

4-15-1996

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David J. Merrill

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### Recommended Citation

David J. Merrill *Compassion for Drug Addicts or Government-Sanctioned Drug Use?: An Overview of the Needle Exchange Controversy*, 23 Pepp. L. Rev. Iss. 3 (1996)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol23/iss3/7>

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# Compassion for Drug Addicts or Government-Sanctioned Drug Use?: An Overview of the Needle Exchange Controversy

## I. INTRODUCTION

Platzpromenade Park is littered with hundreds of people thrusting needles into their arms and necks. Blood falls to the grass. Bodies overload the park's benches, heads dangle at impossible angles, eyes roll back. Drug-filled syringes stick from scarred flesh. The field of bodies has the appearance of a war zone—but it is, instead, an approved drug program of the Zurich City Council.<sup>1</sup>

In 1971 President Nixon announced a "War on Drugs" that is still raging in the streets of our inner cities.<sup>2</sup> In recent years, this battle has intensified due to the spread of the Human Immunodeficiency Virus (HIV), which leads to the Acquired Immune Deficiency Syndrome (AIDS), through the sharing of contaminated syringes used by drug addicts.<sup>3</sup> This has incited some medical experts to call for "needle exchange programs."<sup>4</sup> The number of drug users who use cocaine, heroin, and other drugs intravenously is between 1.1 million and 1.5 million.<sup>5</sup> As of June 1993 there were approximately 315,390 persons in the United States with the AIDS virus.<sup>6</sup> Of those 315,390 people, about one-third acquired the disease through drug use or from a drug user due to sexual relations or

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1. Lonny Shavelson, *Two Cities Deal with the Needle*, S.F. CHRON., THIS WORLD, Mar. 11, 1990, at 11. This is the author's account of a park with a needle exchange program near Zurich, Switzerland's financial district.

2. *Can Clean Needles Slow the AIDS Epidemic?*, 59 CONSUMER REP. 466, 469 (1994).

3. For a history of the AIDS virus, see generally MIRKO D. GRMEK, HISTORY OF AIDS: EMERGENCE AND ORIGIN OF A MODERN PANDEMIC (Russell C. Mavlitiz & Jacalyn Duffin trans., 1990).

4. AIDS COORDINATING COMMITTEE, AMERICAN BAR ASSOCIATION, AIDS: THE LEGAL ISSUES 228, 233 (1988).

5. *UC Study Urges Federal, State, and Local Governments to Support Needle Exchange Programs to Prevent HIV Spread Among Injecting Drug Users*, BUS. WIRE, Sept. 30, 1993, available in LEXIS, Market Library, BWIRE File.

6. *Id.*

the birth process.<sup>7</sup> There are approximately forty-one needle exchange programs in the United States that serve about five percent of injecting drug users.<sup>8</sup>

During the first week in September 1994, the mayor of Los Angeles, through the use of the state's emergency clause,<sup>9</sup> signed a local ordinance authorizing the establishment of needle exchange programs in the city of Los Angeles.<sup>10</sup> Los Angeles' needle exchange program, as in many other cities, contradicts the statutes against possession or distribution of hypodermic needles or other drug paraphernalia.<sup>11</sup> Although the city ordinances violate state law,<sup>12</sup> the states often do not take action against the cities.<sup>13</sup> To understand why this is the case, it is important to understand the arguments on both sides of this delicate issue.

The proponents of needle exchange programs find such programs necessary in the fight against HIV for several reasons.<sup>14</sup> First and foremost, supporters of needle distribution programs argue that these facilities save lives by reducing the sharing of hypodermic needles, which ultimately results in a decrease in the transfer of the AIDS virus.<sup>15</sup> Second, advocates of needle exchanges note the reality that most children and non-drug-using heterosexuals infected with the AIDS virus have become so by contact with drug users.<sup>16</sup> Third, supporters of these programs oppose laws restricting the sale and possession of syringes on the grounds that their illegality makes addicts share syringes.<sup>17</sup> Fourth, advocates state that the needle exchange programs act as a "bridge" for drug users to get treatment for their addiction.<sup>18</sup> Fifth, giving needles to

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7. *Id.*

8. Don C. Des Jarlais et al., *Regulating Syringe Exchange Programs: A Cautionary Note*, 272 JAMA 431, 432 (1994) (advocating the use of syringe-exchange programs to reduce the risk of HIV).

9. For a discussion of using the state's emergency clause to justify the distribution of hypodermic needles to addicts, see *infra* notes 51-62 and accompanying text.

10. Christine Spolar, *To Fight AIDS, California Cities Pointedly Skirt State Drug Laws*, WASH. POST, Sept. 9, 1994, at A24.

11. *Id.*

12. For a discussion of drug paraphernalia and hypodermic needle statutes, see *infra* notes 40-48 and accompanying text.

13. There is one instance, in *Spokane County Health District v. Brockett*, 839 P.2d 324 (Wash. 1992), where the prosecuting attorney for Spokane, Washington said that if the Health District established a pilot needle exchange program he would prosecute the Health District. See *infra* notes 104-09 and accompanying text.

14. See *infra* notes 114-40 and accompanying text.

15. See *infra* notes 119-22 and accompanying text.

16. See *infra* notes 123-24 and accompanying text.

17. See *infra* notes 125-29 and accompanying text.

18. Larry Gostin, *The Interconnected Epidemics of Drug Dependency and AIDS*, 26 HARV. C.R.-C.L. L. REV. 113, 152 (1991). In a New York pilot needle exchange pro-

addicts provides them with a means to avoid contracting AIDS while waiting to enter a drug treatment center.<sup>19</sup> Sixth, needle exchange programs are less expensive than the treatment of AIDS patients.<sup>20</sup> Seventh, needle exchange programs provide a safe and effective means to dispose of contaminated and potentially deadly hypodermic needles.<sup>21</sup> For these reasons, proponents of syringe exchange programs desire to establish more such programs nationwide.<sup>22</sup>

The opponents of needle exchange programs have several fears in instituting a method by which the government disperses clean hypodermic needles that allow drug addicts, who are breaking the laws that the government establishes, to continue their habit.<sup>23</sup> First, and probably the most significant problem for the opponents of needle exchange programs, is a fear that it condones, if not promotes, drug abuse.<sup>24</sup> Bernard F. Law, a Catholic Archbishop of Boston, illustrated this view in noting, "The answer to drugs must be an unequivocal no. It is difficult to say that convincingly while passing out clean needles."<sup>25</sup> Second, opponents of needle exchange programs fear that such a "mixed message" will result in an increase in the number of people who inject illegal narcotics.<sup>26</sup> Third, the opponents of needle exchanges indicate that these programs may not fulfill their purpose "because needle sharing is part of the drug culture."<sup>27</sup> Fourth, advocates against needle exchange programs indicate that there are problems with needle exchanges in other countries.<sup>28</sup> Fifth, those who oppose the establishment of hypodermic needle exchange facilities fear that this is the first movement down a slippery slope toward the legalization of drugs.<sup>29</sup> A sixth reason people

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gram about 78% of the addicts who used the clinic "accepted a referral to treatment." *Id.*; see *infra* notes 130-31 and accompanying text.

19. See *infra* notes 134-35 and accompanying text.

20. See *infra* notes 136-38 and accompanying text.

21. See *infra* notes 139-40 and accompanying text.

22. See *supra* notes 14-21 and accompanying text.

23. See *infra* notes 141-59 and accompanying text.

24. See *infra* notes 141-47 and accompanying text.

25. Gostin, *supra* note 18, at 148 (quoting Allan R. Gold, *Bostonians Split on Mayor's Idea of Needle Swap*, N.Y. TIMES, Mar. 24, 1988, at A16).

26. *Id.*; see *infra* notes 141-47 and accompanying text.

27. Donald E. Craven, *Human Immunodeficiency Virus in Intravenous Drug Users: Epidemiology, Issues, and Controversies*, in THE AIDS EPIDEMIC 347, 362 (Padraig O'Malley ed., 1989); see *infra* notes 148-51 and accompanying text.

