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Is HIV "Extraordinary"?

Jordan B. Hansell

The Sentencing Reform Act of 1984 (the "Act") attempts to reduce inconsistencies in the sentences of defendants convicted of comparable crimes. The Act created a Sentencing Commission (the "Commission") and authorized it to promulgate a set of sentencing guidelines to steer judicial decisionmaking. To fulfill this mandate, the Commission drafted the Federal Sentencing Guidelines (the "Guidelines"), which Congress enacted in 1987.

Although Congress wanted to eliminate sentencing disparities, it also wanted to allow some degree of individualized sentencing. To achieve the correct balance, the Commission created three categories of characteristics: those a court must consider in sentencing each defendant; those a court must never consider; and those that, while normally irrelevant to sentencing decisions, a court may consider when circumstances warrant. Among the characteristics usu-

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5. See 28 U.S.C. § 991(b)(1)(B) (providing that the purpose of the Guidelines is to avoid disparity in sentencing "while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices").

6. These include the defendant's role in the offense, the defendant's criminal history, and the scope of the defendant's dependence upon criminal activity for his livelihood. See U.S.S.G. § 5H1.7-9.

7. These include: race, sex, national origin, creed, religion, and socio-economic status, see U.S.S.G. § 5H1.10; lack of guidance as a youth and similar circumstances, see U.S.S.G. § 5H1.12; and drug or alcohol dependence, see U.S.S.G. § 5H1.4.

8. These include: age; education and vocational skills; mental and emotional conditions; physical condition; employment record; family ties and responsibilities, and community ties, see U.S.S.G. § 5H1.1-6; military, civic, charitable, or public service; employment-related contributions; and record of prior good works, see U.S.S.G. § 5H1.11. For a good general discussion of the interplay between these three types of characteristics, see United States v. Rivera, 994 F.2d 942, 948-49 (1st Cir. 1993).

In Koon v. United States, 116 S. Ct. 2035 (1996), the Supreme Court appeared to give sentencing courts more leeway in departing from the Guidelines. See Mark D. Harris & Douglas A. Berman, The Koon Case: Departures and Discretion, 9 FED. SENTENCING REP. 4, 4 (1996). Exactly how this case will affect sentencing decisions, however, is unclear. See generally id. Some argue that Koon will emancipate sentencing judges, while others argue that it maintains the status quo. See generally Koon v. United States: The Supreme Court's Puzzling Ruling on Departures and Discretion, 9 FED. SENTENCING REP. 2 (1996). Early reports seem to suggest that little has changed. See id. at 5. Irrespective of the effect of the
ally inapposite to a sentencing court's decision is the physical condition of the defendant — a consideration mentioned in section 5H1.4 of the Guidelines. Only when the defendant's condition represents an "extraordinary physical impairment" may the sentencing court grant a downward departure or consider a sentence other than imprisonment.

Courts have been unable to agree on the question of whether HIV-positive status, HIV with an attending medical complication, or AIDS should count as extraordinary physical impairments warranting a downward departure. Unfortunately, this problem will not fade away. Experts predict that the number of HIV infections will increase in the coming years, disproportionately affecting criminal populations. This Note argues that HIV-positive status, HIV with an attending medical complication, and AIDS should not automatically qualify as extraordinary physical impairments. Rather, the sentencing court should make findings of fact to determine whether the individual defendant suffers from a related complication — either before or after any explicit application of the

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Koon decision, sentencing courts still must decide whether HIV and AIDS warrant downward departures. Consequently, courts must continue to wrestle with the question this Note addresses.

12. Compare United States v. Shein, 31 F.3d 135, 138 (3d Cir. 1994) (arguing that HIV with a serious complication should count as an extraordinary physical impairment) with United States v. DePew, 751 F. Supp. 1195, 1199 (E.D. Va. 1990) ("Only an 'extraordinary physical impairment' may justify a sentence other than imprisonment. AIDS is not such a 'physical impairment' . . . ." (citation omitted)). One court has even found that all three conditions might qualify if particular, though unspecified, characteristics were present. See United States v. Rabins, 63 F.3d 721, 729 (8th Cir. 1995) ("To some extent, both sides have argued this case as if it presented the abstract question whether someone with an HIV infection, or with ARC, or with AIDS, is suffering from an 'extraordinary physical impairment.' No doubt there is a sense in which an affirmative answer would be proper in all three of these situations.").
13. Despite the relatively limited number of ways in which an individual can contract the HIV virus, the number of those infected has increased rapidly, and experts expect further growth in the coming years. See Helena Brett-Smith & Gerald H. Friedland, Transmission and Treatment, in AIDS Law Today: A New Guide for the Public 18, 19 (Scott Burris et al. eds., 1993). The World Health Organization has estimated that between eight and ten million adults and one million children may be infected worldwide and that the numbers may quadruple by the year 2000. See id. In the United States, the Centers for Disease Control (CDC) had received reports of 200,000 cases of full-blown AIDS by 1991. See id. These cases generallyrepid Perlman, AIDS Deaths Drop Sharply Again in S.F., S.F. CHRON., Oct. 15, 1997, at A1 (noting a trend in the declining number of AIDS cases and deaths in San Francisco).
14. See Alexa Freeman, HIV in Prison, in AIDS Law Today: A New Guide For The Public, supra note 13, at 263, 264. Individuals within these populations commonly have a history of behavior, such as intravenousonly the sickest individuals and constitute only a small portion of those who are HIV positive. See id. But see Davus drug use, that places them in high risk categories. See id.
AIDS label — such that the related complication qualifies him for a downward departure.\textsuperscript{15}

To support this claim, this Note proceeds in two steps. Part I provides a systematic test for courts to consider in determining whether an extraordinary physical impairment exists. It then examines the legislative history and language of the Act, the language of the Guidelines, and several cases that have addressed this issue. Using these sources, this Part identifies four relevant factors that should guide the extraordinary physical impairment determination.\textsuperscript{16}

Part II applies this four-factor test to HIV and argues that one factor, the severity and predictability factor, proves determinative in assessing the applicability of HIV status to downward departures. It then posits that the remaining factors of the general test enunciated in Part I all point toward declaring HIV ordinary.

\textsuperscript{15} At least one commentator, James MacGillis, advocates a broader standard. Under MacGillis's scheme, a medical diagnosis of AIDS or advanced HIV itself would suffice as an extraordinary physical impairment. See James C. MacGillis, Note, The Dilemma of Disparity: Applying the Federal Sentencing Guidelines to Downward Departures Based on HIV Infection, 81 Minn. L. Rev. 229, 253 (1996) (“Courts should consider departing below the Guidelines range for an offender with AIDS or an advanced HIV designation because the advanced stages of HIV will produce an ‘extraordinary physical impairment.’” (emphasis added)). Under MacGillis's definition, a person has late-stage HIV if he fits within the third or fourth CDC classification group. See id. at 253 n.119.

