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Strengthening the Effectiveness of California's HIV Transmission Statute

*Erin McCormick**

Imagine that you are in a loving, committed, and sexually intimate relationship with a partner whom you trust completely. One day, you accompany your partner to the doctor because he is too sick with a bout of food poisoning to drive himself. You wait patiently in the room while the doctor examines your partner. Now imagine that you hear the doctor ask your partner how he has been tolerating the current round of HIV medication prescribed to him several months ago. In that one instance, it hits you like a ton of bricks: Your loving and honest partner of two and a half years has been lying to you. He is HIV-positive, and now, you may be too.

This is the story of Miles,¹ a gay man living in the San Francisco Bay Area who was unknowingly infected with HIV by his HIV-positive partner, who had failed to disclose to Miles his HIV-positive status. In fact, Miles' partner had not just failed to disclose his HIV-positive status; he outright lied to Miles. Five weeks earlier, Miles had proposed that they both get tested. Miles did and was HIV-negative. When asked what his partner's test results were, Miles' partner said that he, too, was HIV-negative. Of course, this was a lie and his partner had not been tested. The truth was that Miles' partner had been HIV-positive for at least a decade and had been receiving continuous medical treatment for the disease, which had now advanced to full-blown AIDS,² the entire time he and Miles were together.

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1. Miles is not just someone I interviewed so that I could add a face to this issue; Miles is my dad. As the story illustrates, my dad was infected with HIV by his partner who had lied to him about his HIV-positive status. His overwhelming courage and heart in fighting this disease on a daily basis, coupled with my own feelings of outrage over what happened to him and the injustice of not being able to prosecute his case, inspired me to write this article.

2. See *HIV/AIDS Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/resources/qa/definitions.htm> (last updated Nov. 6, 2006), for a more

Miles' case does not stand in isolation. Others have been infected with HIV by sexual partners who failed to disclose their HIV-positive status.³ In fact, many people who test positive for HIV choose not to disclose their HIV-positive status to their sexual partners, either because of a decision to remain silent based on a fear of community rejection or a sense of denial that they are HIV-positive.⁴ This has left people like Miles, unprotected and abandoned by the California judicial system, who fail, or are unable, to step in when justice requires. This must change.

In this note, I will argue that California's HIV transmission statute should be amended to prosecute people who know that they are infected with HIV or AIDS and who have unprotected sex with their partner without disclosing their HIV-positive status. In Part I, I will examine California's current HIV transmission statute and point out areas of the statute that make bringing prosecutions virtually impossible. I will then discuss some of the reasons supporting the argument for amending the statute in order to make it more effective. In Part II, I will discuss why the issue of a more effective HIV transmission statute is so important, specifically for those living in San Francisco's gay community where the AIDS epidemic hit hard and forced a drastic and controversial city response, namely, the closing of the city's gay bathhouses. In Part III, I will lay out a proposal for an amended HIV transmission statute for the California legislature, as well as combat commonly cited criticism for HIV transmission statutes in general.

I. CALIFORNIA'S CURRENT HIV TRANSMISSION STATUTE

The initial push for specific HIV transmission statutes first came in the late 1980s when the AIDS epidemic was at a peak. In 1987, President Reagan formed the Presidential Commission on the Human Immunodeficiency Virus Epidemic to examine the effects of the AIDS pandemic.⁵ The Commission urged the need for HIV specific criminal

in-depth discussion on the specifics of HIV (human immunodeficiency virus) and its progression into AIDS (acquired immunodeficiency syndrome).

3. David Kiefer, *HIV: When it's OK to tell a lie*, S.F. EXAMINER, May 15, 2002, available at <http://www.aegis.org/DisplayContent/print.aspx?SectionID=70839>.

4. Amy L. McGuire, *AIDS as a Weapon: Criminal Prosecution of HIV Exposure*, 36 HOUS. L. REV. 1787, 1789 (1999); Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/exposure Laws*, 23 NOVA L. REV. 847, 879 (1999) ("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."); Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 478-79 (2007) (a 2007 empirical trial indicating that "many HIV-positive people fail to disclose their status to their primary sexual partners—only about one-half of these individuals inform casual partners that they may be at risk.").

