); World Health Organization, UNAIDS, United Nations Office on Drugs and Crime, "Evidence for Action on HIV/AIDS and Injection Drug Users. Policy Brief: Reduction of HIV Transmission in Prisons," WHO/HIV/2004.05 (2004).

[7] Krebs, CP, "High Risk HIV Transmission Behavior in Prison and the Prison Subculture," *Prison Journal* vol. 82 (2002), p. 19.

[8] See, e.g., Krebs, CP et al, "Intraprison Transmission: An Assessment of Whether it Occurs, How It Occurs, and Who Is at Risk," *AIDS Education and Prevention* (Supp. B) vol. 14 (2002) p. 53.; A. Spaulding, et al, "Can Unsafe Sex Behind Bars Be Barred?" *American Journal of Public Health* vol. 91(8) (2001) p. 1176; N. Mahon, "New York Inmates' HIV Risk Behaviors: the Implications for Prevention Policy and Programs," *American Journal of Public Health* vol. 86 (1996) p. 1211; Human Rights Watch, *No Escape: Male Rape in US Prisons*, April 2001.

prevalence and patterns.[9] Home-made tattoos and body piercings also contribute to a risk of transmission.[10]

Correctional Policy and Condom Distribution

This paper focuses on condoms, a harm reduction method endorsed by public health officials for prevention of HIV transmission since the advent of the disease. Condoms are highly efficacious in preventing the transmission of HIV and other sexually transmitted infections. According to UNAIDS, scientific data "overwhelmingly confirm that male latex condoms are highly effective in preventing sexual HIV transmission."[11] The Institute of Medicine, a body of experts that acts under a Congressional charter as an advisor to the US government, noted in 2001 that scientific studies have shown that comprehensive sex and HIV/AIDS education and condom availability programs can be effective in reducing high-risk sexual behaviors.[12]

Despite overwhelming evidence that condom use prevents the transmission of HIV, US prison officials continue to limit the availability of condoms to incarcerated persons. Less than 1 percent of US correctional facilities provide condoms to inmates.[13] These policies stand in stark contrast to the public health approach taken by prison officials in Canada, Western Europe, Australia, Ukraine, Romania, and Brazil, where condoms have been available to inmates for years. Moreover, several large urban jails in the US as well as one state have provided condoms to inmates, either through medical staff or more general distribution. Where institutional policy provides for condom distribution, no correctional system has yet to find any grounds to reverse or repeal that policy.

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[9] Prison Rape Elimination Act, 2003, P-L 108-79, 108th Congress.

[10] CDC MMWR, "Hepatitis B Outbreak in a State Correctional Facility, 2000" June 29, 2001, vol. 50, no. MM25, p. 529.

[11] Joint United Nations Programme on HIV/AIDS (UNAIDS), *2004 Report on the Global AIDS Epidemic: 4th Global Report (2004),* p. 75.

[12] Institute of Medicine, *No Time to Lose: Getting More from HIV Prevention* (Washington DC: National Academy Press, 2001).

[13] Weinbaum, *supra.*

Moreover, leading correctional health experts in the US endorse condom distribution in prisons and jails. The National Commission on Correctional Health Care (NCCHC), the nation's primary standard-setting and accreditation body in the field of corrections, has endorsed the implementation of harm reduction strategies, including condom distribution, in US prisons and jails. The Commission states, "While NCCHC clearly does not condone illegal activity by inmates, the public health strategy to reduce the risk of contagion is our primary concern."[14] Further, the American Public Health Association Standards for Health Services in Correctional Institutions (3rd Edition, 2003) recommends that condoms be available for inmates in order to prevent the transmission of infection.

Some corrections officials have been concerned that condom distribution would negatively affect institutional security. As discussed below, several recent evaluations of condom distribution programs in correctional settings provide evidence that security concerns are not well founded.

Condom Distribution Programs: Washington DC

A recent study examined the condom distribution program in effect since 1993 at the Central Detention Facility in Washington, DC (CDF).[15] The study found that the CDF housed approximately 1400 adult males, 100 adult females, 40 juveniles, and processes an average of 2800 inmates per month. It was staffed by 551 correctional officers. Condoms were provided free of charge through public health and AIDS service organizations. Inmates had access to the condoms during health education classes, voluntary HIV pre-test or post-test counseling, or upon request to members of the health care staff. Approximately 200 condoms were distributed each month according to inventory audits.

