Criminalizing conduct related to HIV transmission.

Donald H. J. Hermann, DePaul University

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CRIMINALIZING CONDUCT RELATED TO HIV TRANSMISSION

DONALD H.J. HERMANN*

INTRODUCTION

The majority of health care professionals and public health authorities maintain that education and counseling are the most effective means to stem transmission of human immunodeficiency virus (HIV).¹ HIV is regarded by most authorities as the causative agent of acquired immunodeficiency syndrome (AIDS).² Evidence suggests that educational programs are effective in changing the conduct of certain populations at high risk of HIV infection.³ There is, however, concern that certain individuals, knowing they are HIV-infected, may disregard the risk they pose to others.⁴ Some people may deliberately engage in conduct which threatens others with HIV infection.⁵ When individuals threatened the health of others by their deliberate or reckless behavior, it has been urged that criminal prosecution should be a considered response by the state.⁶

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* Professor of Law and Philosophy, Director of the Health Law Institute of DePaul University College of Law. A.B., 1965, Stanford University; J.D., 1968, Columbia University; LL.M., 1974, Harvard University; M.A., 1979, Northwestern University; Ph.D., 1981, Northwestern University.

1. See UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, HOW EFFECTIVE IS AIDS EDUCATION? 1 (June 1988) [hereinafter AIDS Education] “Public health officials in the United States, the World Health Organization, and many foreign countries . . . stress education as the means to prevent further spread of HIV.” Id.


4. See INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS UPDATE 1988, at 83 (1988) “There have been a number of celebrated cases of ‘recalcitrant’ individuals who refused to conform in their behavior to the advice of health officials.” Id.


This Article examines the arguments for and against the use of criminal sanctions as a means to reduce transmission of HIV by those who with a culpable state of mind engage in conduct likely to transmit the virus. This Article suggests that traditional crimes are ineffective and inappropriate in dealing with culpable conduct likely to transmit HIV and that special HIV specific criminal statutes will best serve the objectives of those who see merit in criminalizing conduct related to HIV transmission.

I. THE PURPOSES AND EFFICACIOUSNESS OF THE CRIMINAL LAW AND PREVENTION OF HIV TRANSMITTING BEHAVIOR

Criminal law is retributive to the extent it provides punishment for violations of promulgated rules. Where a person deliberately violates a statute, the actor deserves to be punished. However, the effect of the criminal law is not merely to punish, but also to deter and to prevent criminal acts. The criminal law also provides a social means to educate and to reinforce norms of social behavior.

The purposes underlying criminal law are realized in appropriate rules and penalties directed at stemming HIV transmission. Those persons who deliberately violate rules aimed at preventing HIV transmitting conduct, deserve to be punished. As the Report of the Presidential Commission on Human Immunodeficiency Virus Epidemic stated: "Just as other individuals in society are held responsible for their actions outside the criminal law's established parameters of acceptable behavior, HIV-infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions."

Moreover, there is a social objective to prevent conduct likely to spread HIV in order to prevent further transmission of HIV to uninfected persons; and there is a social goal to educate the public about conduct likely to spread HIV and to reinforce

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8. See H. HART, PUNISHMENT AND RESPONSIBILITY 158-59 (1968). "This... conception of punishment... makes primary the meting out to a responsible wrongdoer of his just desert." Id.
9. See Andenaes, General Prevention-Illusion or Reality, 43 J. CRIM. L.C. & P.S. 176, 179 (1952). "By general prevention we mean the ability of criminal law and its enforcement to make citizens law-abiding." Id. at 179.
10. See Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROB. 401 (1958) "[W]hat distinguishes a criminal... sanction... is the judgment of community condemnation which accompanies and justifies its imposition." Id. at 404.
CRIMINALIZING HIV TRANSMISSION

social norms against behavior likely to result in HIV transmission.

The question arises as to whether the criminal law is an efficacious means to deter HIV transmitting behavior. Criminal statutes are effective to deter individuals from engaging in HIV transmitting behavior to the extent statutes specify proscribed behavior which is likely to spread the virus, to the extent violations of such statutes will be reported and prosecuted, and to the extent such statutes have explicit penalties established for their breach. As one commentator suggested: "It is not unreasonable for society to establish clear parameters as to the behaviors it will not tolerate. By drawing a bright line around the behaviors that pose serious public health risks, the law gives clear notice of the conduct which will be subject to criminal penalty." Criminal statutes which are clear in their content, specifying prohibitions which are within the capacity of rational persons, and which specify specific penalties for their breach can be expected to result in compliance. When such statutes are directed at HIV transmitting behavior such statutes should be effective in reducing the transmission of HIV.

Another question arises, can criminal statutes directed at behavior likely to result in HIV transmission be just? Where the conduct forbidden is conduct which is medically and scientifically recognized as conduct likely to result in the transmission of HIV, it is just to forbid that conduct. As has been suggested, with the lack of an effective vaccine or curative therapy, all reasonable means of encouraging restraint with respect to behavior known to spread infection should be explored. Conduct likely to infect others with HIV, including serious illness and likely death, warrants criminal sanctions. Moreover, the use of the criminal law is fair to those who may be subject to criminal liability when behavior forbidden is within their control and the law gives such persons clear notice of the behavior prohibited.

Finally, the question arises whether the criminal law is the preferred use of state authority to prevent HIV transmission. The alternative means of exercising the police power of the state are the mental health law and the public health law. The mental health law re-

14. See REPORT, supra note 11, at 130. "Establishing criminal penalties for failure to comply with clearly set standards of conduct can also deter HIV-infected individuals from engaging in high-risk behaviors, thus protecting society against the spread of the disease." Id.
17. See, e.g., Institute of Medicine, National Academy of Sciences, Mobilizing
quires not only a showing that an individual poses a risk of harm to others, but also that the person suffers from a mental illness. While both showings may be made in some cases of persons when engaged in HIV transmissible behavior, both showings will not be possible in most cases.

Public health law can provide the means to isolate individuals who persist in HIV transmitting behavior. The question arises, however, whether the public health law is as or more appropriate than the criminal law is stemming HIV transmitting behavior of individuals who are known to and intend to engage in HIV transmitting behavior. A constitutionally valid criminal statute must expressly describe the behavior it proscribes. Public health statutes can be more expansive. Criminal conviction requires proof of proscribed behavior beyond a reasonable doubt. Public health violations may be established by clear and convincing evidence. The period of imprisonment for a criminal violation is for a fixed term and in proportion to the seriousness of the crime.

*Against AIDS* 187-88 (rev. ed. 1989). "In one case, a Florida judge confined a female prostitute with AIDS to home and enforced the order by requiring her to wear an electronic device that would alert police if she strayed too far from the monitoring device placed in her telephone." *Id.* See, e.g., *ILL. REV. STAT.*, ch. 111-½, para. 7407(a) (1987):

Subject to the provisions of subsection (b) of this Section, the Department may order a person to be isolated in a place to be quarantined and made off limits to the public to prevent the probable spread of a sexually transmissible disease, until such time as the condition can be corrected or the danger to the public health eliminated or reduced in such a manner that no substantial danger to the public's health any longer exists.

