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A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws

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I. INTRODUCTION

Sam Brown is in his early twenties. He has a drug problem and has been in and out of courts throughout his life, once on a murder charge. Sam moves to a small town in upstate New York, and over the course of two years, he goes on a killing spree. He selects his victims from among the town's most vulnerable youths. He finds them outside schools and in the local park. He picks teenagers with family problems, high school dropouts, and even a thirteen-year-old ninth-grader. These kids go with him voluntarily. They do not know the danger they are in or that Sam is carrying a deadly weapon with him wherever he goes. One at a time, Sam kills ten of

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the girls. Although his crimes are detected, Sam is not put on trial. Why does Sam escape prosecution?

Sam Brown's real name is Nushawn Williams.[1] Mr. Williams, who is HIV-positive, is alleged to have had sexual intercourse with at least forty-eight females[2] after having learned of his HIV status in 1996, and to have kept a tally of the women with whom he had intimate relations.[3] At least thirteen of these females (ages thirteen to twenty-two) are believed to have contracted the HIV virus from Mr. Williams,[4] ten of them after he learned he was HIV-positive. Two of these women have given birth to HIV-positive babies.[5] One young man was also infected when he had sex with one of the females.[6] Absent a medical breakthrough, these sixteen people will die of HIV[7] as a result of Mr. Williams' actions.[8]

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1. With only minor alterations, this could be the story of other HIV-transmitters as well. For example, in Vicksburg, Mississippi, 52 women identified an HIV-positive man as the source of their venereal disease infection, and 12 of them, ages 14–20, also have tested positive for HIV. *See* Shannon Brownlee et al., *AIDS Comes to Small-Town America*, U.S. NEWS & WORLD REP., Nov. 10, 1997, at 52.

In Missouri and Illinois, a man named Darnell McGee, who tested positive for HIV in 1992, infected at least 30 women and had sex with hundreds more. *See* Kristina Sauerwein, *Some HIV Carriers Don't Care Who They Have Sex With*, ST. LOUIS POST-DISPATCH, Nov. 23, 1997, at B1.

In Traverse City, Michigan, an HIV-positive man named James Jones had sex with at least 10 females, ages 15–35, without disclosing his HIV-infection and usually without using condoms. *See* Jim Dyer and Kristin Storey, *In Traverse City: HIV Carrier Ignites Town Sex Scandal*, THE DETROIT NEWS, Dec. 19, 1997, at C1. It is not known whether any of these women actually contracted the disease. *See* John Flesher, *HIV-Infected Man to be Charged With Failing to Notify Partners*, ASSOCIATED PRESS, Dec. 17, 1997, *available in* 1997 WL 4897239.

2. Henry L. Davis, *Latest Tests Reveal Williams Allegedly Infected 13 Women*, BUFFALO NEWS, Dec. 10, 1997, at B4. These 48 women had sexual relations with 85 other people. *Id.* In addition, 10 of Mr. Williams's sexual partners in New York City have tested positive for HIV, but it is not known if they contracted the disease from Mr. Williams or from someone else. *See* Richard Perez-Pena, *Two Births Lengthen List in One-Man H.I.V. Spree*, N.Y. TIMES, Jan. 29, 1998, at B5.

3. *See* Brownlee, *supra* note 1.

4. *See* Davis, *supra* note 2.

5. *See* Perez-Pena, *supra* note 2.

6. *See* Davis, *supra* note 2.

7. Human Immunodeficiency Virus ("HIV") is the name given to a virus that invades the body's immune system. Acquired Immune Deficiency Syndrome ("AIDS") describes a number of related conditions that are usually, but not always, the actual cause of death in the people infected with the HIV virus. *See* Eric L. Schulman, *Sleeping With the Enemy: Combatting the Sexual Spread of HIV-AIDS Through A Heightened Legal Duty*, 29 J. MARSHALL L. REV. 957, 962–63 (1996). For the purposes of this article, both AIDS and HIV will be referred to as HIV.

Nonetheless, the only crime for which Mr. Williams has been charged thus far is statutory rape for his sexual relationship with the thirteen-year-old girl who contracted HIV from Mr. Williams. Prosecutors likely will not charge him with murder or attempted murder because they would be unlikely to get a conviction.[9] There is strong circumstantial evidence that these women contracted HIV from Mr. Williams, in light of the women's youth, their relatively limited number of sexual partners, and the fact that these crimes took place in a small town.[10] Yet, proving murder or attempted murder will be difficult for other reasons. For one thing, the women are still alive and are likely to outlive Mr. Williams, who contracted the virus before the women. Additionally, evidence of intent to kill, an element of both murder and attempted murder, is unavailable.

Mr. Williams may be charged with assault in the first degree and/or reckless endangerment, which carry maximum sentences of twenty-five and seven years, respectively.[11] However, proving these crimes will also be difficult, because they require a showing of present physical injury, which might require proof that the victims are showing symptoms. Furthermore, the prosecution would have to show that the victims contracted the disease from Mr. Williams, which is also challenging to prove. Similar prosecutions in other states, against other modern day "Typhoid Harrys,"[12] have not been successful for these reasons.[13] Thus, Mr. Williams may well serve no time for the deaths of these women. Moreover, Mr. Williams' conduct as to the numerous other women who were put at risk of contracting the disease, but did not actually contract it, will go unpunished.

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8. While new treatments such as protease inhibitors have improved the conditions of HIV-infected people, there is no cure for the disease. *See id.* at 959. It is invariably fatal.

9. Jennifer Tanaka & Gregory Beals, *The Victims' Stories*, NEWSWEEK, Nov. 10, 1997, at 58–59.

10. Unlike larger, more populous areas, Chautauqua County employs only one full-time contract tracer. Because this one individual was informed of each positive test result from Mr. Williams' victims, he was able to identify the links between them and therefore to determine Mr. Williams' identity. *See* Richard Perez-Pena, *Tracing an HIV Outbreak*, ORANGE COUNTY REG., Nov. 16, 1997, at A27. Had this epidemic occurred in a jurisdiction with more contact tracers, Mr. Williams might not have been identified as the source of the infections. *Id.*

11. *See* Brian A. Brown, *The Charge is Murder, the Weapon AIDS*, ASIAN WALL ST. J., Nov. 20, 1997, at 10.

12. Tanaka & Beals, *supra* note 9, at 55.

13. *See, e.g.*, Linda Deutsch, *Attempted-Murder Charges Dropped in AIDS-Blood Case*, ORANGE COUNTY REG., Dec. 2, 1987, at A03 (discussing dismissed attempted murder charge against a defendant who sold AIDS-infected blood to a plasma bank); Joseph Perkins, *HIV Nushawn: A New Age Typhoid Mary*, LAS VEGAS REV. J., Nov. 13, 1997, at 15B (discussing failure of prosecutors to obtain felony convictions against HIV-positive men who had unprotected sex without disclosing HIV-infection).

If Mr. Williams had infected these women in a different state, a far more effective tool might be available to prosecutors. At least twenty-nine states[14] have statutes that criminalize exposing an individual to the HIV virus without disclosing HIV-positive status ("HIV transmission/exposure" laws). While these statutes vary in terms of the particular conduct prohibited and the degree of specificity of the statutory language, they share a common purpose: to deter and punish those who spread a fatal disease ("HIV-transmitters").[15] Of course, their application is not limited to individuals like Mr. Williams who have exposed only casual contacts, but extends to any HIV-positive individuals who do not take care to protect others, including loved ones, from exposure to the disease.

These statutes do have their drawbacks.[16] For example, they may discourage testing, as an individual can only be guilty of the offense if he or she knows he or she is HIV-positive.[17] Also, enforcement of the statutes may impede efforts to preserve the confidentiality of medical records. Furthermore, broader statutes, such as those that include exposure to sweat and other noninfectious bodily substances among the list of prohibited activities, may further public misconceptions about what activities can spread the virus. Also, these broad statutes arguably criminalize conduct having no possibility of infecting a partner.[18]

Despite these significant disadvantages, HIV transmission/exposure statutes are preferable to traditional criminal statutes as a means to punish and deter HIV transmission and exposure[19] for several reasons. First, these statutes remove many of the barriers to conviction posed by traditional criminal statutes to ensure that guilty perpetrators will be punished. Addi-tionally, they signal to the public

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14. According to the National Conference on State Legislatures, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington make it a felony to knowingly transmit or expose another to HIV. Alabama, Kansas, Maryland, and Montana consider this a misdemeanor offense, and North Dakota considers it an infraction. Lee Sanchez & Stephanie Wilson, *Criminalization of HIV Transmission and Exposure* (Mar. 31, 1998) <http://www.stateserv.hpts.org/public/issueb.nsf/970e745f9e50ddca852564f0007b3abd/89201b028fca1962852565c5005b60ad?OpenDocument>.

15. Most HIV transmission/exposure statutes, including the model statute contained in the Appendix, prohibit other kinds of conduct like needle sharing or organ selling in addition to exposure through sexual conduct. For the most part, consideration of other prohibitions is beyond the scope of this paper.

16. *See* discussion *infra* Part III.C.

17. The issue of what constitutes knowledge is addressed *infra* Part III.A.1.

18. *See* Thomas W. Tierney, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT'L & COMP. L. REV. 475, 487 (1991).

19. *See id.* at 512–13.

that spreading the HIV virus is criminal conduct that will not be tolerated. By specifically delineating to HIV-positive individuals what activities are prohibited, states send a clear message that people who engage in risky behavior will be prosecuted through the criminal laws.[20] This is actually advantageous to HIV-positive individuals, because they know exactly what conduct is, in fact, prohibited, and what conduct is permissible. Under general criminal offenses, HIV-positive individuals may avoid many non-risky activities because a broad range of behavior could potentially satisfy the elements of an offense.