28. See *infra* notes 152-55 and accompanying text.

29. See *infra* note 157 and accompanying text. For a discussion of the pros and

oppose needle exchange programs is fear that their neighborhoods will become like Platzpromenade Park.<sup>30</sup> Seventh, opponents fear that the programs will not create the desired effect because the threat of AIDS does not deter addicts, and the addiction compels the addicts to share needles.<sup>31</sup> For these reasons some people strongly oppose the establishment of needle exchange facilities.<sup>32</sup>

This Comment discusses the legal and political controversy over needle exchange programs and advocates the implementation of bleach distribution programs, as opposed to needle exchange programs, as an effective and perhaps less controversial way to stop the spread of AIDS. Section II discusses the laws regulating the sale and possession of hypodermic needles.<sup>33</sup> Section III discusses judicial and legislative approaches to avoiding the state's laws and the current statutes allowing needle exchange programs, as well as recent proposals.<sup>34</sup> Section IV discusses the public policy arguments on both sides of this heavily contested issue and concludes with a short section on public opinion.<sup>35</sup> Section V discusses bleach distribution as an alternative to needle exchange programs,<sup>36</sup> and section VI provides a brief conclusion.<sup>37</sup>

## II. STATUTES REGULATING THE SALE AND POSSESSION OF SYRINGES

In an October 11, 1992 speech, President Clinton spoke candidly about his brother, Roger Clinton, and touched upon the main reason there are drug laws in the country: "If drugs were legal, I don't think he'd [Roger Clinton] be alive today."<sup>38</sup> States employ two different types of statutes,

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cons of drug legalization, see generally Mitchell Rosenthal, *In Opposition To Drug Legalization*, 24 U.C. DAVIS L. REV. 637, 638 (1991) ("The Article concludes that legalization is far more likely to increase rather than reduce the social problems that derive, in whole or in part, from drug abuse."); David Schultz, *Rethinking Drug Criminalization Policies*, 25 TEX. TECH. L. REV. 151, 153 (1993) ("In the case of controlling the social harm caused by drugs, current laws and tactics cause more harm than good and, accordingly, need modification in the direction of legalization."); David Elkins, Note, *Drug Legalization: Cost Effective and Morally Permissible*, 32 B.C. L. REV. 575, 580 (1991) ("[D]rug legalization is a pragmatic and morally defensible solution to the drug problem.").

30. See *supra* note 1 and accompanying text; *infra* note 156 and accompanying text.

31. See *infra* notes 158-59 and accompanying text.

32. See *supra* notes 23-31 and accompanying text.

33. See *infra* notes 38-50 and accompanying text.

34. See *infra* notes 51-112 and accompanying text.

35. See *infra* notes 113-63 and accompanying text.

36. See *infra* notes 164-86 and accompanying text.

37. See *infra* notes 187-88 and accompanying text.

38. *Crossfire* (Cable News Network, Dec. 7, 1993).

"Drug-Paraphernalia Statutes" and "Needle-Prescription Statutes" to attempt to prevent the use of IV drugs.<sup>39</sup>

#### A. *Drug-Paraphernalia Statutes*<sup>40</sup>

Almost every state has a statute regulating "the manufacture, sale, distribution, or possession" of "drug paraphernalia."<sup>41</sup> These laws punish persons who sell or distribute items such as syringes and persons who are in possession of hypodermic needles "if it is known that they may be used to introduce illicit substances into the body."<sup>42</sup> If the person who sells the needles is unaware that a drug addict will use them to inject illegal drugs, that person has not violated the statute.<sup>43</sup>

39. Gostin, *supra* note 18, at 133-41.

40. For an excellent discussion of the history and modern developments of this type of statute, see *id.* at 134-39.

41. *Id.* at 134-35; see ALA. CODE § 13A-12-260 (1994); ARIZ. REV. STAT. ANN. § 13-3415 (1989); ARK. CODE ANN. § 5-64-802 (Michie 1994); CAL. HEALTH & SAFETY CODE § 11364.7 (West 1991 & Supp. 1995); CONN. GEN. STAT. § 21a-267 (1992); DEL. CODE ANN. tit. 16, §§ 4771-4772 (1983 & Supp. 1994); D.C. CODE ANN. §§ 33-603.1 (1993); FLA. STAT. ch. 893.147 (1994); GA. CODE ANN. § 16-13-32.2 (1992); HAW. REV. STAT. § 329-43.5 (1994); IDAHO CODE §§ 37-2732, -2734A, -2734B (1994); 720 ILL. COMP. STAT. ANN. § 600/3 (1994) (ILL. REV. STAT. ch. 56 ½, para. 2103 (1992)); IND. CODE §§ 35-48-4-8.1, -8.3 (1994); KAN. STAT. ANN. §§ 65-4152 to -4153 (1992); KY. REV. STAT. ANN. § 218A.500 (Michie/Bobbs-Merrill 1991 & Supp. 1994); LA. REV. STAT. ANN. § 40:1033 (West 1992); ME. REV. STAT. ANN. tit. 17-A, § 1111-A (West 1983); MD. CODE ANN., art. 27, § 287A (1994); MASS. GEN. L. ch. 94C, § 32I (1994); MICH. COMP. LAWS § 333.7453 (1993) (MICH. STAT. ANN. § 14.15 (7453) (Callaghan 1993)); MINN. STAT. §§ 152.092-.093 (1994); MISS. CODE ANN. § 41-29-139 (1993), amended by 1994 MISS. LAWS Ch. 527 (S.B. 2893); MO. REV. STAT. §§ 195.233, .235 (1994); MONT. CODE ANN. §§ 45-10-103 to -105 (1993); NEB. REV. STAT. §§ 28-441 to -442 (1989); NEV. REV. STAT. § 453.560 (1993), amended by 1995 NEV. STAT. 443 (S.B. 416); N.H. REV. STAT. ANN. § 318-B:2 (1984 & Supp. 1994); N.J. REV. STAT. §§ 2C:36-2 to -3 (1993); N.M. STAT. ANN. § 30-31-25.1 (Michie 1994); N.Y. PENAL LAW §§ 220.50, .55 (McKinney 1989 & Supp. 1995); N.C. GEN. STAT. §§ 90-113.22 to .23 (1994); N.D. CENT. CODE §§ 12.1-31.1-03 to -04 (1985); OHIO REV. CODE ANN. § 2925.14 (Anderson 1993 & Supp. 1994), amended by 1995 OHIO LAWS 50 (S.B. 2); OKLA. STAT. tit. 63, § 2-405 (1995); OR. REV. STAT. § 475.525 (1989); 35 PA. CONS. STAT. ANN. § 780-113 (1994); R.I. GEN. LAWS § 21-28.5-2 (1989); S.C. CODE ANN. § 44-53-391 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 22-42A-3 to -4 (1988); TENN. CODE ANN. § 39-17-425 (1991); TEX. HEALTH & SAFETY CODE ANN. § 481.125 (West 1992 & Supp. 1994); UTAH CODE ANN. § 58-37a-5 (1994); VT. STAT. ANN. tit. 18, § 4476 (Supp. 1994); VA. CODE ANN. § 18.2-265.3 (Michie 1988); WASH. REV. CODE § 69.50.412 (1994); W. VA. CODE § 47-19-1 (1992); WIS. STAT. § 161.573 (1994); WYO. STAT. § 35-7-1056 (1994).

42. Gostin, *supra* note 18, at 135.

43. *Id.* at 135-36. In this case, a pharmacist can legally sell hypodermic needles

## B. Needle-Prescription Statutes<sup>44</sup>

Needle prescription laws effectively "prohibit the sale, distribution or possession of hypodermic syringes or needles [by anyone] without a valid medical prescription."<sup>45</sup> Eleven states have needle-prescription statutes.<sup>46</sup> These statutes have serious consequences for doctors and pharmacists who abuse their power to write prescriptions.<sup>47</sup> Although states enact these laws, there are several incidences where cities and courts have disregarded drug-paraphernalia and needle-prescriptions statutes and allowed needle exchange programs.<sup>48</sup>

## C. Federal Statute

Congress explicitly stated in the Health Omnibus Programs Extension of 1988 that money allocated to stop the spread of the HIV virus cannot be used to provide hypodermic needles to drug addicts.<sup>49</sup> The statute does allow, however, money to be spent on needle exchange programs if

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over the counter to diabetics or others who need syringes without requiring a prescription as long as the pharmacist does not believe the purchaser will use the syringe for illegal drug injection. *Id.* at 136.