This Note argues that these labels, while helpful, fail to correspond to the Guidelines' requirements for finding a physical impairment extraordinary. The CDC classifications neither provide nor are intended to provide courts with the kind of guidance required in this area. See infra note 90 and accompanying text.

MacGillis also argues that in addition to § 5H1.4, § 5K2.0 — the catchall departure guideline that allows downward departures for conditions the Commission did not consider adequately — supports finding AIDS and advanced HIV to be extraordinary impairments. See U.S.S.G. § 5K2.0; see also MacGillis, supra, at 241-42. Sections 5K2.0 and 5H1.4, however, are related in a way that makes discussion of both unnecessary. The term “extraordinary” in § 5H1.4 represents the physical condition analogue to § 5K2.0's general directive about inadequately considered conditions. See Bruce Selya & Matthew Kipp, An Examination of Emerging Departure Jurisprudence Under Federal Sentencing Guidelines, 67 Notre Dame L. Rev. 1, 22-23, 31-38 (1991) (arguing that a § 5H1.4 departure based on a defendant's physical condition is a "quantitative" departure under § 5K2.0); cf. United States v. Lopez, 938 F.2d 1293, 1296 (D.C. Cir. 1991) (using § 5K2.0 to define the term "extraordinary" for § 5H1.1). But see United States v. Rabins, 63 F.3d 721, 734 (8th Cir. 1995) (Wilson, J., dissenting) (“[E]ven assuming arguendo that § 5H1.4 should not be interpreted [as including an HIV-positive defendant with a deteriorating condition],”) 18 U.S.C. § 3553(b) and § 5K2.0 provide independent bases for departure under circumstances of a deteriorating HIV patient.”). Section 5K2.0 mirrors § 3553(b) in allowing for departures for conditions the Sentencing Commission has not adequately considered. See, e.g., Selya & Kipp, supra, at 22. By definition, when a condition is extraordinary, the Commission did not adequately consider it and a departure is therefore warranted. This connection between the two sections means that an exhaustive discussion of both is unnecessary.

\textsuperscript{16} For a good overview of some of these factors, see generally Stacey M. Studnicki, Individualized Sentencing: Federal Sentencing Departures Based upon Physical Condition, 1994 Det. C. L. Rev. 1215.
PART I: CRAFTING THE EXTRAORDINARY PHYSICAL IMPAIRMENT TEST

This Part suggests a test for sentencing courts to use in deciding whether a defendant suffers from an extraordinary physical impairment. It considers the statutory language and history of the Sentencing Reform Act, the language of the Guidelines, and several cases in compiling a comprehensive list of factors a court should consider.\(^\text{17}\) It concludes that there are four\(^\text{18}\) relevant factors: (1) whether the condition severely and predictably impairs the defendant; (2) whether the prison system is able to provide necessary medical care; (3) whether incarceration will worsen the defendant’s condition; and (4) whether the condition exposes the defendant to victimization.\(^\text{19}\)

\(^{17}\)Section I.A refers to statutory debates and language surrounding both the general departure standard and those sections relating directly to physical condition. The Sentencing Commission ultimately placed the general standard in § 5K2.0 and the physical condition standard in § 5H1.4. While this Note concentrates on § 5H1.4, the interrelation between the two provisions, see supra note 15, makes an inquiry into Congress’s attitude toward the general standard a worthwhile and germane endeavor.

\(^{18}\)Courts and commentators have discussed two additional factors that this Note contends are irrelevant. First, they have considered the cost of caring for the defendant. See Rabins, 63 F.3d at 735-37 (Wilson, J., dissenting); MacGillis, supra note 15, at 255. But § 5H1.4, on which these courts rely, allows a sentencing court to consider the costs of caring for the defendant only in those cases in which the court has previously found the defendant to suffer from an extraordinary physical impairment.

This reading of the cost consideration is consistent with the overall two-step approach that Congress created for departure decisions. This Note addresses whether HIV should be considered extraordinary, but a sentencing court has two steps it must traverse before it can grant a departure. First, the court must determine whether the condition is extraordinary. Second, the court must determine whether that condition warrants a downward departure. Congress hinted at this two-part analysis when it explained:

A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in its usual form and not in the particularly extreme form present in a particular case. The provision recognizes, however, that even though the judge finds an aggravating or mitigating circumstance in the case that was not adequately considered in the formulation of the guidelines, the judge might conclude that the circumstance does not justify a sentence outside the guidelines.

S. REP. No. 98-225, at 78-79 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3261-62. This language eventually found its way into § 5K2.0. Given the interaction between § 5K2.0 and § 5H1.4, see supra note 15, that language is applicable in this case. Consequently, the court should first decide whether the condition is extraordinary and then decide whether it justifies a departure.

Second, courts have discussed the continued dangerousness of the defendant as a factor for departure. See, e.g., Rabins, 63 F.3d at 735-38 (Wilson, J., dissenting). This factor originates from the third of the original four purposes of sentencing: protecting the public from further crimes. Cf. infra note 22 and accompanying text. No court has found this factor to be directly relevant to the impairment decision because releasing a criminally dangerous defendant violates the third purpose of sentencing regardless of his condition. See, e.g., Rabins, 63 F.3d at 735-38 (Wilson, J., dissenting).

\(^{19}\)How these factors play out will depend on the facts of each case. This Note does not attempt to supply a method of application for each possible physical condition. Rather, it argues only that the first factor, as applied to HIV, is both necessary and sufficient for finding an extraordinary physical impairment. See infra Part II.
A. The Severe and Predictable Condition

Section I.A argues that a court should consider whether the defendant’s condition severely impairs her in a predictable manner. Specifically, section I.A.1 contends that congressional discussion of the Act’s goals and of the physical condition category supports the severity requirement. Section I.A.2 then maintains that Congress’s desire for fairness and rationality supports requiring a predictable condition.

1. The Severity Requirement

Congress intended for only severe physical conditions to play a role in departure decisions. Congress first evinced this intention by focusing the sentencing decision on a defendant’s criminal characteristics, as opposed to personal traits. This choice is evident in Congress’s enunciation of the four purposes of sentencing:

1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; 2) to afford adequate deterrence to criminal conduct; 3) to protect the public from further crimes of the defendant; and, 4) to provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Notably, the first three goals of sentencing have nothing to do with the defendant’s personal characteristics; they concentrate either on punishment or deterrence. Only with respect to the fourth goal — rehabilitation — might one argue that Congress considered the defendant’s personal characteristics — that is, those characteristics that would make the defendant either amenable or not amenable to certain rehabilitative efforts. The rehabilitative goal, however, has fallen out of favor, as evidenced by section 994(k) of the Act. In it, Congress instructed the Commission to create Guidelines that “reflect the inappropriateness” of sentencing a defendant for the purpose of rehabilitation.