After awareness was raised by the Jamestown epidemic allegedly caused by Mr. Williams, New York legislators began pushing for such a law. Assemblyman Stephen B. Kaufman (82d District, Albany, NY) has introduced legislation creating the crime of aggravated reckless endangerment for individuals who knowingly expose others to HIV through uninformed sexual contact or needle sharing. The crime would be punishable by up to fifteen years imprisonment.[21] The remaining twenty states should follow suit, and establish the offense of "HIV transmission/exposure,"[22] to ensure that those who knowingly expose others to a fatal disease will be brought to justice.

II. GENERALLY APPLICABLE CRIMINAL AND PUBLIC HEALTH REMEDIES

A. *General Criminal Offenses*

It is sometimes possible to prosecute those who knowingly transmit the HIV virus through existing criminal statutes.[23] In fact, such prosecutions

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20. Despite continued efforts at public education, there is disturbing evidence that people are engaging in risky sexual practices. For example, a recent NEWSWEEK article reports that there is a growing number of gay men, known as barebackers, who do not practice safe sex. *See* Marc Peyser, *A Deadly Dance*, NEWSWEEK, Sept. 29, 1997, at 76–77. And a recent Gallup poll shows that the number of Americans concerned about contracting AIDS has dropped from 42% in October 1987 to 30% in October 1997. *See* Charles W. Henderson, *HIV Transmission (Health) Fear and Appraisal of Safe-Sex Warnings in NY Scare*, AIDS WEEKLY PLUS, Nov. 24, 1997, *available in* 1997 WL 14715036.

21. Other HIV-related bills have been introduced in New York, including one that would impose mandatory testing for prison inmates who attack prison guards (A.5795, 220th Leg. (N.Y. 1997) (introduced by Assemblyman Daniel L. Feldman, D-Brooklyn)), and another that would weaken confidentiality laws to aid health agencies in their efforts to locate sex partners of infected people (A.6629, 220th Leg. (N.Y. 1997) (introduced by Assemblywoman Nettie Mayersohn, D-Queens)).

22. For a proposed statute, *see* Appendix *infra*.

23. Additionally, the victim of an HIV-transmitter may seek recourse through tort law. For a discussion of tort recovery for HIV transmission, see Schulman, *supra* note 7, at 968–71.

have been made in the past, sometimes successfully.[24] Many of these prosecutions involved HIV-positive individuals who knew of their respective infections, and who bit other people, usually police officers or prison guards.[25] Depending on the conduct involved, criminal offenses such as murder, attempted murder, manslaughter, negligent homicide, assault, or reckless endangerment might be used to prosecute those who expose others to the HIV virus.

Some commentators have argued that these general criminal statutes are appropriate for use in prosecuting HIV-transmitters.[26] A traditional murder statute, for example, is generally applied to all sorts of homicides, regardless of the particular circumstances or the weapons used. According to this argument, the HIV virus is a deadly weapon like any other.[27] Just as killing someone with the use of a gun, knife, or hammer is considered to be murder, so should killing someone with the use of the HIV virus be considered murder. Under this view, general criminal statutes are as well suited for use in HIV prosecutions as in any other crime.

However, HIV prosecutions are unlike those arising under other circumstances. They involve unique considerations that render them ill fitted for prosecution under general criminal statutes. Not only does each general criminal offense contain elements that are difficult to prove in the context of HIV prosecutions, but also the use of general criminal statutes is disadvantageous to defendants and potential defendants.

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24. *See, e.g.*, State v. Stark, 832 P.2d 109 (Wash. Ct. App. 1992) (affirming the assault convictions of an HIV-positive defendant who had engaged in unprotected oral, anal, and vaginal intercourse); Zule v. State, 802 S.W.2d 28 (Tex. Ct. App. 1990) (affirming the conviction of an HIV-positive man who had anal intercourse with a minor). Additionally, knowing exposure of others to HIV is sometimes considered an aggravating factor for purposes of sentences imposed for the commission of other crimes such as sexual assault or rape. *See, e.g.*, State v. Guayante, 783 P.2d 1030, 1032 (Or. Ct. App. 1989).

25. *See, e.g.*, United States v. Moore, 669 F. Supp. 289 (D. Minn. 1987) (upholding the assault conviction of an HIV-positive inmate who bit a corrections officer); State v. Smith, 621 A.2d 493 (N.J. 1993) (upholding the attempted murder and aggravated assault convictions of an HIV-positive inmate who bit corrections officers); Scroggins v. State, 401 S.E.2d 13 (Ga. Ct. App. 1990) (upholding the aggravated assault with intent to murder conviction of a person who bit a police officer).

26. *See, e.g.*, Michael L. Closen & Jeffrey S. Deutschman, *A Proposal to Repeal the Illinois HIV Transmission Statute*, 78 ILL. B. J. 592, 596 (1990).

27. In fact, in Texas, an HIV-positive defendant's penis and bodily fluids have been held to be deadly weapons sufficient to sustain a conviction for aggravated sexual assault. *See* Najera v. State, 955 S.W.2d 698, 701 (Tex. Ct. App. 1997). The *Model Penal Code* defines "deadly weapon" as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury." MODEL PENAL CODE § 210.0 (1985).

The application of murder statutes to HIV transmission demonstrates that general criminal statutes are undesirable for use in prosecuting these cases. Under the *Model Penal Code*,[28] a defendant is guilty of murder where he purposefully or knowingly caused the death of another human being, or where such death is caused by an action "committed recklessly under circumstances manifesting extreme indifference to the value of human life."[29] A conviction for murder requires that three elements be proved: 1) conduct; 2) state of mind; and 3) causation.[30]

The first element, proof of conduct, is the easiest to establish.[31] It requires a showing that the defendant engaged in the conduct that resulted in HIV transmission. For example, it might involve the presentation of evidence that the defendant did have sexual relations with the victim. It is the second and third of these elements that pose barriers to effective prosecution.[32]

As to the second element, the perpetrator must have the intent to kill through transmission of the HIV virus. For first degree murder, the actor must know of his or her HIV-positive status, and must desire to spread the virus to another person. This element may not be present in many HIV transmission cases, as the goal of the perpetrator may not be to spread the virus, but just to have sexual relations.[33] Even where the perpetrator did plan or hope to spread the virus, this is difficult to prove absent an admission by the defendant.

Lesser degrees of murder require a knowing or reckless state of mind,[34] which are perhaps easier to establish but are nonetheless

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28. While many states do not follow the *Model Penal Code*, this paper will refer to *Model Penal Code* definitions because of the wide variety of statutes that have been enacted by the fifty states.

29. MODEL PENAL CODE § 210.2(1)(b) (1985). In states that have enacted the common law, murder is defined as an unlawful killing with malice aforethought.

30. *See* MODEL PENAL CODE § 210.1(1), (2) (1985).

31. For instance, in the Nushawn Williams case, Mr. Williams admitted to having had sexual relations with many of the victims. James Barron, *Officials Link Man to 11 Teen-Agers With H.I.V.*, NEW YORK TIMES, Oct. 28, 1997, at A2. In fact, he himself identified many of them to public health officials. *Id.*

32. *See* Marvin E. Schechter, *AIDS: How the Disease is Being Criminalized*, 3 CRIM. JUST. 6, 8 (1988).

33. When an individual discharges a gun at someone's head or thrusts a knife at a person's chest, the intent to injure or kill usually can be readily inferred from the conduct itself. However, when an HIV-positive individual engages in sexual activity, such an intent can not be presumed.

34. Common law states such as Maryland generally indicate what types of murder constitute first degree, such as that committed in perpetration of a rape, *see* MD. CODE ANN., Crimes and Punishments §§ 408–10 (Supp. 1998), and classify all types of murder that do not fall into these categories as second-degree murder, *see id.* § 411.

challenging. Reckless murder, for example, requires conscious awareness both of HIV-positive status and of the risk of infecting another through the contested behavior, accompanied by "extreme indifference to the value of human life."[35] And knowing murder, which requires knowledge that the conduct will result in death, is probably impossible to establish in light of the fact that the virus is not transmitted by every sexual or other bodily contact.[36]

Even where the requisite degree of intent can be shown, the third element, causation, often presents an insurmountable barrier to conviction. It is difficult to establish that the disease was contracted from the defendant, especially where the victim has had multiple sexual partners or numerous possible sources of infection.[37] The potentially long period between exposure and detection exacerbates this problem. It can take as long as ten years before a victim develops symptoms of the HIV virus.[38] Unless the victim goes in for an HIV test before this time, he or she will not know until long after that the criminal act has taken place. Even where the victim does go in for testing absent symptoms, it can take as many as six months or more before the victim is seropositive, meaning that the HIV virus is detectable in the blood.[39] Given these obstacles, establishing causation may not be possible.[40]

The final challenge in prosecuting HIV-transmitters under traditional murder statutes is that the prosecution cannot proceed until the victim dies. Although HIV is invariably fatal, the victim may not die for many years.[41] Clearly, such a delay will significantly hinder both the prosecution and the defense in a case brought under a murder statute. Also, many states still follow the year and a day rule, whereby murder cannot be charged unless the victim dies within a year and a day of the criminal activity.[42] Further, given that the defendant also has the HIV virus, and necessarily

35. MODEL PENAL CODE § 210.2(1)(b) (1985).

36. *See* Kathleen M. Sullivan & Martha Field, *AIDS and the Coercive Power of the State,* 23 HARV. C.R.-C.L. L. REV. 139, 162–63 (1988).

37. For a discussion of the issues involved in proving even the relatedness of two individuals' HIV-infections, much less evidence of causation. *See* State v. Schmidt, 699 So. 2d 448 (La. Ct. App. 1997).

