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Governing Bodies and Spaces

A Critical Analysis of Mandatory Human Immunodeficiency Virus Testing in Correctional Facilities

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As it currently stands, mandatory human immunodeficiency virus (HIV) testing of prisoners is performed by nurses in more than 24 states and throughout the federal correctional system. The aim of this article was to bring to the attention of the nursing community the inner workings of mandatory HIV testing and its implications for HIV-positive prisoners. Building on a recent report published by Human Rights Watch, we critically examine the deployment of mandatory HIV testing in state correctional facilities located in Alabama and South Carolina. We, therefore, intend to situate this practice within a bio-political logic and explore its human rights consequence. **Key words:** *bio-politics*, *bio-power*, *corrections*, *Foucault*, *HIV testing*, *Human Rights*, *nursing practice*

When I came to the system, I went to the receiving unit. They took my blood. Then they came and told me that I needed to be isolated, and they put me in the green room. They didn't give me any information, I was crying. The nurse told me I was HIV-positive. I went off. I was in such a state of shock. There was no chaplain, no medical people, they just said go in this 4 × 4 cell and stay there.

Interview with Leslie J., August 5, 2009[1]

AT THE END OF 2009, it was estimated that up to 2.3 million adults (1% of US adults) were housed in state and federal correctional facilities across the United States.[2,3] On admission to these facilities, every prisoner comes in contact with health care providers (mainly nurses) and undergoes a health assessment. The admission process can be a rare opportunity for those who enter the correctional system to access health care, many of whom suffer from chronic conditions, mental health problems, and substance abuse.[3] A majority of state and federal correctional facilities require that nurses perform voluntary or mandatory human immunodeficiency virus (HIV) testing as part of the admission process. As it currently stands, mandatory HIV testing is performed by intake nurses in more than 24 states and throughout the federal correctional system.[4] This article focuses exclusively on mandatory HIV testing of prisoners who enter state prisons in Alabama and South Carolina. These facilities were chosen because they not only perform mandatory testing on entry but also segregate prisoners in designated HIV/AIDS housing units—a practice that has been abolished in other facilities across the United States.[1]

The aim of this article was to bring to the attention of the nursing community the inner workings of mandatory HIV testing within the correctional apparatus and the role that nurses play in the testing process—one that violates the fundamental rights of prisoners.

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Building on a recent report published by Human Rights Watch,[1] we intend to critically examine the deployment of mandatory HIV testing in state correctional facilities and interrogate this practice from a human rights perspective. To set the stage, we define mandatory HIV testing and describe how it is implemented in state correctional facilities in both Alabama and South Carolina. Then, drawing on the seminal work of late French philosopher Michel Foucault, we provide a brief overview of the concept of bio-power and how this complex form of power is concerned with the regulation of life in correctional facilities. Finally, we expand on mandatory HIV testing as a practice that concerns the management of bodies and the production of spaces of exclusion. At last, we provide a brief discussion on the implications of mandatory HIV testing from a human rights perspective and assert that these implications have been widely overlooked in the nursing literature.

MANDATORY HIV TESTING IN STATE PRISONS: THE CASE OF ALABAMA AND SOUTH CAROLINA

The introduction of HIV antibody testing in 1985 was a major breakthrough in the field of HIV/AIDS. At the time, the negligible therapeutic benefits and pronounced social repercussions of testing positive for HIV influenced the development of laws and regulations to safeguard individual rights and freedom.[5] Over the next 2 decades, voluntary and confidential testing became the standard for HIV testing and promoted human rights norms such as informed consent before initiating testing, pretest counseling, posttest counseling, and confidentiality of test results.[6] The standard was frequently referred to as the conditions of the "3C's": confidential, accompanied by counseling, and conducted only with informed consent.[7] In 2007, The Joint United Nations Programme on HIV/AIDS and the World Health Organization issued new guidelines on provider-initiated testing and counseling, thus recommending that testing should be offered to all and integrated to various health care settings.[6] However, the standard remained unchanged. Although testing was now initiated by health care providers, consent, counseling, and confidentiality continued to be a priority.