18. *See* 1 M. PERLIN, MENTAL DISABILITY: CIVIL AND CRIMINAL 30 (1989). "Contemporaneously, commitment laws premised on the 'police power' . . . generally require a finding of mental illness . . . and 'dangerousness'—a term that has proven exceedingly difficult to define . . . as a result of the mental illness." *Id.* See, e.g., *N.M. STAT. ANN.* § 43-1-11(c) (1988). The statute provides for involuntary commitment upon a finding by clear and convincing evidence that:

1. [A]s a result of mental disorder, the client presents a likelihood of serious harm to himself or others; (2) the client needs and is likely to benefit from the proposed treatment; and (3) the proposed commitment is consistent with the treatment needs of the client and with the least drastic means principle. *Id.*

19. *See* Connally v. General Construction Co., 269 U.S. 385, 391 (1926). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Id.*


22. *See*, e.g., *ILL. REV. STAT.* ch. 111-½, para. 7407(b) (1987). "No person may be ordered to be isolated, and no place may be ordered to be quarantined, except . . . upon proof by the Department, by clear and convincing evidence. . . ." *Id.*

23. *See*, e.g., *ILL. REV. STAT.* ch. 38, para. 12-16.2 (1989). "[A] person who commits criminal transmission of HIV commit a Class 2 felony." *Id.* See also *ILL.*
Detention under public health regulations can be indeterminate. The clarity, degree of proof, and other procedural safeguards of criminal law provide significant civil liberties and due process protections to individuals which may not be available under the public health law. Finally, every person convicted of a criminal offense has demonstrated a willingness to violate a legal proscription. Use of the police power through the criminal law in light of such behavior, should avoid public opposition which may be more likely to arise against the use of the public health law to isolate infected persons for an indefinite period.

II. OBJECTIONS TO THE USE OF THE CRIMINAL LAW TO REDUCE HIV TRANSMISSION

It can be argued that statutes aimed at controlling behavior intended or likely to spread HIV involve an intrusion into legally protected privacy rights. However, courts have refused to recognize the privacy rights of sexual partners as constituting a barrier to criminal convictions arising out of sexual conduct even in marriage. Courts in civil cases, have held that a constitutional claim of privacy does not preclude an unmarried woman from suing a man in tort for transmission of herpes to her as a result of sexual intercourse. The privacy interests of an individual intentionally or knowingly engaged in conduct likely to transmit HIV are similarly outweighed by the social interest in protecting a sexual partner from HIV infection.

It can also be argued that criminal laws seeking to prohibit sexual activities between consenting adults do not provide an effective deterrent. The example is cited of the ineffectiveness of sodomy statutes in deterring the behavior they proscribe. There is, however, a difference between a sodomy statute which forbids all sexual activity between partners, and HIV specific legislation which is directed at specific behaviors, and which recognizes a defense based on consent.

Finally, it can be argued that criminal laws are not effective in deterring HIV transmitting behavior because such behavior is emotion-
ally charged and irrational.\textsuperscript{28} However, studies of other forms of sexual behavior such as incest suggest that statutory schemes which are effectively used to detect, convict, and punish specified sexual behaviors can be effective in controlling such behaviors.\textsuperscript{28}

Since behaviors such as unsafe sexual practices and unsafe use of intravenous needles involve consensual voluntary acts, there may be no complaint to legal authorities until there is an indication of infection—which may occur sometime after the proscribed behavior. Problems of proof resulting from the difference in time between forbidden behavior and awareness of injury will reduce the likelihood of detection and conviction with a lessening of the intended deterrent effect of the criminal statute. However, it is possible to develop statutory provisions which focus on behavior likely to transmit HIV rather than requiring proof of actual infection. Moreover, there are circumstances where an individual who engages in proscribed behavior will be known to be HIV-infected or whose seropositive status becomes known by an individual who has engaged in the proscribed behavior with an HIV-infected partner. There have been successful military prosecutions of individuals who knowing they were infected engaged in behavior likely to infect others.\textsuperscript{30} The publicity given these prosecutions is likely to have had a deterrent effect on the conduct of others. It is no argument against the deterrent significance of a criminal statute that there are factors which limit the deterrent effect of the statute.

It has been suggested that it is inequitable to use the criminal law to discourage behaviors related to HIV infection—that it is tantamount to asking individuals to behave at the highest stages of moral development, and it may be unrealistic to expect vulnerable groups such as drug users or prostitutes to do so.\textsuperscript{31} However, if the need to protect others from possible infection will otherwise lead to implementation of an alternative use of the police power through the public health authority to quarantine or isolate infected individuals, the onus of personal responsibility placed on individuals by the criminal law seems preferable. The personal responsibility not to engage in behaviors likely to infect others imposed on infected persons is not disproportionate to the harm those behaviors would otherwise impose on others.

There are certain dangers in using the criminal law to discourage behaviors likely to transmit HIV. However, the effect of these concerns

\textsuperscript{28} Gostin, \textit{supra} note 13, at 1044.
\textsuperscript{30} See, e.g., United States v. Morris, 25 M.J. 579 (A.C.M.R. 1987), remanded, 26 M.J. 46 (C.M.A. 1988). The accused in \textit{Morris} was charged with offenses alleging that he engaged in sexual intercourse and sodomy knowing that he was infected with HIV and that the virus can be sexually transmitted. \textit{Morris} was convicted of consensual sodomy, and engaging in unprotected sex after medical counseling about AIDS.
\textsuperscript{31} See Gostin, \textit{supra} note 13, at 1044.
has to be weighed against the benefit derived from the effect of such statutes in reducing HIV transmission. One danger is that the use of the criminal law to stem HIV transmission may be counterproductive. To the extent criminal statutes directed to prevent HIV transmission require a person know whether they are infected before being subject to a criminal charge for engaging in activity likely to spread the virus, these statutes may encourage individuals to avoid testing which would determine infection in order to avoid establishing a basis for subsequent criminal liability.\textsuperscript{32} This effect may be reduced by continued public health efforts to encourage testing by infected individuals so they may have early access to available drug therapies which have proven most effective when instituted at an early stage of development of AIDS.\textsuperscript{33} To the extent testing is linked to available medical treatment rather than a need to protect others, any effect of using the criminal law in discouraging testing should be minimized.

Traditional formulations of crimes have significant problems of proof when directed to prosecution for conduct related to intended or likely transmission of HIV.\textsuperscript{34} Problems of intent and causation are particularly acute.\textsuperscript{35} These difficulties may be reduced by carefully drafted statutes directed to specific behaviors likely to transmit HIV.