38. *See* Schulman, *supra* note 7, at 966.

39. *See* Tierney, *supra* note 18, at 480–81.

40. *See id.* at 493.

41. According to research current in February 1996, 95% of people with HIV will die within 12 years of contracting the disease. *See* Najera v. State, 955 S.W.2d 698, 701 (Tex. Ct. App. 1997).

42. *See* State v. Minster, 486 A.2d 1197, 1200 (Md. 1985) (citing jurisdictions retaining the year and a day rule).

contracted it before the victim, it is likely that he or she will have died before the prosecution can go forward, rendering the prosecution moot.[43]

Prosecutions for HIV transmission under traditional murder statutes are also unfair to defendants. In addition to the fact that they may take place long after the actual exposure occurred, there may be no protection for defendants who warned victims of their HIV-positive status. Because consent is not a defense to murder, even those sexual contacts that took place after full disclosure by the HIV-positive individual, and after a conscious affirmance of the desire to proceed with the sexual encounter by the "victim," would be considered criminal.[44] Thus, HIV-positive individuals are effectively banned from engaging in any sexual contact whatsoever, at least with uninfected individuals. Any sexual contact, despite the degree of disclosure and consent that might be present, would constitute murder under traditional criminal murder statutes.[45]

Manslaughter prosecutions pose similar difficulties. Although a first degree manslaughter prosecution does not require proof of an intent to transmit the virus, but merely consciousness that certain conduct might result in transmission, the *mens rea* element is still difficult to establish. Moreover, the difficulties with causation that are present in murder prosecutions are identical in manslaughter cases.[46]

As with murder statutes, the use of manslaughter statutes is also detrimental to the defendant. The jury must evaluate how a defendant should have acted, resulting in the risk of prejudice and selective enforcement.[47] It is possible that a person could be convicted of manslaughter even absent knowledge of HIV-positive status if the factfinder determines that infection was due to behavior involving "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[48] A jury that disapproves of certain lifestyles might consider the commonplace practices of people who live that lifestyle as a deviation from law-abiding conduct even where that conduct is perfectly legal.

Use of negligent homicide statutes is also ill-advised. Since an individual is guilty of negligent homicide when he ignores a risk of which he should be aware, this offense could be used to prosecute those who do not know of their HIV-positive status. While negligent homicide might be easier to prove than murder, it would permit factfinders, usually juries, to impose

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43. *See* Tierney, *supra* note 18, at 492.
44. *See* Sullivan & Field, *supra* note 36, at 165.
45. *Id.*
46. *See* Tierney, *supra* note 18, at 494.
47. *See* Sullivan & Field, *supra* note 36, at 164.
48. MODEL PENAL CODE § 2.02(2)(c) (1985).

their interpretations of what constitutes "reasonable" conduct, and would allow prejudice and discrimination to govern the determination of guilt.[49]

Prosecution under an assault statute can proceed before the death of the victim, making both prosecution and defense easier in some respects. However, similar requirements of intent and causation exist. The defendant must have known of his or her HIV-positive status and have believed that the disease could be spread through the conduct in question.[50]

Unless "likeliness" of transmission can be demonstrated, assault prosecutions may not succeed. Additionally, "likeliness" may be hard to establish. In *Guevara v. Superior Court*,[51] a California judge granted the defendant's motion to set aside the information as to the assault charges because of the lack of proof that "one or two individual incidents of unprotected sex between an HIV-positive male and an uninfected female [was] . . . 'likely to produce great bodily injury.'"[52] Given that one incident of unprotected sexual contact is not, in fact, "likely" to result in contraction of the disease,[53] jurisdictions that contain "likeliness" in their definition of the crime may not be able to use assault to punish HIV-transmitters.[54]

One advantage of using assault statutes to prosecute HIV transmission is that consent, participation in consensual sexual contact after disclosure of HIV-infection, is probably a defense to assault.[55] In *Guevara*, the court held that the defendant, who knew he was HIV-positive, could not assert that the victim, a minor, consented to the assault merely by participating in a consensual sexual encounter with the defendant.[56] The *Guevara* court, however, did not address the situation where the defendant has disclosed his HIV-infection status to the victim, leaving open the argument that disclosure of HIV-positive status and procurement of consent to proceed before engaging in sexual relations constitutes a defense to assault charges.

An additional, and substantial, disadvantage with each of the above discussed criminal offenses (murder, manslaughter, negligent homicide, and assault) is that risky behavior that does not actually result in transmission

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49. *See* Sullivan & Field, *supra* note 36, at 164–65.

50. *See* Tierney, *supra* note 18, at 498.

51. 73 Cal. Rptr. 2d 421 (Cal. Ct. App. 1998).

52. *Id.* at 424.

53. There may be as little as a 1 in 500 risk of contracting HIV through sexual activity absent aggravating factors like the presence of another sexually transmitted disease. *See* Michael L. Closen et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921, 961 (1994).

54. Even where assault can be proven, it is only a misdemeanor crime. MODEL PENAL CODE § 211.1(1) (1985). Assault may carry insufficient punishment, especially in those circumstances where the transmission was purposeful or knowing.

55. *See* Sullivan & Field, *supra* note 36, at 168.

56. *See Guevara*, 73 Cal. Rptr. 2d at 423–24.

will go unpunished. Unless the victim contracts the disease, the HIV-infected individual is guilty of no crime, regardless of whether he intended to infect or consciously disregarded the risk of infecting the victim. His behavior, however, may be just as reprehensible as that of the individual who actually did infect his partner. For this reason, murder, manslaughter, and other criminal offenses requiring actual transmission are an insufficient means of punishing those who expose others to HIV.

Attempt crimes such as attempted murder have the advantage that they can be used to charge defendants where no actual transmission occurs. Even absent transmission, a person who "does . . . anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part" may be guilty of an attempt crime.[57] Thus, attempt crime prosecutions can be pursued against individuals who engage in risky behavior. Defendants who engage in like behavior are treated equally regardless of whether HIV transmission occurs. Also, because actual transmission is not required, the element of causation that poses such problems in prosecutions for the choate crimes discussed above is eliminated.

However, attempt crimes have disadvantages. They are hard to prove because they require a strong showing of intent. Because attempt generally requires a purposeful or knowing state of mind, at least under the *Model Penal Code*, a person would have to have the goal of infecting another individual, or knowledge that infection would, in fact, occur in order to be found guilty.[58] Not only is this a relatively rare occurrence within the scope of HIV transmissions,[59] but it is also difficult to prove.[60]

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57. MODEL PENAL CODE § 5.01(1)(b) (1985).

58. In *State v. Hinkhouse*, 912 P.2d 921 (Or. Ct. App. 1996), for example, a conviction for attempted murder and attempted assault was affirmed, but only because there was evidence both that the defendant had stated his intent to spread the virus and that the defendant took precautions including condom usage and disclosure when having relations with his future wife, but not when intimate with other women. *Id.* at 925.

In another case, an attempted manslaughter charge against a prostitute was dismissed on the grounds that attempt to engage in prostitution despite knowledge of HIV-positive status could not be equated to the intent to kill. *See* State v. Sherouse, 536 So. 2d 1194, 1194 (Fla. 5th Dist. Ct. App. 1989).

59. *See* Sullivan & Field, *supra* note 36, at 167.

60. In *Smallwood v. State*, 680 A.2d 512 (Md. 1996), for example, the Maryland Court of Appeals reversed an HIV-positive defendant's conviction for attempted murder and assault with intent to murder because the court found that there was insufficient evidence of intent. *Id.* at 514. The court noted the absence of a statement of intent by the defendant, distinguishing the case from others where the defendants "have either made explicit statements demonstrating an intent to infect their victims or have taken specific actions demonstrating such an intent and tending to exclude other possible intents." *Id.* at 516. While the defendant

Additionally, because impossibility generally is not a defense,[61] attempt crimes may be used to prosecute intent to transmit through biting or spitting.[62] These are activities that are unlikely to actually transmit the HIV virus.[63] Criminalizing these activities, then, reinforces erroneous beliefs about transmission, thus undermining public education efforts.[64] Furthermore, it punishes individuals who have not actually harmed anyone and who could not have harmed anyone by the activity for which they are being prosecuted.[65] Prosecutions for this conduct may be warranted because some of the perpetrators do, in fact, desire to infect another and may be quite dangerous. The problem is that HIV-positive individuals prosecuted for biting or spitting may *not* actually have intended harm, and may have been fully aware that their actions were incapable of spreading the disease. This concern is especially high where there is limited or no direct evidence, such as incriminating statements, that reveal an intent to kill.

Reckless endangerment is arguably the easiest of traditional criminal offenses to establish. It does not require a finding of actual transmission,[66] and thus, no proof of causation must be presented. Additionally, no intent or purpose is required, but only that the defendant recklessly engaged in conduct "which places or may place another person in danger of death or serious bodily injury."[67]

Reckless endangerment is also easier to establish than other crimes because actual knowledge of HIV status may not be needed where the defendant had symptoms and/or engaged in risky behavior. However, this

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would probably have been found guilty under an HIV transmission/exposure law, as the court noted that they "ha[d] no trouble concluding" that the defendant had knowingly exposed the victim to the risk of an infection, the conviction for attempted murder had to be dismissed because there was insufficient evidence that the defendant had an intent to kill. *Id.* at 517 n.4.

61. *See* Closen, *supra* note 53, at 930.

62. Of the more than 10 attempted murder convictions for HIV transmission or exposure around the country, most have involved biting or spitting. *See* Brown, *supra* note 11, at 10.

63. *See* Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1023–25 (1989).

64. *See* Closen, *supra* note 53, at 933–34.

