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DISCUSSION

Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*

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Closen: Unfortunately, the HIV-AIDS\(^1\) epidemic is

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1. The abbreviation HIV-AIDS stands for Human Immunodeficiency Virus-Acquired Immune Deficiency Syndrome. This designation is preferred over reference to AIDS alone because the focus upon AIDS is not representative of the full course of the disease. HIV-AIDS starts with HIV infection and the gradual erosion and suppression of the immune system. After becoming infected with HIV, individuals may remain in an asymptomatic state for up to nine years or longer. Once people with HIV develop symptoms and are diagnosed as having AIDS Related Complex (ARC), a label that seems to be falling out of favor, or AIDS, those persons may live with the disease for several years, possibly as long as eight to ten years. Hence, HIV-AIDS can appropriately be considered a chronic disease condition. See REPORT OF THE PRESIDENTIAL COMM’N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 8, 15 (1988) [herein-
still out of control. According to federal estimates, another American becomes infected with HIV every thirteen minutes; consequently, eight people in the United States will contract HIV during the course of this program. Many individuals have been prosecuted and convicted for exposing others to HIV and in rare circumstances for actually transmitting HIV to others. These cases have involved activities such as biting, spitting, throwing bodily substances, and sexual conduct.

Serious questions have been raised about some of the prosecutions as well as the HIV-after Presidential Comm'n Report]; U.S. Dep't of Health and Human Servs., Surgeon General's Report on Acquired Immune Deficiency Syndrome 11-12, 20 (1986) [hereinafter Surgeon General's Report]; R. Jarvis et al., AIDS Law in a Nutshell 22-23 (1990) [hereinafter Jarvis et al.].

The term "AIDS" is obsolete. "HIV infection" more correctly defines the problem. The medical, public health, political, and community leadership must focus on the full course of HIV infection rather than concentrating on later stages of the disease, ARC and AIDS. Continual focus on AIDS rather than the entire spectrum of HIV disease has left our nation unable to deal adequately with the epidemic.

Presidential Comm'n Report, supra at xvii.

2. See generally Centers for Disease Control, Projections of the Number of Persons Diagnosed with AIDS and the Number of Immunosuppressed HIV-Infected Persons—United States 1992-1994, 41 M.M.W.R. (December 25, 1992); Geoffrey Cowley et al., AIDS-The Next Ten Years, Newsweek, June 25, 1990, at 20 ("The AIDS epidemic is far from over. It's not even under control.") Worldwide, "the situation isn't expected to stabilize for several more decades.").


6. See supra note 3; see cases cites supra note 4. See also Elliott v. Dugger, 542 So. 2d 392 (Fla. App. 1989) (involving a guard's worker's compensation claim alleging that an inmate placed HIV-infected blood into the guard's coffee).

7. See, e.g., United States v. Moore, 846 F.2d 1163 (8th Cir. 1988) (holding an inmate with AIDS guilty of assault with deadly weapon, his teeth); Brock v. State, 555 So. 2d 285 (Ala. Crim. App. 1989) (holding an inmate with HIV could not be convicted of first degree assault for biting a guard although he could be convicted of third degree
specific criminal statutes which have been adopted. This discussion will address prosecu-


8. In Illinois, for example, two trial judges have declared the HIV criminal transmission law to be unconstitutional. People v. Russell, No. 91-CF-1304 (St. Clair Co. April 9, 1992); People v. Lunsford, No. 92-CF-147 (Coles Co. Oct. 9, 1992). The consolidated cases are now pending in the Illinois Supreme Court, Nos. 73721, 74443 (Professor Closen is one of the pro bono counsel for the defendant in the Lunsford appeal). See State AIDS Law Declared Unconstitutional, ILL. POL. MAG., Dec. 1992, at 12. The Illinois Attorney General has determined to withdraw from the representation of the prosecution of the appeal, leaving it to other government officials to pursue the appeal in support of the statute. Attorney General Burris Responds To Advocates, 6 ACTION BULL. (AIDS Foundation of Chicago), Feb. 1993 at 2.


Commentators have observed that the HIV-specific criminal laws were hastily conceived for political expedience. "HIV-specific statutes have been passed most often as political measures to calm the fears of the populace at the beginning of the epidemic. The hastiness of the drafting of these statutes makes them less than ideal." See Tierney, supra note 7, at 511. "[P]olitical pressures on legislators to use the coercive powers of the state to combat the [AIDS] epidemic are unmistakable." Lawrence O. Gostin, Public Health Strategies for Confronting AIDS, 261 JAMA 1621, 1629 (1989). See generally Gostin, supra note 7, at 1052-57 (discussing necessary elements to an appropriate HIV-specific offense); Sullivan & Field, supra note 7, at 172-86 (discussing HIV-specific statutes).

Despite these criticisms, criminal statutes and prosecutions are likely to increase in number. The popularity of criminal prosecution is evidenced by the recent enactment of the Ryan White Comprehensive AIDS Resources Act of 1990. Pub. L. No. 101-381, 104 Stat. 576 (1990). This statute requires states seeking certain types of federal assistance to certify that their criminal statutes are adequate to prosecute persons who knowingly engage in certain behavior with the intent to transmit HIV. Id.
tions under traditional criminal statutes. Additionally, the HIV-specific statutes themselves will be considered, including whether they are constitutional as well as consistent with sound public health policy and criminal law policy.

A starting point for this discussion involves the prosecutions which have occurred for the various kinds of conduct noted earlier.

Strader:

One of the issues to be addressed is whether criminal law is an appropriate route for addressing HIV-AIDS issues, particularly because of the potential for abuse given that most defendants are disfavored minorities such as gay/bisexual men, intravenous drug users, and racial minorities. Generally speaking, these minorities have been the defendants in the initial HIV-AIDS cases.

Originally these cases were prosecuted under the traditional criminal law statutes of homicide, assault, and attempt. Of these, homicide prosecutions can result in the harshest criminal law penalties. Although no one has

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9. Statistics compiled by the Centers for Disease Control ("CDC") showed that, as of July 1992, fifty-eight percent of the adult and adolescent AIDS cases were among "men who have sex with men" but do not inject drugs. Of these cases, eighteen percent were among black men and eleven percent among Hispanic men. Twenty-three percent of the adult and adolescent AIDS cases were among female and heterosexual male intravenous drug users. Among women with AIDS, an even greater proportion are members of minority groups. The CDC reported that, of the adult and adolescent women with AIDS, fifty-two percent were black and twenty-one percent were Hispanic. ABE M. MACHER, HIV DISEASE/AIDS: MEDICAL BACKGROUND IN AIDS AND THE LAW § 1.4 (Wiley L. Publications eds., 2d ed. Supp. 1993). In light of the demographics of HIV-AIDS, a number of commentators have recognized the risk of discriminatory enforcement. See, e.g., Sullivan & Field, supra note 7, at 161-62, 189-91.

10. As one commentator has noted, the public generally perceives that only particular groups, intravenous drug users, homosexuals, and prostitutes, are at risk for contracting HIV. Peter J. Nanula, Comment, Protecting Confidentiality in the Effort to Control AIDS, 24 HARV. J. ON LEGIS. 315, 316 (1986). Those same groups faced criminal sanctions for their behavior even before the introduction of HIV statutes. Amy Fisher, Note, AIDS: The Life and Death Conflict Between the Confidentiality of Blood Donors and the Recovery of Blood Recipients, 42 WASH. U. J. URB. & CONTEMP. L. 283, 296 n.69 (1992).

been prosecuted for an actual homicide resulting from transmission of HIV, there is the potential for such a prosecution. Homicide crimes include murder, manslaughter, and negligent homicide.

Murder is defined as a killing caused by the defendant's conduct where the defendant was acting with either extreme recklessness or the purpose or knowledge that the death would occur. Extreme recklessness may be defined as acting "with extreme indifference to the value of human life," or with "an abandoned and malignant heart." Another homicide crime is manslaughter. Generally manslaughter is defined as a killing committed with ordinary recklessness or gross negligence, and thus this crime involves a lesser degree of culpability than murder. The distinction between murder and manslaughter is a jury question. Gross negligence generally means one has some awareness of the risk but proceeds despite that awareness.

A number of states, following the

17. MODEL PENAL CODE, § 210.3(1)(a) (1980); gross negligence is the standard adopted at common law. See generally MODEL PENAL CODE § 210.4, cmt. 1 (1980).
Model Penal Code, have adopted negligent homicide statutes; these statutes impose homicide liability for mere negligent behavior. Under a negligence standard, the defendant acted even though he or she should have known of the risk.

Some common problems and issues arise in homicide prosecutions for exposing one to the risk of HIV. As Professor Closen stated, in most of these cases the prosecution has not attempted to prove that the defendant's actions resulted in transmission of the virus to another party. Rather, the prosecution has argued that the other party was exposed, or possibly exposed, to the virus.

The most obvious difficulty in prosecuting these cases is proving that the defendant had the requisite mental state. Generally, when someone engages in risky behavior, he or she is not going to be acting with an intent to kill. There have been a few cases of "revenge sex," where

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21. MODEL PENAL CODE § 2.02(2)(d) (1985). The Model Penal Code notes that, in order to satisfy a negligence standard, the relevant "risk" must have been so severe that "the actor's failure to perceive it, considering the nature and purpose of his conduct . . . involves a gross deviation from the standard of care that a reasonable person would observe . . . ." (emphasis added). Applying this standard to HIV exposure cases may be problematic. In many cases, the nature and purpose of the defendants' conduct will not consistently support a finding of guilt or innocence. For example, a defendant might have the purpose of infecting another when spitting on a correctional officer. The nature of that conduct, however, in a medical sense is not risky. Alternatively, an HIV-infected actor could have "protected" sex with his partner. Such activity carries a certain medical risk, and is therefore arguably risky by nature, but it is not done with the purpose of infecting his partner. Indeed, the use of protection could be precisely to prevent communication of the virus. Proof of negligence in such cases could therefore be quite difficult.


23. Having sex is "a highly indirect modus operandi for the person whose purpose is to kill." Martha A. Field & Kathleen M. Sullivan, AIDS and the Criminal Law, 15 LAW, MED. & HEALTH CARE 46, 47 (1987) [hereinafter AIDS and the Criminal Law].
the defendant has adopted the attitude towards the sexual partner that, "since I'm dying, you are going to die, too." This scenario, however, is not ordinarily the case. Thus, murder ordinarily would be a difficult prosecution for HIV transmission.

At the other extreme, negligent homicide could theoretically be prosecuted in a number of circumstances. With negligent homicide, the jury only needs to find that the defendant should have known his or her acts carried some risk of HIV transmission. In today's society, who should have known of the risk? A prosecutor could argue that anyone in a high-risk group should have known of the risk. Does that mean if anyone in a high-risk group had sex, he or she could be prosecuted for negligent homicide if the virus were transmitted and the sexual partner died?

Thus, "proof of the requisite mental state is a substantial hurdle to overcome in a murder prosecution for transmitting HIV." Tierney, supra note 7, at 492.

24. A Cincinnati woman is alleged to have said, "[w]elcome to the world of AIDS," to a man with whom she had just had sex. He alleged the statement sent him into a rage and prompted him to kill her. Man Convicted in AIDS Killing, CHICAGO DAILY L. BULL., Jan. 30, 1991, at 1. See also State v. Stark, 832 P.2d 109, 112 (Wash. Ct. App. 1992) (defendant who was convicted for exposing another to HIV through sexual activity had told a witness, "I don't care. If I'm going to die, everybody's going to die.").

25. See supra note 21.

26. A prosecutor could even argue that presence in a high risk group amounted to constructive knowledge sufficient for a manslaughter or murder prosecution.

27. Determining what constitutes a high-risk group will become increasingly difficult as the demographics of HIV change. CENTER FOR DISEASE CONTROL, HIV/AIDS Epidemic: The First Ten Years, 40 MORBID & MORTALITY WKLY REP., 357, 358-59 (1991). As HIV becomes more common in all segments of society, anyone who has had multiple sexual partners is theoretically at risk. NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, AIDS: THE SECOND DECADE 38-80 (1990). Therefore, the potential for negligent homicide prosecutions could increase as more people are included in high-risk categories.

28. Prosecutions for negligent homicide necessarily require (1) infection of another and (2) death of the infected person. Theoretically, a person even could be charged with attempted negligent homicide. Assume that "A," a person in a "high risk" group, purposefully has sex with an uninfected person, "X." A does not, in fact, have HIV. However, a reasonable person in A's position would know that there was a significant risk that he was infected and could have transmitted the virus to X. The circumstances as A
A practical problem in homicide prosecutions based on HIV transmission exists in that the person prosecuted for transmitting HIV to another person is likely to die before the victim. A homicide prosecution is not possible because the "victim" will not have died. 29

Also, the causation issue is likely to be difficult in any homicide prosecution. The government must prove beyond a reasonable doubt that the defendant's actions caused the death. If the victim has had multiple sexual partners, the government is going to have a difficult time meeting its burden of proof. 30

Assault is another possible avenue for prosecuting HIV-AIDS transmission. Usually a misdemeanor, 31 assault is generally defined as attempting to cause or causing bodily injury to
another. If the defendant manifests extreme indifference to human life, assault may be punished as a felony. Consent is generally a defense to assault. In these assault cases the government argues that although the partner of the defendant may have consented to have sex, the partner did not consent to HIV exposure. According to the government, because the partner was not informed that the defendant was HIV-positive, no valid consent existed.