On the basis of the latest World Health Organization and The Joint United Nations Programme on HIV/AIDS guidelines, health care providers must perform pre- and posttest counseling in all settings (including prisons). As part of the pretest counseling, health care providers should provide knowledge on HIV prevention and transmission; assess risk factors and practices that may place the person at risk for HIV transmission; and explore the clinical and prevention benefits of knowing one's serological status as well as the potential effects of testing positive for HIV such as stigmatization, exclusion, and violence.[8] During posttest counseling, health care providers must announce the test result and discuss methods to prevent HIV transmission. If the test is positive, they must also help the patient cope with their emotions; address his or her concerns; and arrange follow-up visits or referral for treatment, care, counseling, and support.[8] Mandatory HIV testing differs from voluntary and confidential testing, and provider-initiated testing and counseling in the sense that it is not a voluntary process and it may not include appropriate pre- and posttest counseling. Furthermore, it is discordant with human rights standards, international guidelines on HIV testing, and best practices for managing HIV in correctional settings.[1]

In recent years, the disproportionately higher prevalence of HIV/AIDS in US prison systems has been made prominent with reports suggesting that the prevalence is 3 to 5 times greater than that of the general population.[4] Consequently, many states have changed their laws and policies regarding HIV testing within correctional facilities and require that nurses undertake this specific form of testing during the admission process. Despite its criticism, mandatory HIV testing is

currently implemented in 24 state correctional facilities and throughout the federal correctional system.[4] The remaining states have not enacted mandatory testing.[9] To our knowledge, these states have continued to adhere to current guidelines, which suggest that prisoners should be tested on a request-only basis or routinely with an option to opt out.[9] For many years now, mandatory HIV testing has been widely criticized by organizations such as the American Public Health Association, the National Association of People with AIDS, the American Correctional Health Services Association, and the National Commission on Correctional Health Care.[9] The Joint United Nations Programme on HIV/AIDS, the United Nations Office on Drugs and Crime, and the World Health Organization have also condemned the implementation of mandatory HIV testing in correctional settings.

The implementation of mandatory HIV testing has been largely motivated by a desire to systematically identify HIV-positive prisoners upon their entry in the correctional system. As such, many attempts have been made to justify this practice from a health and safety perspective—even though it clearly violates the rights of prisoners.[1] Proponents of mandatory HIV testing have argued that the systematic identification of HIV-positive prisoners is justified by the need to enhance the delivery of care and necessary for the protection of other prisoners. These arguments have been largely overthrown by the various organizations (listed previously) that continue to see mandatory HIV testing as a coercive measure that has little to do with the health status of individual prisoners and more to do with the identification of those who could potentially spread the virus within the prison population. Here, it is important to recognize that mandatory HIV testing is being implemented by facilities that are eager to identify those who are deemed unhealthy and exclude them by more radical means—segregation being one of them.

Alabama and South Carolina are among the states that have implemented mandatory HIV testing in all of their correctional facilities; therefore, each prisoner undergoes this form of testing upon entry to the correctional system and, in certain circumstances, upon release as well.[4] When prisoners test positive for HIV, they are immediately placed in isolation cells on 23-hour lockdown for periods of a week to several months, waiting first for a confirmation test and then for a vacant bed in a designated HIV/AIDS housing unit—all of them located in maximum security facilities.[1] Once transferred to their designated unit, HIV-positive prisoners are required to eat by themselves in the dining hall and sit together on one side of the chapel when they attend church services.[1] In Alabama, HIV-positive prisoners may partake in a therapeutic community program for substance abuse, but they must leave once the class is done as they are not allowed to live in the community with the other prisoners.[1] They can also attend trade school, but they must circulate separately and be called out one by one during periodic headcounts.[1]