65. In *State v. Smith*, 621 A.2d 493, 495 (N.J. 1993), for example, an attempted murder conviction was affirmed despite the appellant's contention that he did not intend to transmit the virus and did not believe it was possible to transmit the virus through a bite. *Id.* at 495–96. The defendant specifically appealed his conviction to no avail on the grounds that HIV could not be spread through a bite. *Id.*

66. In fact, prosecution under reckless endangerment statutes is possible even absent any evidence that the defendant himself is actually infected. *See* Tierney, *supra* note 18, at 495. A sexually active homosexual male with HIV-like symptoms who engages in unprotected intercourse may satisfy the elements of the crime. *Id.*

67. MODEL PENAL CODE § 211.2 (1985).

poses a risk to potential defendants. There are serious negative ramifications to holding people responsible for knowledge of HIV status merely on the basis of their conduct, for this gives factfinders a dangerous opportunity to discriminate against disfavored groups.[68] For example, it permits a factfinder to equate homosexuality with HIV-positive status. Use of the reckless endangerment statutes raises the possibility of a huge scope of enforcement against all those who engage in high risk behavior. Like manslaughter, this offense allows for a subjective jury determination of what constitutes "reckless" behavior.

Not only can the offense of reckless endangerment be used to the detriment of a criminal defendant, it also imposes burdens on the criminal justice system in light of the difficult and potentially prejudicial evidentiary requirements like past sexual history that might be implicated.[69] And like assault, reckless endangerment is a misdemeanor, not a felony, which may undermine its punitive and deterrent effects.[70]

In addition to the disadvantages in the use of general criminal offense statutes as discussed above, there are no limitations on what conduct can trigger a prosecution. With HIV transmission/exposure laws, prohibited conduct is clearly delineated.[71] Under general criminal statutes, however, prosecutors have broad discretion to pursue cases involving conduct that should not be considered criminal. Not only is this situation disadvantageous to potential criminal defendants, but it also creates a risk that the public will harbor a negative view about the advisability of criminalizing HIV transmission/exposure.[72]

B. *Public Health Crimes*

In several states, it is a crime to expose others to contagious diseases, and in others, to expose others to sexually transmitted diseases.[73] In some respects, these statutes seem suitable for use in prosecuting HIV-transmitters, as HIV is both sexually transmitted and contagious in certain circumstances. Generally speaking, these crimes capture activity only by those who knew of their infection, thus limiting the role of prejudice in HIV prosecutions.

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68. *See* discussion *infra* Part III.A.1.

69. *See* Tierney, *supra* note 18, at 495–96.

70. *See id.* at 496.

71. *See* discussion *infra* Part III.

72. *See* Closen, *supra* note 53, at 935–36.

73. *See, e.g.*, COLO. REV. STAT. ANN. § 25-4-401(2) (West 1997); S.C. CODE ANN. § 44-29-60 (Law. Co-op. Supp. 1998); UTAH CODE ANN. § 26-6-5 (1998).

However, these statutes do not take into account the severity of the HIV virus and the inevitability of death upon contraction. Unlike most other sexually transmitted diseases ("STDs") and most contagious diseases, HIV is incurable and is invariably fatal. Many of these statutes are inadequately lenient in terms of the punishment they impose on offenders, in some cases providing for only a small fine for violations.

Additionally, like some of the statutes that are specific to HIV transmission,[74] some of these public health statutes are overly broad in the sense that they criminalize conduct that cannot spread the HIV virus.[75] Sexually transmitted disease statutes are also, by definition, underinclusive in light of the fact that HIV can be transmitted by nonsexual contact such as needle sharing or blood transfusions.[76]

Finally, as with the use of murder statutes, which would, in effect, criminalize all sexual contact regardless of consent,[77] many of these public health statutes would require permanent abstinence.[78] Given that it is possible to prevent or greatly limit the risk of contracting the disease through safe sex practices, a permanent and unequivocal restriction on all sexual contact is unnecessary.

C. *Public Health Regulations*

Some states seek to control HIV transmission through regulatory rather than criminal provisions. Delaware, for example, has a number of regulatory provisions governing the state's ability to quarantine infected persons or to prohibit certain conduct by infected persons, in addition to provisions relating to reporting, confidentiality, and required treatment.[79] Like those of other states, Delaware's public health provisions are not restricted to HIV, but govern all contagious diseases.

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74. *See infra* Part III.A.2.

75. *See* Sullivan & Field, *supra* note 36, at 170. For example, LA. REV. STAT. ANN. 14:43.5(B) (West 1997) provides that "[n]o person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through *any* means or contact," (emphasis added), without defining what is meant by these terms. Because medical science often cannot rule out the possibility, however infinitesimally small, that the virus cannot be transmitted by a particular type of conduct, this statute could be interpreted to criminalize such things as a kiss.

76. *See* Sullivan & Field, *supra* note 36, at 170–71.

77. *See* discussion *supra* Part II.A.

78. *See, e.g.*, COLO. REV. STAT. ANN. § 25-4-401(2) (West 1997) (stating: "It is unlawful for any person who has knowledge or reasonable grounds to suspect that he is infected with a venereal disease to . . . knowingly perform an act which exposes to or infects another person . . . .").

79. *See* DEL. CODE ANN. tit. 16 §§ 701–712 (1997).

Some of these provisions give the state the power to isolate individuals with the HIV virus from contact with other people.[80] Because these provisions are regulatory, not punitive, they are not subject to constitutional restrictions barring cruel and unusual punishment or excessive bail under the Eighth Amendment.[81] Although it is conceivable that a state might seek to segregate all those people infected with the HIV virus,[82] such a broad-reaching provision is unlikely to be politically accepted,[83] and it is not constitutionally permissible under the Due Process and Equal Protection Clauses.[84] Quarantine provisions that provide for restriction only of those HIV-infected individuals whose actions fall within the statute's guidelines, on the other hand, might be constitutionally permissible.[85] Those HIV-positive individuals described as "incorrigible" or "recalcitrant," who continue to engage in high risk behavior, might be subject to these behavior-based quarantines.[86]

The goal behind these provisions is similar to that of using criminal laws to control HIV: to prevent the spread of the disease and to deter HIV-positive individuals from engaging in behavior with a high risk of transmittal.[87] However, there are several drawbacks to these provisions that render them inferior to criminal prosecutions.[88] These shortcomings include constitutional concerns, insufficient protection of individual rights because of lower evidentiary burdens, and the serious risk of selective enforcement.

For example, the standard of proof for civil confinement and other civil public health remedies, which is "clear and convincing evidence," offers less protection to the infected person than does the criminal "beyond a reasonable

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80. *See, e.g.*, COLO. REV. STAT. ANN. §§ 25-4-1401 to 1410 (West 1997); IDAHO CODE § 39-603 (1997).

81. *See* Sullivan & Field, *supra* note 36, at 145.

82. For example, Proposition 64 on the California Ballot, which was defeated on November 4, 1986, would have allowed authorities to confine HIV-positive individuals to places designated for such purposes. *After the AIDS Vote*, L.A. TIMES, Nov. 7, 1986, at 4.

83. *See* Sullivan & Field, *supra* note 36, at 146–47.

84. *Id.* at 147.

85. *See* Gostin, *supra* note 63, at 1036.

86. *Id.* While a behavior-based type of quarantine provision is in many respects superior to a status based system, it poses the significant problem of requiring individualized assessments of behavior. Because personal protections are minimal in the civil context, behavior-based quarantine is undesirable.

87. One benefit of using quarantine provisions over criminal imprisonment is that, because the individual will be in the company only of other HIV-positive individuals, the individual cannot spread the disease to others, which could occur if he is imprisoned.

88. As Larry Gostin observes, "[b]ecause the virus is primarily transmitted by intentional behavior that is within the control of the carrier, it is seen as susceptible to a legal, rather than a public health, solution." *See* Gostin, *supra* note 63, at 1019.

doubt" standard.[89] Especially where there is the risk of prejudicial or selective enforcement, and where people's liberty may be infringed by the proceedings, the state should be held to a higher burden of proof. Because HIV is incurable, use of these provisions might constitute a "civil life sentence,"[90] and should be subject to restraint and careful application.

Behavior-based quarantine is also ill-advised because it is unnecessarily broad in terms of the restrictions it imposes. Unlike other contagious diseases, HIV is not airborne nor is it transmitted by casual contact such as touching or kissing.[91] Thus, quarantine is an unnecessary remedy where there is no evidence of behavior that has the capacity to transmit the virus. If an individual has actually engaged in conduct that puts others at risk of contracting a disease, he or she deserves to be punished. If not, the person is merely an innocent victim of a terrible disease who is suffering enough without being forced to submit to a proactive limitation on liberty through quarantine. As Sullivan and Field observe, "AIDS is spread by acts, not by mere proximity . . . . Criminal law punishes culpable acts, not statuses such as being ill or infected."[92] As such, criminal laws more accurately restrict only that behavior that is prohibited.

III. HIV TRANSMISSION/EXPOSURE LAWS

Because traditional criminal statutes, public health offense statutes, and public health regulations pose the difficulties discussed in Section II above when applied to HIV exposure and transmission, statutes specifically designed to capture the unique set of circumstances and issues surrounding HIV exposure and transmission should be passed and utilized.[93]

A. *What Are HIV Transmission/Exposure Laws and What Do They Prohibit?*

At least twenty-nine states have enacted statutes that specifically criminalize knowingly exposing others to the HIV virus.[94] These statutes,

89. *See* Closen, *supra* note 53, at 969–70.

90. Gostin, *supra* note 63, at 1029.

91. *See id.* at 1027.

92. Sullivan & Field, *supra* note 36, at 156.

93. In 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic concluded, after more than 48 hearings and a year of deliberation, that "HIV infected individuals who knowingly conduct themselves in ways that pose significant risk of transmission to others must be held accountable for their actions." Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic at XVII (1988).