Finally, there is a danger of selective enforcement of laws directed at HIV transmitting activity. The possibility of arbitrary and abusive enforcement stems from the discretionary effect such statutes may provide police and prosecuting authorities.\textsuperscript{36} There is a concern that such statutes may be selectively applied against gay men and other minority or unpopular groups. The selective application of criminal statutes creates a more general concern that the public which does not identify with these groups may mistakenly feel that the danger of HIV infection is contained. These dangers can be avoided only by public vigilance of police and prosecutorial activity. Selective enforcement is a danger which should receive continuing attention. Moreover, it will need to be made clear to the public that criminal prosecution of HIV-infected behavior should not create a false sense of security that such prosecutions

\textsuperscript{32} See \textit{Mobilizing Against AIDS}, supra note 6, at 153. “Public health officials recognize that individuals at high risk of HIV infection are likely to come forward for voluntary testing if they believe they will not suffer adverse consequences. . . .” \textit{Id.}

\textsuperscript{33} Many early opponents of HIV testing have changed their views on the basis of new knowledge about the natural history of HIV infection. Scientists believe that almost all of those who are seropositive will eventually become ill. Clinical and laboratory studies suggest that early diagnosis and proper clinical management may help some of them live longer.

\textit{Id.}

\textsuperscript{34} See text accompanying notes 75-78.

\textsuperscript{35} See text accompanying notes 79-82.

\textsuperscript{36} See \textit{generally} H. PACKER, \textit{The Limits of the Criminal Sanction} 88-91 (1968).
have in any way effectively removed the danger of infection to those who engage in the behaviors likely to facilitate transmission of HIV.

III. USE OF TRADITIONAL CRIMINAL LAWS AGAINST BEHAVIOR LIKELY TO TRANSMIT HIV

Only eighteen states have enacted or have proposed legislation for engaging in conduct likely to transmit HIV. Accordingly, in most states prosecution of behavior likely to transmit HIV currently must occur under traditional criminal statutes. Such traditional crimes include, but are not limited to: homicide, attempted homicide, assault, reckless endangerment, exposure of others to a communicable

37. See infra note 106.
38. While the designation and definition of criminal offenses varies from state to state, it is possible to discuss traditional criminal law offenses in the terms of modern statutory formulations by reference to the Model Penal Code drafted by the American Law Institute. "To a large extent, the Model Penal Code actually illustrates existing law in most American Jurisdictions. More importantly, the provisions of the Model Code define the terms of the debate on virtually every issue of penal law of general significance." P. Low, CRIMINAL LAW A-3 (2d ed. 1986).
39. See MODEL PENAL CODE § 210.1 (1962) [hereinafter MODEL PENAL CODE] (Proposed Official Draft). Criminal Homicide: "(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being . . . (2) Criminal homicide is murder, manslaughter or negligent homicide." Id.
40. See MODEL PENAL CODE, supra note 39, at § 5.01. Attempt: A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Id.
41. See MODEL PENAL CODE, supra note 39, at § 211.1. Simple Assault: A person is guilty of assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily harm. Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

Id. Aggravated Assault: A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.
42. See MODEL PENAL CODE, supra note 39, at § 211.2. Recklessly Endangering
disease, and sodomy. It is difficult to prove the elements of traditional criminal charges against a person accused of engaging in conduct intended to or likely to result in transmission of HIV. These problems include difficulty in proving elements of intent and causation.

The range of behaviors and charges related to conduct likely to transmit HIV reveals that prosecutions have been brought for behaviors which are not viewed by medical and scientific authorities as likely to facilitate HIV transmission, as well as for behaviors which are believed to permit HIV transmission. Charges of attempted murder, attempted manslaughter, and assault are among those that have been most often brought against persons charged with conduct likely to transmit HIV. For example, an HIV-infected federal prison inmate in Minnesota was convicted of assault with a deadly and dangerous weapon for biting two prison guards upon a finding that his teeth constituted a deadly and dangerous weapon. Although reversed on appeal based on a finding that AIDS is not likely to be spread through saliva, an Alabama inmate was charged with intent to commit murder for biting a correctional officer and breaking the skin “the said . . . defendant being infected with the AIDS virus and being aware that the AIDS virus is transmitted through bodily fluids secreted through his mouth.” A prostitute in Florida was charged with attempted manslaughter for engaging in sexual intercourse with a client after she had been informed she had AIDS. A man in South Carolina who knew he had AIDS and then sexually assaulted a woman was charged with assault and battery with intent-to-kill. A man in Indiana was charged with attempted murder when, with knowledge he had AIDS, he sprayed his blood on others. A male defendant in New York, knowing

Another Person: “A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.”

Id. 43. See, e.g., COLO. REV. STAT. § 25-4-401(2) (1989) (misdemeanor to “willfully expose”); S.C. CODE ANN. §§ 44-29-60 and 140 (Law Co-op. 1985) (misdemeanor to expose another).

44. See, e.g., ALA. CODE § 13A-6-65(a) (1982); LA. REV. STAT. ANN. § 14:89 (West 1986); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (Vernon 1989).


51. State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (where although the defendant was convicted of attempted murder, his conviction was overturned because his actions were found to not constitute a substantial step toward killing anyone).
he had AIDS, engaged in sexual conduct with a minor, was charged with reckless endangerment.  

Perhaps the most controversial criminal charge which can be brought in some states against conduct likely to transmit HIV is sodomy. Many of these statutes define sodomy as oral and/or anal-genital intercourse. Many of these statutes do not limit their prohibitions to sexual conduct between members of the same sex, nor do they limit their prohibitions to individuals acting outside a marital relationship.

In a number of states in recent years, antisodomy laws have been repealed by legislation or invalidated by judicial action. However, in Bowers v. Hardwick, the United States Supreme Court, as recently as 1986, upheld a Georgia sodomy statute. The Supreme Court held that sodomy statutes do not violate the privacy protection of the United States Constitution. The Court reasoned that the claim that any kind of sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Among the arguments made by the state of Georgia was that it was within the proper limits of the use of the police power to make acts criminal by statute that may have serious adverse consequences for the general public, such as spreading communicable diseases.

The problem with the argument made in Bowers is that it is both over inclusive and under inclusive as it applies to behavior likely to transmit HIV. It is not consensual acts of sodomy, even defined as consisting of anal-genital intercourse, which transmits HIV. It is acts of sodomy without effective barrier protection involving an HIV-infected partner which transmits HIV. Moreover, anal intercourse with the use of a condom has been urged by public health authorities as a means to reduce the likelihood of transmission of HIV. There is even some

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59. See GA. CODE ANN. § 16-6-2 (Michie 1988).
61. See SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (1987). Under the heading “AIDS: you can protect yourself from infection” the report recommends that:

If your partner has a positive blood test showing that he/she has been infected with the AIDS virus or you suspect that he/she has been exposed by previous heterosexual or homosexual behavior or use of intravenous drugs
medical and scientific evidence that HIV may not be transmitted by oral sex which is included in the definition of sodomy used in many jurisdictions. However, there is persuasive evidence that HIV may be transmitted by an HIV-infected partner in vaginal intercourse which is not forbidden by any sodomy statute.