Recently, attempted murder has been the most fruitful area for prosecutions under traditional criminal laws. In Texas, for example, an attempted murder conviction in which the defendant received a life sentence was affirmed where the defendant was accused of spitting on someone.

In some ways attempted murder is easier to prosecute than homicide; a death is not necessary for an individual to be guilty of an attempt crime. Therefore, no causation is required. The

32. Id. See also Sullivan & Field, supra note 7, at 167-69 (critical discussion of the application of assault principles).
33. MODEL PENAL CODE § 211.1(2)(a) (1980).
35. The assault in an HIV-transmission context could be either the sex itself or the exposure to HIV. Prosecutors could avoid any consent defense by defining the assault as the exposure to HIV. Under the relevant section, consent to bodily injury is only effective if “the bodily injury consented to or threatened by the conduct consented to is not serious.” MODEL PENAL CODE § 2.11(2)(a) (1985). Presumably, this provision would not include HIV transmission.

Other commentators have noted that the defense of consent should be encouraged in order to foster disclosure by infected persons. See, e.g., K.J.M. Smith, Sexual Etiquette, Public Interest and the Criminal Law, 42 N. IR. LEGAL Q. 309 (Winter 1991); see infra text accompanying note 196. But see infra text accompanying note 187.

37. Weeks v. State, 834 S.W.2d 559 (Tex. Ct. App. 1992). The court in Weeks refused to take judicial notice of the improbability of transmitting HIV by spitting. Id. at 562 n.2. Although the court conceded that “many of the AIDS experts express the opinion that it is impossible to transmit HIV through saliva,” it also stated that “this has not been conclusively established and is not free from reasonable dispute.” Id. The court did not say precisely what would have been a conclusively demonstrated medical fact. In light of the availability of medical “experts” to contradict any medical fact, it seems that a court could always refuse to take judicial notice of a medical fact.
difficulty in attempted murder prosecutions is that the government must prove a purpose to kill, and it cannot rely on knowing or extremely reckless conduct. While the requisite mental state makes prosecution difficult, the government is favored in one facet of attempt prosecutions; in many states, impossibility is not a defense to an attempt crime. Even though the defense may be able to prove the alleged activity did not transfer HIV to the victim, that proof is irrelevant. For example, spitting has never resulted in transmission of HIV. The defendant's state of mind rather than impossibility of


40. There cannot be absolute proof of this negative. The accumulated data strongly support the conclusion that transmission of HIV occurs only through blood, sexual activity, and perinatal events. Nevertheless, the fear of transmission by other routes may continue to increase with the anticipated increase in the number of cases of AIDS over the next few years. An unrealistic requirement for absolute certainty about the lack of transmission by other routes persists, despite the knowledge that it is not scientifically possible to prove that an event cannot occur.


"If such transmission through household contacts and work-related contacts readily occurred, one would expect to see an increase in the proportion of cases of AIDS outside of recognized high-risk groups; this increase is not present." Alan R. Lifson, Do Alternate Modes for Transmission of Human Immunodeficiency Virus Exist?, 259 JAMA 1353, 1355 (1988) [hereinafter Lifson].
transfer is more important to the prosecution. A defendant who had the purpose to kill and believed that his or her actions could lead to the death of the other party had the required mental state.\textsuperscript{41}

A notable Indiana case involves this type of scenario where impossibility is not an issue.\textsuperscript{42} The defendant was convicted of attempted murder for having spat on, scratched, bitten, and thrown blood on corrections officers and health care workers. The trial judge granted the defendant's motion to overturn the conviction because the government had not proven these actions to be possible methods of HIV transmission.\textsuperscript{43} The appellate court reinstated the conviction on the ground that the actual possibility of transmission was not the issue.\textsuperscript{44} Instead, the issue was whether the defendant believed that these actions were routes of transmission.

Prosecutors are faced with significant burdens when they employ traditional criminal laws for prosecuting HIV transmission and the risk of HIV transmission. However, with attempt crimes, the scope of liability is extremely broad in that many actions most individuals would not consider to be high-risk activities are nonetheless punishable.

Closen: Are these traditional criminal statutes effective in dealing with individuals who are engaged in exposure activities? Professor Schultz, you helped draft a non-traditional statute.

\textsuperscript{41} With the possible exception of Missouri, none of the states that have enacted HIV criminal transmission statutes allow a defendant to raise the defense that he was never counselled as to his HIV infection and the risks it could pose to others. Tierney, \textit{supra} note 7, at 501.

\textsuperscript{42} State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989). The court also held, in the alternative, that there was sufficient evidence in the record to support a finding that defendant's actions could have transmitted the virus. \textit{Id.} at 839-41.

\textsuperscript{43} \textit{Id.} at 836-37.

\textsuperscript{44} See \textit{IND. CODE ANN.} § 35-41-5-1 (Burns 1985) (specifically eliminates impossibility as a defense to attempt crimes).
Schultz: The Missouri law, a non-traditional statute, was drafted under the coercion of having something worse if it was not drafted. A very serious problem exists in any of these discussions because, if the concern is reducing the amount of transmission, then that is an empirical question. However, it is virtually impossible to come up with empirical evidence on the subject of transmission. Society cannot even agree if the death penalty works, and that subject has been debated for about a thousand years. Thus, an inherent problem exists. Nevertheless, a few factors can be considered because some decisions must be made without definitive empirical evidence.

The obvious possibility exists that if certain conduct is criminalized, that conduct will be re-

45. The statute, which was drafted by Professor Schultz, provides:

Prohibited acts, criminal penalties. 1. It shall be unlawful for any individual knowingly infected with HIV to: (1) Be or attempt to be a blood, organ, sperm or tissue donor except as deemed necessary for medical research; or (2) Deliberately create a grave and unjustifiable risk of infecting another with HIV through sexual or other contact when an individual knows that he is creating that risk. 2. Violation of the provisions of subsection 1 of this section is a class D felony. 3. The department of health may file a complaint with the prosecuting attorney of a court of competent jurisdiction alleging that an individual has violated a provision of subsection 1 of this section. The department of health shall assist the prosecutor in preparing such case.


47. It has been argued that there must be some deterrent effect and that some deterrence is better than none, but this is incomplete. The two most frequent routes of infection, unprotected sex and using contaminated needles for injecting drugs, are notoriously resistant to the threat of criminal sanction. See Public Health, supra note 46, at n.75. In addition, punishment may have other effects. Rather than reduce the amount of criminal conduct, it may increase efforts to avoid detection. In the context of sexual conduct, that may take the form of serial, anonymous sex which most public health authorities believe to be extremely risky for transmission of HIV. See also Michael L. Closen et al., AIDS: Cases and Materials 688-91 (1989) [hereinafter Closen et al.].

48. Closen & Deutschman, supra note 8, at 593.
duced. However, it is possible that by criminalizing certain conduct, that conduct will become more secretive. In other words, the conduct will less likely be detected in order to avoid the penalty, but individuals will still be allowed to do what they want.\textsuperscript{49}

The number of people who are willing to be tested may be reduced because they know that many of these statutes require knowledge of one's HIV status.\textsuperscript{50} Because it is imperative to general public health to have people voluntarily test for HIV,\textsuperscript{51} this situation jeopardizes public health.\textsuperscript{52}

Bobinski: Professor Schultz's statement helps illustrate some of the problems with the traditional criminal statutes. For example, proving intent in an attempted murder charge is problematic because the prosecutor must show that the accused's conduct proves that he or she intended to kill the victim.\textsuperscript{53} Arguably, this standard appears to be positive because such conduct seems morally culpable. The average person would probably believe that an individual should be subject to criminal prosecution if he or she intends to transmit HIV infection and engages in behavior believing that it could actually transmit the infection. Thus, the moral statement purpose of the criminal law is followed if traditional criminal statutes are employed to criminalize that kind of behavior.\textsuperscript{54}

The drawback to using the traditional

\begin{footnotes}
\footnotetext{49}{See supra note 47.}
\footnotetext{50}{Closen & Deutschman, supra note 8, at 594; Kinney, supra note 7, at 248.}
\footnotetext{51}{See Public Health, supra note 46, at n.223 and accompanying text.}
\footnotetext{52}{See Public Health, supra note 46, at n.67 and accompanying text.}
\footnotetext{53}{\textsc{Model Penal Code} § 5.01 (Proposed Official Draft 1962) (the intent requirement for an attempted crime mirrors that of the crime that was attempted) \textsc{Model Penal Code} § 210.2 (Proposed Official Draft 1962) (murder requires act committed "purposely or knowingly," or one committed "recklessly under circumstances manifesting extreme indifference to the value of human life").}
\footnotetext{54}{Wayne R. LaFave & Austin W. Scott, Criminal Law 10-12 (2d ed. 1986).}
\end{footnotes}
criminal statutes is that they may create an impression that the defendant’s behavior actually poses some risk of HIV transmission. This risk is of particular concern when convictions are based on behavior such as spitting.\(^{55}\) People may think that the defendant is culpable in some moral sense; however, this situation can have a boomerang effect in leading people to believe that HIV infection can be transmitted by activities such as sharing drinking cups.\(^{56}\) Professor Schultz discussed the problem of discouraging people from being tested as a boomerang effect of criminalizing. Another possible ramification of criminalizing is that traditional criminal statutes can lead to public ignorance regarding the actual mechanisms for HIV transmission.\(^{57}\)


\(^{56}\) The transmission of HIV through spitting or biting is theoretically possible because HIV has been isolated in saliva. Y. Goto et al., Detection of Proviral Sequences in Saliva of Patients Infected with Human Immunodeficiency Virus Type 1, 7 AIDS RES. HUM. RETROVIRUSES 343 (1991) (infected cells may be present in saliva in low numbers). The actual risk of transmission through this route is considered to be extremely minute. See Gostin, supra note 7, at 1023-25. Cf. Brock v. State, 555 So. 2d 285 (Ala. Crim. App. 1989) (court reversed first degree assault conviction because not sufficient evidence of dangerousness of bite by HIV infected person).

\(^{57}\) The negative effect of criminal prosecution has been noted by others as well. See, e.g., Tierney, supra note 7, at 487 n.105 (“These types of convictions [for biting and spitting] surely fuel the misinformation, hysteria, and discrimination surrounding the HIV epidemic, and hurt the criminal law’s social objective of educating the public, because they punish behavior that does not risk transmitting HIV.”); Kinney, supra note 7, at 248 (“To the extent criminal statutes are used at all in the public health effort to control the spread of AIDS, they should be used (1) as a means of informing the public of the proscribed acts medically proven as capable of transmitting HIV, (2) to assuage public fears of casual contagion.”).

The medical irrationality of these prosecutions is particularly noteworthy when compared to civil HIV/AIDS litigation, where courts have consistently deferred to medical science, specifically to existing knowledge at the time in question. See, e.g., School Board of Nassau County v. Arline, 480 U.S. 273, 288 (1987) (the employment inquiry regarding a person handicapped with a contagious disease should be “based on reasonable medical judgments given the state of medical knowledge . . . ”); Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988) (Sneed, concurring). Judge Sneed stated:

Confronted with some uncertainties about scientific truth, judges, perhaps above all others, should act on the basis of that which is known, or, where this
Hermann: It is important to reiterate that these statutes should not ever be justified, or viewed, as significant measures in combating HIV infection.\textsuperscript{58} If criminal prosecution is going to occur and be justified, it must be done on the basis of the justifications for the criminal law such as retribution.\textsuperscript{59} Public health law is the area of law that should be relied upon for dealing with significant efforts to stem transmission.

Additionally, criminal prosecution under the traditional offenses presents a serious problem in that it has permitted the prosecution of behavior when there is no possibility of transmission.\textsuperscript{60} Not only is the wrong message sent to the general public regarding their need to be concerned about or fear behaviors that involve no serious likelihood of transmission, but the misuse of traditional criminal offenses also runs counter to any sensible use of the criminal law in this particular area.\textsuperscript{61} A general public hostility to any possible criminal prosecution is cre-
Narrow statutes which identify very specific behavior that presents a serious risk or danger to others are to be preferred. Such HIV-specific statutes provide notice to the public as well as the potential defendant, and they provide an opportunity for the state to successfully prosecute without all the problems that are raised by traditional offenses that have specific intent or purpose requirements and that require establishing causation.