94. *See* discussion *supra* Part I. For a discussion of international statutes addressing the issue, see Tierney, *supra* note 18, at 502–10.

while all attempting to serve a similar purpose, vary in several significant respects. For one, some are broadly worded while others are very specific. Also, there is variation as to what conduct is prohibited. For example, some bar just the sale of HIV-tainted blood. Others punish those engaging in a wide range of activities. The basic purpose of these statutes is to criminalize specified conduct that poses a risk of spreading the HIV virus, such as sexual intercourse, unless the infected party discloses his or her HIV-positive status and obtains consent.

There are three elements that must be satisfied to be guilty of criminal HIV transmission/exposure.[95] The first element is knowledge.[96] A defendant cannot be guilty of the crime unless he or she knows, or arguably should know,[97] that he or she is HIV-positive. The second element is that the defendant must have engaged in prohibited contact such as intercourse or oral sex.[98] The final element is the absence of a defense such as consent or,

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95. A good statute will clarify, either in the text or legislative history, that it is meant to be used in place of, not in addition to, traditional criminal offenses. *See* Closen, *supra* note 53, at 936. While such a provision raises questions about separation of powers and prosecutorial discretion, *see* United States v. Batchelder, 442 U.S. 114, 123–24 (1979), it seems that state prosecutors would be bound to obey it, *see* People v. Ford, 417 Mich. 66, 80 (Mich. 1982) (looking to "several indications that the Legislature did not intend these [two] statutes to be exclusive chargeable offenses"); People v. Ramsey, 218 Mich. App. 191, 193 (Mich. Ct. App. 1996) (rejecting defendant's claim that legislative enactment of a new statute precluded conviction under other statute because language of new statute did not support defendant's argument that other statute was precluded); People v. Little, 434 Mich. 752, 760 (Mich. 1990) (upholding prosecutor's decision to prosecute under two provisions because "[t]he Legislature's enactment of [the two statutes] does not indicate any legislative intent to limit the prosecutor's charging discretion.").

96. Another method of achieving the same goal is through a strict liability provision. Such a law would provide that anyone who infects another with HIV is guilty of a criminal offense, regardless of whether the perpetrator knew he or she was HIV-positive. This type of provision would have several advantages to existing criminal transmission/exposure laws. It would be easier to prove because no evidence of intent or *mens rea* of any kind would need to exist nor would proof that the defendant had received notification of his HIV-positive status be admissible. Additionally, there would be a strong deterrent against unprotected sex. Similarly, a strict liability provision would encourage people to get tested frequently so that they could be sure they were not putting others at risk of contraction of the virus. However, there are also numerous disadvantages that militate against adoption of strict liability criminal laws of this nature. A primary drawback is that, like most general criminal offenses such as murder, proof of causation would be required. *See* discussion *supra* Part II.A. Also, criminal remedies should not be applied where the defendant was not aware of the criminal nature of his behavior, as this has no deterrent effect.

97. *See* discussion *infra* Part III.A.1.

98. This element of the crime poses the most difficulties from a drafting standpoint, and is the subject of much of the disputes on criminal HIV exposure statutes.

perhaps, condom usage.[99] States take different approaches to resolving the disputes around what satisfies these three elements.[100] Some seek to provide more precise guidelines, while others offer only a broad definition of the offense.[101]

1. Knowledge

HIV transmission/exposure statutes provide for criminal liability only where the defendant knows of his HIV-positive status.[102] Not every statute, however, is specific as to what constitutes knowledge.[103] Some statutes indicate that the knowledge provision can only be satisfied by positive results from a blood test.[104] Others do not specify what will be deemed "knowledge."[105]

Where an individual has been tested and has been informed by medical or public health personnel that he or she is HIV-positive, it seems uncontroversial that the knowledge element of HIV transmission/exposure is satisfied.[106] The question is whether less than actual knowledge can satisfy

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99. In a report published by the Archives of Internal Medicine, 40% of HIV-infected people surveyed indicated that they did not disclose their HIV-positive status to sexual partners, and 57% of these people also indicated they do not always use condoms. *See* Steven Gray, *Debate Looms on HIV Disclosure Laws: Is It Use of Deadly Weapon or Rights Breach?*, STAR-LEDGER (Newark, N.J.), Feb. 22, 1998, at 204.

100. States also provide different penalty levels for violations of their HIV transmission/exposure laws. Of the 29 offenses established by state laws, 25 are felony crimes of varying degrees, four are misdemeanors, and one is an infraction. *See supra* note 14.

101. *See, e.g.*, MO. ANN. STAT. § 191.677 (West 1997). Because broad statutes may be both vague and overbroad, *see* Closen, *supra* note 53, at 950–51, states should seek to draft statutes with specific, precise prohibitions such as the one found in the Appendix.

102. There are two issues with regard to proof of infection. The first, addressed in this section, involves the issue of when an individual has knowledge of his infection sufficient to consider his actions criminal. The second relates to evidence of infection that can be admitted at trial. It is in conjunction with this second area of HIV testing that disputes over the advisability of mandatory testing arise.

103. *Compare* MO. ANN. STAT. § 191.677(1) (West 1997) (providing that creating risk of infecting another with HIV is unlawful where the individual is "knowingly infected with HIV"), *with* ARK. CODE ANN. § 5-14-123(b) (Michie 1995) (providing that a "person commits the offense of exposing another to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus").

104. *See, e.g.*, ARK. CODE ANN. § 5-14-123 (Michie 1995); NEV. REV. STAT. § 201.205 (1995); *see also* Appendix *infra* for Model Statute.

105. *See, e.g.*, GA. CODE ANN. § 16-5-60 (1997).

106. Even positive test results might not be challenged as failing to satisfy the knowledge requirement in some circumstances. For example, Nushawn Williams has claimed that, although he did receive positive test results when he was tested by the Chautaqua County

the statutory requirements. Is constructive knowledge sufficient? Generally, a person can be held to have constructive knowledge of a fact if the exercise of reasonable care would have revealed that fact to that person.[107] There are three scenarios that might be sufficient to establish constructive knowledge: symptoms, high-risk behavior, and a prior positive partner. However, the use of any of these three means for establishing constructive knowledge is ill-advised.

The first possibility for establishing constructive knowledge, the existence of symptoms, is unsatisfactory because in many cases the symptoms of HIV are similar to those of other common ailments such as the common cold or flu.[108] Nonetheless, at least in the civil context, the presence of symptoms may be enough to hold a defendant to constructive knowledge.[109] However, common symptoms such as weight loss, fatigue, fevers, night sweats, diarrhea, and enlarged lymph glands[110] are insufficiently distinctive to provide notice to the individual that he or she is infected with the HIV virus.[111]

Health Department in August 1996, he did not believe that these results were accurate. *See* Barron, *supra* note 31, at A24. Instead, he believed that they were fabricated because officials were "just trying to get [him] out of town." *Man With HIV Says Numbers Overstated*, DALLAS MORNING NEWS, Nov. 6, 1997, at A28.

In the civil context, positive test results constitute actual knowledge sufficient to establish a duty. *See, e.g.*, Maharam v. Maharam, 510 N.Y.S.2d 104, 107 (N.Y. App. Div. 1986).

107. *See* Schulman, *supra* note 7, at 987 (citing Attoe v. State Farm Mutual Auto Ins. Co., 153 N.W.2d 575, 579 (Wis. 1967) (defining constructive knowledge as "that which one who has the opportunity, by the exercise of ordinary care, to possess")). It is possible to argue that persons who intentionally decline to determine their HIV-positive status can be imputed with that knowledge. *See* Closen, *supra* note 53, at 965. In other words, a person who deliberately avoids HIV testing, in the face of strong indications that he or she might be infected, might not be able to point to the lack of official notification of HIV-positive status as a lack of knowledge.

108. *See* Tierney, *supra* note 18, at 479.

109. *See* Doe v. Johnson, 817 F. Supp. 1382, 1391 (W.D. Mich. 1993).

110. *See* Schulman, *supra* note 7, at 987 n.206.

111. Some cases of HIV do involve identifiable symptoms such as lesions which, at least when coupled with other things like long-term cold like symptoms or a history of high risk activity, could reasonably provide a warning that an HIV test is advisable. *See id.* at 987–88. Schulman proposes that constructive knowledge be deemed to exist where there are identifiable or long-term symptoms, especially when coupled with conduct carrying a high risk of transmittal in the absence of other possible medical explanations for the symptoms. *Id.* Under Schulman's proposal, the existence of these factors should require an immediate HIV test and abstention from sexual or other activity with the possibility of transmittal of the virus until a negative result is obtained. *Id.* Schulman would also

An individual might also be held to have constructive knowledge that he is HIV-positive where he has engaged in high risk activities in the past. This is the most controversial of the three possibilities for constructive knowledge, as it looks not to actual warning signs but merely class wide identifications. For example, under this method, anyone who had ever engaged in anal intercourse might be deemed to have constructive knowledge of HIV-infection.[112] Because of the serious risk of prejudicial application, and the potential far-reaching coverage of such a definition of knowledge, prior high risk activities should not be considered to provide constructive knowledge of HIV-positive status.[113]

The final circumstance under which an individual might be held to have constructive knowledge of his or her HIV-infection is where that person is aware that a previous sexual partner has the HIV virus.[114] Establishing constructive knowledge by a prior sex partner's status is somewhat circular in the sense that it raises the question of what would establish knowledge of the other person's status. Is actual knowledge of positive results from a blood test necessary? This method of constructive knowledge would require an evidentiary showing that the person was informed of the prior partner's status. It also requires an individual to assume infection from a wide range of activities that might characterize someone as a prior sexual partner. Some of these activities might carry a very negligible risk of transmission.