44. For an excellent discussion of needle-prescription laws, see *id.* at 139-41.

45. *Id.* at 140.

46. *Id.* The states with needle prescription statutes are: California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, and Rhode Island. See CAL. BUS. & PROF. CODE § 4149 (West 1990); CONN. GEN. STAT. § 21a-65 (1992); DEL. CODE ANN. tit. 16, § 4757 (1994); 720 ILL. COMP. STAT. ANN. 635/1 (1994) (ILL. REV. STAT. ch. 38, para. 22-50 to -51 (1992)); ME. REV. STAT. ANN. tit. 17-A, § 1111 (West 1994); MASS. GEN. L. ch. 94C, § 27 (1994); MINN. STAT. § 151.40 (1994); N.H. REV. STAT. ANN. § 318:52-c (1984 & Supp. 1994); N.J. REV. STAT. § 24:21-51 (1993); N.Y. PENAL LAW § 220.45 (McKinney 1989); R.I. GEN. LAWS § 21-28-4.04 (1989 & Supp. 1994). Under the General Laws of Rhode Island, the legislature codified the establishment of a pilot needle exchange program, and does not criminally prosecute any person who distributes or possesses needles as part of this program. R.I. GEN. LAWS §§ 23-11-18 to -19 (1994).

47. Gostin, *supra* note 18, at 140-41. Types of punishments the government imposes on physicians who write illegal prescriptions include license revocation and criminal prosecution. *Id.* at 141. If a physician writes a prescription for a patient "to satisfy the craving of an addict" rather than "to treat or to cure," "the physician has overstepped the boundaries of the statute." *Id.*

48. See *infra* notes 52-109 and accompanying text.

49. 42 U.S.C. § 300ee-5 (1994). It is interesting to note that the French-legislated Decree No. 72-200 requires a prescription to get a syringe. WORLD HEALTH ORGANIZATION, LEGISLATIVE RESPONSES TO AIDS 75-76 (1989). If the person does not have a prescription, then the medical personnel can give the individual a needle free of charge only if the person is over age 17 and gives his name and address to the provider. *Id.* The medical personnel are then authorized to give the individual's name and address "to the police authorities or to health inspectors." *Id.*

the "Surgeon General of the Public Health Service determines that a demonstration needle exchange program would be effective in reducing drug abuse and the risk that the public will become infected with the etiologic agent for acquired immune deficiency syndrome."<sup>50</sup>

### III. AVOIDING STATE LAWS

#### A. *The Use of the "State of Emergency" Clause*

AIDS does *not* "just happen" and it cannot just "happen to anybody." But it certainly can happen to anyone who engages in high-risk behavior and therein lies the real message: *High-risk behavior, not an unavoidable AIDS virus, is the enemy.*<sup>51</sup>

Even in the face of the truth about the AIDS virus, several cities treat AIDS as an "unavoidable virus" and declare states of emergency to institute needle exchange programs.<sup>52</sup> California Government Code section 8558(c) defines a state of emergency in a city:

"Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake . . . .<sup>53</sup>

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50. 42 U.S.C. 300ee-5 (1994).

51. C. EVERETT KOOP & TIMOTHY JOHNSON, LET'S TALK 80 (1992).

52. Spolar, *supra* note 10, at A24 (Mayor Richard Riordan "declared an emergency and signed an order asking the police department to put needle exchange programs—which are against the state's drug paraphernalia law—low on their list of priorities"); Elaine Herscher, *Berkeley Gives Tacit OK To Needle Swap*, S.F. CHRON., Dec. 8, 1993, at A18 (stating that Berkeley "declared a state of emergency over the AIDS epidemic . . . that gives local approval to needle exchange programs"); Sabin Russell, *S.F. To Challenge State, Start Needle Exchange*, S.F. CHRON., Mar. 13, 1993, at A1 (stating that the mayor of San Francisco "declare[d] a public health state of emergency" in order to start a needle exchange program).

53. CAL. GOV'T CODE § 8558(c) (West 1994); *see also* ALA. CODE § 31-9-8 (1989); ALASKA STAT. § 26.20.040 (1990 & Supp. 1994); ARIZ. REV. STAT. ANN. § 35-192 (1994), *amended by* 1994 Ariz. Legis. Serv. Decl. of Emerg. July 26, 1994; ARK. CODE ANN. § 19-2-404 (Michie 1994); CONN. GEN. STAT. § 28-9 (1992); DEL. CODE ANN. tit. 20, § 3125 (1985); D.C. CODE ANN. § 6-1501 (1989); FLA. STAT. ch. 14.021 (1994); GA. CODE ANN. § 38-3-51 (1982 & Supp. 1994); HAW. REV. STAT. § 128-1 (1985); Idaho Code §§ 46-1002, -1008 (1977 & Supp. 1994); 20 ILL. COMP. STAT. ANN. 3305/2 (1994), *amended by* 1994 ILL. LAWS 606; IND. CODE §§ 10-4-1-3, -7 (1994); IOWA CODE § 29C.2, .3 (1993); KAN. STAT. ANN. § 48-904 (1983), *amended by* 1994 Kan. Sess. Laws 248



The statute indicates that there must be an "existence of conditions of disaster or of extreme peril."<sup>54</sup> As Dr. Timothy Johnson indicates from the quotation above, AIDS is not "unavoidable."<sup>55</sup> AIDS is not as widespread a disease as "the bubonic plague of 1348 or the disastrous flu pandemic of 1918."<sup>56</sup> Although AIDS is avoidable if one refrains from high-risk behavior, other cities and counties, like Orange County, California and New Brunswick, New Jersey, have declared a state of emergency for measles, which is generally not deadly, unlike AIDS.<sup>57</sup> However, the Orange County declaration of a state of emergency for measles was to obtain "state funds," and in New Jersey the declaration was for the purpose of vaccinating students, not to override a law.<sup>58</sup>

Although the city's state of emergency declarations are "carefully choreographed,"<sup>59</sup> and "[m]edical officers in local jurisdictions have the authority to declare states of emergency that could override state law, . . .

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(H.B. 3055); KY. REV. STAT. ANN. § 39.400 (Michie/Bobbs-Merrill 1992); ME. REV. STAT. ANN. tit. 37-B, §§ 703, 742 (West 1989 & Supp. 1994); MD. ANN. CODE art. 16A, § 6 (1994); MICH. COMP. LAWS § 30.402 (1994) (MICH. STAT. ANN. § 4.824(12) (Callaghan 1993)); MINN. STAT. ANN. § 9.061 (West 1994); MISS. CODE ANN. § 33-15-305 (1993); MO. REV. STAT. § 44.010 (1994); MONT. CODE ANN. § 10-3-103 (1993); NEB. REV. STAT. § 81-829.39 (1994); NEV. REV. STAT. § 414.020 (1993); N.Y. EXEC. LAW § 20 (McKinney 1993); N.D. CENT. CODE § 37-17.1-04 (1987); OKLA. STAT. tit. 63, § 683.3 (1995); OR. REV. STAT. § 401.025 (1989); 35 PA. CONS. STAT. ANN. § 7102 (1994); R.I. GEN. LAWS § 30-15-3 (1994); S.D. CODIFIED LAWS ANN. § 33-15-1 (1994); TENN. CODE ANN. § 58-2-101 (1989); TEX. GOV'T CODE ANN. § 418.004 (West 1990); UTAH CODE ANN. § 53-2-102 (1994); VT. STAT. ANN. tit. 20, §§ 1, 2 (1987 & Supp. 1994); VA. CODE ANN. § 44-146.16 (Michie 1994); WASH. REV. CODE § 38.52.010 (1994); W. VA. CODE § 15-5-2 (1995); WIS. STAT. § 66.325 (1994); WYO. STAT. § 19-5-102 (1994).