The argument that punishing sodomy is a rational means to stem HIV transmission was made in a case involving the Missouri sodomy statute that was specifically limited to homosexual conduct. In *State v. Walsh*, the Missouri Supreme Court upheld this statute. The court found the statute to be "rationally related to the State's concededly legitimate interest in protecting the public health." The State argued that forbidding homosexual activity will inhibit the spread of sexually communicable disease like acquired immunodeficiency syndrome. This statute which forbids "deviate sexual intercourse with another person of the same sex" and defines deviate sexual misconduct as "any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person." This statute compounds the problems of over and under inclusiveness present in the Georgia statute. In addition to the problems cited above, this statute forbids mutual masturbation by same sex partners which has no relationship to HIV transmission. Moreover, the statute does not forbid unprotected anal intercourse by heterosexual partners which is as likely to result in transmission of HIV in the same manner as it does between homosexual partners.

The most serious criminal offense with which a person can be charged for infecting another person with HIV is homicide. In order to establish homicide, the state must prove a specific state of mind, either purposeful or intentional, knowing or reckless. In order for the state to prove that someone purposely or intentionally spread HIV with intent to cause the death of another, it must show that the wrongdoer

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with shared needles and syringes, a rubber (condom) should always be used during (start to finish) sexual intercourse (vagina or rectum).

*Id.* at 17.

62. *See Lyman, Minimal Risk of AIDS-Associated Retrovirus Infections by Oral Genital Contact, 255 J.A.M.A. 1703 (1986).*


64. *Mo. Rev. Stat. § 566.090 (1986).*

65. 713 S.W.2d 508 (Mo. 1986) (en. banc).


67. *See Brief for Appellant at 15-16, State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (No. 67,465).*


69. *See Model Penal Code, supra note 39, at § 210.1.*

70. *See id. Criminal Homicide: "A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being. Id.*
was aware or believed she was HIV-infected, that she believed she could transmit the virus by the behavior in which she engaged, and that she desired to cause the death of another through her behavior.\footnote{1}{In order for the state to prove a person knowingly spread HIV, it must show the wrong-doer was aware she carried HIV, and that she was practically certain that her conduct would cause another person's death or seriously bodily harm.\footnote{2}{Finally, for the state to prove that a person recklessly caused the death of another by infecting another with HIV, it must prove a person acted in conscious disregard of a substantial and unjustifiable risk that she was infected with HIV, and could transmit it and consciously disregarded that such transmission of HIV could cause the death of another.\footnote{3}{Under the criminal statutes based on the Model Penal Code criminal homicide is murder, manslaughter, or negligent homicide.\footnote{4}{Murder is committed when it is committed purposely or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.\footnote{5}{It is difficult to establish the proof necessary to establish murder in the case of a person who infected another with HIV. It is necessary to prove the wrong-doer was aware that she was infected at the time of the conduct which infected another. This is difficult to prove because it requires the state to prove such an awareness at a time so long ago and with a virus that is difficult to detect.}}}}

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\footnote{1}{See Model Penal Code, supra note 39, at § 2.02(2)(a).}

A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

\footnote{2}{See Model Penal Code, supra note 39, at § 2.02(2)(b).}

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

\footnote{3}{See Model Penal Code, supra note 39, at § 2.02(2)(c).}

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

\footnote{4}{See Model Penal Code, supra note 39, at § 210.1. Criminal Homicide: "A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being." Id.}

\footnote{5}{See Model Penal Code, supra note 39, at § 210.2.}
prove because many individuals have been anonymously tested and their test results may be withheld by the test subject. Moreover, under many state laws, a person may not be compelled to submit to AIDS-related testing or to disclose the results of such testing, except under special circumstances. It is also necessary to prove the wrong-doer knew she could transfer HIV by her conduct and that she intended to infect and consequently cause the death of another person. As was suggested, intent in the context of HIV transmission may be difficult to establish since, "Having sex or sharing needles is a highly indirect modus operandi for the person whose purpose is to kill."

In addition to establishing the requisite state of mind for a homicide offense, it is necessary to prove the wrong-doer's act caused the forbidden result. In order to establish that a defendant's act caused the result of transmitting HIV and caused the death of the victim, the prosecution must prove the defendant was HIV-infected at the time the act was committed. As suggested, with anonymous testing and statutory protection of medical records related to HIV antibody testing in most states, it may be difficult to confirm the HIV status of a defendant unless the defendant admits to having been infected or the informa-

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Because public health officials believe it is advantageous for infected people to be tested so they will know of their infection, funding has been provided for anonymous testing—and anonymous counseling—in most major cities; advocates credit these programs, along with AIDS education, with a dramatic drop in the HIV transmission rate among gays.

Id. See also Ill. Rev. Stat. ch. 111-1/2, para. 7306 (1988). "A subject of a test who wishes to remain anonymous shall have the right to do so, and to provide written, informed consent by use of a coded system that does not link individual identity with the request or result." Id.


No person may disclose or be compelled to disclose the identity of any person upon whom a test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except to the following persons. . . .

(g) a person allowed access to said record by a court order which is issued in compliance with the following provisions: (i) no court of this State shall issue such order unless the court finds that the person seeking the test results has demonstrated a compelling need for the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest which may be disserved by disclosure which deters blood, organ and semen donation and future HIV related testing.

Id.


79. See Model Penal Code, supra note 39, at § 210.1(1). "A person is guilty of criminal homicide if he . . . causes the death of another human being." Id.
tion is otherwise known. Court orders have been granted in some juris-
dictions requiring certain defendants suspected of being HIV-infected
to submit to HIV antibody testing.\textsuperscript{80} Currently, legislation has been
proposed or enacted in various jurisdictions requiring defendants of cer-
tain sexual crimes to submit to HIV antibody testing.\textsuperscript{81}

In addition, in order to establish causation, the prosecution must
demonstrate the victim contracted HIV from the defendant. In order to
establish the required causal connection, two negative facts must be
proven. First, it must be proven the victim was not infected with HIV
prior to the defendant's alleged conduct. Second, it must be proven the
victim was not infected by some other source after the contact with the
defendant.

The second form of homicide with which a person accused of
transmitting HIV may be charged is manslaughter.\textsuperscript{82} To convict on the
charge of manslaughter, the prosecution must show the defendant con-
sciously disregarded a substantial and unjustifiable risk that she was
HIV-infected, can or will transmit the virus, and that the conduct en-
gaged in will do so. The risk must be a gross deviation from the stan-
dard of conduct that a law abiding citizen in the situation of the actor
would observe and the actor must behave in a manner evincing extreme
indifference to human life.\textsuperscript{83} To determine whether the risk fails when
the definition of a gross deviation is a question for a jury that involves
weighing the risk of harm against the social utility of conduct.

It should be noted that a culpable state of mind for purposes of
manslaughter is established when an actor consciously disregards a
substantial and unjustifiable risk that she is infected. Thus, the state
can maintain and prove a case of manslaughter even if it cannot prove
the defendant knew that she was infected with HIV. Nevertheless, the
causation problems that exist with reference to a charge of murder oc-
cur with the charge of manslaughter. Thus, the state must show the

\textsuperscript{80} See Singleton, Judge Requires AIDS Testing for Suspect, UPI Report (Jan.
14, 1988) (LEXIS, Nexis library, Wires file) (Judge ordered rape suspect to submit to
HIV test over defense attorney's objection that such testing would violate fourth
amendment protection against illegal search).