Strader: Would there be any way to insure that prosecutors would not choose to prosecute under both the HIV-specific statutes and the traditional criminal statutes?62

Hermann: There is the general proposition that when a specific and a broad statute conflict, the specific statute controls. However, it would be desirable to have the legislative history of these statutes state that the purpose of the specific statutes is to replace traditional criminal offenses with the specific HIV-related offense rather than just adding one more charge to a whole series. If the specific statute is treated as an additional charge to the traditional criminal law charges, the problem is not solved; it is only aggravated.

Hernandez: Another problem with prosecution under the traditional statutes is that they are too easy in some circumstances. The intent element is supplied usually by the defendant because most of the prosecutions arise in rather volatile situations; the defendants are feeling oppressed and seeking revenge against their oppressors. These oppressors include jail guards, someone who has arrested them, or someone who is hassling them.

for some reason. 63

In one case, an individual tried to kill himself, but another individual tried to rescue him when he did not want to be rescued. 64 Typically situations such as the one described include a statement by the accused that suggests he or she wants to exact revenge on another individual. The intent element is provided with a statement such as "I want to get you." It becomes too easy in attempted murder cases to use that statement, particularly when there is no real likelihood that the potential victim could actually die from the spitting, biting, or other conduct. These traditional criminal statutes are almost too broad, especially for crimes that have severe potential sentences.

Closen: Indeed, in almost all of the HIV cases involving violence that were prosecuted under traditional criminal statutes, the intent component was made easy for the prosecution. In nearly every instance, the defendant exclaimed that he or she intended to injure, kill, or transmit the virus while engaging in some kind of conduct. 65


65. See, e.g., Moore, 846 F.2d at 1165 (during the struggle in question defendant threatened to kill guards; three days later defendant repeated his "hopes . . . that they get the disease that he has"); Scroggins, 401 S.E.2d at 15 (shortly after the biting incident, the victim asked defendant, who had just told a nurse he was "HIV positive," whether defendant had AIDS, and the defendant "just looked at him and laughed"); Haines, 545 N.E.2d at 834-35 (defendant yelled he wanted to "give it [HIV-AIDS] to him [the victim]" during the altercation); Weeks, 834 S.W.2d at 561 (defendant stated at time of incident that he was "going to take somebody with him when he went"); State v. Stark, 832 P.2d 109, 112 (Wash. Ct. App. 1992) (defendant told a witness, "I don't care. If I'm going to die, everybody's going to die").

Sometimes the defendant's premeditation appears even more sinister. For instance, in Commonwealth v. Brown, 605 A.2d 429, 431 (Pa. Super. Ct. 1992), the inmate-defendant, who was HIV-infected and living in the restricted housing unit, threw a cup of liquid containing fecal matter into the face of a guard, and he told a witness "that he
Hermann: In these attempt cases where the conduct was unlikely to transmit the infection, exclama-
tions of intent to harm have occurred. Howev-
er, there have been a number of military and civil prosecutions for sexual intercourse, both hetero-
osexual and homosexual, where there has been no indication that the party intended to transmit the disease. For various reasons, the most detailed cases reported are military cases, but out of the twenty or thirty convictions for HIV related conduct, there have now been about four or five cases of civil criminal prose-
cutions where the defendant does not appear to have expressed an intent to kill.

Bobinski: In the cases involving prisoners who spit on prison guards and say something to the effect of “I’m going to die so I want to take you with me,” it is not always clear that the prisoners really have an intent to kill the guards.66 Sometimes it seems that because the prisoners are generally powerless and they know that the guards are irrationally afraid of acquiring AIDS, the prisoners use this irrational fear to threaten the guards.67 The prisoners do not actually have an intent to kill the guards, but they kept such cups of fecal liquid in his cell in case other inmates gave him trouble” and that the guard had been “messing with [his] mail.”

There is at least one case in which an inmate bit a guard and then falsely claimed to have AIDS. See State v. Cummings, 451 N.W.2d 463 (Wis. Ct. App. 1989).


67. The use of spitting to intimidate has been noted by at least one court. In re Stilinovich, 479 N.W.2d 731, 733 (Minn. Ct. App. 1992) (a patient “began using his HIV status to intimidate people by scratching and spitting on them”). See also Cum-
mings, 451 N.W.2d 463 (inmate falsely claims he has AIDS after biting guard).
are trying to assert the only power they have by exploiting irrational fears.

Clossen: An intent to scare them? 68

Bobinski: Yes. An intent to scare.

Strader: Because these are not sympathetic defendants, 69 a jury can easily infer from the irrational, heat-of-the-moment statement an intent to kill.

Schultz: Moreover, even though well-considered criminal codes exist, rationality often evaporates when the fear of AIDS is combined with a defendant who is from a disfavored minority such as drug users or homosexuals. 70 Impossibility

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68. See Cummings, 451 N.W.2d 463 (inmate falsely claims he has AIDS after biting guard). See also cases cited supra note 65. In some instances, sex attack victims have falsely claimed to have HIV-AIDS in order to scare off the attacker. See, e.g., State v. Mezrioui, 602 A.2d 29, 32 (Conn. App. Ct. 1992).

69. Apart from their status as members of racial or sexual minorities, persons infected with a dangerous disease have suffered a long history of discrimination arising out of the notion that the disease is a sign of divine disfavor. See Schechter, supra note 11; Molly E. Puhlman, Comment, The AIDS Challenge Continues: Should Pennsylvania's Criminal Law Take On the Challenge?, 30 DUQ. L. REV. 283, 292 (1992).

70. See Public Health, supra note 46, at 86-93, 104-05 and 108-10; Schultz & Reuter, supra note 45, at n.141 and accompanying text. The legal distinctions required to be made by a well-considered criminal code on matters such as the risked transmission of HIV may be quite sophisticated. For example, such codes generally define recklessness in terms of a substantial and unjustifiable risk of injury. Ordinary citizens, judges, and prosecutors, may be ill-informed about or uninterested in the degrees of risk associated with conduct such as spitting or oral sex. However, to apply the law to the facts properly, requires great attention to the degree of risk.

This situation can create special problems to the defense attorneys involved. To some extent the defense attorneys will have to become experts on HIV transmission and attempt to impart this information to the trier of fact by use of expert witnesses or other similar measures. See Schechter, supra note 11.

Similarly, the social utility of the conduct must be evaluated in order to make a determination of "unjustifiability." Thus, speeding may not be reckless driving if engaged in to save a child's life. Members of the public may see little social utility in such conduct as oral sex, straight or gay, while the conduct may be extremely important to those who engage in it.

It is submitted that these difficult but critical issues are more likely to be handled poorly where the defendant is a member of an unpopular minority such as drug users or homosexuals. To compensate for this potential injustice, only the strongest and most egregious cases should be prosecuted criminally.

Because of the history of stigmatization and discrimination against people with HIV-AIDS, there has been a tendency for disparate treatment of such persons. The most recent proof of such abuse was in the courtroom of a Circuit Court Judge in Illinois. During the judge's remarks in sentencing an HIV-infected defendant, the judge made comparisons of HIV sufferers to rabid dogs, mad dogs, and lepers, dwelling on
should not be a defense to attempt. The Model Penal Code has another provision, specifically designed for this kind of case: the de minimis exception.\footnote{71} It states that if the conduct does not pose any realistic threat of the type designed to be dealt with under the statute, either the severity of the charge should be reduced or the charge should be eliminated entirely. A spitting case is a perfect example of de minimis conduct. If risks as minuscule as spitting on somebody were criminalized, everyone would be in jail.\footnote{72} In order to persuade people to agree with this de minimis theory, the prosecutors and the judges must be educated. This task is tiresome, but it needs to be undertaken.

Closen: In order to further this discussion, HIV-specific statutes should be considered so as to describe the range of their coverage. Almost half of the states in the past few years have adopted some form of HIV-specific criminal transmission law,\footnote{73} and there is a considerable

\footnote{71. \textsc{Model Penal Code} § 2.12 (Proposed Official Draft 1962).}

\footnote{72. A large portion of human conduct creates at least some risk to others. However, only conduct that creates a substantial and unjustifiable risk to another is generally criminalized. \textit{See Public Health, supra note 46, at 88-9.}}

\footnote{73. The following states have adopted a form of HIV criminal transmission statute: Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Montana, Nevada, North Dakota,}
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Hermann:

Clearly, these statutes have been enacted in response to dissatisfaction or concern with the problems raised by traditional criminal law charges. A good example is the statute from Arkansas which states:

A person commits the offense of exposing another to HIV if the person knows he or she has tested positive for HIV and exposes another person to such viral infection through the parenteral transfer of blood or blood products or engages in sexual penetration with another person without first having informed the other person of the presence of HIV.74

Many of these statutes take this very general form.

The Presidential Commission on the Human Immunodeficiency Virus Epidemic recommended the adoption of these types of HIV statutes in order to provide clear notice of socially unacceptable behavior.75 Scope is a major problem with this Arkansas statute. For instance, does engaging in sexual penetration include oral sex? Should oral sex be included in the statute? Is there a sufficiently established risk of transmission to justify prosecuting that behavior under the statute?76

The specific HIV criminal statutes do have varied forms. One form designates very specific behavior. An example are statutes punishing conduct involving possible transmission from
donation of infected blood. Indiana has a statute which provides that a person who recklessly, knowingly, or intentionally donates, sells, or transfers HIV infected blood, blood component, or semen for artificial insemination commits an offense. The crime of transferring contaminated blood or body fluids is a Class C felony.

Other specifically designated behavior in some of these statutes is sexual behavior. The Michigan law provides a good example. There is a broad provision that covers sexual penetration. The statute goes on to define sexual penetration to mean sexual intercourse, cunnilingus, fellatio, intercourse, or any other intrusion, however slight, of any part of the person's body or any object into the genital or anal openings of another person's body. Emission of semen is not required. It is very specific and clinical regarding the applicable behavior.

A problem with many of these statutes is that they designate behavior such as sexual behavior, but they do not limit the conduct to sexual intercourse or otherwise define adequately the prohibited sexual activities. Illinois, for example, defines "intimate contact with another" to mean the "exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV." Vagueness problems exist. For example, does "could" mean recognized modes of transmission designated by the Centers for Disease Control, or does it mean all the possible methods of transmission determined from a completely theoretical point of view? Statutes such as the Illinois law have many problems because of their broad language. Nevertheless, aside from its problems in defining sexual be-

behavior, the Illinois statute provides a good example in that it describes the specific conduct that is forbidden. It eliminates the requirements of purpose or intent and causation that would exist if a traditional criminal offense was employed. The last section of the Illinois law recognizes the defense of consent. Under subsection (d) of the statute, consent is an affirmative defense if "the person exposed knew that the infected person was infected with HIV, knew that the action could result in an infection with HIV, and consented to the action with that knowledge." The use of the consent defense would have resulted in acquittals in several previous cases in which convictions were entered. Other defenses should be considered, such as the use of condoms, or in situations where someone has received faulty medical advice that he or she is not infected when in fact he or she is infected.

There have been constitutional challenges

Note 79. See, e.g., S.C. CODE ANN. § 44-29-145 (Law. Co-op. Supp. 1992) (South Carolina's HIV criminalization statute applies to specific acts regardless of whether the specific acts can actually spread the HIV infection).

Note 80. ILL. ANN. STAT. ch. 720, para. 5/12-16.2(d) (Smith-Hurd 1993); see also FLA. STAT. ANN. § 14-384.24 (West 1993) (Florida's statute provides for a consent defense if the person is "informed of the presence of the sexually transmissible disease and [consents] to sexual intercourse.").

Note 81. For a thorough discussion of consent as a defense and an argument for its adoption, see Public Health, supra note 46, at 105-08. It is also argued that consent and use of a condom ought to be independent defenses. Id. at n.179. The thrust of the argument is that the employment of criminal law in the area of HIV-AIDS transmission can encourage persons infected with HIV to seek informed consent and/or use a condom, then it should be used because both are likely to reduce the incidence of actual transmission.

Note 82. "It is reasonable to assume that the use of condoms will reduce the transmission of HIV during sexual intercourse. Hence, their widespread use may substantially slow the spread of HIV by sexual transmission." Friedland & Klein, supra note 40, at 1130. "[W]hile consensual sexual intercourse between an HIV infected person and another person informed of the risk of HIV transmission may protect the infected person from criminal liability, the absence of an additional requirement that the partners use prophylactics to guard against HIV transmission does little to control the spread of infection." Kinney, supra note 7, at 271.
to these statutes that have generally focused on the lack of specificity of the conduct. In other words, the statutes have been challenged on the grounds that their vagueness makes them constitutionally defective.\(^8\)

Closen: It is necessary to specify a few of the other kinds of activities that are included in these laws. For example, the sharing of needles or drug paraphernalia is often included.\(^4\)

Hermann: The Illinois statute contains very specific language in describing these other kinds of activities. For instance, subsection (a)(3) targets an individual who "dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia."\(^5\)

Closen: Consent is a defense in the Illinois statute, but consent is not a defense in all the state statutes.\(^6\)


85. ILL. ANN. STAT. ch. 720, para. 5/12-16.2(a)(3) (Smith-Hurd 1993). Although it has been argued that this Illinois provision is overly broad because only the sharing of non-sterile needles that have been used previously to inject drugs into other persons contributes directly to the transmission of HIV. Closen & Deutschman, supra note 8, at 596.