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implement a "duty to investigate" in cases where even commonplace symptoms are coupled with a history of high risk behavior. *Id.*

While this proposal has the advantage of encouraging testing and responsible sexual behavior, it does not account for the potential unfairness of holding an individual responsible for knowledge that he or she does not actually have, especially in the case of an uneducated individual.

The model statute contained in the Appendix defines knowledge as actual knowledge of a positive test result, or as having been told by a medical doctor that symptoms suggest an HIV-infection and that HIV testing is advisable. This provision is designed to encourage testing and to minimize an individual's ability to avoid prosecution by refraining from obtaining actual knowledge through a positive test result.

112. For example, in one case, a Florida court held that a man's homosexual orientation and activity should be sufficient for the man to believe himself to be HIV-positive. *See* Cooper v. State, 539 So. 2d 508, 511 (Fla. 1st Dist. Ct. App. 1989).

113. *See* Closen, *supra* note 53, at 966.

114. *See* Doe v. Johnson, 817 F. Supp. 1382, 1391 (W.D. Mich. 1993). This language is criticized in Schulman, *supra* note 7, at 990, on the grounds that it is unclear whether a prior sex partner constitutes anyone with whom an individual has had some sort of sexual contact, or only those with whom vaginal intercourse has taken place. *Id.* Schulman would require testing of anyone who had engaged in vaginal, anal, or oral intercourse with an infected person. *Id.* Schulman's proposal is thus more of a mandatory testing proposal than one of constructive knowledge.

In a given case, some combination of symptoms, risk factors, and knowledge of direct exposure from an infected partner might provide sufficient evidence that the individual had knowledge beyond a reasonable doubt of his or her infection. However, the risk of allowing consideration of such variable factors is that they will be used prejudicially and arbitrarily. For example, a factfinder might determine that prior homosexual intimate conduct with the use of a precaution like a condom was nonetheless sufficient to provide constructive knowledge. Another factfinder might decline to find constructive knowledge where unprotected heterosexual intimate conduct was a part of the individual's history. For this reason, constructive knowledge should not be satisfactory to establish criminal culpability.

A good HIV transmission/exposure statute will be specific as to what constitutes knowledge. It will provide that only actual knowledge obtained from a test conducted on the individual's blood by medical or public health personnel, or strong indications from a doctor that testing is advisable because of tell-tale HIV symptoms,[115] will constitute knowledge sufficient to establish criminal culpability.

2. Prohibited Activity

Another area where specificity is valuable is in determining what activities are prohibited under the statute. Some statutes lay out very clearly the types of contacts that will suffice to establish criminal culpability, while others are not as precise.[116] Prohibited activities may include vaginal, genital, or anal intercourse, the sale or transfer of blood, sperm, tissue, organs, or plasma, and exchange of unsterile needles.

Because these statutes criminalize exposure, not merely transmission, it is important to specify what activities are prohibited.[117] Otherwise, the specter of possible prohibited activity looms too large. For example, could shaking hands constitute criminal conduct where both people's hands are sweaty?[118] What about an HIV-positive person who sneezes on someone accidentally? Does a pelvic exam by an obstetrician/gynecologist constitute "sexual penetration" under the statute?[119] A good statute will lay out in

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115. *See* Appendix *infra* for Model Statute.

116. *Compare* GA. CODE ANN. § 16-5-60(c) (1997) (providing detailed list of prohibited activities), *with* NEV. REV. STAT. § 201.205(1) (1995) (prohibiting engaging in "conduct in a manner that is intended or likely to transmit the disease").

117. *See* Tierney, *supra* note 18, at 498.

118. *See* Closen & Deutschman, *supra* note 26, at 592.

119. *See* Closen, *supra* note 53, at 952–53.

detail what conduct is prohibited, and will restrict prohibited conduct to that which actually poses the risk of transmitting the HIV virus.

Some of these provisions criminalize acts like biting or spitting. In some respects, biting cases do involve some of the most clear-cut HIV transmission cases because there is often evidence of the intent to transmit.[120] On the other hand, there are no documented cases of transmission from a bite, even where the skin has been broken.[121] Similarly, spitting has not been shown to have caused HIV-infection, as saliva contains very small quantities of HIV.[122]

Because there are no confirmed cases of HIV transfer from these activities, they should not be criminalized in HIV transmission/exposure laws.[123] While the common law doctrine of impossibility would not bar a conviction under most HIV transmission/exposure laws, the fact that it is medically impossible to transmit the virus through biting or spitting render these activities inappropriate for inclusion in HIV transmission/exposure laws.[124]

Some of these provisions would also criminalize the prenatal transfer of the HIV virus from a mother to a child.[125] Childbirth has one of the highest rates of

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120. In many of the biting cases, there is evidence that the defendant verbalized his intent to transmit the virus. *See, e.g.*, United States v. Moore, 669 F. Supp. 289, 290 (D. Minn. 1987), *aff'd*, 846 F.2d 1163 (8th Cir. 1988) (noting that after the biting incident, "defendant stated that he intended to kill the officers"); State v. Cummings, 451 N.W.2d 463 (Wis. Ct. App. 1989) (upholding admission of evidence that defendant had stated his intent to transmit AIDS even though defendant did not have the disease).

In another case, where the defendant had "sucked up excess sputum" before biting a police officer, the court found sufficient evidence to sustain a conviction for aggravated assault with intent to commit murder. Scroggins v. State, 401 S.E.2d 13, 18 (Ga. Ct. App. 1990).

121. *See* Tierney, *supra* note 18, at 484.

122. *See id.* at 485.

123. In the right circumstance, a person could be prosecuted under a general criminal statute if his conduct did not fall within the state's HIV transmission/exposure law but nevertheless was criminal in nature. For example, in *United States v. Moore*, 846 F.2d 1163 (8th Cir. 1988), the court affirmed the assault conviction of an HIV-positive inmate who bit two corrections officers, even though "the medical evidence in the record was insufficient to establish that AIDS may be transmitted by a bite." *Id.* at 1167–68. The court justified this result on the grounds that the jury was entitled to consider the defendant's mouth and teeth to be a deadly weapon even if the defendant was not HIV-positive. *Id.* at 1167.

124. However, prosecution should remain possible where appropriate under general criminal laws for the actual activity in which the individual has engaged, e.g., assault for a bite.

125. *See, e.g.*, ARK. CODE ANN. § 5-14-123 (Michie 1995). For a complete discussion of the subject of the criminalization of prenatal transfer of HIV, *see* Deborah A. Wieczorkowski Wanamaker, *From Mother to Child... A Criminal Pregnancy: Should*

transmission, ranging between twenty and fifty percent, as compared with a 1 in 500 risk of contracting the disease through sexual activity.[126] However, because transmission from mother to child occurs before birth as well as during birth, prenatal transfer should not be included within HIV transmission/exposure statutes because it would effectively bar HIV-positive women from bearing children despite the fact that they have a better than even chance of delivering a healthy baby.[127] Additionally, it might be used to prosecute women who discover they are HIV-positive after conception, thereby forcing women to obtain abortions so as to avoid criminal liability.[128] Furthermore, given that no contraceptive is foolproof in preventing pregnancy, criminalization of prenatal transfer might effectively require permanent abstinence. Finally, such a ban would logically have to be extended to couples with a high risk of passing a genetic disorder to a child. For these reasons, prenatal transfer should be exempted from inclusion in HIV transmission/exposure laws.

Breast-feeding, however, should be considered a prohibited activity. Although the risk of HIV transmission is slight, it is possible that the virus can be spread through breast milk.[129] Because there is a viable alternative to breast-feeding, namely the use of formula, the health of children should not be endangered by this activity.

3. Defenses — Consent and Condom Usage

Many HIV transmission/exposure statutes provide that consent is a defense to the crime.[130] In other words, if the defendant informed the victim that he or she was HIV-positive and the victim consented to participating in the sexual contact despite this fact, the defendant is not guilty of a crime. At least as to sexual conduct,[131] this is as it should be, because the goal of

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Criminalization of the Prenatal Transfer of AIDS/HIV Be The Next Step In the Battle Against This Deadly Epidemic?, 97 DICK. L. REV. 383 (1993).

126. *See* Closen, *supra* note 53, at 960–61.

127. On the other hand, the argument can be made that women should not have the right to bring numerous HIV-positive babies into the world, putting a huge stress on the health care system, and costing the public millions of dollars.

128. *See* Wanamaker, *supra* note 125, at 404.

129. *See* Closen, *supra* note 53, at 977–78 (citing 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)).

130. *See, e.g.*, GA. CODE ANN. § 16-5-60 (1997); IDAHO CODE § 39-608(3)(a) (1997). Even those statutes that do not specifically establish consent as a defense may implicitly allow for such an argument to be raised. *See* Closen, *supra* note 53, at 945.

131. As to other activities such as needle sharing, consent should not necessarily be a defense. Consent is not even a consideration in the context of prenatal transfer, as a fetus is obviously unable to consent to the risk of infection.

criminal transmission/exposure provisions is to ensure that no unsuspecting person is exposed to the HIV virus without being given the opportunity to take precautions or to avoid the risk. The purpose of the laws is not to require an HIV-positive person to be abstinent for the remainder of his or her life. As Closen, et al., observed, society often allows participation in even dangerous activity when consent is given.[132]

A further issue is whether consent is an affirmative defense or whether absence of consent is an element of the crime that needs to be proven by the prosecution. Some statutes specifically provide that consent is an affirmative defense, thereby putting the burden on the defendant to prove consent.[133] Other statutes include lack of consent as an element of the offense, indicating that it is the prosecution's burden to prove absence of consent.[134] Many HIV transmission/exposure cases turn on the issue of consent, and thus the placement of the burden of proof may be dispositive.[135] Because the ramifications of falsely convicting a defendant are so serious, the burden of proving consent should not be shifted to the defendant, but rather should remain on the prosecution, as it does for other crimes, like rape, where consent is often the contested issue. Lack of consent is best seen as an element of the offense, not an affirmative defense.