\textsuperscript{81} See, e.g., ILL. REV. STAT. ch. 38, para. 1005-5-3(g) (1989). which provides in
part:
Whenever a defendant is convicted of an offense under Sections [specify
sexual offenses] . . . of the Criminal Code of 1961, the defendant shall un-
dergo medical testing to determine whether the defendant has any sexually
transmissible disease, including a test for infection with human immu-
nodeficiency virus (HIV) or any other identified causative agent of acquired
immunodeficiency syndrome (AIDS).

Id.

\textsuperscript{82} See MODEL PENAL CODE, supra note 39, at § 210.3 providing in part:
“Criminal homicide constitutes manslaughter when (a) it is committed
recklessly. . . .”

\textsuperscript{83} See MODEL PENAL CODE, supra note 39, at § 2.02(2)(c).
defendant is the person from whom the decedent contracted HIV the infection. As discussed above, this type of causation is difficult to prove.

There is a basis for concern which arises in relation to the degree of culpability sufficient to prove manslaughter. Recklessness is the culpable mental state for manslaughter. When recklessness is the requisite mental state, guilt turns on how the trier of fact evaluates the manner in which persons should act. To determine whether a risk falls within the definition of gross deviation is a jury question that involves a weighing of the risk of harm against the social utility of the conduct. As a consequence, a manslaughter charge may be susceptible to jury overreaction to risk taking behavior by persons who may be HIV-infected. This is especially true in cases involving defendants who are members of minority or unpopular groups whose life styles may be seen as involving gross deviation from normal behavior.

Even if the state is able to establish the necessary degree of culpability to sustain a manslaughter charge; except in rare cases, it will not be able to establish the necessary causative between the defendant's conduct and the decedent's death. In jurisdictions with a statutory offense of negligent homicide, it will be easier to establish the culpable state of mind where it can be shown a defendant should have been aware of his or her HIV infection and ability to infect others. When a negligent state of mind is sufficient to establish culpability, it is sufficient to show disregard of a substantial or unjustifiable risk, since lack of regard involves a gross deviation from the standard of conduct that a law abiding citizen would observe in the actor's situation. However, the same problems of causation described earlier will exist in connection with a charge of negligent homicide.

The two charges most often used to prosecute HIV-infected offenders are attempted murder and assault. An attempted murder charge does not require the prosecution to meet the difficult problem of proving causation presented by homicide charges. Neither proof of death of a victim, nor cause of death, nor actual transmission of HIV need be proven. However, the burden of proving the culpable state of

84. See Model Penal Code, supra note 39, at § 210.4. Negligent Homicide: "(1) Criminal homicide constitutes negligent homicide when it is committed negligently." Id.

85. See Model Penal Code, supra note 39, at § 2.02(2)(d).

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Id.

86. See text and accompanying notes 47, 48, and 50.

87. See text and accompanying notes 49 and 51.
mind is at the highest level. In order to prove attempted murder, it must be shown that the defendant acted with the intent or purpose to cause the death of another. A person could be convicted of attempted murder, as defined by the modern criminal codes, if it can be proven that the person believed her behavior could kill and that she intended that result. This is true even if the wrong-doer’s belief is mistake. Thus, if an HIV-infected person bites another person, believing she could infect another person by biting and intending to transmit HIV, she could be convicted of attempted murder, even through expert scientific and medical testimony showed HIV cannot be transmitted through biting.

The use of attempted murder to prosecute an HIV-infected offender is illustrated by the decision of the Indiana case of State v. Haines where a defendant, who attempted to commit suicide by slashing his wrists upon learning that he had AIDS, requested police and paramedics to leave him to die and, upon their intervention, began to spit, bite, scratch, and throw blood. The Indiana Court of Appeals upheld an attempted murder conviction as supported by evidence that showed the defendant was HIV-infected, aware of his condition, believed it to be fatal, and intended to infect others with HIV by spitting, biting, scratching, and throwing blood. The court noted during the altercation that ensued, the defendant announced “he had AIDS and that he was going to show everyone else what it was like to have the disease and die.”

In accordance with an Indiana statute which provided that “it is no defense that because of a misapprehension of the circumstances, it would have been impossible for the accused to commit the crime attempted,” the court rejected the defense of impossibility. As the court observed:

It is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible. When the defendant has done all that he believes necessary to cause the

88. Attempted murder involves the highest level of culpability. See Model Penal Code, supra note 39, at § 5.01, which requires that the defendant be shown to act “with the kind of culpability otherwise required for commission of the crime” which would be “purpose” or “knowledge” or “recklessness manifesting extreme indifference to the value of human life” under Model Penal Code § 210.2. The “criminal attempt” section (§ 5.01) uses culpability terms of “purpose” and “belief” with regard to the conduct meant to produce the intended result.

89. See Model Penal Code, supra note 39, at § 5.01(1)(a). “A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were or he believes them to be . . . .” Id.

91. Id. at 835.
92. IND. CODE ANN. § 35-41-5-1(b) (Burns 1988).
particular result, regardless of what is actually possible under existing circumstances, he has committed an attempt. The liability of the defendant turns on his purpose as manifested through his conduct. If the defendant's conduct in light of all the relevant facts involved, constitutes a substantial step toward the commission of the crime and is done with the necessary specific intent, then the defendant has committed an attempt.\(^{93}\)

The difficulty in proving attempted murder is the establishment of an actual intent or purpose to cause a death believing it possible to do so by means of an HIV-infected substance. Some states have retained the defense of legal impossibility which will provide a defense to a defendant who purposely employed some means to infect another which is viewed as scientifically and medically unable to transmit HIV.\(^{94}\) In those states, the prosecution will face an additional obstacle in some cases such as those involving biting. However, most states following the lead of the Model Penal Code have eliminated the defense of factual impossibility.\(^{95}\) In those states, the prosecution need not prove the conduct of the defendant could actually have caused the death of the intended victim. In a jurisdiction which abandoned the defense of factual impossibility, it is only necessary to show the defendant did all she believed necessary to bring about the intended result of infecting others with HIV under the purpose of causing the death of those who might be infected, regardless of the possibility of producing the intended result with the means used.

Criminal prosecutors against HIV-infected persons under assault statutes, while rare, have been the most common type of AIDS-related criminal prosecutors to date. Assault charges may be brought against an HIV-infected individual, who knowing she is HIV-infected and is capable of infecting others, engages in activity likely to transmit HIV, knowing that the activity engaged in is likely to facilitate transmission of HIV.\(^ {96}\)

An example of an HIV-related assault prosecution is provided by United States v. Moore\(^ {97}\) where the Eighth Circuit Court of Appeals upheld the conviction of an HIV-infected prisoner found guilty of assault with a deadly weapon for biting two prison guards during a struggle. Other courts in non-AIDS-related prosecutions have found use of body parts to constitute a dangerous weapon including biting with teeth, and use of fists and hands.\(^ {98}\) The Eighth Circuit reasoned that

\(^{93}\) Haines, 545 N.E.2d at 838-39 (quoting Zickefoose v. State, 388 N.E.2d 507 (Ind. 1979)).