54. CAL. GOV'T CODE § 8558(c) (West 1994). For cases dealing with the state of emergency clause in areas other than AIDS, see generally *Martin v. Municipal Court of California*, 196 Cal. Rptr. 218, 221 (Cal. Ct. App. 1983) (holding that a medfly infestation is adequate for a finding of a state of emergency); *D.F.P. Enterprises v. Waterbury*, 498 A.2d 1044, 1047 (Conn. App. Ct. 1985) (holding that the mayor has the authority in a state of emergency to mandate the destruction of a building that was burned in a fire).

55. See *supra* note 51 and accompanying text.

56. Gene Schultz, *AIDS: Public Health and the Criminal Law*, 7 ST. LOUIS U. PUB. L. REV. 65, 68 (1988).

57. Jim Newton, *County is Awash in Emergencies*, L.A. TIMES, Apr. 24, 1990, at B12 (stating that a measles epidemic in Orange County, California prompted a state of emergency); Associated Press, *Measles Cases Prompt Emergency at Rutgers New Jersey Will Provide Free Vaccinations. So Far, 20 Students Have Become Ill In New Brunswick*, PHIL. INQUIRER, Mar. 27, 1994, at B3 ("A measles outbreak at Rutgers University forced New Jersey officials to declare a state of emergency at the school in order to vaccinate 40,000 students, faculty and staff.").

58. Lanie Jones, *Measles Prompts State of Emergency*, L.A. TIMES, Apr. 17, 1990, at B2; Associated Press, *supra* note 57, at B3.

59. Russell, *supra* note 52, at A21.

. such a declaration in the case of HIV transmission has not been tested in court.<sup>60</sup> Some police agencies will continue to arrest people who are in possession of hypodermic needles even though the city declares a state of emergency.<sup>61</sup>

It is evident from the discussion above that needle exchange programs are highly controversial.<sup>62</sup> Although cities may declare a state of emergency to attempt to circumvent state laws prohibiting needle exchange programs, police and private citizens are not always willing to allow individuals to distribute needles. While legislative bodies use their power to trump state law, judicial decisions vary in acceptance of needle exchange programs.

### B. Judicial Approaches to Needle Exchange Programs

Several courts across the United States examined various issues and defenses related to needle exchange programs. One such case is *People v. Bordowitz*.<sup>63</sup> In *Bordowitz*, the state charged the defendants with criminal possession of a hypodermic needle under New York Penal Code section 220.45.<sup>64</sup> The defendants attempted to organize their own needle exchange program in New York City to pass out clean hypodermic needles.<sup>65</sup> The defendants argued that the needle exchange program was a medical necessity in light of the problems created by AIDS.<sup>66</sup>

The court quoted New York Penal Code section 35.05(2) and its "well-recognized" application to cases involving acts designed "to preserve the physical well being of an individual or group of individuals."<sup>67</sup> The court

60. Herscher, *supra* note 52, at A18.

61. Judy Ronnigen, *Cities, Counties Defy Needle-Swap Ban*, S.F. CHRON., Jan. 11, 1994, at A13. Alameda County Sheriff Charles Plummer said that declaring a state of emergency in order to distribute clean needles "prostitutes what a real state of emergency is." *Id.* at A14. In Hollywood, "[j]ust a week after Mayor Richard Riordan declared a state of emergency to allow for the distribution of clean needles to drug users," a group of citizens placed people who distributed needles "under citizen's arrest for breaking the state law that prohibits needle exchanges." Tina Daunt, *Citizen's Arrests Halt Distribution of Syringes*, L.A. TIMES, Sept. 16, 1994, at B3.

62. See *supra* notes 51-61 and accompanying text.

63. 588 N.Y.S.2d 507 (N.Y. Crim. Ct. 1991).

64. *Id.* at 508; see N.Y. PENAL LAW § 220.45 (McKinney 1989).

65. *Bordowitz*, 588 N.Y.S.2d at 508.

66. *Id.* at 509.

67. *Id.* The court quoted New York Penal Code section 35.05(2), which states:

[C]onduct which would otherwise constitute an offense is justifiable and not

then noted the emergence of a "medical necessity defense" from the common application of the law, a defense excusing otherwise illegal medical treatment or actions from punishment if necessary to preserve life.<sup>68</sup> The court found that the defendant's distribution of clean hypodermic needles fell within the "medical necessity" defense.<sup>69</sup>

The court also indicated two limitations on the necessity defense. First, a defendant cannot claim this defense if the legislature has already "acted on the very issue raised by the defense."<sup>70</sup> Second, the court said that "[t]he necessity defense cannot be used to 'excuse criminal activity intended to express the protestor's disagreement with positions reached by the lawmaking branches of the government.'"<sup>71</sup> The court then enumerated five requirements for the medical necessity defense:

- 1) the defendant acted under a reasonable belief, supported by medical evidence, that his or her action was necessary as an emergency measure to avert an imminent public or private injury; 2) the defendant's actions did not create the crisis; 3) it is clearly more desirable to avoid the public or private injury than the injury caused by violating the statute; 4) there are no available options; and 5) prior legislative action does not preclude the defense and defendant's actions are not based only upon considerations of the morality and advisability of the statute violated.<sup>72</sup>

After examining the facts in the case, the court reasoned that the defendants could reasonably believe that passing out hypodermic needles

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criminal when:

(2) Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.

*Id.* (quoting N.Y. PENAL LAW § 35.05(2) (McKinney 1987)); *see also* ARK. CODE ANN. § 5-2-604 (Michie 1994); COLO. REV. STAT. § 18-1-702 (1994); DEL. CODE ANN. tit. 11, § 463 (1994); HAW. REV. STAT. § 703-302 (1994); 720 ILL. ANN. STAT. ch. 720, para. 5/7-13 (Smith-Hurd 1993); KY. REV. STAT. ANN. § 503.030 (Michie/Bobbs-Merrill 1994); ME. REV. STAT. ANN. tit. 17-A, § 103 (West 1994); MO. REV. STAT. § 563.026 (1994); N.H. REV. STAT. ANN. § 627:3 (1994); OR. REV. STAT. § 161.200 (1994); 18 PA. CONS. STAT. § 503 (1994); TENN. CODE ANN. § 39-11-609 (1994); TEX. PENAL CODE ANN. § 9.22 (West 1995); WIS. STAT. ANN. § 939.47 (1994).

68. *Bordowitz*, 588 N.Y.S.2d at 509.

69. *Id.* at 511.

70. *Id.* at 510.

71. *Id.* (quoting *United States v. Dorrell*, 758 F.2d 427, 432 (9th Cir. 1985)).

72. *Id.* at 511.

was necessary "to avert an imminent public injury," due to the spread of AIDS.<sup>73</sup> In addition, the court reasoned that it was clear the defendants did not create the AIDS epidemic.<sup>74</sup> Furthermore, the court concluded that it was more desirable to reduce harm to individuals at high risk of catching the HIV virus than to obey the statute.<sup>75</sup> Moreover, the court stated that due to the lack of drug treatment programs in New York, the inefficiency of counseling or "bleach kits," and the fact that many drug addicts do not want to submit to treatment, there are no other alternatives than to pass out clean needles.<sup>76</sup> The court also indicated that the legislature has not taken any decisive action that would preclude the defendants from using the necessity defense.<sup>77</sup> Lastly, the court found that the defendants' primary purpose was to distribute needles and not create a demonstration, even though there was a "crowd of sympathizers . . . demonstration signs and . . . press coverage."<sup>78</sup> The court found the defendants not guilty by reason of the medical necessity defense.<sup>79</sup>

Although in *Bordowitz*, New York's Criminal Court reached the conclusion that passing out hypodermic needles to prevent the spread of AIDS is a medical necessity, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Leno*<sup>80</sup> reached the opposite conclusion. In *Leno*, the defendants had operated a needle exchange program with the purpose of saving the lives of drug addicts who shared dirty needles.<sup>81</sup> On appeal, the defendants contended that they were entitled to the medical necessity defense jury instruction at trial, where the jury convicted them of possession and distribution of hypodermic needles.<sup>82</sup> The court held that the defendants were not entitled to a medical necessity defense jury instruction.<sup>83</sup>