In addition to consent, another potential defense is that the defendant used a condom when engaging in sexual contact, thereby preventing transmission of the disease.[136] A defendant might try to offer this as a defense even where no disclosure of infection was made. The advantage of allowing this as a defense is that HIV-positive individuals could preserve their privacy and confidentiality. The problem is that condoms are not

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132. *See* Closen, *supra* note 53, at 947–48.

133. *See, e.g.*, IDAHO CODE § 39-608(3)(a) (1997) (stating: "It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity."). A Florida judge, in the course of sentencing an HIV-positive man to one year of probation for having sex with a minor, ordered the man, who had boasted about his active sexual lifestyle, to obtain written consent from partners before engaging in sex. *See Man With HIV Must Get Written Consent For Sex*, WASH. POST, Jan. 23, 1998, at A28.

134. *See, e.g.*, ARK. CODE ANN. § 5-14-123(b) (Michie 1995) ("A person commits the offense of exposing another to human immunodeficiency virus if the person . . . exposes another . . . without first having informed the other person of the presence of the human immunodeficiency virus.").

135. *See* Closen, *supra* note 53, at 945.

136. A supplemental question is whether condom usage should be required of all sexual contact involving HIV-positive individuals.

infallible when it comes to preventing HIV transmission,[137] and so the use of condoms should not be able to suffice as a defense. In other words, the use of a condom should not replace the need to disclose HIV-positive status.

B. *Advantages of HIV Transmission/Exposure Laws*

In general, HIV transmission/exposure statutes have many advantages over generally applicable criminal laws as applied to HIV transmission and over public health related criminal and regulatory provisions. They are preferable in that they make prosecution easier and more successful, they offer better protection to society from HIV-transmitters, and they are more fair to the criminal defendant.

Because criminal HIV transmission/exposure does not require that the victim actually contracts the HIV virus, but rather that the defendant engages in an activity that puts the victim at risk of such transmission, many problems associated with the use of general criminal laws are avoided. For one, there is no need to prove that a victim contracted the HIV virus from the defendant, thereby avoiding difficult evidentiary issues involving the victim's other sexual contacts or potential sources of infection. Prosecution can be pursued immediately rather than only after HIV antibodies are detectable in a victim's blood. Thus, no lag in charging will exist. Also, unlike with murder or manslaughter, there is no need to wait for the death of the victim before charging or prosecution.[138]

Criminal transmission/exposure laws also allow legislatures to determine what the proper degree of punishment is for exposing another to HIV. These statutes can provide for punishment less strict than murder, which should be treated more harshly in light of the fact that it requires a showing of intent. On the other hand, punishment can be more severe than is provided for assault or reckless endangerment, which is appropriate because HIV exposure will often result in the death of the victim.

Guilt is also easier to establish than with general criminal offenses because there is no intent requirement. The defendant need not have wanted or planned to spread the HIV virus or even have thought about whether transmission may result from their actions. Because responsible behavior and conscious consideration of the risks of transmission on the part of HIV-

137. "[C]ondoms are susceptible to breakage, spillage, seepage, defective workmanship, and improper usage." Schulman, *supra* note 7, at 986. Nonetheless, the risk of transmitting HIV from one sexual encounter with the use of a condom, assuming a 90% effective rate, is estimated to be 1 in 10,000. *See* Gostin, *supra* note 63, at 1022.

138. *See* Gostin, *supra* note 63, at 1042 n.129.

positive individuals is desirable, this aspect of HIV transmission/exposure laws benefits society.[139]

Another advantage to HIV transmission/exposure laws is that there is greater deterrent effect by having a specific statute.[140] Even absent a public prosecution of a criminal HIV exposure offender, the existence of an HIV specific statute on the books makes it clear to putative offenders that risky conduct will not be tolerated. Absent such a clear signal, some HIV-transmitters may not even be aware of the criminal nature of their conduct.

Not only is this advantageous to society because undesirable behavior will be deterred, it is also beneficial to those HIV-positive individuals who are engaging in conduct that puts them at risk of prosecution under a general criminal statute. While the illegality of uninformed sexual contact may not be apparent in a jurisdiction without an HIV transmission/exposure statute, a jurisdiction that does have such a law provides notice to HIV-positive individuals that they are at risk of being prosecuted if they engage in certain specified conduct. Thus a deterrent effect will be realized even if prosecutions are not more frequent or more successful than under general criminal laws, simply because of the public educational benefit of enacting an HIV transmission/exposure law.[141]

Potential defendants also benefit from the existence of an HIV transmission/exposure statute in the sense that it is less subject to prejudicial application.[142] Because the statute itemizes what conduct is prohibited, selective prosecutions are more apparent. In contrast, a prosecutor's decision to forgo prosecution against one individual under a general criminal statute while pursuing it against another may escape detection. At a minimum, the non-specific nature of a general criminal statute may allow the prosecutor to justify his actions. A specific law is, therefore, less arbitrary.

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139. In light of the fact that individuals are held responsible for realizing the dangers of transmittal through certain contact, medical and public health personnel should inform people of methods of transmission at the time that positive test results are given.

140. Some commentators have argued that this deterrent effect may not actually exist or that it is overstated. *See, e.g.*, Closen & Deutschman, *supra* note 26, at 593.

141. Deterrence through education of the illegality of HIV exposure is especially significant because HIV-positive individuals, as a group, are likely to be less susceptible to deterrence than the general population because of their short life expectancy. Coupled with the increased likelihood that prosecutions will be successful under a transmission/exposure law, the tendency of many people to avoid criminal activity makes public education of the illegality of exposure an effective route to achieving deterrence.

142. *See* Closen, *supra* note 53, at 950.

C. *Disadvantages of HIV Transmission/Exposure Laws*

Despite the many advantages of HIV transmission/exposure laws, there are some drawbacks.[143] The primary one is that there is the potential that the existence of such statutes may discourage individuals from getting tested.[144] Especially under a statute that provides for criminal culpability only where there is actual, and not merely constructive, knowledge of HIV-positive status, people may avoid receiving official notification of their infection so as to be able to engage in behavior which otherwise would be prohibited.[145] The model statute in the Appendix seeks to limit this problem by holding people responsible for knowledge where they have been told by a doctor that their symptoms may indicate HIV-infection and that they should be tested.

Another disadvantage of the use of HIV specific laws is that it raises issues with regard to the confidentiality of medical records. In their efforts to prosecute HIV transmission/exposure, prosecutors must obtain evidence that the defendant knew of his or her HIV-positive status. However, in some states such information is protected by confidentiality statutes that protect the defendant's medical records.[146] Even where not protected by statute, the preservation of confidentiality is of crucial importance in encouraging people to get tested. By the very act of prosecuting an individual for criminal HIV transmission/exposure, the state is disclosing that individual's HIV-infection.[147] Because of concerns about confidentiality, HIV transmission/exposure prosecutions should only be permitted where the crime is brought to the government's attention by a complaining witness or some other means outside the public health reporting system. The disclosure of confidential medical records in pursuance of a prosecution should be as

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143. Some of these issues can be resolved with a carefully drafted statute. *See* Appendix *infra* for Model Statute.

144. *See* Closen, *supra* note 53, at 964–65.

145. *See id.* at 967. One method of avoiding this problem is by providing for mandatory testing of certain individuals such as those accused of another crime. For discussion of the issues raised by mandatory testing provisions, see Michael P. Bruyere, *Damage Control for Victims of Physical Assault—Testing the Innocent for AIDS*, 21 FLA. ST. U. L. REV. 945 (1994).

146. *See, e.g.*, COLO. REV. STAT. ANN. § 25-4-1404 (West 1998); OKLA. STAT. ANN. tit. 63, § 1-502.2 (West 1997). Some confidentiality statutes provide that prosecutors do have access to otherwise confidential test results. *See* State v. Stark, 832 P.2d 109, 112–13 (Wash. Ct. App. 1992) (interpreting WASH. REV. CODE ANN. § 70.24.105 (West 1992)).

147. In fact, an Illinois court held in *In re Multimedia KSDK, Inc.*, 581 N.E.2d 911 (Ill. App. Ct. 1991), that the Illinois confidentiality statute did not bar a television station from broadcasting the identity of an HIV-positive individual because she was a defendant in a case being pursued under Illinois' HIV transmission/exposure statute. *Id.* at 912.

limited as possible, and conducted in a manner designed to preserve the defendant's confidentiality.

It should be noted that confidentiality concerns are not reserved to prosecutions involving HIV-specific statutes. Any prosecution for exposing or transmitting the HIV virus may necessitate the disclosure of medical records. In fact, even where no prosecution takes place, issues of confidentiality may arise. For example, in order to publicize Nushawn Williams' HIV-positive status and the epidemic of HIV cases that were cropping up in Jamestown, New York, public health officials utilized a previously unused statute that permitted the disclosure of confidential HIV test records upon court order.[148]

Not only do these confidentiality provisions pose serious privacy issues with regard to HIV-transmitters, but they also may require disclosure of victims' private medical information.[149] It is possible that, in an effort to track the criminal activity of an HIV-transmitter, police and prosecutors may attempt to trace back exposure and transmittal of the disease through victims.[150] Where transmission has occurred, this infringement on privacy might even extend to other sexual partners of the victim in order to rule out other possible sources from which the victim might have contracted the disease.[151] However, the privacy of third parties is less likely to be infringed by HIV transmission/exposure prosecutions than by general criminal offense prosecutions, because a finding of guilt under a transmission/exposure law requires only exposure, not actual transmission, so the victim's HIV status is not a necessary piece of evidence.