5. *Presidential Commission on the Human Immunodeficiency Virus Epidemic*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/presidential-commission-on-the-human>

statutes and even recommended how these statutes should be written.⁶ After Congress passed the 1990 Ryan White Comprehensive AIDS Research Emergency Act, mandating that in order to receive federal funding for HIV/AIDS prevention, states had to “prove the adequacy of their laws for criminal prosecution of intentional transmission of HIV,” a majority of states enacted specific HIV transmission statutes.⁷ Although not all states developed HIV specific transmission statutes, all states did, in fact, certify that their criminal statutes were adequate to prosecute the intentional transmission of HIV.⁸

In general, these statutes seek to deter and criminally punish HIV-positive individuals who expose others to the HIV virus without first disclosing their HIV-positive status.⁹ California is one of thirty-seven states that currently have a statute specifically designed to address HIV transmission and/or exposure.¹⁰ The California statute specifically related to HIV transmission by way of sexual intercourse,¹¹ codified in California's Health and Safety Code § 120291, reads as follows:

(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his/her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years. Evidence that the person had knowledge of his/her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.

-immunodeficiency-virus-epidemic (last visited Feb. 29, 2012) (the Presidential Commission on the Human Immunodeficiency Virus Epidemic is also known as the Watkins Commission).

6. James B. McArthur, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 714–15 (2009).

7. *Id.* at 715.

8. Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There A Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 840–41 (2004).

9. Markus, *supra* note 4, at 850.

10. *Criminal Statutes on HIV Transmission*, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/comparetable.jsp?ind=569&cat=11> (last visited Feb. 28, 2012).

11. California has five separate statutes dealing with HIV Transmission: CAL. HEALTH & SAFETY CODE § 120291(a) (West 2012) (unprotected sexual activity by one who knows self to be infected by HIV); CAL. HEALTH & SAFETY CODE § 120290 (West 2012) (willful exposure of self or others to disease); CAL. PENAL CODE § 12022.85(a), (b) (West 2012) (sentence enhancement for sexual offenses); CAL. HEALTH & SAFETY CODE § 1621.5(a) (West 2012) (donation of blood, etc., by person know that he or she has HIV/AIDS); and, CAL. PENAL CODE § 647(f) (West 2012) (penalty enhancements concerning prostitution). However, in this note, I will only be focusing on CAL. HEALTH & SAFETY CODE § 120291, which deals with HIV Transmission during sexual intercourse as this statute is the one specifically relating to the controversy in question.

(b) As used in this section, the following definitions shall apply: (1) "Sexual activity" means insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner. (2) "Unprotected sexual activity" means sexual activity without the use of a condom.¹²

There are major problems with this statute that currently make it ineffective. First, the statute only applies to those persons who actually intend to infect another with the HIV virus. Exposing another to HIV is not punishable if that person's intent was only to have sex with the person who they expose. This is true even if that person knew they were HIV-positive¹³ and chose not to wear a condom. California is the only state that limits the breadth of its HIV transmission statute to intentional exposure or transmission.¹⁴

Second, the exposure is only punishable if the sexual activity is unprotected. Therefore, if the HIV-infected person wears a condom, but the condom breaks or otherwise fails and subsequently infects their sexual partner with the HIV virus, they are not held liable under this statute. Even if the condom never breaks, the person with whom the HIV-positive person is having sexual contact may be unknowingly putting themselves at risk simply because the HIV-positive person has failed to disclose his/her status.

Third, not all sexual activity that might risk HIV transmission is considered. For example, the statute says nothing about the risk of exposure during oral sex even though HIV transmission is possible during oral sex.¹⁵

12. CAL. HEALTH & SAFETY CODE § 120291(a) (West 2012).

13. *Id.* ("Evidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.").

14. Burris et. al., *supra* note 4, at 483.

15. Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 328 (2004)

("Unprotected anal intercourse is the riskiest sexual activity. The probability of HIV being transmitted from an HIV-infected man to his uninfected partner through a single act of unprotected anal intercourse is approximately 1 in 50 if the infected man is the insertive partner and 1 in 2000 if he is the receptive partner. The risks associated with unprotected vaginal intercourse are relatively small as well: approximately 1 in 1000 for male-to-female transmission and 1 in 2000 for female-to-male transmission. Less is known about the probability of HIV transmission through oral sex. Although there have been a small number of cases in which HIV reportedly was transmitted through cunnilingus, anilingus, or being the insertive partner in fellatio, the risk associated with these activities is generally (though not universally) considered to be negligible. In contrast, while the risk to the receptive ("giving") partner in fellatio is less than the risk associated with anal or

The legislature's intent in amending this section of the Health and Safety Code was to protect the health and safety of the public, who had previously been inadequately protected by the law from the threat of infection by those who carry "AIDS, AIDS-related conditions, and other communicable diseases" by requiring vital information be obtained and disclosed.¹⁶ Unfortunately, the way in which the legislature wrote the statute has made it impossible to successfully prosecute cases like those of Miles.