86. More thought needs to be given to the consent issue. See Michael L. Closen, When A Doctor Has AIDS, NAT. LAW J., Sept. 9, 1991, at 15 (arguing that informed consent is insufficient protection of patients when surgeons and dentists have HIV-AIDS). This consent issue was decided in a military proceeding in which the accusation was "wanton disregard for human life." United States v. Morris, 30 M.J. 1221 (1990). In Morris, an HIV-infected male soldier engaged in repeated sexual intercourse over a period of months with a female soldier who knew that he carried the virus. The Army Court of Military Review concluded that consent was not a defense to this charge, noting "the societal interests involved with this type of offense; the deterrence of appellant and others from further reckless behavior and stopping the spread of a deadly disease." Id. at 1228. The court opined "that society has an interest in preventing such conduct... whether the victim consents or not." Id.

Conversely, "[a]llowing a defense of consent would encourage disclosure and reward responsible behavior, while denying this defense would leave a person with HIV the choice of either sexual abstinence or potential criminal liability." Tierney, supra note 7, at 498.
Hermann: Consent is a defense in the minority of statutes. The defendant could argue that there is an implicit consent defense even if it has not been specified in the statute. 87

Bobinski: It is interesting to consider whether consent is actually a defense or something that the prosecution has to disprove. These HIV-specific laws often define the offense as engaging in certain behavior without consent. 88 It could be argued that the prosecution has to prove the absence of consent, rather than allowing consent as an affirmative defense. 89 This argument can

87. See Schultz & Reuter, supra note 45, at n.139 and accompanying text. Even where consent is not formally a defense, it can be argued that whether a person disclosed his or her HIV status is relevant to the issue of whether the risk involved was “unjustifiable.” A given level of risk could be more readily justified where there has been disclosure of that risk.


Some statutes refer to disclosure of one’s HIV infection without expressly referring to consent from the other individual. See, e.g., Ga. Code Ann. § 16-5-60 (Michie 1988) (“. . . and the HIV infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to . . .” sexual intercourse, transferring hypodermic needle, or donating blood products).


89. A comparison of the Arkansas and Illinois statutes illustrates this point. In Arkansas, “consent” is found in the statutory definition of the offense:

A person commits the offense of exposing another to HIV if the person knows he or she has tested positive for HIV and exposes another person to such viral infection through the parental transfer of blood or blood products or engages in sexual penetration with another person without first having informed the other person of the presence of HIV.

Ark. Code Ann. § 5-14-123(b) (Michie Supp. 1992). Illinois specifies that consent is an affirmative defense: “It shall be an affirmative defense that the person exposed knew
be tricky. In many of these cases, the claim is asserted that there was full disclosure of the HIV status between the two participants. Thus, identifying who has the burden of proving or disproving consent is very important.

Strader: Some legislatures intended for consent not to be a defense. Again, consent is not a defense to homicide crimes. An individual cannot consent to being murdered. The same reasoning has been adopted by some legislatures: an individual cannot consent to having HIV transmitted to himself or herself or exposing himself or herself to HIV.

Hermann: There is a difference with the two examples. It is not absolute that one is going to be infected after an exposure to HIV. Conversely, in cases where one consents to execution or killing, there is a great likelihood or certainty of outcome. HIV cases involve a willingness to take a risk. Certainly, in many other areas, people have a right to take a risk.

Closen: It may be that the legislatures in a number of these instances did not consider thoroughly the consequences of their actions. There was a flurry of legislative activity about HIV-AIDS in the middle to late 1980s. An interesting question that can be posed regarding many of these statutes is whether they cover vertical mother-to-child transmission. Does a pregnant woman with HIV commit an offense by giving birth to her child? Only a couple of states explicitly...
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exclude in utero transmission from their statutes.\textsuperscript{94} In the other jurisdictions, legislatures intended either to criminalize vertical transmission or did not consider the question at all.\textsuperscript{95}

Hermann: There are states that use very general language. The Texas statute, for instance, has language that states “engages in conduct reasonably likely to result in the transfer of the actor’s own blood or bodily fluids containing visible blood . . .” Usually, the more general the conduct described in these statutes, the more specific must be the intent. For instance, this statute provides “with intent to cause serious bodily injury or death intentionally engages in conduct reasonably likely to result in the transfer” of fluids which will result in HIV infection.

Schultz: Another issue to be highlighted is that there are many situations where people are permitted to consent to extremely dangerous things: surgery, cosmetic surgery, and sports such as boxing, football, and hockey.\textsuperscript{96} All of

\textsuperscript{94} Both the Oklahoma and Texas statutes which criminalize HIV exposure conclude by providing “except during in utero transmission of blood or bodily fluids.” OKLA. STAT. ANN. tit. 21, § 1192.1(A) (1991); TEX. PENAL CODE ANN. § 22.012(a) (West 1992) (repealed effective Sept. 1, 1994).

\textsuperscript{95} See Closen & Isaacman, supra note 8; Isaacman, supra note 8. See also Gestational Responsibility, supra note 93.

these consensual activities are allowed despite the risk of death or serious bodily injury which, in some instances, is much higher than certain types of conduct involving HIV that are criminalized.

A hierarchy of valuable conduct is created. Plastic surgery is very valuable. Sex between two men is not valuable. Thus, even if one is living in a committed relationship and explains to the other person that he or she is HIV-positive, the other person cannot consent to sex, even if a condom is used. Why? According to the hierarchy of values, sex is useless or even condemned conduct, unlike cosmetic surgery which is fairly important and socially valuable.

Bobinski: Professor Schultz's comment returns this discussion to the issue of legislatures specifically choosing to criminalize certain types of behavior. For example, some of the statutes mentioned by Professor Hermann specify as prohibited conduct the action of an individual donating blood knowing that he or she is HIV-positive. Other statutes are broader in coverage...
and include the sharing of needles or sexual activity.¹⁰⁰ A few statutes deal with prostitution. These statutes make it a specific offense for an individual who knows he or she is HIV-positive to engage in or solicit sex.¹⁰¹

Hermann:

It is important to examine why some of these statutes were enacted. The blood statutes were enacted first because people were using blood donation as a means for obtaining HIV testing; lawmakers wanted to discourage that practice. Instead, it is desirable to encourage people to go to testing sites and use the public health facilities to determine their HIV status.

A serious problem exists with these statutes in terms of not recognizing either safe sex or the use of a condom as a defense. In the absence of such an articulated defense, it is possible to argue that by looking at the conduct specified, the use of a condom removes the conduct from the

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statutory definition of conduct likely to result in HIV transmission.

Hernandez: It should be emphasized that the statutes do not make safe sex practices a defense. This omission is one of the problems with the HIV-specific laws. It seems lawmakers are trying to inhibit any kind of sexual conduct between a person who is HIV-infected and someone who does not know the other is HIV-infected regardless of the precautions they may take.\(^{102}\)

Hermann: This omission is a very dangerous measure. It becomes much more objectionable when the possible life span of an infected person is considered. First, it is unclear whether HIV is one hundred percent fatal. Secondly, the life span of an HIV-infected person can be ten or fifteen years.\(^ {103}\) It is unreasonable to think that individuals are going to abstain from sex given their infection.\(^ {104}\)

Schultz: It can be argued that the HIV specific statutes have the advantage of being specific. If the law deems as an offense anal and vaginal intercourse engaged in by someone who knows he or she is HIV-positive, the law is straightforward. It has the substantial advantage of being less susceptible to prejudicial application.

Conversely, the broad HIV statute has the obvious disadvantage of being vague or overbroad. The Illinois statute, which is currently under review by the Illinois Supreme Court, contains language prohibiting intimate bodily contact which is defined as "the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the

\(^{102}\) See, e.g., FLA. STAT. ANN. § 14-384.24 (West 1993) (prohibits sexual intercourse with no reference to safe sex precautions); S.C. CODE ANN. § 44-29-145 (Law Co-op. Supp. 1992) (likewise creates an outright prohibition of "sexual intercourse, vaginal, anal or oral").

\(^{103}\) See JARVIS ET AL., supra note 1, at 22 ("the life span from time of infection with HIV to death due to AIDS-related infections may be twenty years").

\(^{104}\) See AIDS and the Criminal Law, supra note 23, at 51.
transmission of HIV."\textsuperscript{105} If "could" is interpreted in an absolute sense, then it seems that this statute is overbroad.\textsuperscript{106} Any careful scientist leaves himself or herself options; nothing is impossible.\textsuperscript{107} Therefore, in the context of the statute, "could" becomes 'anything'. For example, an HIV-positive individual could not ride the bus because the bus might have an accident. The HIV-positive individual may bleed when the accident happens, someone else might be bleeding at the same time, and the infected blood might be transferred to the uninfected person. Thus the HIV-positive individual is a criminal because he or she did something that could have exposed bodily fluid or did expose bodily fluid to someone in a manner that could transmit the virus.\textsuperscript{108}

Hermann: Broad HIV statutes may be carried to further extremes. The Illinois statute, for example, could permit prosecution of any HIV-infected person who sneezes in public because it has not been proven with absolute certainty that HIV cannot be transmitted in that manner.\textsuperscript{109}

Clossen: The Illinois statute arguably covers pregnant women, HIV-infected health care workers, and HIV-infected patients, who neglect to disclose in each instance their HIV status to the individuals with whom they have "intimate contact."\textsuperscript{110}

Strader: These examples are not hypotheticals. There are actual cases involving these issues;

\textsuperscript{105} ILL. ANN. STAT. ch. 720, para. 5/12-16.2(b) (Smith-Hurd 1993).
\textsuperscript{106} See Clossen & Deutschman, supra note 8, at 595-96; Tierney supra note 7, at 501 (noting the "vagueness of the Illinois statute").
\textsuperscript{107} See supra note 40.
\textsuperscript{108} See Public Health, supra note 46, at 86-91.
\textsuperscript{109} For other hypothetical examples of possible criminalization of casual contact, see Clossen & Deutschman, supra note 8, at 592 (shaking hands and swimming in a public pool). See also supra note 40.
\textsuperscript{110} See Clossen & Isaacman, supra note 8; Clossen & Deutschman, supra note 8; Tierney, supra note 7, at 501 (noting the "vagueness of the Illinois statute").
some cases are civil and based on these types of scenarios.\textsuperscript{111}

Schultz: Narrow statutes also have disadvantages. These statutes leave out conduct, and again they create a hierarchy of conduct.\textsuperscript{112} In a case involving sexual intercourse where one party knows he or she is HIV-positive, does not tell the other person, does not use any precautions, and has anal or vaginal sex, the conduct is very questionable and of doubtful moral value. However, transfer this situation to the dentist or the doctor and make one of them culpable. The doctor knows that he or she is HIV-positive, takes no precautions, does not disclose that he or she is HIV-infected, and then performs the most risky kind of surgical procedure. That conduct is excluded from the HIV statutes. These HIV specific statutes create a hierarchy. A value judgment has been made: surgeons and dentists cannot be that immoral. Therefore, they are excluded from the coverage of the law. It is suspect for lawmakers to criminalize unprotected sex for people with HIV, while at the same time not criminalize certain conduct of HIV-infected surgeons and dentists.

Bobinski: The vagueness of the statutes is shocking. For example, the statutes list activities like sex-

\textsuperscript{111} In a recent suit brought by a medical technician who was accidentally cut during an operation in which she assisted, a California court sustained a jury award of $102,500 against an HIV-positive patient who had failed to disclose her HIV status. Henry Chu, \textit{Patient in AIDS Case Told to Pay Damages to Technician}, \textit{Los Angeles Times}, March 12, 1993, at B6. More common are suits brought by patients against health care providers who allegedly failed to disclose that they had tested positive for the virus. \textit{See, e.g.}, Faya \textit{v.} Almaraz, 61 U.S.L.W. 2554 (Md. Ct. App. March 9, 1993) (allowing negligence suit by two patients whose surgeon did not disclose that he was HIV-positive, even though the plaintiffs did not allege that they had contracted the virus). \textit{See also} Wade Lambert \& Junda Woo, \textit{Suit Over AIDS Victim's Death is Allowed}, \textit{Wall St. J.}, Nov. 18, 1992, at B6.

\textsuperscript{112} The issue of whether statutes should be drawn narrowly to improve one's ability to determine what is prohibited or to prevent dangerous conduct from escaping punishment has often been debated. What is important to this discussion is that narrow statutes devalue the criminalized conduct in comparison to other non-criminalized conduct which is equally or more dangerous.
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ual penetration; however the actual definition of sexual penetration could include someone performing an OB/GYN exam. The Arkansas statute defines sexual penetration to be "any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." 113 That definition could include the performance of a vaginal exam. 114

Strader: Thus, an ear examination could be included under some of the statutes. 115

Bobinski: Problems also exist with provisions that deal with sharing intravenous drug materials. Typically, the statutes say that it is a criminal offense for someone with HIV infection to allow someone else to use a nonsterile needle. 116 The statutes may not specify how that needle is to be nonsterile. 117 A needle is nonsterile if someone picks it up with his or her hands. However, some of the statutes do not specify that the needle has to be nonsterile because it has been exposed to blood from someone with HIV infec-


114. In referring to this definition of sexual penetration in the Arkansas and Michigan statutes, another commentator has opined, "[s]everal of the statutes are drafted so that they clearly proscribe conduct that poses no risk of transmitting HIV." Tierney, supra note 7, at 500.