In South Carolina, institutional policy states that HIV-positive prisoners cannot be assigned to kitchen detail or any related tasks.[1] This is also true for prisoners who serve time in Alabama and who have restricted access to in-prison jobs and programs such as work release programs, which provide the opportunity to reside in lower security facilities while earning wages.[1] Work release programs are considered by many to be an essential step in the preparation for release and the transition that takes place once a prisoner is back in the community.[1] Yet, both Alabama and South Carolina impose unnecessarily restrictive criteria to determine whether HIV-positive prisoners can work or fully access programs or services, including addiction services.[1] In sum, both states rely on mandatory HIV testing to maintain segregated housing and living arrangements within their correctional facilities. They insist that these arrangements are necessary for the health and safety of all prisoners. Finally, they fully endorse these arrangements as the best (and most effective approach) to reduce the

transmission of HIV and facilitate the delivery of care to HIV-positive prisoners.[1]

BIO-POWER AND THE REGULATION OF LIFE IN CORRECTIONAL FACILITIES

Bio-power (or power over life) is a subtle, diffuse, and arguably the most effective form of power involved in the regulation of life at the individual and population levels. Its purpose is to manage individual bodies and control populations in ways that preserve and reproduce social order.[10] Bio-power may be traced back to the 18th century, a period characterized by the rapid development of various disciplines as well as a growing concern with demography (birth, mortality and fertility rates, longevity, state of health, etc).[10] This form of power is defined as having 2 poles: the *anatomo-political* pole includes forms of power that address individuals, whereas the *bio-political* pole seeks to control entire populations.[11] Anatomo-politics is the pole concerned with individual bodies and various processes that make up disciplines or rather, as Foucault explains, methods that make possible the meticulous control of the operations of the body and the production of a skillful, productive, and docile self.[10] Bio-politics, on the contrary, is imbued with the regulatory control of populations and the calculated management of life itself, which, according to Foucault, is tied to economic and political imperatives.[10] These 2 poles of power over life (bio-power) complement each other, but for the purpose of this article, only bio-politics will be used.

Bio-politics, explains Foucault, is closely tied to surveillance and the production of knowledge about populations.[10] In fact, the birth of bio-politics is said to coincide with the introduction of new techniques to study and closely monitor biological occurrences at the population level.[10] Here, it is important to understand that the detailed knowledge produced by these techniques forms the basis for bio-political interventions. In other words, the numbers extracted by means of surveys, census, studies, and so forth serve to justify the deployment of bio-political interventions for the management and regulation of populations.[11] To this end, bio-political interventions take on the semblance of solutions to discrepancies uncovered in the process of gathering information about a particular population and biological occurrences within that population.[11] The linkage between the production of knowledge about a population and the potential for more effective regulation is one that cannot be understated. As such, it is important to recognize that bio-politics operates as the state (and its institutions) becomes more knowledgeable about specific populations and more involved in their regulation, including the regulation of life processes such as birth, death, health, propagation of diseases, sickness, sexuality, and so on.

The prison, as a place of surveillance and knowledge production, is highly preoccupied with the regulation of life within its walls. Here, bio-politics operates at the level of a captive population to identify, prevent, contain, and manage potential risk to all areas of life inside the well-defined spaces of the prison. We consider that the bio-political axis of bio-power is extremely useful to understand the inner workings of mandatory HIV testing, for a crucial implication of this procedure is that risk management be addressed from a collective standpoint. It should be noted that mandatory HIV testing functions as a bio-political tool to generate knowledge about a captive population and possibilities for the management of life processes proper to this population—a population that has a reality of its own.[12] As such, it is concerned with the government of "risky" bodies and the use of space to regulate the propagation of infectious diseases among prisoners. It is no surprise, then, to note that sections of the prison function as spaces of exclusion where HIV-positive prisoners can be confined and subjected to more effective techniques of power. It is within these spaces that HIV-positive prisoners (as a subpopulation) will be exposed to a particular mode of surveillance and will be required

to participate in their own regulation. In the following segment, we will expand on these ideas and explain why mandatory HIV testing constitutes an instrument of bio-politics.