20. See United States v. Bell, 974 F.2d 537, 539 (4th Cir. 1992) (noting that the Guidelines seek uniformity by resting “sentences upon the offense committed, not upon the offender” (quoting United States v. McFih, 920 F.2d 313, 319 (4th Cir. 1989))); see also THOMAS W. HUTCHINSON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 766-67 (2d ed. 1994) (“The Guidelines thus reflect decisions by Congress to some extent, but especially by the Commission, to devise a sentencing scheme based primarily on the characteristics of the offense, not the offender.”).


Congress intimated its disfavor with rehabilitation as a purpose in sentencing when it stated: “[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can
One also finds Congress's intent to downplay a defendant's personal characteristics in its description of section 3553(a)(1), which calls on the sentencing judge to consider the defendant's history and characteristics.24 Congress stated, "[w]ith respect to the history and characteristics of the defendant, the judge must consider such matters as the criminal history of the defendant, as well as the nature and effect of any previous criminal sanctions."25 Any similar directive with respect to a defendant's personal characteristics is conspicuously absent from Congress's discussion.

Congress's limitation of the consideration of a defendant's personal characteristics in the context of the penal system's goals suggests that consideration of personal characteristics should be limited in sentencing decisions as well. Because physical condition is a personal characteristic, one may assume that Congress preferred that courts take the same overall approach with respect to it as they do toward personal characteristics in general.

A given personal characteristic does become relevant to a defendant's sentence when it is severe.26 Two arguments support this position. First, Congress used the analogous word "serious" in describing conditions that should qualify as extraordinary physical impairments.27 In describing 28 U.S.C. § 994(d)(5),28 the provision that instructs the Commission to consider physical condition, Congress stated that under certain circumstances involving a "particularly serious illness," a court may give probation to a defendant who otherwise would go to prison.29

Second, Congress intimated a severity requirement in its parallel treatment of downward departures for physical condition and sentence modifications.30 These two provisions address similar issues, but at different stages in the penal process. Downward departures...
tures address any conditions present at the time of sentencing, while modifications address conditions that have developed or progressed while the inmate was in prison. Congress declared that a severe illness would suffice for both determinations. To give courts guidance, Congress cited terminal cancer, an obviously severe example.

The Sentencing Commission followed through on Congress's directives and incorporated them into the Guidelines. The Commission emphasized criminal, rather than personal, characteristics. The Commission also adopted almost verbatim Congress's language limiting relevant physical conditions to those that are severe.

First, the Commission created guidelines that define "the defendant strictly in criminal terms, not personal ones." Consequently, personal characteristics, as a general category, ordinarily are irrelevant to a sentencing court's decision. Personal characteristics, such as physical condition, become part of the sentencing consideration only when they are extraordinary in nature.

The Guidelines provide little room for a court to consider the defendant's personal traits in sentencing. Specifically, in Part H of Chapter 5, the Sentencing Commission outlined the role criminal and personal characteristics are to play in a defendant's sentence. The Commission stated that only the defendant's role in the offense, criminal history, and dependence on criminal activity for

31. First, Congress stated that only a severe condition supported a sentence modification. See S. Rep. No. 98-225, at 55, reprinted in 1984 U.S.C.C.A.N. at 3238 ("The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness . . . ." (emphasis added)). Second, Congress said that the same standard should apply to both provisions. See S. Rep. No. 98-225, at 173, reprinted in 1984 U.S.C.C.A.N. at 3356.


34. See U.S.S.G. § 5H1.4.

35. Hutchison & Yellen, supra note 20, at 766.

36. See id.

37. See id. at 767 ("Most courts have held that, by clear implication, when personal circumstances are present that are not 'ordinary,' but are rather 'extraordinary,' the sentencing court may depart from the applicable range.").

38. The Second Circuit emphasized the distinction between criminal and personal traits when it noted: "The contrast between th[e] highly detailed categorization of offense conduct and the treatment of the character of the defendant could scarcely be more marked. For, as to defendant characteristics, the Guidelines contain virtually no categorizing instructions." United States v. Merritt, 988 F.2d 1298, 1307-08 (2d Cir. 1993); see also Hutchison & Yellen, supra note 20, at 767.

39. See Hutchison & Yellen, supra note 20, at 767; U.S.S.G. ch. 5, pt. H.

40. See U.S.S.G. § 5H1.7.

41. See U.S.S.G. § 5H1.8.
livelihood\textsuperscript{42} are always relevant to a court's sentencing decision. Each of these considerations pertains to a defendant's criminal attributes.

Second, and more important, the Commission adopted Congress's language in discussing the specific role of extraordinary physical impairments. Section 5H1.4 provides that the defendant's condition must be both serious and incapacitating to justify a departure. In defining which physical conditions could constitute grounds for a departure, section 5H1.4 uses the word "impairment" and gives as an example a "seriously infirm defendant."\textsuperscript{43} The word "impairment" alone requires that there be some reduction in the defendant's ability to function. If this were not the case, and the defendant could function normally despite his condition, there would be no reason for a court to declare his case extraordinary and section 5H1.4 would not apply. In addition, the Commission's use of the word "seriously" indicates that it took to heart Congress's limitation on the applicability of nonsevere conditions.

In short, Congress made clear its intention that only severe conditions should qualify as extraordinary physical impairments. The Commission, following that directive, then created Guidelines that appropriately limited extraordinary physical impairments to severe conditions.\textsuperscript{44}

2. The Predictability Requirement

Congress wanted defendants convicted of similar conduct to receive similar sentences and wanted those sentences to be fair and rational. This section argues that Congress's desire for fairness and rationality militates in favor of establishing a predictability requirement for physical impairment decisions.

The central goal of the Act was to eliminate sentencing disparities among similarly situated defendants.\textsuperscript{45} Congress wanted to encourage fairness by reducing disparity.\textsuperscript{46} In fact, Congress directed judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."\textsuperscript{47} Similarly, Congress instructed the Sentencing Commission to create guidelines that "provide... fairness in meeting the purposes of sentencing."\textsuperscript{48} In relation to an extraordinary physical impairment, fairness means that defendants

\begin{itemize}
  \item \textsuperscript{42} See U.S.S.G. § 5H1.9.
  \item \textsuperscript{43} U.S.S.G. § 5H1.4 (emphasis added).
  \item \textsuperscript{44} See supra note 15.
  \item \textsuperscript{47} 18 U.S.C. § 3553(a)(6) (1994).
  \item \textsuperscript{48} 28 U.S.C. § 991(b)(1)(B) (emphasis added).
\end{itemize}
with identical conditions should receive identical sentences.\textsuperscript{49} Were this not the case, courts could treat defendants who have precisely the same symptoms and prognoses differently.