115. The statutes such as the Illinois statute on "Criminal Transmission of HIV" appear to be written to include any activity which poses a risk of transmission. Ill. Ann. Stat. ch. 720, para. 5/12-16.2 (Smith-Hurd 1993) (statute was enacted as PA 86-0897, effective Sept. 11, 1989). Therefore, prosecutors are given extreme discretion in deciding what constitutes risky behavior. Such broad prosecutorial discretion raises the likelihood of discriminatory prosecutions based on either political expediency and/or the minority status of the defendant.


117. See e.g., Ill. Ann. Stat. ch. 720, para. 5/12-16.2 (Smith-Hurd 1993) ("transfers to another any nonsterile intravenous drug paraphernalia").
Thus, there is an overbreadth problem in that some nonsterile needles create no risk of transmitting HIV. 119

Hernandez: Another concern with these statutes is the lack of consistency regarding the appropriate punishment for what is arguably the same behavior. They vary from misdemeanor statutes to rather serious felony statutes. 120 If conduct is offensive in some manner, it should be consistently offensive across the board. It should not be more offensive in Illinois than it is in Florida. However, there is no consistency in the potential punishment for essentially the same acts from state to state. 121

Closen: Of course, where a statute defines the conduct to constitute a felony and a substantial prison term is imposed, that sentence, in most instances, will be for life. 122

Is there a risk of selective enforcement of these HIV specific statutes?

Schultz: Absolutely. The intent behind the drafting of the Missouri statute was to make it broad so

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118. Id.

119. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 138-42, 148-55 (2d ed. 1986) (discussing difficulties of constitutional challenges to criminal statutes which proscribe conduct that does not create a risk to the public); Closen & Deutschman, supra note 8, at 596. See also supra note 114.

120. Compare FLA. STAT. ANN. § 14-384.24 (West 1993) (misdemeanor punishable by up to one year in jail) with ILL. ANN. STAT. ch. 720, para. 5/12-16.2(e) (Smith-Hurd 1993) (class 2 felony, punishable imprisonment term not listed).

121. Under traditional criminal law the same concern arises. Because prosecutors have discretion in what offenses to charge, criminal HIV exposure may be prosecuted as assault in one place and as attempt murder elsewhere. See cases cited supra note 4.

122. Most statutes do make HIV exposure a felony, or at least a basis to enhance a sentence. Although some individuals with HIV infection may live fifteen to twenty years, on average their life expectancies are much shorter. See JARVIS ET AL., supra note 1, at 22-3. “Currently, the period of survival after AIDS diagnosis is between two and three years in the United States.” AIDS IN THE WORLD 679 (J. Mann et al. eds. 1992). United States ex rel. Savitz v. Gallagher, 800 F. Supp. 228 (E.D. Pa. 1992) involved a defendant who had HIV-AIDS and was charged with multiple offenses for “involuntary sex acts with young men who had not yet attained the age of consent.” In this habeas corpus proceeding, the federal judge stated “[t]he record established that Savitz, if convicted, faces a maximum imprisonment . . . of twenty-seven to fifty-four years, which exceeds his life expectancy of six months to two years.” Id. at 232.
that no hierarchy of conduct was created. Also, the intent of the statute was to provide a specific statement articulating that not only did the person have to know that he or she was HIV-infected, but also he or she had to know that there was a very substantial and unjustifiable risk of transmission.\textsuperscript{123} This situation combines the benefits of a broad and a narrow statute. Prosecutors, however, interpret that language to mean any risk, no matter how small or justifiable.

For example, an HIV-positive man in St. Louis was charged for sexual conduct. The prosecutor did not know what type of sexual conduct was involved. He had not investigated that aspect of the case, and he did not care. As far as he was concerned, if this man had HIV and had engaged in sexual conduct, then the man was guilty. A world of difference exists between unprotected anal intercourse, protected oral intercourse, or mutual masturbation. Terrible prejudice and lack of understanding or sensitivity enters these prosecutions. The world does not understand because this sexual activity is devalued conduct.

Closen: Is there any concern with selective enforcement against women, especially prostitutes?

Bobinski: Definitely. When prostitution cases are examined,\textsuperscript{124} the history of prostitutes as the vector of transmission for sexually transmitted diseases in society must be considered.\textsuperscript{125} Histori-

\textsuperscript{123} For a discussion of the Missouri provision see Schultz & Reuter, supra note 45, at 622-27.

\textsuperscript{124} See, e.g., People v. Adams, 597 N.E.2d 574 (Ill. 1992). Some states create a separate crime or an elevated sentence if a prostitute is HIV positive. See also supra note 70.

cally, the focus has been on the prostitutes' behavior, rather than on the people who visit the prostitutes or other sexually active people. In the case of HIV infection, this focus is even more ironic because of the evidence which indicates it is fairly difficult for a female prostitute to transmit HIV infection to a man. It is more efficient for the transmission to occur from a man to a woman.

Privacy is also an issue. There are at least two different kinds of privacy concerns involving these statutes. One concern is the idea of confidentiality, either in a constitutional sense or statutory sense. The other privacy issue

& Field, supra note 7, at 170 (noting the history of selective enforcement of some statutes against prostitutes).

126. BRANDT, supra note 125, at 36-7.

127. See, e.g., Nancy S. Padian et al., Female-to-Male Transmission of Human Immunodeficiency Virus, 266 JAMA 1664 (1991) (survey of heterosexual couples illustrates that "the odds of male-to-female transmission were significantly greater than female-to-male transmission"); Friedland & Klein, supra note 40, at 1129 ("frequency of occurrence of female-to-male transmission remains controversial; transmission from women to men may be less efficient than that from men to women").

128. Commentators have consistently noted the privacy problems inherent in criminal prosecutions for the transmission of HIV. See, e.g., Sullivan & Field, supra note 7, at 187-89.

129. The United States Supreme Court has recognized a constitutional right to informational privacy. Whalen v. Roe, 429 U.S. 589 (1977). In Whalen, the Court rejected a challenge to New York state's requirement that the names of all individuals who obtain certain drug prescriptions be reported to the state. The Court found that the state had an interest in requiring disclosure of this sensitive information and held that New York's reporting system did not violate any constitutionally protected right. According to the Court,

[the . . . supervision of public health . . . require[s] the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances the duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with and protection of, the individual's interest in privacy.

Id. at 605 (emphasis added). See also Doe v. Borough of Barrington, 729 F. Supp. 376 (D. N.J. 1990) (municipality liable for police failure to maintain confidentiality of HIV-related information and for failure to provide proper training on maintenance of confidentiality).

130. A number of states have specific statutes protecting the confidentiality of HIV
concerns the right of an individual to take risks in his or her intimate relationships.

The confidentiality of HIV status is often protected under state laws. One issue in these criminal cases is the manner in which the prosecution can obtain access to information that would inform the prosecution that the defendant actually knew his or her HIV status. These criminal transmission statutes usually require that the individual knew he or she had HIV infection and then proceeded to engage in a particular behavior. There is both a practical problem of finding information that informs the prosecutor that the defendant knew he or she was HIV-positive and a constitutional problem dealing with the privacy of sexual relationships. In both areas, the courts have not been particularly sympathetic. Courts have typically permitted the disclosure of HIV information about defendants, even in the absence of a specific statutory provision that allowed prosecu-


131. See supra note 99.

132. See Public Health, supra note 46, at n.212 and accompanying text.

tors to have this information. 134


Judicial creativity is not always required. Many state statutes authorize the imposition of HIV-antibody tests on certain categories of criminal defendants or on those convicted of specified crimes. See, e.g., ARIZ. REV. STAT. ANN. § 13-1415 (Supp. 1992) (individual convicted of sexual offense or "other crime which involved significant exposure" may be ordered to be tested for HIV); CAL. PENAL CODE § 1202.1 (West Supp. 1993) (the court shall order every person convicted of a sexual offense to submit to a blood test); CAL. PENAL CODE § 1202.6 (West Supp. 1993) (testing those convicted of prostitution); COLO. REV. STAT. ANN. § 18-7-205.5 (West Supp. 1992) (testing of persons convicted of patronizing a prostitute); COLO. REV. STAT. ANN. § 18-7-201.5 (West Supp. 1992) (testing of persons convicted of prostitution); FLA. STAT. ANN. § 960.003 (West Supp. 1993) (testing after being charged with a sex offense which "involves the transmission of body fluids" upon request of the victim); ILL. ANN. STAT. ch. 720, para. 5/12-18 (Smith-Hurd 1993) (testing after charged and upon request of the victim); IND. CODE ANN. § 35-38-1-9.5 (Burns Supp. 1992) (testing those convicted of "sex crime" or offense relating to "controlled substance"); KY. REV. STAT. ANN. § 529.090 (Michie/Bobbs-Merrill 1990) (requires testing of anyone convicted of prostitution or of procuring a prostitute); ME. REV. STAT. ANN. tit. 5, § 19203-E (West Supp. 1992) (HIV testing after conviction for sexual assault); MICH. COMP. LAWS § 333.5129 (1992) (individual upon conviction for prostitution, solicitation, intravenous use of controlled substance or criminal sexual conduct shall be tested); MO. REV. STAT. § 191.663 (Supp. 1992) (convicted defendants are tested; victims have right to results); OR. REV. STAT. § 135.139 (1990) (HIV testing after conviction if requested by victim and crime in which "transmission of body fluids was involved or likely to be involved"); VA. CODE ANN. § 18.2-346.1 (Michie Supp. 1992) (testing required of those convicted of prostitution); VA. CODE ANN. § 18.2-62 (Michie Supp. 1992) (after arrest for sexual assault or sexual offense against a child upon finding of probable cause). See also People v. McVickers, 840 P.2d 955 (Cal. 1992) (applying mandatory testing statute retroactively to defendant whose offenses were committed before enactment of statute did not violate ex post facto clause). These statutes generally permit the release of the test results to the defendant's victim. See, e.g., ARIZ. REV. STAT. ANN. § 13-14-15 (Supp. 1992); CAL. PENAL CODE § 1524.1 (West Supp. 1993); FLA. STAT. ANN. § 960.003 (West 1992); ILL. ANN. STAT. ch. 720, para. 5/12-18 (Smith-Hurd 1993); ME. REV. STAT. ANN. tit. 5, § 19203-E (West Supp. 1992); MICH. STAT. REV. § 333.5129 (West Comp. Laws Ann. 1992); OR. REV. STAT. § 135.139 (1990); VA. CODE ANN. § 18.2-62 (Michie Supp. 1992).

Discovery of HIV status may also be permitted in civil cases. See, e.g., Martinez, Jr. v. Brazen, 1992 U.S. Dist. LEXIS 5613 (S.D.N.Y. 1992) (court authorizes discovery of defendant's HIV related information in suit brought by former lover alleging trans-
Privacy and intimate personal decision issues have arisen in other contexts. For example, in tort cases for transmission of sexually transmitted diseases, courts have said that relationships are not protected by privacy to the extent that the state has an overriding role in protecting public health. While one may have some right of privacy that protects one's ability to engage in these relationships, the state can still permit a tort action; for example, an action can be maintained for negligent or intentional transmission of herpes.

mission of HIV; plaintiff required to disclose own HIV status first as measure of good faith).

135. It appeared for a time that at least some courts might reject tort claims brought between sexual partners. One early case involved a man's claims of misrepresentation against a woman after she became pregnant and sued him for child support; the man claimed that the woman had "falsely represented to him that she was taking birth control pills." Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618, 619 (1980). The court characterized Stephen's claim as "asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct"; the claim was rejected because of the specter of "unwarranted governmental intrusion into matters affecting the individual's right of privacy." Id. at 620.


One important question is whether the state's interest in preventing the spread of disease is sufficient to trump all types of privacy rights. In other words, is the state going to be permitted to determine that an individual must obtain the knowing consent of the other person in sexual relationships, or is the state going to be able to determine that an individual cannot even engage in certain sexual conduct, even if consent is obtained? Does the state interest in preventing the risk of HIV transmission extend to the prohibition of procreation? One of the highest risks of HIV transmission is from HIV-infected
mother to child. The risk of transmission is thirty to fifty percent.140 This risk is significantly higher than the one in 500 risk that is usually associated with sexual intercourse.141 If risk reduction really is the primary goal of HIV statutes, then the state would seek to criminalize the act of an HIV-infected woman giving birth to a child. Obviously, such a policy would seriously infringe common notions of procreative liberty. When constitutional concerns are invoked, the question becomes whether there is any kind of constitutional protection to have a child, even though that child may be placed at risk.142 Obviously, this issue is not limited to


There would be other health and policy implications of the criminalization of certain conduct of mothers-to-be.