73. *Id.*74. *Id.*75. *Id.*76. *Id.* at 512.77. *Id.*78. *Id.* See generally Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79 (1989); James O. Pearson, Jr., Annotation, "Choice of Evils," *Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based On Acts of Public Protest*, 3 A.L.R. 5th 521 (1992).79. *Bordowitz*, 588 N.Y.S.2d at 513.80. 616 N.E.2d 453 (Mass. 1993); see also *Kauffman v. State*, 620 So. 2d 90, 91 (Ala. Crim. App. 1992) ("The defense of medical necessity . . . is not embraced within the definition of 'duress.'")81. *Leno*, 616 N.E.2d at 454.82. *Id.*83. *Id.* at 455. The requirements of the medical necessity defense in Massachusetts

The court reasoned that the defendants did not show that the harm they were trying to prevent was "imminent," but instead found it to be a future harm, which is not entitled to the medical necessity defense.<sup>84</sup> In addition, the court stated that the legislature's "policy is entitled to deference by courts."<sup>85</sup> Furthermore, the court reasoned that the defendants were not without any other legal action since they can "petition the Legislature."<sup>86</sup> The differing decisions in the two cases above indicates the conflicting views about the proper method for stopping the spread of HIV without exacerbating the drug problem.

In *People v. Monroe*<sup>87</sup> the police arrested the defendant for the sale of a controlled substance and possession of hypodermic needles.<sup>88</sup> The defendant sought to avoid punishment for the possession of the hypodermic needles by claiming that his enrollment in a state-run needle exchange program "create[s] an exception to the Penal Law's ban on the possession of hypodermic needles for participants in such a program."<sup>89</sup> The needles the defendant carried at the time of the arrest were brand new and not marked with the blue label that identified them as from the needle exchange program.<sup>90</sup>

The court held that the fact the defendant participated in the needle exchange program did not entitle him to a defense on the facts presented.<sup>91</sup> The defendant argued that since the program received needles without the blue marking, it permitted the participants to possess needles not obtained from the program.<sup>92</sup> The court rejected this argument and reasoned that the purpose of the program was to collect unmarked, used needles, not brand new needles, still in their packages.<sup>93</sup>

This case suggests that even if an addict enrolls in a needle exchange program, possession of clean needles not from the city may subject him to prosecution. In addition, this case indicates that those addicts participating in needle exchange programs may abuse the system by selling drugs and needles.

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are very similar to the New York rule. *Id.*; see *supra* note 72 and accompanying text.

84. *Leno*, 616 N.E.2d at 456.

85. *Id.* at 456-57.

86. *Id.* at 457; see also MASS. CONST. Pt. I, art. 19.

87. 593 N.Y.S.2d 742 (N.Y. Crim. Ct. 1992).

88. *Id.* at 743. The District Attorney dropped the charge for sale of a controlled substance when the prosecution discovered that the substance was not heroin. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 745.

92. *Id.* at 744.

93. *Id.*

In *State v. Sorge*,<sup>94</sup> the police arrested the defendants under a disorderly persons statute for establishing a needle exchange program.<sup>95</sup> The defendants asserted that the government should dismiss their prosecution under section 2C:2-11 of the New Jersey Revised Statutes, which allows a judge to strike down the prosecution of an individual if the defendant's act "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction."<sup>96</sup> This statute also allows the judge to choose not to prosecute defendants whose crimes were due to circumstances the legislature could not reasonably have foreseen.<sup>97</sup> The defendants in *Sorge* claimed that their prosecution was unwarranted because they were attempting to stop the spread of HIV, which the Legislature could not have reasonably foreseen, and that "their conduct did not actually cause or threaten the harm sought to be prevented by the statute barring possession or distribution of hypodermic needles."<sup>98</sup>

The court disagreed with the defendants' contentions and reasoned that their needle exchange program was not "trivial" because it "facilitat[ed] illegal drug use."<sup>99</sup> Additionally, the court stated that dismissing the defendants' prosecution "would amount to a judicial license for defendants and others to embark on a course of conduct with significant law enforcement and public health implications."<sup>100</sup> The court went as far as to indicate that giving out needles to addicts may "actively promote and encourage drug abuse,"<sup>101</sup> and pointed to the harm of drugs through abuse and crime.<sup>102</sup> Finally, the court further stated that it is a "legislative function" to determine whether the state should institute nee-

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94. 591 A.2d 1382 (N.J. Super. Ct. Law Div. 1991).

95. *Id.* at 1383. In exchange for contaminated needles, the defendants planned to distribute clean hypodermic needles, a small container of bleach, and instructions for cleaning the needles. *Id.*

96. *Id.* at 1383-84 (referring to N.J. REV. STAT. § 2C:2-11 (1993)).

97. *Id.* at 1384.

98. *Id.*

99. *Id.* at 1385.

100. *Id.*

101. *Id.*

102. *Id.* at 1386. The court stated that the New Jersey Legislature, when it enacted the Comprehensive Drug Reform Act of 1986, concluded that drug usage is directly related to other types of "violent and non-violent crimes." *Id.* (quoting N.J. REV. STAT. § 2C:35-1.1(b) (1993)).

dle exchange programs and thus courts must exhibit judicial restraint in such matters.<sup>103</sup>

This case suggests that some courts are reluctant to sanction needle exchange programs over the desires of the legislature. It further indicates that the institution of needle exchange programs is a policy decision that should be given careful thought.

Unlike *Sorge*, the Supreme Court of Washington in *Spokane County Health District v. Brockett*<sup>104</sup> found a city-instituted needle exchange program valid, even though it contradicted state law.<sup>105</sup> In *Brockett*, the Spokane County Health District sought judicial approval for its needle exchange program.<sup>106</sup> The defendant, the prosecuting attorney of Spokane, told the Spokane County Health District that if it engaged in a needle exchange program, it would be subject to prosecution under the Washington drug paraphernalia statute.<sup>107</sup> The court validated the needle exchange program, even though it contradicted state law, due to "the broad authority vested in the SCHD [Spokane County Health District] Board of Health and health officer" to prevent the spread of deadly diseases.<sup>108</sup> In addition, the court reasoned that the legislature created the AIDS Act, which allows for needle sterilization, and affirmed the trial court's finding that "needle exchange is a form of needle sterilization."<sup>109</sup>

From the cases discussed, it is clear that there is much controversy between courts as to whether needle exchange programs, even when they conflict with existing state law, should be considered valid measures to prevent the spread of a deadly disease. Although the individual courts have ruled on whether needle exchange programs are beneficial or harmful, the debate still rages, as the states continue to propose bills to provide for needle exchange programs.

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103. *Id.*

104. 839 P.2d 324 (Wash. 1992).

105. *Id.* at 328.

106. *Id.* at 327.

107. *Id.* The Washington drug paraphernalia statute states that "[i]t is unlawful for any person to deliver . . . drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to . . . inject . . . or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor." *Id.* (quoting WASH. REV. CODE § 69.50.412(2) (1994)).

108. *Id.* at 328.

109. *Id.* at 329-30; *see also* WASH. REV. CODE § 70.24.015 (1994).

### C. Proposed and Current Needle Exchange Legislation

Rhode Island, the District of Columbia, Connecticut, Maryland, and Massachusetts are five jurisdictions where legislatures have established "pilot" needle exchange programs.<sup>110</sup> In addition, there were at least seven states with proposals for the creation of pilot needle exchange programs in 1993 and 1994.<sup>111</sup> The California Legislature twice passed a bill allowing for needle exchange programs, but both times Governor Pete Wilson vetoed the bills.<sup>112</sup>

There is clearly a struggle between the courts, the legislatures, the city councils, the governors, and the people as to whether the government should enact needle exchange programs in their towns. The next section discusses the opposing public policies of the controversy over needle exchange programs.