Congress emphasized that courts should be concerned with the fairness of their sentences “particularly in deciding when it is desirable to sentence outside the Guidelines.”\textsuperscript{50} In responding to a series of amendments offered by the House, the Senate clarified that the amendments would have no effect on the departure standard. Indeed, Senator Hatch said specifically that “[t]he standard for departure is vital to the proper functioning of the Guidelines” and that should Congress relax the standard, “unwarranted departures would undermine the core function of the Guidelines . . . which is to reduce disparity . . . and restore fairness . . . to the sentencing process.”\textsuperscript{51}

Congress also aspired to create guidelines that would structure the sentencing decision and thereby rationalize the sentencing process.\textsuperscript{52} To emphasize its desires, Congress disparaged other systems\textsuperscript{53} as “completely ineffective in . . . imposing a rational order on . . . criminal sentencing.”\textsuperscript{54} Sentencing decisions based on unpredictable conditions only add irrationality to the process, as they amount to little more than pure soothsaying.\textsuperscript{55} Courts therefore would irrationally grant different departures to identically situated defendants, thereby violating congressional intent.

\textsuperscript{49} See infra section II.A (discussing the application of this test to HIV status and arguing that a per se rule based on HIV’s classifications could potentially treat identical defendants unfairly).


\textsuperscript{52} Cf. S. REP. No. 98-225, at 79, reprinted in 1984 U.S.C.C.A.N. at 3262 (discussing the failure of the voluntary sentencing system in Massachusetts to provide this kind of rational order in rejecting an amendment to the Guidelines that would have allowed the sentencing court more discretion in deciding when to depart).

\textsuperscript{53} Specifically, Congress discussed the Massachusetts state system and considered the efficacy of a voluntary, as opposed to a mandatory, system, see S. REP. No. 225, at 79, reprinted in 1984 U.S.C.C.A.N. at 3262, rather than the role of unpredictable physical conditions in downward departures. Nevertheless, this discussion highlights a congressional desire for a rational system, and unpredictable physical conditions are as threatening to that goal as is a voluntary system.


\textsuperscript{55} Congress chose to avoid decisions based on insufficient information when it chose to relegate rehabilitation in sentencing defendants to a minor role. It feared that our knowledge of human behavior was too limited to serve as a basis for determining the length of a defendant’s incarceration. See S. REP. No. 98-225, at 40, reprinted in 1984 U.S.C.C.A.N. at 3223 (“We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.”).
B. Providing the Necessary Medical Care

A court should consider whether the prison system can provide a defendant with needed medical care, and, as a general rule, should not grant a downward departure if a defendant’s condition is one for which the prison system can provide the necessary care. Section 3553(a)(2)(D) mandates that the court consider whether the sentence can “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” By logical extension, a court could label a condition extraordinary and depart from the Guidelines if its treatment requires more care than the prison system provides.

In United States v. Greenwood, the Fourth Circuit faced such a question. In that case, the government appealed the district court’s downward departure, granted because the defendant was a Korean War veteran who had lost both his legs below the knee during his tour of duty. The court affirmed the district court’s downward departure because incarceration would have jeopardized the treatment Greenwood had been receiving at the Veterans Administration Hospital.

C. Prison’s Effect on the Defendant’s Condition

A court also should determine whether a defendant’s time in prison will worsen his condition. As with the adequate care factor,

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56. See, e.g., United States v. Martinez-Guerrero, 987 F.2d 618, 620 (9th Cir. 1993) (“The ability of the Bureau of Prisons to accommodate a disability is a factor which the district court may consider in making this factual finding.”); see also United States v. McClean, 822 F. Supp. 961, 962 (E.D.N.Y. 1993) (arguing that because prison officials refused to provide the defendant with the type of metal crutches he required, his severely crippled left leg constituted an extraordinary physical impairment).

57. Section 3553 provides a series of factors that courts should consider when fashioning a defendant’s sentence. See 18 U.S.C. § 3553 (1994).

58. 18 U.S.C. § 3553(a)(2)(D) (emphasis added). The validity of this reading of § 3553(a)(2)(D) becomes apparent when one compares it to § 994(k), which provides: “The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” 28 U.S.C. § 994(k) (1994) (emphasis added). The only way to reconcile these two provisions is to read § 3553(a)(2)(D) as requiring a court to consider the possible inability of a sentence to provide the listed considerations as a drawback, rather than to consider that section as allowing a court to sentence a defendant to imprisonment to provide her with those services.

59. 928 F.2d 645 (4th Cir. 1991).

60. See 928 F.2d at 646.

61. See 928 F.2d at 646.

62. One must distinguish this factor from concern about the health and welfare of other inmates in the Federal System with respect to in-prison transmission of HIV. Courts do not typically consider other prisoners’ health and welfare in the extraordinary physical impairment context. Furthermore, while in-prison transmission does occur, the available evidence indicates that it does not occur at rates in excess of the spread in populations outside the prison system. See Richard S. Wilbur, AIDS and the Federal Bureau of Prisons:
this factor derives from section 3553(a)(2)(D), which requires a court to consider whether the sentence will provide the defendant with appropriate medical care.63 If incarceration would substantially worsen a defendant's condition, clearly it would compromise the defendant's medical care and should weigh against a court's imposing that sentence.64

Few courts have considered the extent to which the prison system must exacerbate the defendant's condition for it to become judicially cognizable. In United States v. Jefferson,65 one of the few cases to consider this factor, the district court indicated that the defendant must be able to prove more than that "the defendant's medical conditions have been aggravated by prison life."66 Instead, the court held that the defendant must proffer "'extraordinary and compelling reasons' for reduction of [his] term."67

D. The Possibility of Victimization

Finally, a court should ascertain whether the defendant's condition will expose her to victimization at the hands of his fellow inmates. Of all the factors in this test, the threat-of-victimization factor stands on the softest ground. Not only was this factor completely fashioned by the courts,68 but the Commission has since altered the Guidelines in an attempt to deemphasize possible victimization as grounds for a departure.69 Nonetheless, possible victimization remains a permissible justification for a court that wishes to grant a downward departure.70