GOVERNING BODIES AND SPACES WITHIN THE CORRECTIONAL APPARATUS

We begin this discussion by rejecting the idea that testing prisoners without their consent is somehow justified or somewhat necessary. We also reject the notion that more aggressive forms of testing are warranted in correctional facilities and the common perception that early detection is inherently beneficial for prisoners. Instead, we argue that the ends served by mandatory HIV testing have less to do with early detection and treatment than with rendering the identification of HIV-positive prisoners more efficient and their segregation more legitimate.

> The process of entering the system and getting tested for HIV is miserable. Prisoners arrive at Kilby which is the receiving unit, and if you test positive they take you straight to lockup. They tell you you've got AIDS and are going to die. They put you in the hole and now guys are staying 2-3 months because they are so overcrowded, there are no beds in [designated HIV units] dorm B or C. (Interview with John S, August 7, 2009).[1(p23)]

Through our analysis, we wish to demonstrate that mandatory HIV testing is bio-political because it is concerned with a population that continues to be seen as deeply chaotic and uncontrolled—and by extension, risky. For years now, prisoners have been constructed as vectors of disease on the basis of the fact that they are in close contact with each other and may engage in risky behaviors that are known to contribute to the spread of HIV (ie, unprotected sex, sharing of injection equipment, and tattooing). The bio-political imperative of maximizing the health of prisoners has led to the deployment of more aggressive forms of testing in US correctional facilities and strategies to contain the HIV epidemic within the confined space of the prison.

The use of nurses in the implementation of mandatory HIV testing is just as compatible with a bio-political logic as the testing itself. Here, it is important to recognize that nurses produce knowledge that serve to identify HIV-positive prisoners and force them into a state of permanent visibility. Nurses may not recognize that HIV testing is, in fact, a political act that defines the status (serological and moral) of each prisoner within the correctional apparatus. And so, nurses may not see their practice as political or consider that they exercise power as health care providers despite the fact that they help govern a captive population. To conceive nurses as professionals who function within the correctional apparatus and respond to bio-political orders is important at this point in the article because it challenges the assumption that mandatory HIV testing serves the interest of prisoners. As such, it is an essential step to challenge the inner workings of mandatory HIV testing and the idea that testing without consent is necessary to ensure optimum care and health of all prisoners.

As complex as it may seem, it is important to critically examine the effects of mandatory HIV testing and the ways in which it transforms the lives of HIV-positive prisoners. As an instrument of bio-politics, this specific form of testing generates knowledge about each prisoner, maps the presence of the virus collectively, makes room for a new divide between the sick and the healthy, and in the end allows for the spatial disposition of unhealthy (read risky) bodies. Thus, the knowledge produced through mandatory HIV testing goes along with, but is also fundamental to, the production of spaces of exclusion, the branding of HIV-positive prisoners, and the discriminatory practices that are well documented in Alabama and South Carolina state correctional facilities.[1] Indeed, there are at least 3 ways in which mandatory HIV testing works to ensure the constant division between HIV-positive prisoners and HIV-negative prisoners. This division has to do with the making of physical boundaries and the spatial disposition of bodies. It also refers to the

symbolic divide that is made possible by the full identification and the deliberate exclusion of HIV-positive prisoners within the prison system.

First, mandatory HIV testing produces the necessary knowledge to identify HIV-positive prisoners and assign them to designated HIV/AIDS housing units. These spaces of exclusion operate through the logics of *quadrillage*[13] (a term coined by Michel Foucault) to prevent the spread of the virus to other prisoners and ensure a more effective regulation of everyday life. In other words, they ensure the segmentation of space and the differential distribution of prisoners on the basis of their serological status.[13] Second, mandatory HIV testing allows for the full identification of HIV-positive prisoners who are automatically required to wear an armband, a badge, or a marker to signal their serological status to others.[1] This form of branding relates to Foucault's work on leprosy,[13] especially his ideas around the segregation of contagious individuals and the ways in which power was exerted to exclude these individuals from the healthy community. Third, it justifies the deliberate exclusion of HIV-positive prisoners from various activities and programs that are part of everyday life in prison. Here, the problem is not so much the ability of HIV-positive prisoners to take part in these activities and programs but the fact that they pose a risk to the health and safety of the prison population. At least, that is how HIV-positive prisoners are seen in the prison system.