Although California's Sentence Enhancement statutes for those who expose another to the HIV virus during the commission of a sex crime or prostitution have been used,¹⁷ albeit rarely, there has only ever been one charge and/or conviction under California's HIV transmission statute.¹⁸ That case involved a forty-one-year-old HIV-positive man who pled guilty to having unprotected sex, knowing that he was HIV-positive, and acting with the intent to infect the person with whom he had sexual contact.¹⁹

As of 2007, California had the second highest number of HIV cases in the nation.²⁰ Some commentators have suggested that the cumulated number of new infections could decrease by thirty-six percent over a ten-year period simply by doubling the rate of prosecutions against HIV-positive persons who commit these offenses.²¹ A possible decrease in the number of new HIV-infection cases is one reason why the statute should be amended so as to provide broader culpability.

A. THE DIFFICULTY IN PROVING A SPECIFIC INTENT MENS REA

Likely the most problematic element of California's HIV transmission statute is the mens rea of intent, specifically that the prosecution must prove that the defendant intended to infect the victim with the virus.²² The extremely high bar of this mens rea requirement is not lost on the California legislature as evidenced by a 2004 statement made by Roland Foster, a congressional aide on the subcommittee for Criminal Justice, Drug Policy and Human Resources.²³ Foster spoke to the *San Francisco*

vaginal intercourse, it is not negligible. One study estimated the per-act risk to the partner performing fellatio to be 1 in 2500.").

16. CAL. HEALTH & SAFETY CODE § 121050 (West 2012).

17. *Guevara v. Superior Court*, 62 Cal. App. 4th 864 (1998).

18. *Ending & Defending Against HIV Criminalization*, THE CTR. FOR HIV LAW & POLICY (Nov. 17, 2010), <http://www.hivlawandpolicy.org/resources/view/564> (discussing the cases which have been brought under California HIV Transmission statutes).

19. THE CTR. FOR HIV LAW & POLICY, *supra* note 18, at 21.

20. Adeline Delavande et al., *Criminal Prosecution and Human Immunodeficiency Virus-Related Risky Behavior*, 53 J.L. & ECON. 741, 743 (2010) ("Cases of AIDS are concentrated in New York (15.8 percent of the total number of people living with AIDS in 2006), California (13.7 percent of cumulated cases), Florida (10.4 percent), and Texas (7.6 percent).").

21. *Id.*

22. Galletly & Pinkerton, *supra* note 15, at 332.

23. *Id.*

Examiner “describing the ‘intent to transmit’ requirement in California’s criminal HIV exposure statute as a ‘nearly impossible’ standard to meet, making the law ‘pretty much meaningless.’”²⁴ The difficulty in proving the mens rea greatly reduces the deterrence effect of this law as “relatively few people attempt to purposely infect others.”²⁵

B. PROSECUTION UNDER TRADITIONAL CRIMINAL LAW IS NOT ALWAYS EFFECTIVE

California prosecutors could prosecute those who intentionally or recklessly expose another to HIV through the use of traditional criminal laws such as murder, attempted murder, and/or assault,²⁶ but these laws often prove equally inadequate²⁷ and are infrequently applied.²⁸ For example, under a murder charge, the prosecutor must wait until the victim has died before bringing charges against the person who infected them.²⁹ The necessity of death for a murder prosecution is complicated in this context because it is likely that the person originally infected will die before their victim does.³⁰ Also, under both a murder and an attempted murder charge, the prosecution must prove that the infected person did, in fact, infect the victim with HIV, something that may be difficult to prove if the victim was sexually active with multiple partners³¹ and thus, may have been infected by another. For some people, months may pass before the HIV virus is even detected in their system, leaving the element of causation difficult to pinpoint.³² Additionally difficult to prove under both a murder and an attempted murder charge is the intent to kill,³³ specifically that the infected person intended to kill the victim by infecting them with HIV. This intent to kill requirement “is unnecessarily burdensome on the prosecution.”³⁴ Furthermore, the criticism of assault charges are that the penalties involved are minimal compared to the possible harm or if the

24. Galletly & Pinkerton, *supra* note 15, at 332.

25. Arianne Stein, *Should HIV Be Jailed? HIV Criminal Exposure Statutes and Their Effects in the United States and South Africa*, 3 WASH. U. GLOBAL STUD. L. REV. 177, 191 (2004).