## IV. PUBLIC POLICY ARGUMENTS

"Any proposal to make drug use safer creates an apparent conflict between two policies: preventing and ending drug abuse and stemming the spread of AIDS."<sup>113</sup>

### A. Support for Needle Exchange Programs

There are essentially three ways to stop the spread of HIV through

110. R.I. GEN. LAWS §§ 23-11-18 to -19 (1994); D.C. CODE ANN. § 33-603.1 (1994); CONN. GEN. STAT. § 19a-124 (1992), amended by 1994 CONN. ACTS 94-16 (Reg. Sess.); MD. CODE ANN., HEALTH-GEN. § 24-801 to -806, -808 to -809 (1994); MASS. GEN. L. ch. 94C, § 27 (1994). The District of Columbia Code allows the Mayor to set up needle exchange programs to give addicts free needles if they are waiting to enter into a drug treatment program. D.C. CODE ANN. § 33-603.1(a) (1994). The Rhode Island law states that anyone involved in the needle exchange program "shall be immune from criminal prosecution" if they are in possession of needles, "unless the individual(s) is found to have in his or her possession hypodermic needles and syringes that are not a part of the exchange program." R.I. GEN. LAWS § 23-11-19 (1994).

111. The states with proposals for pilot needle exchange programs are: California, Florida, Illinois, New Jersey, New York, and Texas. See A.B. 2610, Reg. Sess., 1993 Cal. Laws; H.B. 729, 13th Leg., 2d Reg. Sess., 1994 Fla. Laws; S.B. 1539, 88th Gen. Ass., Reg. Sess., 1993 Ill. Laws; S.B. 203, 206th Leg., 1st Reg. Sess., 1994 N.J. Laws; S.B. 2396, 215th Gen. Ass., 1st Reg. Sess., 1993 N.Y. Laws; H.B. 1716, 73rd Leg., Reg. Sess., 1993 Tx. Laws.

112. Spolar, *supra* note 10, at A24.

113. Catherine O'Neill, *Intravenous Drug Abusers, in AIDS AND THE LAW* 253, 279 (Harlon L. Dalton et al. eds., 1987).



shared needles.<sup>114</sup> The first way is to stop drug abuse all together.<sup>115</sup> This should be the ultimate goal of any state's policy toward AIDS and drug usage because it will stop the ravages of drug use and stop the spread of HIV to intravenous drug users.<sup>116</sup> The second way to stop the spread of HIV through shared needles is to stop intravenous drug abuse.<sup>117</sup> The third way is to distribute clean needles.<sup>118</sup>

Proponents say that needle exchange programs "save lives."<sup>119</sup> In addition, experts indicate that "[n]eedle exchange programs do not appear to increase drug use and do prevent HIV infections."<sup>120</sup> Some proponents of needle exchange programs argue that needle exchange programs are effective, as evidenced by Edward Kaplan's study of a Connecticut needle exchange program, which relied on testing the needles, not asking the addicts.<sup>121</sup> The test showed a twenty-seven percent decrease in the contamination rate, which resulted in about a thirty-three percent reduction of HIV transmission.<sup>122</sup>

Further, it is clear that "IV drug users are the major link for transmission of HIV to heterosexuals and children."<sup>123</sup> Because of this, supporters of needle exchange programs also argue that the "[f]amilies and children of drug abusers deserve protection from infection by AIDS."<sup>124</sup>

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114. *Id.* at 276-80.

115. *Id.* at 276-77.

116. *Id.*

117. *Id.* at 277-78. This is a very difficult task to accomplish due to several factors: (1) addicts "are often alienated, difficult to reach, and distrustful of mainstream society"; (2) the long period of time between contraction of the disease and symptoms "dilutes the reality of the risk"; and (3) "AIDS is only one among many causes of illness and death that persons involved in drug abuse commonly risk." *Id.* at 278. In addition, using needles "is the most efficient way to ingest" certain drugs. *Id.*

118. *Id.* at 278-80.

119. Herscher, *supra* note 52, at A18 (quoting Berkeley Councilwoman Carla Woodworth).

120. *UC Study Urges Federal, State, and Local Governments to Support Needle Exchange Programs To Prevent HIV Spread Among Injecting Drug Users*, *supra* note 5; see also *Can Clean Needles Slow The AIDS Epidemic?*, *supra* note 2, at 469.

121. *Can Clean Needles Slow the AIDS Epidemic?*, *supra* note 2, at 468. Opponents of needle exchange programs criticized previous tests as unreliable because "[a]ddicts dependent on a program might conceivably report what they think interviewers want to hear." *Id.*

122. *Id.*

123. AIDS COORDINATING COMMITTEE, *supra* note 4, at 228. "Seventy percent of all heterosexually transmitted cases in native born citizens have been IV drug users' sexual partners . . . and at least seventy percent of children with AIDS have been the infants of IV drug users or their sexual partners . . . ." *Id.*

124. O'Neill, *supra* note 113, at 279.

Supporters of needle exchange programs oppose drug paraphernalia and needle prescriptions statutes, claiming that "[t]hese laws . . . make injecting drug users more likely to share syringes."<sup>125</sup> Experts claim that the two prime reasons for needle sharing are "legal and economic."<sup>126</sup> The economic reasons stem from the fact that "the restrictions on needle sales in states requiring prescriptions creates scarcity and drives up the cost of sterile needles."<sup>127</sup> The legal reason is that experts state that "the illegality of carrying 'works' promotes the rental of equipment in shooting galleries, and sharing elsewhere."<sup>128</sup> There is some evidence that "high rates of HIV are present in many states that limit access to free needles," and therefore the opponents of these laws contend that repealing them will slow the spread of AIDS.<sup>129</sup>

Another positive aspect of needle exchange programs is that they bring addicts in for treatment who have never sought substance abuse treatment before.<sup>130</sup> In one needle exchange program it was shown that "one of every six addicts who joined the program subsequently entered drug treatment."<sup>131</sup> However, some needle exchange programs have experienced difficulty in attempting to educate addicts.<sup>132</sup> Needle exchange programs in England noted a very "high attrition rate" because addicts are compelled to enter unappealing programs.<sup>133</sup>

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125. *UC Study Urges Federal, State, and Local Governments to Support Needle Exchange Programs to Prevent HIV Spread Among Injecting Drug Users*, *supra* note 5; see also *Can Clean Needles Slow the AIDS Epidemic?*, *supra* note 2, at 467 (stating that the potential for imprisonment is one reason why addicts share needles).

126. AIDS COORDINATING COMMITTEE, *supra* note 4, at 234.

127. *Id.*

128. *Id.* (footnote omitted). It seems highly speculative that drug addicts concern themselves about the legality of possessing a hypodermic needle, but are not concerned about the legality of the possession of illegal narcotics.

129. Craven, *supra* note 27, at 362; see also Gostin, *supra* note 18, at 146.

130. RONALD O. VALDISERRI, PREVENTING AIDS 176 (1989).

131. *Can Clean Needles Slow The AIDS Epidemic?*, *supra* note 2, at 469.

132. See Gostin, *supra* note 18, at 158.

133. *Id.* at 158-60. The English needle exchange program reported that 61% of the addicts came back to the needle exchange program a second time, but only 17% returned "for a tenth visit." *Id.* at 158. The author indicated that "[p]rograms that 'don't preach' and only distribute needles have lower client attrition." *Id.* at 160. If the goal is to get addicts off drugs, then ceasing education and other services and simply distributing needles seems to thwart that goal. The author does suggest several ways to balance attracting clients and offering services. *Id.* New York City's mayor, however, dismantled a needle exchange program "because it had too few enrollees." *Id.* at 153. The author suggests that this was due to a poor location. *Id.*

Medical experts suggest that the state should distribute clean needles to IV drug users because there are not enough drug treatment centers for those who want to get off of drugs, and not all users will want to stop using drugs.<sup>134</sup> States may need needle exchange programs to further life while addicts are forced to wait for entry into a drug treatment program.<sup>135</sup>

The financial aspects of treating AIDS patients compared with the cost of running a needle exchange program is an additional argument for establishing needle exchange programs.<sup>136</sup> Estimates in 1989 indicated that the cost of treating one person inflicted with the AIDS virus was between \$47,000 and \$147,000.<sup>137</sup> A study of Connecticut needle exchange programs showed that through the lives it saved, the program also saved more than "\$2 million for the health-care system."<sup>138</sup>

A final reason for needle exchange programs is that they provide a location for the "safe disposal of a large amount of potentially contaminated injection equipment."<sup>139</sup> This is a very important aspect for these programs in that they will keep needles that are contaminated with the deadly HIV virus off of the streets.<sup>140</sup>

For these reasons, some people feel that needle exchange programs are an effective way to slow the spread of HIV.