\(^{96}\) See notes 47, 48, & 50 and accompanying text.

\(^{97}\) 846 F.2d 1163 (8th Cir. 1988).

\(^{98}\) See, e.g., United States v. Parman, 461 F.2d 1203 (D.C. Cir. 1971) (biting
what constitutes assault with a dangerous weapon depends not on the nature of the object itself, but on its capacity, given the manner of its use to endanger life or to inflict great bodily harm. Ultimately, the Moore court held teeth to be a dangerous weapon within the context of an aggravated assault statute, regardless of the presence or absence of HIV infection in the assailant. The record, according to the court, established by expert testimony, revealed only a remote or theoretical possibility that HIV could be transmitted through biting.

In a similar case involving an HIV-infected defendant prosecuted for biting, the Alabama Court of Appeals in Brock v. State held teeth did not constitute a deadly weapon within the context of an aggravated assault statute. The defendant, who was aware he was HIV-infected, bit two prison guards during a struggle. The defendant was charged with attempted murder, but was convicted of aggravated assault by a jury. The Alabama appellate court set aside the conviction finding the record did not support the conclusion that biting could provide a source of transmission of HIV. Although the court took judicial notice of the fact that AIDS is a life-threatening disease, and that contraction of HIV constitutes a serious physical injury, the court would not take judicial notice that biting is a means capable of spreading AIDS.

Thus assault prosecutions face special problems of proof. For HIV to be significant in an assault prosecution, the prosecutor must not only establish culpability by showing a wrongdoer knew of their HIV status, and that their conduct could transmit HIV, but the state must also establish it is possible to transmit HIV by the means used or conduct engaged in by the defendant. Otherwise, the state must show some other aspect of the defendant’s conduct created a risk of injury to the intended victim.

Several states have enacted statutes which make it a criminal offense for a person with a contagious disease willfully or knowingly to expose another person to such disease. Generally these statutes require that a person knowingly transmit or purposely expose another to the communicable disease. Some of these statutes have special elements such as that in Minnesota which requires the conduct prohibited by the statute occur in a public place. Other state statutes are limited to specific diseases such as syphilis, gonorrhea, and chancroid. One alternative to the special HIV-related criminal legislation described in

with teeth found to be deadly weapon); State v. Born, 159 N.W.2d 283 (Minn. 1968) (fists or feet may be dangerous weapons).

99. Moore, 846 F.2d at 1167.
the next section of this Article, is to modify statutes dealing with transmission and exposure to communicable disease to include HIV infection as a condition covered by these provisions.

Another traditional criminal charge which an HIV-infected person might face is reckless endangerment. To establish reckless endangerment the state must prove a defendant, with conscious disregard of a risk to another, engaged in conduct which placed or may have placed another person in danger of death or serious bodily injury. It is not necessary to show the victim was actually harmed by the defendant. The jury must find that the defendant’s conduct was a gross deviation from the standard of conduct observed by law abiding citizens. As with manslaughter, the jury’s determination of recklessness raises serious concern that a jury might be prejudiced by the status of the defendant as a homosexual, drug user, or prostitute in a way that would skew the finding required of the jury. However, this concern is limited by the fact that reckless endangerment is a misdemeanor under most modern criminal codes. On the other hand, the fact that reckless endangerment is a misdemeanor, may reduce its efficacy as a criminal sanction and thus not serve the purposes sought in using the criminal law as a device to punish or deter the type of conduct which has been cited as justifying the use of the criminal law.

This discussion suggests that traditional formulations of crimes are neither appropriate nor effective as a means for prosecuting HIV-infected persons who intentionally or purposely engage in behavior likely to transmit HIV. Almost all traditional crimes involve serious problems of proving intent, or causation, or both. Where these problems of proof are avoided, the criminal charge is usually a minor offense without significant sanction. In such cases, the purposes sought by using the criminal law to punish and deter conduct by persons knowing that they are HIV-infected are not achieved.

IV. DEVELOPMENT OF HIV SPECIFIC CRIMINAL STATUTES

In response to the inadequacies of the traditional criminal law in punishing and deterring conduct by HIV-infected persons that is likely to result in transmission of HIV, many state legislatures have enacted or proposed legislation making it a criminal offense for an HIV-infected person to knowingly engage in activity likely to result in the

104. See Model Penal Code, supra note 39, at § 211.2. “A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” Id.

105. See Model Penal Code, supra note 39, at § 2.02(2)(c). Recklessness must be based on a finding that the conduct at issue “involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” Id.
transmission of HIV.\textsuperscript{108}

The Presidential Commission on the Human Immunodeficiency Syndrome Epidemic recommended that HIV specific statutes be drafted and adopted.\textsuperscript{107} The Commission in its final report observed that problems in applying traditional criminal law to HIV transmission should lead to the adoption of criminal statutes specific to HIV infection.\textsuperscript{108} According to the Commission, an HIV specific statute can provide clear notice of socially unacceptable standards of behavior specific to the HIV epidemic and can facilitate tailoring punishment to the specific crime of HIV transmitting behavior.\textsuperscript{109}

\begin{itemize}
\item \textbf{107.} REPORT, \textit{supra} note 11, at 131.
\item \textbf{108.} \textit{Id.} at 130.
\item \textbf{109.} \textit{Id.}
While the enacted and proposed HIV specific laws have varied from state to state, all these statutes make it an offense for an HIV-infected person to knowingly engage in behavior likely to transmit HIV. Some of these statutes avoid the problems created by many traditional offenses which require proof of intent or purpose, causation, or actual injury. The majority of the proposed statutes have classified the proscribed behavior as a felony, thus avoiding the criticism leveled at other traditional criminal offenses available for prosecuting HIV transmitting activity, as being too lenient where the transmitting activity is engaged in knowingly or intentionally. The advantage of these HIV specific criminal laws is that they are, for the most part, narrowly drafted to address particular conduct that places others at risk of HIV infection.

The laws that have been proposed or enacted thus far that criminalize conduct likely to transmit HIV have been directed at conduct which is specially designated such as donation of blood by a person who knows they are HIV-infected or at conduct more generally designated such as conduct likely to transmit HIV by a person who knows they are HIV-infected.