Any attempt to criminalize the behavior of pregnant women can reasonably be expected to increase the number of abortions performed in this country. Criminalization also will erect another barrier to assuring adequate prenatal care to pregnant women. Fear of being “turned in” by their doctors and convicted by evidence and statements unearthed during prenatal care will keep some women from seeking it.

Gestational Responsibility, supra note 93, at 107-08.

140. Transmission rates of as low as twenty to thirty percent are commonly reported in studies of HIV-infected women in the United States and Europe. EUROPEAN COLLABORATIVE STUDY, Children Born to Women with HIV-1 Infection: Natural History and risk of Transmission, 337 LANCET 253 (1991) (12.9 percent rate of vertical transmission); A.A. Monforte et al., Maternal Predictors of HIV Vertical Transmission, 42 EUR. J. OBSTET. GYNECOL. REPROD. BIOL. 131 (1991) (retrospective study of 57 HIV-positive women finds twenty-eight percent of infants to be HIV-infected). Higher rates of transmission are thought to occur in other countries. See also Closen & Isaacman, supra note 8; WORLD HEALTH ORGANIZATION, CONSENSUS STATEMENT FROM THE WHO/UNICEF CONSULTATION ON HIV TRANSMISSION AND BREAST-FEEDING 2 (1992) (“Based on the various studies conducted to date, roughly one-third of the babies born worldwide to HIV-infected women become infected themselves,” during pregnancy, delivery, and breast-feeding).

141. See, e.g., Norman Heurst & Stephen B. Huller, Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients Bad Advice?, 259 JAMA 2428, 2429 (1988) (1/500 risk); Gostin, supra note 7, at 1044 (the risk from unprotected intercourse is 1/1,000, but condom usage reduces risk to 1/10,000).

142. The Supreme Court has been involved in tracing the contours of a right not to have children; there is little analysis of the right to have children. See Skinner v. Oklahoma, 316 U.S. 535 (1942) (court strikes down, on equal protection grounds, a sterilization statute applied to career criminals, noting that it dealt with “one of the fundamental rights of man”); but see Buck v. Bell, 274 U.S. 200 (1927) (court upholds
HIV; it also involves women who have inherited genetic conditions which place their children at risk.  

Closen: Some commentators believe that traditional criminal laws should govern exclusively because defendants receive greater protection from the higher mental state requirements. Isolating HIV-AIDS for criminalization is one more kind of stigmatization that is not needed for an epidemic that has been plagued by hysteria.

Hermann: If the traditional specific intent crimes are utilized, an important problem arises in that conduct which presents no threat at all can be prosecuted; an example of such conduct is spitting. Almost all of the early prosecutions involved spitting and biting actions.

Closen: It does not make sense that one could be prosecuted for attempt murder for spitting, particularly if spitting does not involve any real risk of a homicide.

Hermann: Impossibility has been stricken as a defense in about half the jurisdictions.

Strader: Traditional criminal law should be employed, although its use potentially over-

sterilization of woman alleged to be mentally retarded). Dicta in the abortion and contraceptives cases would suggest that the right to bear children is fundamental. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (right to decide whether or not to bear or begat a child).

143. Couples who both carry the trait for Tay-Sachs disease, for example, have a twenty-five percent probability of bearing a child with the condition. Eve Nichols, Human Gene Therapy 19-20 (1988). Such children generally do not live past the age of four. James T. Nora & F. Clark Fraser, Medical Genetics: Principles and Practice 102 (1989).

144. See Closen & Deutschman, supra note 8. Most states have not adopted HIV-specific criminal transmission/exposure laws. However, there is considerable opinion to the contrary. See, e.g., Presidential Comm'n Report, supra note 1, at 130; Kinney, supra note 7; Tierney, supra note 7.

145. See generally AIDS Testing Democracy, supra note 130. See also Tierney, supra note 7, at 487 ("Unclear laws proscribing more than just behavior that poses a serious public health risk not only frustrate efforts to educate the public about AIDS, they also promote discrimination against HIV-infected persons.").
criminalizes the law of attempts. If Professor Schultz's suggestion that states adopt and prosecutors adhere to the Model Penal Code provision that prohibits prosecution or lessens punishment where there is an insubstantial risk that the conduct will cause the intended result is accepted, this overcriminalization problem may be avoided. Prosecutors must be educated on this point.

Hermann: In all of these cases, prosecutors have been able to find medical authorities to suggest that there is some possibility of risk of HIV transmission. The medical experts discuss those cases where blood might be spilled on people with acne, or they highlight the possibility that someone will spit on a person with an open sore. The combination of the medical possibility with the fact that the defendants in these cases are not going to be very attractive to the jury, creates a situation that is not very hopeful for the defendants. The situation is more dismal given the fact that the de minimis argument is not available in many jurisdictions.

Clossen: A few constitutional challenges have been asserted against the HIV-specific statutes. The Illinois statute has been declared unconstitutional by two trial judges in two rural counties in Illinois, and the case is now pending before the Illinois Supreme Court. In a recent decision, the Washington appellate court has upheld the constitutionality of the state HIV transmission statute. The Washington court stated with regard to the definition of "exposed" that "[a]ny reasonably intelligent person would understand from reading the statute that the term refers to engaging in conduct that can cause another per-

146. See supra text accompanying notes 37-44.
148. See CLOSEN ET AL., supra note 47, at 699-703 and cases cited therein.
149. See supra note 8.
son to become infected with the virus." The Washington court thinks it is an easy matter for people to know about the modes of HIV transmission, although the disease is fairly elusive even for doctors. Thus, the constitutional battle has just begun in a few jurisdictions.

The question of whether these HIV specific laws are consistent with sound health care policy should also be discussed.

Hernandez: The HIV-specific transmission laws create a tension with public health policy. Most states have a policy to encourage testing so that people will become aware of their HIV status. The states make that situation possible in a number of different ways. Basically the states try to insure some confidentiality or anonymity to the individual when he or she is tested.

Knowledge on the part of the potential defendant is one of the key elements in most of the criminal transmission statutes. Therefore, these statutes may actually encourage individuals not to test so that they would not be armed with knowledge that, at another time, could be used against them. As Professor Bobinski indicated, confidentiality regarding one's HIV status is often violated. Thus, the state wants to encourage testing in order to have people become aware of their HIV status. On the other hand, the state punishes people if they do become aware of their status by using that knowl-

151. See, e.g., Closen et al., supra note 47, at 688-91.
152. See, e.g., Fla. Stat. Ann. § 381.609 (West 1988) (renumbered as § 381.004 by Laws 1991, c. 91-297, § 17, eff. July 1, 1991) ("The Legislature finds that the public health will be served by facilitating informed, voluntary, and confidential use of tests designed to detect human immunodeficiency virus infection."). See also supra note 130 (statutes protecting confidentiality of HIV test results).
154. See Closen & Deutschman, supra note 8, at 593-94, 598-99; Kinney, supra note 7, at 248.
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Hermann: Contrary arguments do exist that suggest criminal prosecution should not deter testing. One argument is that testing should be encouraged regardless of the drawback of possible use in litigation or prosecution because of the advantages of early medical intervention. Moreover, it is possible to impute knowledge where one wilfully refrains from determining their HIV-positive status. For example, one case involved a violation for overloading of trucks. The company simply avoided having the trucks weighed, and the court held that the company could be charged with knowingly violating the statute. Similarly, this same argument could be employed against someone in a high-risk group who deliberately avoided testing in order to protect against possible criminal prosecution.

Hernandez: Some of the statutes require knowledge, but some of the statutes specifically require test results.

Closen: Professor Hermann, is constructive knowledge arguable under these HIV-specific laws? If one were a prostitute, a gay man, or had substantial weight loss, night sweats, and swollen lymph nodes would that individual have constructive knowledge even though the person had

155. The confidentiality barrier can be breached with a court order if the HIV-positive person is convicted of certain sex crimes as well as controlled substance crimes. See, e.g., FLA. STAT. ANN. § 381.609 (West 1988) (renumbered see supra note 152); IND. CODE ANN. § 35-38-1-10.5 (Michie Supp. 1992); WIS. STAT. ANN. § 146.025 (West Supp. 1992); see also supra text accompanying note 134.

156. See United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (deliberate ignorance and positive knowledge are equally culpable).

157. See, e.g., ILL. ANN. STAT. ch. 720, para. 5/12-16.2(a) (Smith-Hurd 1993) (“A person . . . knowing that he or she is infected with HIV . . .”). See also supra note 153.

158. See, e.g., ARK. CODE ANN. § 5-14-123(b) (Michie Supp. 1992) (“. . . the person knows he or she has tested positive for HIV . . .”); COLO. REV. STAT. ANN. § 18-7-201.7, 205.7 (West Supp. 1992) (“. . . such person has been tested . . . and the results indicate the presence of [HIV]. . .”); GA. CODE ANN. § 16-5-60 (Michie 1992) (“[k]nowledge of being infected with HIV”).
not been tested and had not been advised by a physician that he or she had HIV or AIDS? 59

Hermann: When statutes specifically state “have been advised by a physician or received a diagnosis,” such language requires knowledge. According to the general criminal law, cases involving statutes that employ a general term like “knowing,” the state can present evidence that the accused was in a position to have knowledge or is part of a group that would make inferences from certain information, and the jury can make the judgment that the accused did in fact know or believe he or she was HIV-positive.

Schultz: This situation is very troublesome. First, this scenario is analogous to the distinction between negligence and recklessness, and negligence carries generally much lighter penalties. Secondly, many juries would find sufficient knowledge if it were implied that the defendant was gay or a prostitute.

Hermann: That danger exists. It is important for people who are involved in drafting or revising these statutes to change the language so that it is specific and diagnostically related.

Closen: A Florida appellate opinion states that a sexually active gay man should believe himself to be HIV-positive simply because of his sexual

159. For a discussion of the constructive knowledge issue in the HIV-AIDS area, see Closen & Deutschman, supra note 8, at 594-95; Tierney supra note 7, at 495. See also C.A.U. v. R.L., 438 N.W.2d 441 (Minn. App. 1989); Idaho Code § 39-608(1) (Supp. 1992) (“Any person . . . knowing that he or she is or has been afflicted with . . . (AIDS), . . . (ARC), or other manifestations of . . . (HIV) . . . .” (emphasis added)).

160. See Public Health, supra note 46, at 103-05. See also Closen et al., supra note 47, at 703-06 (discussing Cooper v. Florida, 539 So. 2d 508 (Fla. Ct. App. 1989) which implies that all sexually active gay males should be held to be aware of a “high likelihood” of being infected with HIV). Is that implication rational? The authors suggest that it is not rational given the fact that sexually active gays may not engage in dangerous conduct, either because barrier protections are used or for other reasons, such as limiting sexual contact to mutual masturbation.

161. See Public Health, supra note 46, at 93-7 (discussing the difference between recklessness and negligence).

162. See Closen et al., supra note 47, at 707; see also id. at 715-20 (excerpting Wiggins v. Maryland, 554 A.2d 356 (Md. 1989)).
Strader: Public health care officials have placed a great deal of emphasis on encouraging HIV testing. However, a substantial portion of high risk populations do not want to be tested. These individuals would rather not know so that they do not have to live with the knowledge of their HIV infection. When this concern is coupled with possible criminal prosecution based on one’s knowledge, Professor Hernandez’s point is persuasive. The HIV-specific statutes provide another reason not to be tested.

Hernandez: Another policy issue that is troubling is whether the appropriate way to deal with HIV infected people engaging in this kind of behavior is to place them in prison populations? Is that where they should be? As Professor Closen indicated earlier, this action is essentially a life sentence for some people. Even a sentence of twelve months could be a life sentence for some of these individuals. Such sentencing could potentially raise Eighth Amendment cruel and unusual punishment questions.

From a social engineering standpoint, is it desirable to place a number of HIV-infected people into prison for engaging in sexual behavior? Prisons may not be the best place for them. For some people, prison may be a favorable option given that there is very little support for HIV-positive individuals in the general commu-

163. Cooper v. State, 539 So. 2d 508, 510-11 (Fla. 1989). See also id. at 512 (dissenting opinion).
165. See generally Personal Choice, supra note 96.
166. See CLOSEN ET AL., supra note 47, at 721 (excerpting Public Health, supra note 46, at 113).
167. See supra note 122.
168. U.S. CONST. amend. VIII. A felony sentence of five to ten years for what is essentially assault-like behavior would be particularly burdensome to a person with a life expectancy of less than two years.
nity. In prison, at least someone is going to give these individuals some kind of medical treatment and feed them in their last days.\textsuperscript{169}

\textbf{Clossen:} In some instances prisoners have refused to leave prison systems because they regard the care that they would receive on the outside as less desirable than the care they receive in prison.\textsuperscript{170} In some federal penitentiaries, prisoners are refusing to leave. They are threatening to commit federal offenses if they are forced to leave, so that they will be returned to those institutions.\textsuperscript{171}

\textbf{Hermann:} In jurisdictions such as Illinois, the public health law contains a provision for the public health department to intervene in cases involving people who are continuing to engage in behavior likely to transmit the disease.\textsuperscript{172} The law even provides authority to isolate the person until the department is satisfied that its program of education and intervention will result in a change of behavior. This technique is much preferable to using the criminal statute. However, a serious problem occurs when the legisla-

\textsuperscript{169} For a discussion regarding health care for persons living with AIDS in prisons see \textit{Clossen et al.}, \textit{supra} note 47, at 737-39 (suggesting wide variations in both the type of care offered and the attitudes of courts to that care).