#### *B. Opposition to Needle Exchange Programs*

Robert Martinez, director of the Office of National Drug Control Policy under President Bush, presented the main disagreement with needle exchange programs when he said, "Distributing needles 'undercuts the credibility of society's message that drug use is illegal and morally wrong'"<sup>141</sup> In addition, he stated that AIDS should not "undermine our determination to win the war on drugs."<sup>142</sup>

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134. AIDS COORDINATING COMMITTEE, *supra* note 4, at 233. However, if the goal is to stop drug abuse, not only the spread of HIV, then providing needles for addicts who do not want to stop using drugs perpetuates the problem and frustrates the ultimate goal.

135. *Can Clean Needles Slow the AIDS Epidemic?*, *supra* note 2, at 468.

136. Craven, *supra* note 27, at 363.

137. *Id.*

138. *Can Clean Needles Slow the AIDS Epidemic?*, *supra* note 2, at 469.

139. Gostin, *supra* note 18, at 153. Out of 110 people who came back to a needle exchange a second time, about 60% "returned their needles." *Id.*

140. *See id.*

141. *Can Clean Needles Slow the AIDS Epidemic?*, *supra* note 2, at 467 (quoting Robert Martinez, director of the Office of National Drug Control Policy under President Bush).

142. *Id.*

The opponents of needle exchange programs "equate education on needle cleaning and sterile needle distribution programs with the facilitation of IV drug use."<sup>143</sup> They fear that the government sanctioning of needle exchange programs will lead to further drug usage.<sup>144</sup> In *State v. Sorge*,<sup>145</sup> the court indicated this concern when it said that drug users who "smoke, swallow, or snort drugs other than heroin" may start shooting-up instead which gives rise to the risk of AIDS and other medical problems.<sup>146</sup> Some studies suggest that the only way some addicts can get needles is through a needle exchange program.<sup>147</sup>

Another concern is that the drug culture will render needle exchange programs useless.<sup>148</sup> Needle sharing "signifies camaraderie among users"<sup>149</sup> and needle exchange programs would not be effective "because needle sharing is part of the drug culture and the means for disinfection are widely available."<sup>150</sup> Needles can be freely given out, but unless addicts change their culture, the programs will not have the desired effect.<sup>151</sup>

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143. VALDISERRI, *supra* note 130, at 140.

144. Craven, *supra* note 27, at 362. Although opposition to needle exchange programs is seen as a traditionally conservative position, several more liberal African-American leaders oppose needle exchange programs because of concern "that access to injection equipment will only fuel the cycle of addiction, crime, and violence decimating their communities." *Can Clean Needles Slow the AIDS Epidemic?*, *supra* note 2, at 467. See generally Wayne L. Graves, *The Black Community, in AIDS AND THE LAW* 281 (Harlon L. Dalton et al. eds., 1987).

145. 591 A.2d 1382 (N.J. Super. Ct. Law Div. 1991).

146. *Id.* at 1386 (citing Mark A. Kleiman, *AIDS, Vice, and Public Policy*, 51 *LAW AND CONTEMP. PROBS.* 315, 362 (1988)). The fact that intravenous drug use "is the most efficient way to ingest" certain drugs lends credibility to this argument. See O'Neill, *supra* note 113, at 277-78.

147. Sarah Lonsdale, *Free Drug Needles Put Brake on HIV Numbers*, *OBSERVER* (London), Feb. 10, 1991, at 6. The survey showed that 120 needle exchanges in England distributed about 15,000 needles every month. *Id.* In 1987 about 28% of the addicts shared needles. *Id.* In 1990 only 21% shared needles. *Id.* Of 900 addicts surveyed 32% said they used the exchange for fear of getting AIDS, but 41% used it "because they could not get syringes any other way." *Id.* "Fourteen per cent [sic] said they could not afford syringes and another 14 per cent [sic] said they would rather get syringes free" than buy them. *Id.*

148. O'Neill, *supra* note 113, at 279-80.

149. VALDISERRI, *supra* note 130, at 170.

150. Craven, *supra* note 27, at 362.

151. AIDS COORDINATING COMMITTEE, *supra* note 4, at 234. Opponents of needle exchanges claim that users will continue to share needles "due to addicts' 'social rituals' and the compulsions of addiction." *Id.*

The proponents of needle exchanges point to other countries, like the Netherlands, where the government promotes needle exchanges and where the evidence indicates "that no new cases of AIDS have been reported among IV-drug users since that country implemented its needle-trading program . . . ."152 However, the opponents suggest that Italy allows access to clean needles, but HIV rates there continue to climb rapidly.153 Furthermore, the Swiss have a needle exchange program and have "the highest rate of drug addiction in Europe . . . and the highest rate of AIDS."154 In addition, although other countries which allow over-the-counter purchases of needles have lower infection rates, it is undecided "whether the rates are the result of the policy or of cultural differences and a smaller reservoir of virus."155

There are several other reasons that some oppose needle exchange programs. First, there is a concern that the areas around the exchanges will become a den of addicts.156 Second, there is a worry that needle exchanges are the first step in the legalization of drugs, which the opponents feel will be detrimental.157 Third, the threat of AIDS may not be enough for addicts to stop sharing needles since sharing continues even in the face of other threats such as hepatitis.158 Fourth, the addiction compels the addicts to use the first available needle whether or not it is contaminated.159

It is clear that there are very real and legitimate concerns over whether the government should establish needle exchange programs. Governor Wilson, when he vetoed a bill that called for needle exchange programs,

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152. O'Neill, *supra* note 113, at 280.

153. VALDISERRI, *supra* note 130, at 176. HIV infection rates increased in one Italian city from 5 to 50% in just a few years. *Id.* However, there is some evidence that in Italy, the problem instead may be that pharmacists will not sell needles to drug addicts. *Id.*

154. Shavelson, *supra* note 1, at 11.

155. Craven, *supra* note 27, at 362.

156. See Shavelson, *supra* note 1, at 11. The article indicated that "the crime rate near the park increased by 30 percent." *Id.* at 12.

157. *Crossfire*, *supra* note 38.

158. O'Neill, *supra* note 113, at 280. A survey of 900 addicts in England showed that only 32% of the addicts who used needle exchange programs did so out of fear of getting AIDS. Lonsdale, *supra* note 147, at 6.

159. O'Neill, *supra* note 113, at 280.

Withdrawal has been shown to be a critical factor retarding safer injection practices. The severe physical discomfort and the craving for relief drives users to resort to any readily available needle and syringe for injecting the drug. Asking a drug-dependent person to prolong withdrawal in order to obtain uncontaminated injection equipment virtually guarantees failure in risk-reduction efforts.

Gostin, *supra* note 18, at 154 (footnote omitted).

said that there was not "clear and convincing evidence" that these programs are effective.<sup>160</sup> Until the evidence is overwhelmingly clear that needle exchanges will not result in the problems discussed above, it is doubtful they will be politically accepted.

C. *Public Opinion*

In response to a poll of 1001 adults in the nation regarding needle exchanges, fifty-five percent of the respondents supported "needle exchange programs to reduce the spread of diseases such as AIDS."<sup>161</sup> Forty percent of the people surveyed opposed needle exchange programs and only five percent were unsure.<sup>162</sup> Although it seems clear that a slight majority supports needle exchanges, it is less clear whether people want them in their own neighborhoods.<sup>163</sup>

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160. Russell, *supra* note 52, at A1.

161. Peter D. Hart, RES., Feb. 3, 1994, available in WESTLAW, POLL Database. The question stated:

I am going to read you several proposals that have been suggested as ways of controlling the damage that is done to society's health and that of drug users themselves, because of illegal drugs. For each one that I read, please tell me if you would favor or oppose the proposal . . . Implementing needle exchange programs to reduce the spread of diseases such as AIDS. Would you favor or oppose this proposal?