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64. See United States v. Jefferson, 786 F. Supp. 1267 (N.D. W. Va. 1992); cf. United States v. Rabins, 63 F.3d 721, 728 (8th Cir. 1995) (holding that an HIV-positive defendant should not receive a downward departure in his sentence because he failed to present evidence that prison would worsen his condition).
66. 786 F. Supp. at 1267.
68. See, e.g., United States v. Lara, 905 F.2d 599, 603-05 (2d Cir. 1990).
70. See, e.g., Koon, 116 S. Ct. at 2051 ("The Commission did not see fit, however, to prohibit consideration of physical appearance in all cases, nor did it address the broader category of susceptibility to abuse in prison. By urging us to hold susceptibility to abuse in prison to be an impermissible factor in all cases, the Government would have us reject the Commission's considered judgment in favor of our own.").
The Second Circuit, in *United States v. Lara*,71 first articulated potential victimization as a foundation for a downward departure. In that case, the defendant, Morales, was small in stature, effeminate, and bisexual.72 During his incarceration pending sentencing, two inmates attempted to force Morales to serve as their prostitute.73 To assure his safety, correctional officials placed Morales in solitary confinement.74 The court held that Morales's potential for victimization, combined with his placement in solitary confinement for protection, constituted an extraordinary situation that warranted a downward departure.75

Apparently in response to *Lara*, the Sentencing Commission amended section 5H1.4 to include the phrase "[a defendant's] appearance, including physique, is not ordinarily relevant in determining whether a sentence should fall outside the applicable guideline range."76 Despite the Commission's reaction to *Lara*, some courts continue to rely on a defendant's potential for victimization to justify downward departures.77 Interestingly, these courts seem to combine the physical impairment language in section 5H1.4 with *Lara*'s potential-for-victimization rationale.78 For instance, the Eighth Circuit, in *United States v. Long*,79 held that an "extraordinary physical impairment that results in extreme vulnerability is a legitimate basis for departure."80

The Supreme Court, in *Koon v. United States*,81 appeared to approve of continuing to use victimization as a rationale for a downward departure.82 The Court did not, however, approve the use of extraordinary physical impairment to grant a departure based on potential abuse.83 Rather, it noted that the Sentencing Commission inherently suggested that physical appearance could be relevant to sentencing under extraordinary circumstances when it categorized physical appearance as not *ordinarily* relevant.84 The Court then

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71. 905 F.2d 599, 601 (2d Cir. 1990).
72. See 905 F.2d at 601.
73. See 905 F.2d at 601.
74. See 905 F.2d at 601.
75. See 905 F.2d at 603.
76. U.S.S.G. § 5H1.4 (emphasis added), discussed in Montgomery, supra note 70, at 40.
77. See, e.g., United States v. Long, 977 F.2d 1264, 1277 (8th Cir. 1992).
78. See Montgomery, supra note 70, at 40.
79. 977 F.2d 1264 (8th Cir. 1992).
80. 977 F.2d at 1277.
82. See Koon, 116 S. Ct. at 2053; see also supra note 8.
83. See 116 S. Ct. at 2050-51.
84. See 116 S. Ct. at 2051.
held that the same must be true for "the broader category of susceptibility to abuse in prison."\textsuperscript{85}

In brief, the confluence of the statutory language, legislative history, and several judicial opinions yields a four-factored test that a court should use to evaluate physical conditions. The relative weight that a court should give to each factor will depend on the nature of the condition and its interplay with each other factor.

**PART II: HIV STATUS AND THE EXTRAORDINARY PHYSICAL IMPAIRMENT TEST**

Part II argues that, given the four-factored test articulated above, courts should refrain from focusing their physical impairment determination on HIV's labels. Rather, they should focus on the defendant's attendant condition, if any. Specifically, this Part posits that the severe and predictable factor of the test proves determinative as to whether a court should find an extraordinary physical impairment.

First, in applying the extraordinary physical impairment test to HIV status, section II.A argues that HIV's unpredictability makes the labels HIV and AIDS unreliable foundations for the extraordinary physical impairment determination. Second, section II.A claims that the search for predictability correctly focuses the court on the nature of the condition that may accompany the defendant's HIV infection. It is this condition that may qualify as an extraordinary physical impairment. This Part does not argue that HIV is completely irrelevant to the sentencing decision. For example, a court should view a defendant who is HIV-positive and has pneumonia differently from a defendant who has only pneumonia. This Part simply contends that the court should ask itself the following question: Taking the defendant's HIV status as a given, does the defendant suffer from an attendant condition that allows the court to predict with sufficient certainty her clinical outcome and its time frame? It is in this sense that the court should focus on the condition. The court should not ponder the defendant's viral load\textsuperscript{86} or CD\textsuperscript{4} counts\textsuperscript{87} or rely on the number of years that have passed since

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\textsuperscript{85} 116 S. Ct. at 2051.

\textsuperscript{86} Physicians track the individual's viral load — the amount of virus per milliliter of blood — to determine the extent of the infection. See Ronald Baker, *HIV Viral Load Testing*, BULL. EXPERIMENTAL TREATMENT FOR AIDS (San Francisco AIDS Found., San Francisco, California), July 1996.

\textsuperscript{87} CD\textsuperscript{4} is a specific protein receptor located on the outside of certain human immune cells. See Brett-Smith & Friedland, *supra* note 13, at 21. Physicians monitor the individual's CD\textsuperscript{4} count to follow directly the deterioration of the individual's immune system. See *id.* at 34.
the defendant's seroconversion.\textsuperscript{88} Nor should the court attempt to place the defendant somewhere within the CDC's classification system and base its decisions on where she falls.

Finally, sections II.B, II.C and II.D argue that the remaining three factors of the test all suggest that HIV or AIDS alone are ordinary conditions and that an HIV-related complication is either nondispositive or irrelevant with respect to each remaining factor.

A. The Severe and Predictable Condition

When a defendant's condition at the time of sentencing substantially and permanently impairs him, or will do so with an acceptably predictable course,\textsuperscript{89} the court should find that it constitutes an extraordinary physical impairment.\textsuperscript{90} HIV's unpredictable course\textsuperscript{91}

\textsuperscript{88} Seroconversion "means that the blood (serum) changes (converts) from negative to positive for the antibody test." Id. at 31

\textsuperscript{89} This Note purposely leaves concepts like "substantially impaired" and "acceptable predictability" somewhat undefined. Any such definitions, with respect to diseases like HIV, at their essence remain qualitative rather than quantitative. A terminal disease with a predictable course, however, should fall under these definitions. This Note uses "terminal" according to its most common legal definition: a patient's condition is terminal when she has six months or less to live. See, e.g., OR. REV. STAT. § 127.800(12) (1995) ("Terminal disease' means an incurable and irreversible disease that . . . will . . . produce death within six (6) months."); 42 C.F.R. § 418.22(b) (1997) (limiting the Medicare hospice benefit to patients with a "prognosis . . . for a life expectancy of 6 months or less if the terminal illness runs its normal course"). Nevertheless, even this definition, at base, is qualitative. Rather than providing sentencing judges with a binary choice, this Note seeks to provide them with the correct question to ask. Specifically, it seeks to dissuade them from blindly using the categories of HIV and AIDS to make their decisions. It argues that judges should concentrate instead on the particular complication that accompanies an HIV infection to determine whether the condition warrants a downward departure.