26. Delavande et al., *supra* note 20, at 749.

27. McGuire, *supra* note 4, at 1795; but see Jody K. Kuiper, *The Need for Tougher Standards in Washington Imposing Criminal Liability for the Intentional Exposure to HIV*, 34 GONZ. L. REV. 185, 194 (1999) (some states treat the intentional exposure of HIV as attempted murder).

28. THE CTR. FOR HIV LAW & POLICY, *supra* note 18.

29. McArthur, *supra* note 6, at 714–15.

30. *Id.*

31. *Id.*

32. McGuire, *supra* note 4, at 1792.

33. McArthur, *supra* note 6, at 714–15.

34. *Id.* at 717.

victim were to actually be infected with the HIV virus, the actual harm caused in contracting an incurable and fatal disease.³⁵

C. CHANGING ATTITUDES TOWARDS AIDS MEANS A CONTINUATION OF UNSAFE SEXUAL PRACTICES

Although HIV prevention efforts have been effective within the gay community,³⁶ the majority of new HIV cases in San Francisco continue to be among gay and bisexual men.³⁷ This is reflected in the national trend showing that the majority of new HIV infections in 2009 occurred with men who had sex with other men.³⁸ Prevention among young gay men has been the least effective. "Young gay men" is the only demographic group in which the number of HIV infections between 2006 and 2009 actually increased.³⁹ In fact, San Francisco health officials estimate that of the approximate 585 new cases of HIV infection among gay and bisexual men in 2011, the bulk are in their thirties.⁴⁰

Research by the San Francisco Department of Health illustrated the trend of HIV transmittal among young gay men and found that although "young men are knowledgeable about HIV and know how it is transmitted," they continue to engage in unsafe sexual practices for various reasons including: they believed that they could not become infected as AIDS was "an old man disease," they were in love, substance use, the "inability to ask their partners to put on a condom" due to the power dynamics of the relationship, the feeling that they would inevitably become infected anyway, and "the strong sexual urges of adolescence, coupled with the general high risk-taking that occurs during this time."⁴¹ Other research has found that young men "may be less competent in negotiating low-risk sex and less knowledgeable about making safe sex activities enjoyable"

35. Erin M. O'Toole, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, 10 J.L. & HEALTH 183, 188 (1996).

36. Jose Antonio Vargas, *D.C. Gay Group Battles 'AIDS Fatigue'*, (Aug. 13, 2006) available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/12/AR2006081200948.html>; Mitchell H. Katz, *AIDS Epidemic in San Francisco Among Men Who Report Sex with Men: Successes and Challenges of HIV Prevention*, 14 J. OF ACQUIRED IMMUNE DEFICIENCY SYNDROMES S38, (1997) available at <http://www.ncbi.nlm.nih.gov/pubmed/9070513>.

37. Matthew S. Bajko, *HIV continues retreat in SF*, THE BAY AREA REP. (Mar. 24, 2011), <http://www.ebar.com/news/article.php?sec=news&article=5576>; *Statistics*, S.F. AIDS FOUND., <http://www.sfaf.org/hiv-info/statistics/> (last visited Feb. 28, 2012) ("There were 411 newly diagnosed HIV cases in 2009, down from 434 in 2008 and 518 in 2007. The majority was male (90%), MSM (73%), aged 25-49 (71%) and white (50%).").

38. *The HIV/AIDS Epidemic in the United States*, THE HENRY J. KAISER FAMILY FOUND., <http://www.kff.org/hivaids/upload/3029-12.pdf> (last updated Feb. 2012).

39. *Id.*; Katz, *supra* note 36.