*Id.*

162. *Id.*

163. See Daunt, *supra* note 61, at B3 (discussing a group of citizens who arrested people who distributed clean needles).

## V. BLEACH AS AN ALTERNATIVE TO NEEDLE EXCHANGES<sup>164</sup>

It seems that the best solution might be a compromise between the two sides. A possible middle ground may be found in "Bleach-Distribution Programs."<sup>165</sup> In contrast to distributing clean hypodermic needles, where the government actually provides the instrument for the drug user to inject illegal drugs into his system, bleach distribution programs instead allow a drug user to clean a contaminated needle through the use of household bleach that the addict could purchase legally at any store.<sup>166</sup> The distribution centers would distribute "vials of bleach" and "information about AIDS, including directions on how to sterilize needles and syringes through boiling or the use of alcohol and bleach."<sup>167</sup>

Ethnographic studies conducted in San Francisco during 1984-85 revealed that a worthwhile disinfection method has five desiderata: (1) it should be quick, preferably taking less than 60 seconds; (2) it should be cheap; (3) it should use materials conveniently available; (4) it should be safe to the user and his injection equipment; and (5) it should be effective at neutralizing viruses.<sup>168</sup>

Researchers tested four cleaning solutions that were readily available and

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164. Some may use the arguments in this next section to attempt to legitimize the distribution of condoms to children in schools. They may argue that passing out condoms to students is analogous to bleach distribution since the government is merely facilitating the safety of people from contracting the AIDS virus, not giving them the ability to engage in the behavior. However, the reasoning in this section should not be used to justify condom distribution to teenagers because drug use has the added element of addiction. The goal of bleach distribution programs should be to prolong the life of addicts long enough to get them into drug treatment centers and free them from the ravages of drug abuse. Although the addicts are ultimately responsible for their actions, the addiction to the drugs in many ways prevents them from stopping drug use without some assistance. See *supra* note 159 and accompanying text. Sex, although a strong human desire, is not the same as a drug addiction and can be controlled. For information about the controversy surrounding condom distribution in schools, see generally Eugene C. Bjorklund, *Condom Distribution in the Public Schools: Is Parental Consent Required?*, 91 Ed. L. Rptr. 11 (1994); Jane D. Oswald et al., *AIDS: Coping With HIV on Campus*, 27 J. MARSHALL L. REV. 449 (1994); Karl J. Sanders, Comment, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms in Public Schools*, 61 U. CIN. L. REV. 1479 (1993).

165. Gostin, *supra* note 18, at 153.

166. *Id.* at 154.

167. *Id.*

168. John A. Newmeyer, *Why Bleach? Development of a Strategy To Combat HIV Contagion Among San Francisco Intravenous Drug Users*, in *NEEDLE SHARING AMONG INTRAVENOUS DRUG ABUSERS: NATIONAL AND INTERNATIONAL PERSPECTIVES* 151, 153 (Robert J. Battjes & Roy W. Pickens eds., 1988).

inexpensive under the five criteria.<sup>169</sup> They determined bleach to be the most effective disinfectant under the five criteria.<sup>170</sup>

Several states, including Massachusetts, New Jersey, New York, California, and Maryland, distribute bottles of bleach with instructions for proper use.<sup>171</sup> A San Francisco group stated that "two flushings with bleach" with "two subsequent flushings with water" is the most effective way to clean the needle and ensure that no bleach is left in the syringe.<sup>172</sup> The bleach is generally given out in small, refillable plastic bottles.<sup>173</sup> The group that did the study ensured that the bleach would not deteriorate the syringe and that an injection of bleach into the body was not as harmful as originally thought.<sup>174</sup>

A survey of drug users in San Francisco indicated that they considered bleach an effective disinfectant and that "about three-quarters of those interviewed had actually used bleach at least once" to disinfect their needles.<sup>175</sup> Furthermore, an additional benefit of distributing bleach is that compared to the cost of treating a person with AIDS, giving out bleach is much less expensive.<sup>176</sup>

Although still controversial, bleach distribution programs satisfy several of the goals advanced by those in favor of needle exchange programs, and they appease several of the concerns of those opposed. First, the effective use of bleach to sterilize hypodermic needles can also "save

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169. *Id.* at 154. The four solutions were "boiling water, alcohol, hydrogen peroxide, and bleach." *Id.* The researchers rejected boiling water because sterilization required 15 minutes, which was too long. *Id.* The study did not accept alcohol due to the ease that an addict could mistake regular drinking alcohol as a solution sufficient to kill the virus. *Id.* The researchers rejected hydrogen peroxide because exposure to sunlight or leaving the cap off may diminish its effectiveness. *Id.*

170. *Id.*; see also Craven, *supra* note 27, at 362 (stating that the use of household bleach "has been recommended as an effective, safe, and convenient method of disinfection"); Gostin, *supra* note 18, at 154 (stating that bleach allows users immediate access to clean needles).

171. Craven, *supra* note 27, at 362.

172. Newmeyer, *supra* note 168, at 155; see also Gostin, *supra* note 18, at 154.

173. Newmeyer, *supra* note 168, at 155-56.

174. *Id.* at 156. The researchers found that it was possible to leave a syringe in bleach for two days "with no adverse consequences to any part of the equipment or its seals other than an erosion of part of the numbering on the body of the syringe." *Id.* In addition, they "cite the case of a woman who recovered from an injection of 1.8 ml of full-strength bleach." *Id.*

175. *Id.* at 157.

176. *Id.* at 157-58.



lives.<sup>177</sup> Second, if addicts sterilize their needles with bleach they will not transmit AIDS to their sexual partners or their children.<sup>178</sup> Third, bleach is readily available and there are no laws that outlaw household bleach.<sup>179</sup> Fourth, bleach distribution programs will bring in addicts for treatment who have never sought this type of treatment before.<sup>180</sup> Fifth, cleaning needles with bleach may buy the addicts enough time for them to enroll in a drug treatment program.<sup>181</sup> Sixth, bleach distribution programs are less expensive than treating an individual for AIDS.<sup>182</sup> Last, although bleach distribution programs do not provide a safe place for the disposal of needles, there may be less needles in circulation if the addicts continually clean and reuse their own needles.<sup>183</sup>

With regard to the opponents' fears about needle exchange programs, bleach distribution programs may seem like the government is condoning drug usage; however, one could argue that bleach distribution programs provide only a method for cleaning syringes, not a method for drug use itself.<sup>184</sup> Since there will not be widespread needle availability, it does not seem that the bleach will lead to more drug use.<sup>185</sup> Moreover, even if needle-sharing is part of the drug culture, if the addicts clean the needles before sharing them, then they will be effective at slowing the spread of HIV.<sup>186</sup> For these reasons, bleach distribution programs may seem more palatable to the opponents of needle exchange programs.

## VI. CONCLUSION

Needle exchange programs are clearly controversial. Local legislatures and courts express their disagreement with federal and state laws prohibiting needle exchanges by using various means to sidestep state laws. Drug use and AIDS are both hotly debated topics and needle exchanges bring these two vast areas to a focal point. Whatever side of the fence one stands on, it is clear that something must be done about drug usage and the spread of HIV. In this cloudy issue two things are definitely clear: *“High risk behavior, not an unavoidable AIDS virus, is the ene-*

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177. See *supra* notes 119-22 and accompanying text.

178. See *supra* notes 123-24 and accompanying text.

179. See *supra* notes 125-29 and accompanying text.

180. See *supra* notes 130-31 and accompanying text.

181. See *supra* notes 134-35 and accompanying text.

182. See *supra* notes 136-38 and accompanying text.

183. See *supra* notes 139-40 and accompanying text.

184. See *supra* notes 141-42 and accompanying text.

185. See *supra* notes 143-47 and accompanying text.

186. See *supra* notes 148-50 and accompanying text.

*my*,<sup>187</sup> and no one wants to see the carnage of intravenous drug usage as evidenced by Lonny Shavelson's portrayal of Platzpromenade Park.<sup>188</sup>

DAVID J. MERRILL

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187. Koop & Johnson, *supra* note 51, at 80.

188. *See supra* note 1 and accompanying text.