\textsuperscript{90} At least one court has considered the severity-and-predictability factor in sentencing an HIV-positive defendant. See United States v. Rabins, 63 F.3d 721, 729-29 (8th Cir. 1995) (holding that the defendant's condition did not constitute an "extraordinary physical impairment" because he was relatively healthy at the time of sentencing and could remain so for some time); see also Marjorie P. Russell, Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners — Is the Cure Worse than the Disease?, 3 WIDENER J. PUB. L. 799, 813-14 (1994) (noting that § 5H1.4 can provide for a lesser sentence for a defendant suffering from a terminal condition at the time of sentencing).

\textsuperscript{91} Generally, immediately following infection, most individuals are asymptomatic and feel healthy. See Brett-Smith & Friedland, supra note 13, at 33. The individual remains infectious, however, and her immune system begins to deteriorate. See id. The onset of some other infectious disease marks the next phase of the disease. Symptoms of this phase, among other manifestations, may include oral or vaginal thrush, anemia, swollen lymph glands, or shingles. See id. at 34. In addition, other diseases such as tuberculosis, syphilis, or hepatitis may become more difficult to treat as the individual's immune system becomes less effective. See id.

The final stage of the disease is known as AIDS. At this point, the individual's CD\textsuperscript{4} count usually is particularly low and she is at great risk of contracting opportunistic infections. See id. at 35. The CDC defines an individual with AIDS as one who has a CD\textsuperscript{4} count persistently below 200/mm\textsuperscript{3}, or any one of 26 complications that can accompany HIV infection, or both. See Centers for Disease Control and Prevention, U.S. Dept. of Health and Human Servs., 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, Morbidity & Mortality Weekly Rep., Dec. 18, 1992, at 8 [hereinafter CDC Definition]. The term AIDS has a specific definition
makes this factor the dominant one in a court’s decision whether to grant the departure.92 This same unpredictability makes the labels HIV and AIDS poor foundations for an extraordinary physical impairment decision.93 Instead, the sentencing court should focus on any condition that attends the defendant’s HIV infection and grant a downward departure only if that condition provides the requisite predictability.

Predicting the course of HIV in a given individual is a daunting task because, on the individual level, HIV remains an erratic disease.94 The traditional understanding of HIV as a virus that progresses from a prolonged asymptomatic stage, to a mild illness stage, to a terminal stage over a predictable time period has proved not to fit reality.95 Instead, some individuals may develop severe complications soon after infection and die, while some may develop a complication, recover, and remain stable for years.96 Others may remain completely asymptomatic for years, while still others may appear outwardly healthy though their CD4 counts linger at levels under fifty cells per cubic millimeter.97

As researchers have made medical advances, doctors’ ability to predict HIV-positive individuals’ longevity has simultaneously improved and worsened. On the one hand, new treatments have extended the average AIDS patient’s life expectancy from a few
months to a few years. The long-term potential of these new treatments, however, remains uncertain. The uncertain success of these treatments adds to the unpredictability of individual prognoses.

On the other hand, scientists have identified better ways of determining clinical outcomes. Most promisingly, researchers have developed viral load testing and have proved that a patient’s viral load correlates with longevity. Nevertheless, while viral load can provide general guidelines for HIV progression and treatment, it is of limited value in ascertaining a given patient’s longevity.

Some conditions that accompany AIDS infection, however, may provide the requisite predictability. Instead of focusing on the defendant’s HIV classification, a court should contemplate his related complication and the likely impact it will have on his health. If the court can satisfy itself that this complication furnishes the necessary predictability, it should classify that complication as an extraordinary physical impairment and depart downward.

Some have argued that courts have granted downward departures for conditions that seem much less extraordinary than AIDS or advanced HIV and that, therefore, AIDS or advanced HIV should qualify as well. Certain cases — such as the Fourth Circuit decision that granted a downward departure to a defendant who had lost the lower part of both of his legs and the Third Circuit decision that affirmed a departure for a defendant who suffered from chronic pulmonary disease — might offer support for that argument. At first glance, these conditions do indeed ap-

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98. See id. at 37.
100. See id. In fact, many patients have succumbed to HIV despite their religious adherence to the new drug regimens. See Sheryl Gay Stolberg, Despite New AIDS Drugs, Many Still Lose the Battle, N.Y. Times, Aug. 22, 1997, at A1.
101. See Baker, supra note 86.
102. There is some connection between viral load and prognosis — “the higher the viral load, the shorter the time to AIDS and the shorter the survival time.” See id. Despite providing general predictions by range, viral load tests do not do so at the individual level. See E-mail from Gordon Nary, Executive Director, Intl. Assn. of Physicians in AIDS Care to Jordan Hansell (Mar. 12, 1997) (on file with author). Viral load count serves as a measure for the effectiveness of the treatment, not for the longevity of the individual patient. See The Relationship Between the Human Immunodeficiency Virus and the Acquired Immunodeficiency Syndrome (pt. I), NIAID Press Release (Natl. Inst. of Allergy and Infectious Diseases, Natl. Inst. of Health, Washington, D.C.), July 24, 1995.
103. See United States v. Rabins, 63 F.3d 721, 734 (8th Cir. 1995) (Wilson, J., dissenting); MacGillis, supra note 15, at 253.
pear less "serious" than HIV infection. As Part I argues, however, the question under section 5H1.4 is not about which condition is worse in some absolute sense, but about which is worse in a predictable way. Both of the conditions mentioned above are static — at the time of sentencing, the court is cognizant of the future impact of each. At present, however, it is impossible for a court to have a similar understanding of the future effects of HIV or AIDS. Without this understanding, neither HIV nor AIDS should be classified as extraordinary under section 5H1.4.

Others have argued that courts should simply apply a per se rule to HIV.106 In particular, one author has argued that courts should draw the line at AIDS or advanced HIV.107 It is true that a test of this sort would provide a certain sort of predictability. Both outsiders and defendants would know ex ante whether the defendant's status would qualify him for a downward departure.108 Nevertheless, it would fail to provide the kind of predictability Congress desired and the Guidelines require. First, a rule of this type would fail to provide fairness. As argued above, advanced HIV and AIDS do not allow a court to predict longevity. Consequently, a court basing its decision on an AIDS classification might sentence two defendants suffering from different complications — the true predictors of longevity — to identical sentences, thereby thwarting Congress's desire for fairness.

Second, a test of this sort fails to provide the kind of rationality Congress desired. A court attempting to determine the length of a downward departure by considering an AIDS classification alone would be forced to rely on an uneducated guess as to the effect of the disease on the defendant: Will the defendant be incapacitated in ten weeks, ten months, or ten years? Basing a sentencing decision on something so mercurial, and thereby divorcing the sentencing decision from the defendant's true state, can only undermine Congress's desire for rational, principled decisionmaking.