\textsuperscript{170} See Richard S. Wilbur, \textit{AIDS and the Federal Bureau of Prisons: A Unique Challenge}, 11 N. Ill. U. L. Rev. 275, 293 (1991) (The author, an attorney-physician and consultant to the Federal Bureau of Prisons (BOP), notes that in 1989 six HIV-AIDS infected prisoners were offered early release; however these prisoners opted to remain in a BOP hospital “where they felt they could receive definitive care more readily than they could outside the institution. These infected inmates believed that they would live longer and in better health inside the BOP hospital than they would outside.”). There is evidence that the more experience caregivers have in dealing with HIV-AIDS, the longer their HIV-AIDS patients will survive. Valerie Stone et al., \textit{The Relation Between Hospital Experience and Mortality for Patients with AIDS}, 268 JAMA 2655 (1992).

\textsuperscript{171} Prison officials are not likely to want to go on record about these episodes for fear of others getting the idea to do or threaten to do the same thing. Not all prisoners have been satisfied with their HIV-AIDS care while confined in jails and prisons. See \textit{Dying Man Prepares for the Trial of His Life—He Claims Jail Officials Denied Him Treatment to Combat AIDS}, \textit{The Recorder}, Dec. 17, 1992, at 3. See also \textit{Clossen et al.}, \textit{supra} note 47, at 721-39.

\textsuperscript{172} See \textit{supra} note 139.
ture passes such a public health statute, but it fails to provide resources for appropriate intervention. Naturally criminal law is the safeguard, but it is certainly not as satisfactory.

Bobinski: It is interesting to consider how differently some law professors tend to view the criminalization of HIV transmission from the public at large. One reason people tend to accept uncritically criminalization of HIV is that they do not compare it to other possible methods of dealing with the problem. Another method of regulating HIV transmission is the use of traditional public health statutes. Public health authorities employ civil commitment or civil methods to deal with people who have contagious diseases and continue to engage in risky behavior.173 These public health measures have been used for people with tuberculosis or other transmissible conditions.174 A question remains regarding the effectiveness of public health measures to control or restrict HIV-infected individuals' behavior in a manner desired by the general public. Such a method would require protecting the public health without invoking the problems presented by the criminal law measures.

There are some drawbacks to the public health approach for the infected person. Civil methods do not offer the benefit of the burden of proof that is required in the criminal context. In the criminal context the prosecution must prove its case beyond a reasonable doubt.175

173. See, e.g., Minnesota Health Threat Procedures Act, Minn. Stat. Ann. §§ 144.4171-144.4186 (West 1989). See also In re Stilinovich, 479 N.W.2d 731 (Minn. App. 1992) (holding that HIV-infected patient with psychiatric problems was inappropriately committed under the state mental health statute; department of health should have proceeded under more specific health threats statute).

174. See, e.g., Application of Halko, 246 Cal. App. 2d 553, 54 Cal. Rptr. 661 (1966) (tuberculosis); Ex parte Martin, 188 P.2d 287 (Cal. App. 1948) (venereal disease); Moore v. Draper, 57 So. 2d 648 (Fla. 1952) (tuberculosis); State ex rel Kennedy, 185 S.W.2d 530 (Tenn. 1945) (venereal disease).

175. In re Winship, 397 U.S. 358, 370 (1970) (stating that the constitution requires that proof in a criminal charge must be beyond a reasonable doubt).
For civil commitment, the standard of proof may be clear and convincing evidence that the person poses a risk. Additionally, in the public health context, the court must predict whether someone might pose a risk of HIV transmission in the future. With the criminal cases, an individual’s past is examined, and there is evidence that the person actually has posed a risk in the past. Thus, there may be less danger of unwarranted restrictions on people when criminal statutes are used.

Closen: Furthermore, the public health and mental health fields offer more flexibility regarding the period of confinement as opposed to a definite term or indeterminate term of imprisonment or incarceration under the criminal justice system.

Hermann: The emphasis on criminal prosecutions is totally misplaced when the real threat HIV-infected persons pose to the public is examined. Instead, the focus could be on tuberculosis and HIV-infected patients who refuse to continue the regimen of medication for their tuberculosis treatment; these are cases where drug resistant strains are more likely to be developed and transmitted. Most jurisdictions have not placed sufficient resources into the public health departments to provide for institutionalization of people who will not adhere to the recommended regimen of medication. The focus on public health departments is much more important

176. Foucha v. Louisiana, 112 S.Ct. 1780, 1786 (1992) (stating that the standard of proof in a civil commitment is “by clear and convincing evidence”); Addington v. Texas, 441 U.S. 418, 427 (1979) (concluding that in civil commitment proceedings “due process requires the state to justify confinement by proof more than a mere preponderance of the evidence”).

177. Foucha v. Louisiana, 112 S.Ct. at 1787 (holding that it is a violation of due process to indefinitely detain defendants who were acquitted based on insanity if they are not mentally ill and they are proven to be a non-danger to society).

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than worrying about the few cases in which a specific type of conduct could be shown to merit prosecution under criminal statutes.

Hernandez: These statutes may create a false expectation that the existence of a criminal law has eliminated any danger from engaging in unprotected sex. To the extent public health policy states everyone should assume their partners are infected and should take measures accordingly, that policy is undermined by the false belief that criminal statutes have helped reduce the risk.179

Closen: It is necessary to focus on the sexual transmission provisions of the laws when considering the policy issues involved in these statutes. Specifically, as a policy matter, should sexual transmission be criminalized? Is there really a victim in these instances of sexual transmission? At this point in time, should not everyone know about HIV thereby creating a situation where there are no real victims of sexual transmission?

Bobinski: Interesting policy questions are presented when the HIV-specific statutes are examined.

179. Comparable concerns have been expressed about creating a false sense of security or complacency in other settings where mandatory HIV testing has been adopted or proposed. See Personal Choice, supra note 96, at 460 (“for the vast majority of people who test negative, there may be a danger of engendering complacency and disregard for the use of safe practices”). “It can be expected that many who test negatively might actually be positive due to recent exposure to the AIDS virus and give a false sense of security to the individual and his/her sexual partners concerning necessary protective behavior.” SURGEON GENERAL’S REPORT, supra note 1, at 33 (emphasis in original). “The high rate [of transmission of AIDS to nonintravenous drug using heterosexuals in New Jersey] shows a lack of precautionary measures by people who mistakenly believe that they are not at risk for contracting HIV because they are not gay and do not inject drugs.” AIDS Diagnoses Grow Fastest Among Heterosexual Non-IVDUs, 5 AIDS POL’Y & L. (BNA) No. 19 at 4 (Oct. 17, 1990) (interview of Dan Bross, Executive Director, AIDS Action Council, Washington, D.C.). “If HCPs [health care professionals] were falsely reassured that a patient was seronegative, they might not follow necessary infection control guidelines when working with the patient. If a patient tests negative for HIV antibodies, it would be a serious error in judgment to relax efforts to protect against accidental exposure to blood.” Lawrence O. Gostin, Hospitals, Health Care Professionals and AIDS: The ‘Right to Know’ the Health Status of Professionals and Patients, 48 Md. L. REV. 12, 52 (1989). Certainly the debate surrounding the possible deterrent effect of HIV-specific criminal laws will continue endlessly without definitive empirical results.
There are very important and troubling policy questions regarding the criminalization of both sexual transmission and vertical transmission from mother to child.

Two problem areas concerning criminalization of sexual transmission have already been identified. One problem involves the issue of consent.\textsuperscript{180} In other words, what role should consent play in criminalizing sexual behavior between adults? The second problem involves the question of what role precautionary measures in sexual behavior such as engaging in safer sex, using condoms, or other barrier methods to prevent transmission should have when considering the criminalization of behavior.\textsuperscript{181}

Implicit in Professor Closen's comment is the idea that implied consent should be the standard. If an individual engages in sexual conduct despite the daily news accounts regarding HIV infection, he or she has essentially given his or her implied consent to the possibility of HIV transmission.\textsuperscript{182} However, that view is not defensible from a policy standpoint.\textsuperscript{183}

Is express disclosure of HIV status enough to decriminalize the conduct? Here the general problem of autonomy must be considered: how should the right of individual decision making be balanced against the desire to protect people

\textsuperscript{180} See supra text accompanying notes 107-108.
\textsuperscript{181} See supra note 71.
\textsuperscript{182} No state explicitly incorporates implicit or presumed consent ideas into its HIV transmission statutes. States that have failed to expressly criminalize HIV transmission could be reflecting these ideas, but it is more likely that they will use general criminal statutes to penalize behavior creating a risk of HIV transmission.
\textsuperscript{183} The policy choice lies between imposing either a duty of suspicion or a duty of care for those engaged in sexual relationships. A duty of suspicion would protect public health but at a high price: it devalues the idea of trust in relationships, and more importantly, it fails to recognize that most people do not apply \textit{caveat emptor} principles to matters of the heart or loins. The imposition of a duty of suspicion may injure the public health because the existence of such a legal duty might lull persons into failing to exercise self-protection. Imposing a duty to care does have the virtue of recognizing people's expectations about relationships and thus can foster, rather than undermine, that which many people value about sexual intimacy.
from their own decisions.\textsuperscript{184}

From a feminist jurisprudence standpoint, one could argue that by allowing consent as a valid defense, individuals are empowered to make choices about their future thereby appropriately marking the line between the state's desire to protect public health and the need not to intrude on individual autonomy in matters of personal importance.\textsuperscript{185} The drawback is that it is virtually impossible for women to convince, or to have the power to convince, their partners to use condoms in many situations.\textsuperscript{186} To say that consent will be recognized as a defense is basically an illusion if the reality of the power structure in society or the inability of some people to effectively protect themselves is examined. If consent is a defense, those who are most powerless to protect themselves in society are injured.\textsuperscript{187} If consent is not a defense because some people are powerless, then the law itself will establish that women are powerless in

\textsuperscript{184} \textit{See Public Health, supra} note 46, at 86-91; \textit{see also supra} text accompanying note 108.

\textsuperscript{185} \textit{See supra} text accompanying note 137 (discussion on consent and privacy).

\textsuperscript{186} \textit{See, e.g.,} Joseph A. Catania et al., \textit{Prevalence of AIDS-Related Risk Factors and Condom Use in the United States}, 258 \textit{Science} 1101, 1105 (1992) ("[t]he overrepresentation of women among respondents with risky partners who were not using condoms may reflect relationships in which women feel powerless to influence the risk behaviors of their partners or to insist on protective actions that would prevent HIV transmission"); \textit{see also} Mary E. Guinan, \textit{HIV, Heterosexual Transmission, and Women}, 268 \textit{JAMA} 520, 520 (1992) (noting difficulties women face in requiring condom use by male partners); \textit{see generally} Condom Use Among Male Injecting-Drug Users—\textit{New York City, 1987-90}, 41 \textit{Morbidity \\& Mortality Wkly Rep.} 617 (1992) (reporting the low rates of condom usage by male intravenous drug users; condoms were used least often with a man's steady sexual partner). The association of power with women who request condom use is quite strong; a jury in Austin, Texas apparently refused to indict a man for rape after it was revealed that he had worn a condom at the female victim's request. \textit{In Texas, A Grim Question of Survival}, \textit{Time}, Nov. 9, 1992, at 26 (a second grand jury eventually indicted the defendant for aggravated sexual assault). These gendered arguments could apply logically to men as well as women. Men might also be vulnerable to the psychological or economic dependence common to intimate relationships. The current data, however, suggests that women, as a group, might be more vulnerable than men.

\textsuperscript{187} Consent statutes protect people by requiring disclosure of HIV status to those powerless to say no; thus the powerless are permitted to ratify their own destruction.
their relationships and that they need to be protected from their own decisions.\textsuperscript{188}

\textbf{Strader:} Also, attempting to deal with consent in a statutory context is very difficult. For example, a proposed California criminal HIV transmission statute has a somewhat bizarre provision that criminalizes exposure to HIV when a person engages in “protected sexual activity” and knows that he or she is infected with HIV and has not disclosed the information to the sexual partner.\textsuperscript{189} This provision appears to criminalize intercourse with a condom.