40. Bajko, *supra* note 37.

41. Katz, *supra* note 36.

due to their inexperience.⁴² Additionally, for some, the emotional implications of coming out as a gay man may “result in low self-esteem and depression which may reduce their feelings of self-efficacy and motivation for safe sex.”⁴³

A 2000 study by the University of California at San Francisco also found the following changes in the attitudes of San Francisco gay men related to HIV/AIDS: “gay men didn’t find HIV as threatening as they once did, ads for AIDS drugs are seen as glamorizing life with HIV and there is increased acceptance of unprotected sex.”⁴⁴ The study suggested that this change in attitudes may lead to an increase in the rate of HIV infections.⁴⁵ Some commentators believe that the advancement of inhibitors and new medications, which have turned the virus from a guaranteed death sentence to a more manageable disease, have created a lack of urgency, erasing the fear of infection and the “constant reminder to disclose.”⁴⁶

In correlation with these findings, there has been a growing emergence of a subculture of gay men who actively seek out the HIV virus with the goal of becoming infected.⁴⁷ This phenomenon was explored in the 2003 documentary, “The Gift,” which follows a young gay man who moved to San Francisco from the Midwest and actively sought out the HIV virus, subsequently becoming infected.⁴⁸ In this subculture, which dates back to the mid- to late-1990s, intentional HIV transmission occurs between two willing participants⁴⁹: gay men called “bug chasers” seek out HIV infected gay men called “gift givers” to have deliberate high risk sex with (i.e. “barebacking”).⁵⁰ The idea of actually wanting to become infected with HIV and actively seeking out those who are infected is entirely counter-intuitive. However, the myriad of drugs that have been developed to combat HIV/AIDS, referred to as “cocktails,” can make the disease more manageable, causing a complacency of sorts within the gay community.⁵¹

42. *What Are Young Gay Men's HIV Prevention Needs?* THE CTR. FOR AIDS PREVENTION STUDIES AT THE UNIV. OF CAL. S.F., http://people.virginia.edu/~gct2r/library/CAPS_Young_Gay_Men_Prev.pdf (last visited Feb. 29, 2012).

43. THE CTR. FOR AIDS PREVENTION STUDIES AT THE UNIV. OF CAL. S.F., *supra* note 41.

44. Christopher Heredia, *Study Shows Gay Men in San Francisco Less Afraid of HIV/Attitude May Be Leading to More Infections*, S.F. CHRONICLE, (Oct. 22, 2001), <http://www.sfgate.com/health/article/Study-shows-gay-men-in-S-F-less-afraid-of-HIV-2866847.php>.

45. *Id.*

46. Kiefer, *supra* note 3.

47. *Our Motives*, <http://www.thegiftdocumentary.org/ourmotives.html> (last visited May 12, 2012). For another look at the subculture of “bug chasing” and “gift givers” and how it relates to HIV Transmission statutes, see Amanda Weiss, *Criminalizing Consensual Transmission of HIV*, U. CHI. LEGAL F. 389 (2006).

48. *About the Film*, <http://www.thegiftdocumentary.org/aboutthefilm.html> (last visited Feb. 4, 2013).

49. *Our Motives*, *supra* note 47.

50. *Definitions*, <http://www.thegiftdocumentary.org/aboutdefinitions.html> (last visited Feb. 4, 2013).

51. *Our Motives*, *supra* note 47.

According to research done by Louise Hogarth, writer and director of “The Gift,” there existed a

“[P]revalence of the attitude that the answer to HIV/AIDS is simple—take a pill. It seemed that many gay men, particularly younger gay men, were unaware that the drug cocktails can cause serious side effects, including death. Many also did not know that they could be infected or re-infected by a drug-resistant strain of the virus and that drugs might not be an option. Many thought that once they had the virus, they could have unprotected sex without worry that they could get any sicker.”⁵²

Given the fact that these drugs fail to work on everyone in all cases and that there is still no cure for HIV/AIDS means that for some people who become infected, the virus is still very much a death sentence.

In addition to the complacency of those in the gay community who see HIV as a manageable disease, during her research, Louise Hogarth also uncovered in this subculture feelings of isolation, loss, anxiety, and guilt by HIV-negative men.⁵³ However, once infected, some experienced a feeling of belonging to a community—the community being those who were also infected with HIV.⁵⁴ Hogarth also found that some felt that, as gay men, they were going to get the HIV virus anyway so why not just become infected now and get it over with.⁵⁵ These feelings serve as the catalyst for the desire to become HIV-positive and actively seek out those who were infected.⁵⁶

Research figures support the fact that unprotected sex is still happening within the gay community. “Research shows that rates of unsafe sex among infected individuals range from relatively low to frequent and may vary over time, but most individuals do remain sexually active, with as many as forty percent continuing to engage in risky behavior at least occasionally.”⁵⁷ Additionally, a July 2006 study by the Centers for Disease Control and Prevention (CDC) found that of the ten thousand gay men surveyed, forty-seven percent of them had unprotected anal intercourse in the previous year.⁵⁸

These findings appear to coincide with what experts call AIDS Fatigue. AIDS Fatigue happens as the public hears so much about AIDS that the issue no longer attracts or catches people’s attention in the same way that it

52. *Our Motives*, *supra* note 47.