HIV and AIDS alone are simply too unpredictable to provide a foundation for a downward departure decision. Instead, a court should focus on the complication that accompanies the infection to determine whether it provides the necessary predictability.


107. See id.

108. A test of this sort might also simplify judicial administration. It certainly is simpler to determine whether the defendant falls into one of the CDC's classifications than it is to determine the effect the defendant's related complication will have. Nevertheless, this Note argues that the Guidelines demand this kind of inquiry.
B. Providing the Necessary Medical Care

Several courts have argued that the Federal Bureau of Prisons can adequately serve inmates with HIV and AIDS.109 In general, the correctional system carries a constitutional obligation to provide its inmates with adequate medical care.110 "The Supreme Court has declared that . . . ‘deliberate indifference’ by a correctional system to the serious medical needs of its prisoners constitutes the kind of ‘unnecessary and wanton infliction of pain’ that is proscribed by the eighth amendment.”111

The prison system, therefore, has a duty to provide HIV-positive inmates with the medical care they require.112 In response to this mandate, the Federal Bureau of Prisons has created a multi-layered medical system. Each inmate has a specified number of physicians, nurses, pharmacists and other medical personnel who are responsible for monitoring his condition.113 The Bureau of Prisons also operates six specialized medical facilities, with the two principal facilities for men in Springfield, Missouri, and Rochester, Minnesota, and the principal one for women in Lexington, Kentucky.114 The Federal Bureau of Prisons also implemented regulations on January 22, 1991 that deal specifically with HIV-positive

109. See United States v. Rabins, 63 F.3d 721, 728 (8th Cir. 1995) (refusing to grant a downward departure because the HIV-positive defendant offered no evidence that he required care beyond what the prison system could provide); United States v. Weiss, 989 F.2d 497 (4th Cir. 1993) (holding that the defendant could receive adequate care for later stages of AIDS while in prison, so declining a request for a downward departure). One court even went so far as to hold that the defendant's condition had deteriorated enough to constitute an extraordinary physical impairment, but that it would be inhumane to release him because he had nowhere to receive treatment. See United States v. Streat, 893 F. Supp. 754, 757 (N.D. Ohio 1995). This decision would seem to indicate that not only does the Federal Bureau of Prisons provide reasonable medical care, but that, at least with respect to some defendants, it provides them with the best care they can get. The validity of this decision is questionable, however, at least if used to detain defendants for the purposes of providing medical care, given § 994(k)'s provision that it is inappropriate for a court to consider this factor in sentencing. See 28 U.S.C. § 994(k) (1983); supra note 58.


111. Harris v. Thigpen, 941 F.2d 1495, 1504-05 (11th Cir. 1991) (quoting Estelle 429 U.S. at 104). The constitutional standard for adequate care is a relatively low one. See, e.g., Scott Burris, Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars, 47 U. MIAMI L. REV. 291, 321 (1992) (“While inmates enjoy an enforceable right to medical care that free Americans do not, the level of care guaranteed under that right is minimal.”). This Note, however, argues that the Federal Bureau of Prisons provides reasonable medical care that is above the constitutional requirement. Where, as here, the prison system takes adequate steps to provide care above constitutional minimums, the lower level of protection that the Constitution provides is a somewhat peripheral issue.

112. Indeed, a director and an assistant director of the Federal Bureau of Prisons have written specifically of the Bureau's responsibility toward HIV-positive inmates, stating that "prison administrators must provide health care that is commensurate with national community standards." J. Michael Quinlan & Kenneth Moritsugu, AIDS in Prison: The Federal Experience, JUDGES' J., Summer 1990, at 26, 28.

113. See Wilbur, supra note 62, at 287.

114. See id.
inmates.\textsuperscript{115} In their statement of purpose, the regulations provide that, "[i]n conjunction with the current medical procedures and treatments, the Bureau of Prisons provides programs of education, counseling, testing, and reporting for inmates to help restrict the spread of [HIV] and to maintain the quality of life for those who are HIV-positive."\textsuperscript{116} Specifically, section 549 provides that prison health staff must clinically assess each HIV-positive inmate’s condition at least once quarterly\textsuperscript{117} and furnish him with pharmaceuticals approved by the FDA for use in the treatment of HIV-infected individuals.\textsuperscript{118}

Once a patient reaches the active-disease stage of AIDS, the prison system transfers him or her either to its hospital in Springfield, Missouri or to its facility in Rochester, Minnesota.\textsuperscript{119} According to one commentator, the Bureau of Prisons’ "treatment of AIDS is that which is routinely expected in any other good hospital setting."\textsuperscript{120} In fact, "[i]t is of sufficiently high caliber that within the year 1989 six patients with AIDS who were offered early release from prison opted to stay within the [Federal Bureau of Prisons] hospital where they felt they could receive definitive care more readily than they could outside the institution."\textsuperscript{121} Consequently, it appears that the Federal Bureau of Prisons would be able to attend to any related complication as well.

Several authors have argued that inmates receive less than adequate medical care.\textsuperscript{122} Each of these authors, however, has focused primarily on various state systems.\textsuperscript{123} For example, one commentator addressed the California state system, and in particular, the Cal-

\textsuperscript{115} See 28 C.F.R. \S 549, subpart A (1996).
\textsuperscript{116} 28 C.F.R. \S 549.10 (1996).
\textsuperscript{117} See 28 C.F.R. \S 549.18(j).
\textsuperscript{118} See 28 C.F.R. \S 549.18(k).
\textsuperscript{119} See Wilbur, supra note 62, at 293.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{123} See Boyne, supra note 119. Those authors that discuss the federal system at all, see, e.g., Chang & McCooey, supra, gather their data from the U.S. Department of Justice. See, e.g., Theodore M. Hammett et al., 1994 Update: HIV/AIDS and STDs in Correctional Facilities (1995). Unfortunately, it is impossible to assess the quality of the federal system from these data alone because the Department of Justice's data fail to distinguish between state and federal systems. Thus, it is quite possible that insufficient state systems make quality of medical care provided by the federal system appear poorer than it is. As a result, this Note focuses on other sources of information and questions the applicability of conclusions drawn from the Department of Justice's data; Chang & McCooey, supra note 119; Greenspan, supra note 119;
ifornia Institute for Women. She related stories in which "inmates often went weeks without sick call and without seeing a doctor" and in which prison guards left one inmate lying on the floor in her own excrement. As horrific as these stories are, the discussion above regarding the level of care the Federal Bureau of Prisons provides to its inmates indicates that it does not suffer from the same inadequacies. In particular, unlike the medical facilities administered by the Federal Bureau of Prisons, the California Institute for Women is not even a licensed medical facility. Furthermore, this commentator herself notes a wide disparity in the level of medical care inmates receive even among different states. Consequently, while these stories remain powerful, they are inapposite to the care inmates receive in federal prisons.