\textbf{Closen:} The draft of the proposed California law defines “protected sexual activity” as “sexual activity with the use of a condom.”\textsuperscript{190}

\textbf{Strader:} The provision for criminal penalties does not, however, appear to bear any valid relation to culpability. The proposed law states that intercourse with a condom and without disclosure is punishable by imprisonment for up to a year.\textsuperscript{191} If the virus is actually transmitted, presumably when the condom is defective or breaks, the term of imprisonment is enhanced by an additional five years.\textsuperscript{192} The additional penalty is related to the effectiveness of the condom; it is not related to the defendant’s culpability. Thus, in a statutory context, it becomes extremely complicated to try to deal with consent, protective measures, and sentence enhancement in detail.

\textbf{Bobinski:} One question presented by this situation is whether the use of protective measures should

\textsuperscript{188} A person’s power and authority to make decisions on his or her own behalf would be undermined by legal rules which devalued consent to participate in risky transactions. Laws requiring the use of safer sex practices as well as consent, could directly disempower persons from choosing to accept risks.

\textsuperscript{189} California Senate Bill 982, March 8, 1991 (as amended in the Senate, May 6, 1991) (introduced by Senator Davis).

\textsuperscript{190} \textit{Id.} at § 3353.1(e)(4).

\textsuperscript{191} \textit{Id.} at § 3353.1(c).

\textsuperscript{192} \textit{Id.} at § 3353.1(d)(2).
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substitute for consent. In other words, the person's behavior is not to be criminalized if he or she either obtains consent or uses a condom. Should both consent and use of a condom be required? Requiring both measures would remedy the power imbalance problem in some relationships because disclosure alone would not be sufficient.

Schultz: A problem may exist where people do not disclose their HIV status when they are in a power situation. Disclosure is absent because it would not make any difference. The result in more cases probably would be that not only would there be an absence of any specific disclosure but also the power relationship would be such that the use of condoms would be out of the question.

Hermann: Conversely, many situations exist in which an HIV positive drug user continues to have sexual relations with a spouse despite the fact he or she is HIV positive and undergoing treatment. The spouse knows of the diagnosis and treatment, but he or she is powerless to resist the pressure from the other spouse. Subsequently, he or she continues to engage in the unprotected sexual acts.

Schultz: As a general proposition, a tremendous feat has been accomplished when disclosure is obtained in that most people upon disclosure

193. Some commentators have argued that consent is not necessary if barrier protections are used to reduce the risk of transmission. See, e.g., Gostin, supra note 7, at 1054 (arguing that appropriate criminal statute will penalize defendant who "does not notify his partner of his HIV status or does not use barrier protection against exchange of body fluids") (emphasis added). It would be possible to require both consent and the use of safer sex techniques. See, e.g., Kinney, supra note 7, at 271; Sullivan & Field, supra note, 7 at 183.

194. Currently, no state treats consent and use of safer sexual activity as alternative escapes routes from criminalization. Some safer sexual conduct might arguably lie outside the criminalization statutes on the theory that it poses no, or virtually no, risk of HIV transmission. Criminalization of such activities would appear irrational.

would either flee or insist on the use of protective measures.

Hermann: Social situations do exist where those options are not available.

Schultz: Disclosure will result in the fewest people becoming infected. If disclosure is the goal, then create a defense. If condom use is the goal, then create a defense.196

Bobinski: Consent or prophylactic measures as alternatives?

Schultz: Yes, alternatives. However, if empirically a substantial number of situations exist where there is disclosure but HIV transmission is not prevented, then the equation will be changed substantially.

Hermann: Obviously, the ideal would be to provide social resources to women in these situations to empower them to avoid intercourse where they have this potential for exposure; however, those resources do not exist. As the population demographics shift, there is likely to be an increasing problem of people who are not able to refuse sexual relations with infected partners.

Bobinski: The focus of this discussion has thus far been on heterosexual couples where one of the partners is an intravenous drug user. The same type of situation exists with prostitutes. At the moment, it is not uncommon to have a differential price for protected versus unprotected sex.197 Prostitutes face both a personal power problem as well as an economic problem. Disclosure of a client’s HIV status in a prostitution situation does not necessarily mean that the prostitute would walk away because of the economic power imbalance. It may be necessary to

196. See Closen et al., supra note 47, at 712.
197. See, e.g., Filipino Condom-Users Get Sex Discount, The Reuters Library Report, Feb. 24, 1993. See also Gostin, supra note 7, at 1044 (prostitutes often attempt to use barrier precautions).
require disclosure plus use of a barrier method in such a case.

Schultz: The notion that the world should be made safe for sex with HIV infected people is problematic. HIV infected individuals have a definite responsibility. The argument that "everyone knows of the dangers of HIV-AIDS therefore criminal prosecution is not necessary" is analogous to a rationalization regarding crime in North Saint Louis. That argument states: "they're just killing each other so why worry about it?"

Bobinski: Rape cases are also similar in that courts or juries seem to believe that when a woman walks late at night she should know that she is opening herself to a violent assault. 198

Closen: In the context of vertical transmission, should a woman be considered a felon if she is HIV-negative when she bears a child, contracts HIV after childbirth, and then breast feeds that child? 199

Bobinski: The vertical transmission issues can be discussed in a variety of ways. Transmission of HIV at birth or prior to birth 200 can be examined as well as postbirth behavior such as breastfeeding. 201 HIV statutes either fail to mention this problem of transmission from mother to child or exclude only in utero transmission. 202 This exclusion is interesting. For

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199. Although breast-feeding has been documented as a route of HIV transmission from mother to infant, HIV is actually transmitted by that method in only a very small number of the cases of HIV-infected infants. See Jarvis et al., supra note 1, at 7.

200. See supra text accompanying notes 109-112 (pregnancy and risk of transmission).

201. Recent research indicates that HIV may be transmitted through breast milk. See, e.g., Van de Perre, et al., Mother to Infant Transmission of Human Immunodeficiency Virus By Breast Milk: Presumed Innocent or Presumed Guilty, 15 Clinical Infectious Diseases 502 (1992) (reviewing data and concluding that rate of transmission is not known).

202. Several states have HIV statutes with language arguably broad enough to cover maternal transmission. See, e.g., Ala. Code § 22-11A-21 (Supp. 1992) (offense
example, the Texas statute, which has been repealed, excluded in utero transmission without mentioning breast feeding.\textsuperscript{203} This structure implicitly suggests that breastfeeding could be a basis for a criminal prosecution.

These situations are reminiscent of the drug cases involving an alleged delivery of a drug to a child during the birth process.\textsuperscript{204} The HIV specific statutes generally require exposing a "person" to HIV infection; one possible interpretation is that the statutes would not apply in a vertical transmission case because the recipient is not a "person," merely a fetus.\textsuperscript{205} Under
most state laws, until the fetus is born, it is not considered a person. Prosecutors might use this definition of “person” to argue that exposure to HIV occurred through the umbilical cord in that moment after birth when a “person” exists, just as they have attempted to argue in the cocaine cases. The rejoinder arguments also parallel those employed in the cocaine cases; defendants could argue that the legislature did not intend to apply the statute to vertical transmission.

The risk of vertical transmission may seem high in a comparative sense, a thirty percent risk of HIV transmission from mother to child. On the other hand, that same risk can be viewed as very low if it is turned around to state that a seventy percent chance exists of having a child who does not have HIV infection. This statistic could be viewed as a substantial possibility that the child will not be infected.

Closen: If vertical transmission laws are viewed as criminalizing motherhood, women may be encouraged to abort. Their attempts to abort will be nearly 100% effective whereas the women would have had a fifty to seventy percent chance of bearing a child free of HIV infec-

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(West 1992) (repealed effective Sept. 1, 1994) ("transfer the actor's own blood... into the bloodstream of another, or through the other person's skin or other membrane").


207. It is not clear precisely when a woman's HIV infection is transmitted to her fetus. See, e.g., A. Ehrnst et al., HIV in Pregnant Women and their Offspring: Evidence for Late Transmission, 338 LANCET 203, 205-06 (1991) (concluding that HIV transmission was likely to occur in later stages of pregnancy or during birth). The HIV transmission statutes, however, typically criminalize conduct that could pose a risk of transmission. These statutes could apply to post-birth conduct even if the fetus was actually infected with HIV before birth.

208. See generally Gestational Responsibility, supra note 93.

209. See supra note 109 and accompanying text.
Hermann: Hospitals are pressuring for prosecutions in this area because they have been burdened with women who have had two or three HIV-infected children. Hospitals believe that the women have totally ignored the medical advice and are placing the burden on the hospitals as well as depleting the supply of available social services.

Bobinski: A slippery slope problem exists in this instance. Many situations involve women with a genetic history that leads them to believe that their child may have some serious genetic condition, even one that would be fatal to the child. Does society want to criminalize the behavior of women giving birth to children who may have fatal conditions? Is it unfair or socially unjust to focus on HIV infection without also examining other apparently similar types of behavior merely because these other situations do not carry the social baggage of disapproval associated with HIV?

Hermann: This situation has practical implications as well. Many people who deal with neonatal policy making would like to broaden the focus of attention beyond HIV. These individuals argue that prosecution should be considered, particularly when prenatal testing is available; valuable information is given when testing is obtained yet people repeatedly produce children with serious defects.

Schultz: In theory, current doctrine is sophisticated enough to deal with this sort of case. At issue is risk creation, and under the definition that many states have now borrowed from the Model Penal Code, these risks have to be substantial or very substantial as well as unjustifi-

210. See Closen & Isaacman, supra note 8, at 77.
211. See supra note 112; see also John A. Robertson, Procreation Liberty & Human Genetics, EMORY L.J. 697, 715-18 (1990) (discussing coercive application of genetic information).
able. When the literature is consulted to determine what is unjustifiable, it is clear that the value or lack of value of the conduct is taken into consideration. A risk created while raping somebody is an entirely different sort of risk than a risk created when procreating within a committed relationship; both risks should be evaluated differently. The problem is that this distinction is much too fine or sophisticated for most criminal prosecutions.

Strader: This discussion has come almost full circle, because one of the first comments Professor Schultz made was that a lot of the activity that has been discussed is same-sex sexual activity and is viewed as not having value. How do we know that? Five members of the Supreme Court have sent this undeniable message in Bowers v. Hardwick.

Women and minorities face much discrimination in the judicial system. These problems of discrimination have not been dealt with by legislatures in considering these HIV statutes.

Hermann: Furthermore, in a number of the sodomy decisions, courts have indicated that statutes are

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criminal measures that can be used to prevent HIV infection.\textsuperscript{215} However, other courts and commentators have indicated that these statutes are not effective in preventing HIV transmission.\textsuperscript{216}

\textbf{Strader:} Nearly half the states still have criminal sodomy statutes in effect.\textsuperscript{217}

\textbf{Closen:} Certainly this discussion has suggested that the legislation has not thoroughly considered and anticipated all of the important issues regarding the criminalization of the HIV-AIDS epidemic.

\textbf{Bobinski:} Although both the traditional criminal statutes and the HIV specific statutes have been criticized by the panelists, there is general agreement that there are situations where people engage in culpable conduct.\textsuperscript{218} The question is how can those rare instances best be prosecuted?\textsuperscript{219}

\textsuperscript{215} See, e.g., State v. Walsh, 713 S.W.2d 508, 512 (Mo. 1986) (sodomy statute "rationally related to the State's concededly legitimate interest in protecting the public health" because it inhibits transmission of HIV).


\textsuperscript{217} Sodomy laws exist in Alabama, Arizona, Arkansas, District of Colombia, Georgia, Idaho, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, and Virginia. See \textit{Sexual Orientation and the Law} 9-10 n.2 (Harvard Law Review eds., 1989). It should be noted, however, that courts in at least five states have invalidated sodomy laws on state constitutional grounds. See Strader, \textit{supra} note 216, at 339 n.13.

\textsuperscript{218} Closen & Deutschman, \textit{supra} note 8, at 593.

\textsuperscript{219} It should be noted that the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990 makes state emergency AIDS relief grants contingent upon a state's showing statutory capability to prosecute individuals infected with HIV who intentionally or knowingly infect or expose others through sexual contact, blood or tissue donation, or through the sharing of a hypodermic needle. Several alternative means to satisfy the federal requirement are available to the states. In addition to enacting statutes that criminalize the intentional exposure of
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Strader: A major concern with HIV specific statutes is that the legislators will never achieve the level of enlightenment that most of the commentators involved with this discussion have achieved through careful study of these issues. Statutes will never attain sufficient sophistication to satisfy the kinds of concerns expressed in this forum. Thus, the existence of these HIV-specific statutes creates a worse situation for society than would exist without the statutes.

Closen: If the constitutional challenge to the Illinois statute prevails thereby creating the first appellate level case in the country declaring one of these HIV statutes unconstitutional, perhaps an effort comparable to the attack on the sodomy statutes will begin. Piecemeal though it will be, by targeting first the worst statutes, inroads can be made against the most offensive HIV transmission statutes in the country.

others to the AIDS virus, states may also satisfy the federal requirement through several statutory alternatives.