Both inmates and staff were interviewed about their opinion of the condom distribution program. The findings indicate that 55 percent of inmates and 64 percent of correctional officers supported the availability of condoms at the CDF facility. Objections related primarily to moral and religious concerns about homosexual

[14] NCCHC Position Statement, *Journal of Correctional Health Care*, vol. 11, no. 4 (2005).

[15] J. May and E. Williams, "Acceptability of Condom Availability in a US Jail," *AIDS Education and Prevention,* vol. 14, (Supp. B) (2002). P. 85.

activity. Thirteen percent of correctional officers said that they were aware of institutional problems associated with condom distribution, though none provided descriptions of those problems. No major security infractions related to condoms had been reported since commencement of the program. There was no evidence that sexual activity had increased, based upon staff interviews as well as a review of disciplinary reports for the relevant period. The researchers stated:

> Permitting inmates access to condoms remains controversial among most correctional professionals. Even so, no jail or prison in the United States allowing condoms has reversed their policies, and none has reported major security problems. In the Washington, DC jail, the program has proceeded since 1993 without serious incident. Inmate and correctional officer surveys found condom access to be generally accepted by both.[16]

Condom Distribution Programs: Canada

The Canadian correctional system incarcerates approximately 13,000 inmates in 58 facilities, including 8 maximum security, 20 medium security, 17 minimum security, and numerous community correctional centers. In Canada, distribution of condoms in all institutions operated by the Correctional Service of Canada (CSC) is part of a "Management of Infectious Disease" policy that identifies as its objective "To contribute to public health and a safe and healthy environment through a comprehensive infectious diseases program." In implementing this policy the CSC states that it will be "guided by public health principles in managing infectious diseases in the penitentiary environment."[17] In April 1999, two years after commencing a program under which both condoms and bleach were made available, the CSC issued an evaluation of this program. The CSC concluded:

> In all 18 sites visited, staff could not recall any incident where either bleach or condoms had been used as weapons…It has now been two

[16] Ibid, at 89.

[17] Correctional Services of Canada, Commissioner's Directive, "Management of Infectious Diseases," Policy Bulletin 181 (November 4, 2004).

> years since the implementation of the national bleach kit program and six years since condoms were distributed. To date, there is no hard evidence that significant incidents involving these products have resulted in injury to CSC staff.[18]

Condom Distribution Programs: Australia

Similar findings resulted from a study of the effect of condom distribution in the prisons of New South Wales, Australia, a largely urban province that includes the city of Sydney. The research focused upon concerns that had been expressed in 1996, when the program was initiated, that condom distribution would result in increased homosexual activity, and increased security disturbances. The findings indicated a decrease in reports of both consensual male-to-male sex and male sexual assaults during the period 1996-2001; that the contents of condom kits were used for concealing contraband items, primarily tobacco, and that this was not associated with an increase in drug use in the prison; and that only three minor incidents involving the safety of staff had occurred during this time. The researchers acknowledged that other factors such as educational prevention programs may also have influenced the decline in sex and sexual assaults, but concluded:

> Although there was initially strong opposition to condoms in prison, this soon dissipated as most of the anticipated adverse consequences did not eventuate. At least in New South Wales, condoms did not cause rape and mayhem.[19]

Condom Distribution Programs: US Jails

Several large urban jails, including the Los Angeles and San Francisco County jails, make condoms available to inmates. San Francisco Sheriff Michael Hennessey was a strong supporter of California's legislation permitting condom distribution in prison,

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[18] Correctional Services of Canada, "Evaluation of HIV/AIDS Harm Reduction Measures in the Correctional Service of Canada," April 1999, p. 54.