Because HIV transmission/exposure crimes often arise in the context of intimate personal situations, constitutional privacy concerns are also

148. N.Y. PUB. HEALTH LAW § 2785(2)(c) (McKinney 1997), which took effect in 1988, allows broad public disclosure of the identity of an infected person in cases of "clear and imminent danger to the public health." *See* Bill Alden, *Albany Begins Drive to Lift HIV Confidentiality*, N.Y.L.J., Dec. 1, 1997, at 1; Lynda Richardson, *Public Health Cited in Breaching H.I.V. Confidentiality*, N.Y. TIMES, Oct. 29, 1997, at B8. Statutes like this one are found in many states.

149. *See* Sullivan & Field, *supra* note 36, at 188–89.

150. *Id.*

151. *See* Tierney, *supra* note 18, at 488. However, in *Weaver v. State*, 939 S.W.2d 316 (Ark. Ct. App. 1997), the court declined to allow the HIV-positive defendant to ask questions relating to the victim's other sexual encounters. *Id.* at 318. The defendant, who had intercourse without disclosing his HIV-positive status despite the fact that he was informed that this would be a crime, was convicted under ARK. CODE. ANN. 5-14-123 (Michie 1993), and sentenced to 30 years in prison. *Id.* at 317.

implicated.[152] However, the Supreme Court has recognized that states may regulate consensual sexual activity between adults.[153] Additionally, several courts have held, in various contexts, that privacy concerns can be trumped by the state's interest in public health.[154] At least one state court, the Supreme Court of Illinois, has upheld the constitutionality of its HIV transmission/exposure law in *People v. Russell*,[155] where it was challenged on First Amendment grounds.[156]

The existence of these criminal laws may also undermine efforts to extend treatment to all infected individuals. Many of these people are already hesitant to bring their disease to the attention of public health workers and medical personnel, and may go even further underground.

Finally, as with prosecutions under general criminal offense statutes, HIV transmission/exposure laws could be used discriminatorily against politically disfavored groups like homosexuals. Although selective prosecution is less likely under an HIV transmission/exposure law than under a general criminal statute, it is still a possibility. Even in states where sodomy is legal, the existence of HIV transmission/exposure laws might allow government agents to prevent such activity.[157] Not only is this discriminatory behavior unfair to those groups that are negatively impacted by it, but also it may be counterproductive to the overall goal of slowing the spread of the disease. Homosexuals, for example, may avoid obtaining testing and treatment for fear of being targeted for investigation and/or prosecution.[158] To minimize the potential for selective enforcement, HIV transmission/exposure laws should be drawn to limit prosecutorial discretion,[159] and the legislative histories of such laws should clearly indicate that the goal is to prevent prohibited conduct by all groups equally.

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152. An individual's right to privacy in matters involving procreation and sexual activity was recognized in such cases as *Stanley v. Georgia*, 394 U.S. 557, 564–68 (1969), and *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

153. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

154. *See, e.g.*, Doe v. Roe, 267 Cal. Rptr. 564, 568 (Cal. Ct. App. 1990) (noting that privacy right is "outweighed by the state's right to enact laws which promote public health and safety"); Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Cal. Ct. App. 1984) (holding that the right of privacy is sometimes "subordinate to the state's fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender's right of privacy") (citing Barbara A. v. John G., 193 Cal.Rptr. 422, 430 (Cal. Ct. App. 1983)).

155. 630 N.E.2d 794 (Ill. 1994).

156. *Id.* at 795–96.

157. *See* Tierney, *supra* note 18, at 488–89.

158. *See id.* at 489.

159. One method for limiting prosecutorial discretion is for the statute to permit enforcement only upon a victim's request to law enforcement authorities. *See id.* at 512. This

IV. CONCLUSION

Despite the disadvantages discussed above, an HIV transmission/exposure law should be passed and utilized in every jurisdiction because it best ensures that those individuals who expose others to a fatal disease will be held responsible for their actions. HIV is a fatal disease, one which is currently both unpreventable and incurable. Without the use of HIV transmission/exposure laws, many Americans will be exposed to the disease, both by those who do not know that exposure is illegal and by those who do not care. Many of these people will contract the disease and die. Simply by adopting HIV transmission/exposure laws, the message will spread, hopefully faster than the disease itself, that society considers HIV exposure to be unacceptable behavior. And where prosecution is nonetheless necessary, use of the laws will offer prosecutors an increased likelihood of success, but only in those cases where prosecution is truly warranted.

To be certain, the effort to prosecute HIV-transmitters and exposers will necessitate some infringement on confidentiality and privacy. However, this disadvantage, while significant, should not deter the enactment of HIV transmission/exposure laws. The same criticism applies to general criminal laws, perhaps to an even greater extent, as HIV transmission/exposure laws do not require proof of actual transmission and offer better protections against discriminatory enforcement. When balanced against the certainty of death if the HIV virus is spread to uninfected individuals, the interests of confidentiality and privacy must be trumped.

The model statute contained in the Appendix seeks to capture the benefits of HIV transmission/exposure laws while minimizing their disadvantages. Specifically, it provides clear definitions of what constitutes knowledge, what activities are and are not prohibited, what will be considered a defense to the crime, and when the statute should be utilized. This HIV law is superior to general criminal laws because it provides notice to potential defendants, reinforces societal norms against dangerous behavior, deters individuals from engaging in such behavior,[160] and punishes those who do so anyway.

Nushawn Williams might not have engaged in unprotected intercourse with so many women had he known that such activity was illegal. And if he

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limitation is not without downsides of its own, most notably that it permits or perhaps even encourages people to threaten former or current partners with the prospect of punishment. The remedies for this concern, which is by no means exclusive to transmission/exposure laws, is merely a careful prosecutorial screening process and the placement of the burden of proof for all elements of the crime, including lack of consent, on the prosecution.

160. *See id.* at 486–87.

had nevertheless done so, prosecutors in New York would have a much greater chance to get a conviction and to put him in prison for his despicable actions. While punishing Mr. Williams will not give his victims back the lives he allegedly took, it will help treat the disease that afflicts America today: the willingness of some HIV-positive individuals to expose others to a fatal disease. HIV transmission/exposure laws cannot cure our nationwide problem of HIV transmission and the difficulties of punishing and deterring it, but until a medical cure for HIV is found, HIV transmission/exposure laws are the best options we have available.

V. APPENDIX — MODEL STATUTE

Sec. 1 — Criminal HIV transmission/exposure.

A. A person is guilty of the crime of HIV transmission/ exposure when that person has knowledge that he or she is infected with the HIV virus and exposes another person to that virus without the consent of that other person.

B. Violation of Sec. 1.A is a class B felony, punishable by [insert incarceration term consistent with that of other offenses].

C. Prosecution for conduct that constitutes exposure under this Section precludes prosecution under any other Section of the State Code for the same conduct.

D. Definitions to be applied to Sec.1.A.:

1. "Knowledge" means that the person has been informed by a medical or public health official, including but not limited to a doctor, nurse, health department worker, or designated representative of a home HIV testing company licensed by the Federal Food and Drug Administration ("FDA"), that his or her blood tests positive for the antibodies indicating that he or she is infected with the HIV virus; or that the person has been informed by a medical doctor both that he or she has symptoms indicating the possibility that he or she has been infected with HIV and that he or she should obtain an HIV test to confirm or disprove this potential diagnosis.

Prosecution under this Section shall not proceed in the absence of knowledge of HIV infection as herein defined.

2. "Infected with the HIV virus" means that the person has the Human Immunodeficiency Virus ("HIV"), Acquired Immune Deficiency Syndrome ("AIDS"), or any related virus or syndrome such as AIDS-Related Complex.

3. "Exposes" means that the person engages in one of the following types of conduct, and no other type of conduct:

a. Sexual activity consisting of any direct contact between the mouth, tongue, genitals, or anus of one person and the genitals or anus of another, regardless of whether condoms or other protective measures are utilized.

b. Exchange, donation, sale, or any other type of transfer to another individual of a drug needle or syringe that has been utilized by the HIV-infected individual for injecting a substance or otherwise piercing his or her skin and has not subsequently been sterilized.

c. Donation, sale, gift, or any other type of transfer to another person or entity of the tissues, blood, organs, semen, breast milk, or other bodily substance for the purposes of transplantation, transfusion, insemination, or feeding. Transfer of bodily substances to medical professionals for the purpose of testing or medical research shall not constitute prohibited conduct under this Section, nor shall in utero transmission from a mother to a child constitute prohibited conduct under this Section.

4. "Consent" means that a person over the age of majority has disclosed his or her HIV-positive status to the other person and that other person has affirmatively agreed to participate in the conduct constituting exposure under Section 1.D.3. Agreement by a minor to participate in the conduct constituting exposure does not constitute consent. The prosecution bears the burden of proving lack of consent.

5. A person is guilty of criminal HIV transmission/exposure if Section 1.A. is satisfied, regardless of whether or not actual transmission has taken place.

NOTES AND HISTORY

The purpose of this section is to prohibit conduct that has the potential of transmitting the HIV virus. As such, it has been drawn to specifically delineate the conduct that constitutes criminal behavior and to exclude types of conduct, such as biting or spitting, which do not have the capacity to transfer the virus.

It is the goal of the legislature that this section will be applied evenly against all types of people and that it will not be used selectively against certain groups. As such, prosecutors should use careful discretion when applying this section in the absence of a complaint from a victim.

Additionally, this section does not circumvent or in any way alter the provisions of the state's confidentiality statute. Prosecutors must adhere to the provisions laid out in that section of the state code and should take every precaution to preserve the confidentiality of offenders and victims alike.