HUMAN RIGHTS CONSEQUENCES OF MANDATORY HIV TESTING AND SEGREGATION

On the basis of our analysis, we argue that the bio-political imperative of optimizing the health of the prison population is detrimental to HIV-positive prisoners whose lives are completely defined by their serological status for as long as they remain incarcerated. The implementation of mandatory HIV testing is primarily a way of introducing a break into the domains of prison life that are under regulation: a break between prisoners who test negative (seen as healthy members of the prison population) and those who test positive.[14] Although this break is characteristically bio-political, it cannot be solely examined from a Foucauldian perspective. In fact, this break has important consequences on the lives of HIV-positive prisoners who are systematically disadvantaged within the correctional system and sentenced to a life of fear, stigma, and discrimination behind bars. For this reason, it is important for nurses to understand the implications of mandatory HIV testing from a human rights perspective and how this specific form of testing plays a key role in the execution of institutional policies (ie, segregation) that violate the rights of HIV-positive prisoners.

Nurses play an important role in the implementation of mandatory HIV testing. Yet, this article is, to our knowledge, the first one to examine the human rights consequences of this specific form of testing, which has been widely criticized and continues to be seen as coercive.[15] Building on the report published by Human Rights Watch,[1] this section of the article details the human rights violations that take place when prisoners are tested without their consent. It also exposes the harsh consequences of segregation and discrimination for HIV-positive prisoners, both of which constitute a form of "cruel, inhuman, and degrading treatment in violation of international law."[1(p1)] The objective here is to address the zone of silence around the consequences of such practices, which not only breach the treaties signed by the United States,[1] but are also contrary to the fundamental principle that underlies all nursing practice.[16] The position of the American Nurses Association[16] is that respect for human rights of every individual must be at the forefront of nursing practice and that nurses must pay close attention to potential human rights violations within their institutions. To this day, however, the nursing profession has not sanctioned mandatory HIV testing and it continues to be overlooked in the nursing literature.

Are nurses aware that mandatory HIV testing is incompatible with human rights standards and contrary to current international guidelines? Testing prisoners without their consent and forcing them to involuntary disclosure of their serological status are a violation of the right to informed consent, privacy, and confidentiality.[1] The International Covenant on Civil and Political Rights (articles 7 and 17)[17] clearly states that no one shall be subjected to a medical procedure without free informed consent and to an unlawful interference in privacy such as the one experienced by HIV-positive prisoners who are forced to disclose personal health information.

> The thing I have the most trouble with is the armband. It's disclosing my medical confidentiality to the whole prisoner population without my consent. How do I want you to know my business? It's depressing; it's stressful, being treated this way. (Interview with Ken D, August 7, 2009).[1(p26)]

Of particular importance to nurses who work in correctional facilities is the fact that HIV-positive prisoners are required to wear a visible insignia (an armband, a badge, or a marker), which leads to the widespread disclosure of their test results. This breach of confidentiality, reports Human Rights Watch, undermines other human rights by "exposing HIV-positive prisoners to the risk of stigma, discrimination and violence both from staff and other prisoners."[1(p19)] This violation is just one of many more violations faced by HIV-positive prisoners who are confined to HIV/AIDS housing units and experience the devastating and lasting effects of segregation.