The first type of statute imposes penalties on persons who donate blood or body fluids or body parts knowing that they are HIV-infected or that the donor has tested positive for antibody to HIV. The second

110. See, e.g., LA. REV. STAT. ANN. § 14:43.5 (1990). "No person shall intentionally expose another to any acquired immunity deficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim." Id.
111. See, e.g., ILL. REV. STAT. ch. 38, para. 12-16.2 (1989). "A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV\(\text{\textsuperscript{1990}}\) or at conduct more generally designated such as conduct likely to transmit HIV by a person who knows they are HIV-infected.\(\text{\textsuperscript{1990}}\)

The first type of statute imposes penalties on persons who donate blood or body fluids or body parts knowing that they are HIV-infected or that the donor has tested positive for antibody to HIV. The second

114. See, e.g., LA. REV. STAT. ANN. § 14:43.5 (West 1990).
115. See, e.g., IND. CODE ANN. § 35-42-1-7 (Burns 1989). For example, a statute directed at conduct likely to transmit HIV through donations of blood or body fluids, see IND. CODE ANN. § 35-42-1-7 (Burns 1989) which provides:
(a) As used in this section, "component" means plasma, platelet, or serum of a human being.
(b) A person who recklessly, knowing, or intentionally donates, sells, or transfer blood, a blood component, or semen for artificial insemination that contains the human immunodeficiency virus (HIV) commits transferring contaminated blood, body fluid, a Class C felony.
(c) However, the offense is a Class A felony if it results in the transmission of the human immunodeficiency virus (HIV) to any person other than the defendant.
(d) This section does not apply to:
1. a person who, for reasons of privacy, donates, sells, or transfer blood or a blood component at a blood center after the person has notified the blood center that the blood or blood component must be disposed of and may not be used for any purpose; or
2. a person who transfers blood, a blood component, semen, or another
type of statute imposes penalties on a person who engages in sexual intercourse or penetration of another person knowing they are HIV-infected or have tested positive for antibody to HIV.\textsuperscript{116}

More general statutory provision have been enacted which impose criminal sanctions on persons who knowingly commit any act likely to expose another to HIV or to cause transmission of the virus to another.\textsuperscript{117} Often the more general statutes have required proof of specific intent or purpose to injure another person by intentional behavior likely to infect another person.\textsuperscript{118} The latter type statute continues the problems of proof which arise with traditional criminal offenses by requiring a showing that the actor intentionally engaged in conduct likely to result in transmission of HIV. An alternative is provided by statutes which would prohibit activity likely to transmit HIV by specifically identifying those behaviors prohibited of people who know they are HIV-infected.\textsuperscript{119}

\footnotesize{116. MICH. COMP. LAWS § 333.5210 (1988) provides:

(1) A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome-related complex, or who know that he or she is HIV-infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome-related complex or is HIV-infected, is guilty of a felony.

(2) As used in this section, "sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however, slight, of any part of a persons' body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

117. See, e.g., TEX. PENAL CODE ANN. § 22.012 (West 1989).

118. See, e.g., LA. REV. STAT. ANN. § 14:43.5 (West 1990). For example, a statute directed at conduct of a person knowing he or she is HIV-infected who acts with the purpose of harming another, see TEX. PENAL CODE ANN. § 14 (1989) which provides:

(A) A person commits an offense if the person, knowing that he or she has AIDS or is a carrier of HIV and with intent to cause serious bodily injury or death, intentionally engages in conduct reasonably likely to result in the transfer of the actor's own blood, bodily fluids containing visible blood, semen, or vaginal secretion into the blood stream of another, or through the other person's skin or other membrane, except during the utero transmission of blood or bodily fluids, and:

(1) the other person did not consent to the transfer of blood, bodily fluids containing blood, semen, or vaginal secretion; or

(2) the other person consent to the transfer, but at the time of giving consent had not been informed by the actor that the actor had AIDS or was a carrier of HIV.

(B) An offense under this section is a felony of the third degree.

119. See, e.g., ILL. REV. STAT. ch. 38, para. 12-16.2 (1989). For example, a statute directed as specified conduct of a person who knows he or she is HIV-infected, see ILL. REV. STAT. ch. 38, para. 12-16.2 (1989) which provides:}
For the most part, the Illinois statute provides a model HIV specific criminal offense. There is, however, one significant problem in the statute, namely in the specification of the conduct the statute forbids. The statute is clear on its face in the terms with which it deals with transfer of blood or body parts by an HIV-infected donor. Similarly, the statute deals in a clear way with sharing or transferring intravenous drug paraphernalia by an HIV-infected person. The principal difficulty with the statute is its specification of "intimate contact" with another by an HIV-infected persons. The definition of "intimate conduct with another person" as a description of conduct likely to transmit HIV is overbroad and vague. The definition provided is "exposure of the body of one person to a bodily fluid of another person in a manner that could result in transmission of HIV." If this definition is given a judicial construction which limits it to means recognized as capable of transmitting HIV by medical and scientific authorities, or by a governmental agency such as the Centers for Disease Control,

(A) A person commits criminal transmission of HIV when he or she, knowing he or she is infected with HIV:

(1) engages in intimate contact with another;

(2) transfers, donates or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration to another; or

(3) dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia.

(B) For purposes of this section:

"HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.

"Intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.

"Intravenous or intramuscular drug paraphernalia" means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.

(C) Nothing in this section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.

(D) It shall be an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.

(E) A person who commits criminal transmission of HIV commits a Class 2 felony.


121. Id. at para. 12-16.2(A)(2).

122. Id. at para. 12-16.2(A)(3).

123. Id.

124. Id. at para. 12-16.2(B).

125. See generally V. DeVita, supra note 2, at 355-420.

126. See generally Guidelines for Effective School Health Education to Prevent the Spread of AIDS, 37 MORBIDITY & MORTALITY WEEKLY REP. Supp. 2, at 1
Nition looses its vagueness and provides notice of the type of behavior prohibited. An alternative would be to amend the statute to specify the type of sexual activity proscribed, as is done in the Michigan statute.127

There are, nevertheless, several aspects of the Illinois statute that make it preferable to traditional criminal laws as a means for criminalizing HIV transmitting behavior. The first is that the statute sets out specific HIV transmitting behavior prohibited. Second, the statute avoids the requirement of proof of intent or purpose necessary to successfully prosecute HIV transmitting behavior under the more serious traditional criminal law offenses such as murder or attempted murder. Under the Illinois statute it is only necessary to prove that a person knowing they are infected with HIV has engaged in the behavior specified in the statute. Only proof of forbidden conduct by a person who knows they are infected with HIV is required, there is no need to prove intent or purpose to transmit HIV or to cause injury or death to another. Removing the requirement of intent or purpose increases the feasibility of establishing an offense for conduct capable of transmitting HIV.

The Illinois statute does not require that injury be proven to establish a violation of the statute. The fact that an injury need not be proven to establish an offense under the statute means that the troublesome element of causation which arises when invoking many of the traditional criminal law offenses, such as manslaughter, is avoided. By removing the requirement of proof of causation, the possibility of successful prosecution for engaging in conduct likely to transmit HIV is greatly enhanced. The elimination of a requirement that an injury be intended, makes the Illinois statute preferable to traditional inchoate crimes such attempted murder.