[19] L. Yap et al, "Do Condoms Cause Rape and Mayhem? The Long-Term Effects of Condoms in New South Wales Prisons," *Sexually Transmitted Infections (STI) Online*, December 19, 2006, http://sti.bmj.com/cgi/content/abstract/sti.2006.022996v1 (accessed February 1, 2007).

which passed in 2005 but was vetoed by the Governor.[20] In an editorial opinion letter published in the San Francisco Chronicle, Sherriff Hennessey stated that correctional officials should "do everything we can to prevent sexual activity in custody, but we shouldn't turn a blind eye to the reality that it occurs." Further, he noted that the risk of contraband smuggling was much greater from routine contact between inmates and outside visitors than from the availability of condoms inside the facility.[21]

Applicable Law and Guidelines

International Legal Standards

The treatment of prisoners in the United States is governed by international human rights law. The United States is a party to the International Covenant on Civil and Political Rights (ICCPR), which guarantees to all persons the right to life, and to be free from cruel, inhuman or degrading treatment; and if deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person.[22] The United States is also a party to the Convention Against Torture (CAT), which protects all persons from torture and ill-treatment; and a signatory of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which guarantees the right to the highest attainable standard of health.[23] The obligations to protect the rights to life and health and to protect against torture and other ill treatment create positive duties on the government to ensure access to adequate medical services and to take appropriate measures necessary to prevent and control disease.

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[20] Michael Hennessey, "Health-positive bill for prisoners (and the people who love them)", *San Francisco Chronicle*, April 19, 2005.

[21] Ibid.

[22] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976, ratified by the U.S. on June 8, 1992, arts. 6, 7, 10(1).

[23] Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention Against Torture), adopted December 10, 1984, G.A. Res. 39/46, annex, 39 UN GAOR Supp. (no. 51) at 197, UN Doc. A/39/51(1984), entered into force June 26, 1987, ratified by the U.S. on October 14, 1994; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR (no. 16) at 49, UN Doc. A/ 6316 (1966), 99 UNTS 3, entered into force January 3, 1976, signed by the U.S. on October 5, 1977, art. 12.

International human rights law clearly affirms that prisoners retain fundamental rights and freedoms guaranteed under human rights law, "subject to the restrictions that are unavoidable in a closed environment."[24] The conditions of confinement should not aggravate the suffering inherent in imprisonment, as loss of liberty alone is the punishment.[25] States have positive obligations to take measures to ensure that conditions of confinement comply with international human rights norms and standards. The Human Rights Committee, an expert UN body that monitors state compliance with the ICCPR and provides authoritative interpretations of its provisions, has explained that states have a "positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty," stating further that:

> Not only may persons deprived of their liberty not be subjected to [torture, or other cruel, inhuman or other degrading treatment or punishment], including medical or scientific experimentation, but neither may they be subjected to any hardship or restraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the ICCPR, subject to the restrictions that are unavoidable in a closed environment.[26]

The ICESCR recognizes in Article 12 "the right of everyone to the highest attainable standard of health." The ICESCR requires that states take all the steps necessary for "the prevention, treatment and control of epidemic…diseases" which include the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS.[27] Realization of the highest attainable standard of health requires not only access to a system of

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[24] UN Committee on Human Rights, General Comment No. 21, Article 10, Humane Treatment of Prisoners Deprived of their Liberty, UN Doc. HRI/Gen/1/Rev.1 at 33 (1994), para. 3.

[25] Ibid.

[26] Ibid.

[27] Although the US has not ratified the ICESCR, as a signatory it has the obligation to refrain from actions that would defeat the treaty's object and purpose. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980, art. 18.

health care; it also, according to the UN Committee on Economic, Social and Cultural Rights, requires states to take affirmative steps to promote health and to refrain from conduct that limits people's abilities to safeguard their health. Laws and policies that are "likely to result in…unnecessary morbidity and preventable mortality" constitute specific breaches of the obligation to respect the right to health.[28]

Key international instruments establish the general consensus that prisoners are entitled to a standard of health care equivalent to that available in the general community, without discrimination based on their legal status.[29] In some cases, state obligations to protect prisoners' fundamental rights, in particular the rights to be free from ill-treatment or torture, the right to health, and ultimately the right to life, may require states to ensure a higher standard of care than is available to people outside of prison who are not wholly dependent upon the state for protection of these rights.[30] In prison, where most material conditions of incarceration are directly attributable to the state, and inmates have been deprived of their liberty and means of self-protection, the requirement to protect individuals from risk of torture or other ill-treatment can give rise to a positive duty of care, which has been interpreted to include effective methods of screening, prevention, and treatment of life-threatening diseases.[31]