> They literally put up a fence around us and cut us off from everything and everybody. It was like they said 'we're going to take all you guys who have this virus and put you on this island by yourself'. It took a lot out of me. (Interview with Aiden P, August 18, 2009)[1(p32)]

The Universal Declaration of Human Rights (article 5)[17] states that no one shall be subjected to cruel, inhuman, or degrading treatment or punishment. This right is particularly relevant to the situation of HIV-positive prisoners whose lives are completely defined by their serological status for as long as they remain incarcerated—where they will be housed, where they will eat, and where they will recreate; whether they will access in-prison jobs, opportunities to earn wages, or release programs; and how much they will be able to work toward an early release.[1] Institutional policies such as the ones that are being implemented in Alabama and South Carolina consistently deny opportunities, liberties, and privileges to HIV-positive prisoners. And so, these prisoners are not only disadvantaged by these discriminatory policies but also deprived of their right to access programs and services on an equal basis with other prisoners.[1] As a result, they end up serving their sentences in far harsher and more restrictive conditions than other prisoners.[1] They also serve longer sentences and are exposed to more violent environments because designated HIV/AIDS units are located in maximum security prisons. Human Rights Watch explains:

> Many prisoners told us that, if it were not for their HIV status, they would be eligible for assignment to minimum or medium security units based on the variety of factors that are taken into considerations (. . .). In South Carolina, prisoners with sentences as short as 90 days are assigned to the HIV unit at Broad River, a facility that local newspapers describe as "a maximum security prison housing South Carolina's most dangerous male offenders."[1 (p29)]

It is important to recognize that prisoners retain the right to security even though they have been found guilty of a crime and sentenced to prison time. Institutional policies that compromise the safety of HIV-positive prisoners should, therefore, be challenged on the basis of the argument that serological status cannot be determinative of housing assignment in correctional facilities.[1]

In light of our analysis, we argue that the human rights consequences of mandatory HIV testing can no longer be ignored. Although the report published by Human Rights Watch[1] demonstrates that Alabama and South Carolina prisons are unusually restrictive with HIV-positive prisoners, we assert that similar

human rights violations could be documented in other prisons where mandatory HIV testing is implemented. The experience of HIV-positive prisoners who serve time in Alabama and South Carolina speaks to the pervasive stigma and discrimination that can be found in state correctional facilities. It also raises a number of issues around the differential treatment of prisoners on the basis of their serological status. The provision of HIV testing in prison requires that nurses pay close attention to human rights violations, which are often seen as unfortunate, yet necessary to optimize the health of the broader population. When a prisoner is being tested without his or her consent, the relationship with the nurse is less one of care than of control.[18] The arguments presented in this article may prove useful to shed light on this phenomenon and encourage nurses to critically examine the reasons for and the effects of mandatory HIV testing.

FINAL REMARKS

In this article, we have argued that mandatory HIV testing is intimately tied to the domain of bio-politics. Drawing on the work of Michel Foucault, we have explained how this specific form of testing generates knowledge about each prisoner, maps the presence of the virus collectively, makes room for a new divide between the sick and the healthy, and in the end allows for the spatial disposition of unhealthy (read risky) bodies. We have also questioned the rationale behind mandatory HIV testing and explained how it relates to the optimization of health within a population that continues to be seen as deeply chaotic and uncontrolled—and by extension, risky. We began this article by rejecting the idea that mandatory HIV testing is conducted in the interest of early detection and treatment. We argued that the ends served by mandatory HIV testing have less to do with early detection and treatment than with rendering the identification of HIV-positive prisoners more efficient and their segregation more legitimate.

In considering that a large number of prisoners who test positive for HIV upon entry fail to receive care while incarcerated in US correctional facilities and do not have access to sterile injection equipment, sterile tattooing equipment, and condoms,[3] we exercise caution and indeed wonder how mandatory HIV testing can be located within the realm of health care if no (or little) care is actually provided to those who are found to be HIV positive. It is time for the nursing profession to examine its role with regard to this specific form of testing and to ask how nurses can maintain a therapeutic relationship with prisoners if they actually engage in coercive practices. The criticism of Human Rights Watch and other organizations warrant frank and fearless discussion by nurses around forceful testing in prisons and institutional policies that deprive HIV-positive prisoners of their basic rights. It is our opinion that both phenomena require more reflection by nurses working in corrections and by the profession at large.

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