It should be noted that there is a culpability requirement in the Illinois statute, namely that the person engage in the proscribed conduct, “knowing that he or she is infected with HIV.” Two objections may arise in relation to this culpability requirement. On the one hand, it may be objected that proof that an individual knows or knew that he or she was HIV-infected may be difficult because a person may have been anonymously tested or may simply refuse to be tested at all. The problem of proof of culpability, of course, will vary from case to case. However, despite any difficulty posed by the need to prove that an actor knew they were HIV-infected when engaging in the proscribed behavior, the requirement that a person know they are infected with HIV is an important element in limiting the scope of possible prosecution to those who do act with the knowledge they are infected. Otherwise, the scope of prosecution would extend to all those who engage in the proscribed behavior without any regard to the actual danger that conduct

127. See supra note 116.
created of transmitting of HIV. Without the requirement that a defendant be shown to have acted with knowledge of her HIV infection, the law would create strict liability for those who engage in "intimate conduct" when it turned out the individual was HIV infected at the time of the conduct whether or not the individual knew she was infected. Courts and commentators have been critical of imposing strict liability in connection with a significant element of an offense which carries a serious penalty.\footnote{128}

A second objection to the requirement that a defendant be shown to know they were HIV-infected, is that establishing such knowledge as a basis for criminal liability might result in providing a disincentive to voluntary testing. As suggested before, the medical benefits of testing to a person who suspects they are HIV-infected should outweigh any disincentive effect of a criminal statute basing criminal liability on knowledge of HIV infection. Moreover, there is authority from other criminal prosecutions which may permit establishment of proof of knowledge by showing conscious avoidance of verifying one's HIV status.\footnote{129}

The Illinois statute has advantages over traditional criminal laws in terms of efficacy. The fact that a prosecution for conduct capable of transmitting HIV is easier to establish under the Illinois statute, than would be a violation of a traditional criminal law, means that conviction for proscribed conduct is more likely. This will mean the deterrent effect of the HIV specific criminal statute will be greater than that of a tradition criminal law prosecution.

The Illinois statute classifies a violation of its prohibitions as a Class 2 felony.\footnote{130} Under a Class 2 felony, a sentence can be imposed of imprisonment, probation, or fine.\footnote{131} This flexibility in sentencing permits a judge to permit the judge to fashion a sentence appropriate to the facts of the case. The punitive and deterrent effects of a prosecution can be attained without the required imposition of imprisonment which is required for more serious traditional criminal law offenses. At the same time, when a defendant's conduct is intentional and willful, a serious penalty can be imposed.

An important aspect of the Illinois statute is that it provides an affirmative defense of informed consent.\footnote{132} Given the nature of "inti-

\footnote{128. See, e.g., Morisette v. United States, 342 U.S. 246 (1952). See also G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 259 (2nd ed. 1961): "[Strict liability] is an abuse of the moral sentiments of the community. To make a practice of branding people as criminals who are without moral fault tends to weaken respect for the law and the social condemnation of those who break it." \textit{Id.}}

\footnote{129. See United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (deliberate ignorance and positive knowledge are equally culpable).}

\footnote{130. ILL. REV. STAT. ch. 38, para. 12-16(e)(2)(e).}

\footnote{131. \textit{Id. at para.} 1005-5-3(b).}

\footnote{132. \textit{Id. at para.} 12-17(a).}
mate behavior" which the statute sets out to control, challenges to the statute on a constitutional ground such as privacy should fail since the statute recognizes sexual acts between consenting adults as protected. There is existing authority dealing with prosecution of other sexually transmitted diseases which refuses to recognize a constitutional claim to privacy as preventing prosecution of a person infected with a sexually transmitted disease who engages in sexual intercourse without the informed consent of the partner. Similarly, the Illinois statute with its recognition of an affirmative defense of informed consent should survive constitutional scrutiny.

HIV specific statutes have been developed by other jurisdictions which utilize the features of traditional criminal law offenses. Idaho has adopted a statute which provides alternative bases for establishing culpability. The Idaho statute provides:

Any person who exposes another in any manner with the intent to infect, or knowing that he or she is or has been afflicted with acquired immunodeficiency syndrome (AIDS), AIDS-related complex (ARC), or other manifestations of human immunodeficiency virus (HIV) infection, transfers or attempts to transfer any of his or her body fluid, body tissue or organs to another person is guilty of a felony.

The statute defines "transfer" to include:

[Engaging in sexual activity by genital-genital contact, oral-genital contact; anal-genital contact, or permitting the use of a hypodermic syringe, needle, or similar device without sterilization; or giving, whether or not for value, blood, semen, body tissue, or organs to a person, blood bank, hospital, or other medical care facility for purposes of transfer to another person.]

As with the Illinois statute, the Idaho provision permits conviction of a person who engages in the forbidden behavior knowing he or she is HIV-infected. Alternatively, the Idaho statute permits prosecution in terms comparable to those required by more serious traditional offenses by providing for prosecution of those who engage in the prescribed behavior with the intent to infect others. Although the statute does not specifically indicate that these two degrees of culpability are relevant for sentencing under the statute, it does appear that the differences in culpability may have significance for grading the seriousness of an offense. The statute provides for sentencing by imprisonment in a state prison for a period not to exceed fifteen years, by fine not in excess of

135. Id. at § 39-608(1).
136. Id. at § 39-608(2)(b).
five thousand dollars, or by both imprisonment and fine.\textsuperscript{137} It would seem reasonable that in determining the appropriate sentence, a judge should take into account the kind of culpability pleaded and proven. It should be noted that the Idaho statute does not require proof of injury and hence does not require a showing of causation which exists under some traditional criminal offenses; rather, the statute simply requires proof that a person knowing he or she is HIV-infected engaged in the prohibited conduct.

To the extent that providing for different degrees of culpability is a matter of grading, the Idaho statute does not necessarily raise the problems of proof on intent which occur with the HIV specific criminal statutes enacted in other states. The HIV specific statutes enacted in some states require a showing of intent to expose or infect another person. For example, the Louisiana statute provides: “No person shall intentionally expose another to any acquired immune deficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim.”\textsuperscript{138} Similarly the Oklahoma statute provides: “It shall be unlawful for any person to engage in any activity with the intent to infect or cause to be infected any other person with the human immunodeficiency virus.”\textsuperscript{139} The requirement of proof of intent to expose or infect another frustrates the purpose of having an HIV specific criminal statute, which is to avoid the need to prove intent as required by traditional criminal laws. These statutes fail to recognize the formidable obstacle a requirement of intent to injure raises in the HIV context.

CONCLUSION

The use of the criminal sanction to punish and deter conduct likely to result in transmission of HIV raises serious issues about the purposes of the criminal law and its efficacy in dealing with problems such as HIV transmission. It has been argued that the criminal law has no role in dealing with conduct related to HIV transmission; rather, it is urged that reliance be placed on public health measures to educate the public and encourage those at risk to come forward to be tested and counseled about the need to avoid conduct likely to lead to the infection of others with HIV. However, there are cases where individuals knowing they are infected choose to engage in behavior likely lead to the infection of

\textsuperscript{137} \textit{Id.} at § 39-608(1).
others. In such cases, criminal prosecution for the purposes of punishment and deterrence is justified. However, traditional criminal offenses are not well-suited to dealing with conduct likely to transmit HIV. Rather HIV statutes, which are properly drafted, provide a more effective and legitimate means for criminalizing HIV transmitting behavior.