The WHO Guidelines on HIV Infection and AIDS in Prison; UNAIDS International Guidelines on HIV/AIDS and Human Rights; and the UNODC HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings elaborate specific guidance to states on protecting prisoners' fundamental rights to HIV/AIDS prevention, care and

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[28] UN Committee on Economic, Social and Cultural Rights, General Comment No 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 (2000), para. 6.

[29] Basic Principles for the Treatment of Prisoners, UN General Assembly Resolution 45/111 (1990); WHO Guidelines on HIV Infection and AIDS in Prisons (1999), Articles A (4) and C (ii); the Body of Principles for the Protection of All Persons Under any form of Detention or Imprisonment, UN General Assembly Resolution 43/173 (1988). Although these instruments are not legally binding in and of themselves, they provide authoritative guidance to states on the interpretation of relevant treaty obligations.

[30] *See,* Rick Lines, "From equivalence of standards to equivalence of objectives: the entitlement of prisoners to standards of health higher than those outside prisons," *International Journal of Prisoner Health*, vol. 2 (2006), p. 269.

[31] *See*, e. g. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards, CPT/IN/E 2002,para. 31.

treatment.[32] The principle of equivalence is specifically set forth in the Basic Principles for the Treatment of Prisoners, adopted by the United Nations General Assembly in 1990:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants…Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.[33]

The WHO Guidelines on HIV Infection and AIDS in Prisons states that prisoners are entitled to prevention programs equivalent to that available in their community, and specifically addresses the issue of condom distribution in a prison environment:

> Preventative measures for HIV/AIDS in prison should be complementary to and compatible with those in the community. Preventative measures should also be based on risk behaviours actually occurring in prisons, notably needle sharing among injection drug users and unprotected sexual intercourse… Since penetrative sexual intercourse occurs in prison, even when prohibited, condoms should be made available to prisoners throughout their period of detention.[34]

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[32] WHO Guidelines, *supra*; UNAIDS International Guidelines on HIV/AIDS and Human Rights, (2006), Article 21(e); UNODC, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for Effective National Response* (2006).

[33] Basic Principles, *supra*, at para 5.

[34] WHO Guidelines, *supra*, Article A (1).

US Legal Standards

The Eighth Amendment to the US constitution protects prisoners from "cruel and unusual punishment" and requires corrections officials to provide a "safe and humane environment." *Estelle v. Gamble*, 429 U.S. 97 (1976). In the United States prisoners have a right to health care that is not shared by the general population. As Justice Marshall explained in the *Estelle* decision:

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or lingering death," the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering, which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation, codifying the common law view that "it is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself."[35]

In 1991 the Supreme Court narrowed its interpretation of the Eighth Amendment, requiring inmates to demonstrate that officials were "deliberately indifferent to serious medical needs." *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991). This standard involves both an objective (serious medical need) and subjective (deliberately indifferent) component. The subjective component has been interpreted as met when a prison official "knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970 (1994). There are no reported cases addressing the constitutionality of a prison system's failure to provide condoms to inmates. Arguably, the refusal to implement condom distribution programs in US prisons and jails meets this standard, particularly when

[35] *Estelle v. Gamble*, 429 U.S. 97, 100 (1976), citations omitted.

the rates of infection among inmates, their high-risk behavior, and the incidence of transmission of disease is well documented.

Conclusion

Despite increasing documentation of high rates of infectious disease, the occurrence of high-risk behaviors, and transmission of disease among inmates, the distribution of condoms in US jails and prisons continues to be limited. Opposition to these programs on the basis of security concerns is not supported by the evidence provided in reports from jails and prisons in jurisdictions that have established, evaluated, and chosen to retain their condom distribution policies. Human Rights Watch urges prison officials and policymakers to comply with best practices based upon international human rights standards, US constitutional law, and the recommendations of national correctional health experts to ensure that condoms are available to inmates.