Another pair of commentators focus on the Connecticut prison system. They describe instances in which "semicomatose inmates were not given medical treatment or sent to an outside hospital." Again, while deplorable, these stories do not tell a tale of what occurs within the Federal Bureau of Prisons where, as argued above, prisoners receive regular medical care.

In essence, the Federal Bureau of Prisons provides its HIV-positive inmates with the medical care they require. While some commentators have noted failings within various state systems, these failings are irrelevant to this Note's discussion.

### C. Prison's Effect on the Inmate's Condition

Incarceration does not worsen an HIV-positive defendant's condition sufficiently to warrant a downward departure. Because a defendant must assert "extraordinary and compelling reasons" in order to qualify for a departure, he may not argue that simply being in prison generally exacerbates his condition. This reasoning appears to preclude a defendant from arguing, for example, that the stress of being in prison will worsen his condition. Instead, the defendant must plead something more substantial.

Some argue that the condition of a defendant who has a weakened immune system necessarily will worsen while he is in

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124. See Boyne, supra note 119.
125. Id. at 746.
126. See id.
127. See id. at 747.
128. See id. at 757.
129. Chang & McCooey, supra note 119, at 1003.
130. In fact, due in large measure to a lawsuit this pair of commentators filed, these occurrences are no longer prevalent even within the Connecticut system. See id. at 1003-04.
prison.\textsuperscript{132} For example, two commentators argue that an HIV-positive inmate’s weakened immune system makes him especially vulnerable to diseases such as tuberculosis (TB), and that given TB’s resurgence in urban areas, HIV-positive inmates increasingly will face exposure to it in the New York State prison system.\textsuperscript{133} It is quite possible that this kind of threat would constitute extraordinary and compelling circumstances. These analysts focus on the New York State prison system, however, rather than on the Federal Bureau of Prisons.\textsuperscript{134}

The federal system provides its inmates with up-to-date medical care and transfers them to modern medical facilities when their immune systems become seriously compromised.\textsuperscript{135} In addition, the Federal Bureau of Prisons isolates inmates with highly communicable diseases like TB so that, as much as possible, HIV-positive inmates remain safe.\textsuperscript{136} Thus, while no prison system ever will be utterly without cross-contamination among inmates, the Federal Bureau of Prisons provides an environment in which this factor does not rise to a level of extraordinariness.

Moreover, this argument focuses solely on a defendant’s HIV status and not on his attending complication. In effect, the argument is as follows: HIV weakens an individual’s immune response; prison may be a place where the defendant will be exposed to other diseases; and the combination of these two factors means that prison will cause his condition, defined as his health generally, to decline. As noted in section II.A, however, concerns about health in general do not justify a downward departure — courts instead should focus on the related complication.

D. The Possibility of Victimization

The potential for victimization does not warrant a downward departure. While some claim that HIV-positive inmates are more susceptible to abuse than are normal inmates, they provide little evidence for this assertion.\textsuperscript{137} Not only is there little evidence that HIV-positive inmates are more susceptible to abuse than other in-


\textsuperscript{133} See id.

\textsuperscript{134} See id.

\textsuperscript{135} See supra section II.B.

\textsuperscript{136} See 28 C.F.R. § 549.15(a) (1996) (“The [Clinical Director], in consultation with the [Health Services Administrator], shall ensure that inmates with infectious diseases which are transmitted through casual contact (e.g., tuberculosis, chicken pox, measles) are isolated from the general inmate population until such time as they are assessed or evaluated by a health care provider.”).

\textsuperscript{137} See, e.g., Kevin A. McGuire, Comment, AIDS and the Sexual Offender: The Epidemic Now Poses New Threats to the Victim and the Criminal Justice System, 96 DICK. L. REV.
mates, intuitively it would seem they would be less so. Given that 
HIV is transmitted through bodily fluid contact, inmates should be 
more likely to avoid their HIV-positive fellow inmates than to as­
sault them. And while ostracism of this type certainly is unpleas­
ant, it is not cognizable under the Sentencing Guidelines as 
abuse.

Finally, as with the concern that incarceration will worsen the 
defendant's condition, the victimization factor does not relate di­
rectly to a court's decision concerning a related complication. The 
victimization argument hinges on the claim that other inmates will 
harbor a distaste for HIV-positive inmates and abuse them as a re­
result. No one claims that inmates will abuse fellow inmates who are 
HIV-positive because of their related complication, say pneumonia. 
Potential abuse thus is inapposite to the HIV question for two rea­
sons. First, it is unlikely that inmates will abuse other inmates be­
because of their HIV status. Second, it is even less likely they will 
abuse them because of their related complication, which is, as Part 
II argues, the relevant consideration given the Guidelines and their 
statutory foundation.

In short, Part II argues that, as applied to HIV status, the sever­
ity-and-predictability factor is both necessary and sufficient. The 
first factor is determinative because neither HIV nor AIDS in the 
absence of an attending illness is sufficiently predictable to qualify 
under this requirement. Furthermore, each of the remaining three 
factors points toward finding HIV status and AIDS ordinary, and 
suggests that HIV-related complications are ordinary or irrelevant.

CONCLUSION

During the last few years, HIV's progression has become more 
erratic and difficult to forecast rather than less so. During this same 
period, the number of individuals with the disease has increased 
steadily. At least for the foreseeable future, this second trend will 
continue and the justice system will feel its impact as much as any 
other area of society. Time and again judges will face an HIV-

95, 110 & n.128 (1991) (discussing a New York State case in which HIV-negative inmates 
sought mandatory testing of all inmates and segregation for those testing positive).

138. In fact, one of the authors who claim that HIV-positive inmates are susceptible to 
abuse cites for support a case in which HIV-negative inmates sued to have HIV-positive 
inmates sent to hospitals so as to create distance between them. See id. at 110 & n.128 (citing 
LaRocca v. Dalsheim, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983)).

139. If it were, courts would be forced to grant downward departures to child molesters, 
who are widely known to be the most ostracized of all inmates. See, e.g., James E. Robertson, 
The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody In­
mates, 56 U. Cin. L. Rev. 91, 102-03 (1987) ("Child molesters, 'short eyes' in prison argot, 
represent 'the lowest, most despicable kind of criminal.' Like alleged informants, child mo­
lesters confront a presumptive threat of assault." (quoting M. Finero, SHORT EYES 126 
(1975))).
positive defendant asking for a downward departure. Should the court grant that departure?

This Note has argued that a court facing this question should do more than ascertain whether the defendant is HIV-positive. Instead the court should ask, does the complication, if any, accompanying the defendant’s HIV infection severely and predictably impair the defendant? Only if the court can answer this question affirmatively should it grant a downward departure.