53. *Id.*; *About the Film*, *supra* note 48.

54. Kevin Reece, *Spreading HIV/AIDS as a Gift*, KOMO NEWS (Aug. 31, 2006, 12:03 AM), <http://www.komonews.com/news/archive/4093766.html>.

55. *Id.*

56. *Id.*

57. Burris et al., *supra* note 4.

58. Vargas, *supra* note 36.

used to.⁵⁹ “National and local health-care officials say they fear gay men have ‘gotten collectively numb’ about the epidemic.”⁶⁰ When coupled with the fact that the number of newly infected HIV cases has remained stable for more than a decade,⁶¹ AIDS fatigue can be a dangerous component of the changing attitudes toward HIV/AIDS.⁶²

Other commentators give a more complex explanation for the continuation of unsafe sex practices by gay men, asserting that, whether consciously or not, gay men choose to engage in these behaviors as a way to rebel against the constant urging from health promoters and educators to practice safe sex.⁶³ They point to the theory of “‘psychological reactance,” defined as an unpleasant motivational state that consists of pressures to re-establish the threatened or lost freedom. The more important the freedom is to the individual, the greater the reactance when the freedom is threatened or eliminated.”⁶⁴ Under this theory, one of the ways in which people react is by doing the opposite of what has been prohibited and actually engaging in the prohibited behavior.⁶⁵ Therefore, the concern is that health promoters pressure to change the behavior of the person, i.e. stop engaging in unsafe sexual practices, especially if seen as an attempt at censorship, would actually increase the person’s motivation to engage in these prohibited, risky behaviors.⁶⁶

D. VICTIMS INFECTED WITH HIV WANT JUSTICE: RETRIBUTION IN PRACTICE

One of the most compelling arguments for amending California’s HIV transmission statute is to seek justice for the victims who were unknowingly infected with the HIV virus by their sexual partners. Indeed, from a purely retribution standpoint, where the foundational principle is the

59. *Fauci: Despite ‘AIDS fatigue,’ Americans should care*, CNN (Nov. 30, 2007), http://articles.cnn.com/2007-11-30/health/aids.day.fauci_1_hiv-and-aids-new-infections-world-aids-day?_s=PM:HEALTH. For discussion of what the San Francisco community has recently been doing to combat AIDS Fatigue, see generally Seth Hemmelgarn, *Campaign hopes to keep people talking about AIDS*, THE BAY AREA REP. (June 2, 2011), <http://www.ebar.com/news/article.php?sec=news&article=5748>.

60. Vargas, *supra* note 36.

61. Bajko, *supra* note 37; *Fauci*, *supra* note 59.

62. *Fauci*, *supra* note 59.

63. Michele L. Crossley, *Making sense of ‘barebacking:’ Gay men’s narratives, unsafe sex and the ‘resistance habitus,’* 43 BRIT. J. OF SOC. PSYCHOL. 225, 227 (2004)

(“[O]ne of the main reasons why some gay men feel drawn to ‘risky’ sexual practices is because they provide a psychological feeling of rebellion against dominant social values, which, in turn, creates a sense of freedom, independence and protest. By engaging in particular ‘unhealthy’ practices, the body of the gay man comes to be used as a vehicle through which he can ‘embody resistance to cultural norms.’”).

64. *Id.*

65. *Id.*

66. *Id.*

“the guilty deserve to be punished,”⁶⁷ criminalizing those that have wronged another makes sense.

Like Miles, other victims have felt betrayed by the California justice system for not being able to successfully bring a criminal charge against those who have infected them.⁶⁸ Some end up suing under a tort action—their only real option to seek justice.⁶⁹ Others, such as Miles, believe that the social stigma caused by the public outing of their disease under a civil claim would far outweigh whatever compensation, if any, they may recover if they were to win an action against the accused.⁷⁰ Additionally, even if someone like Miles were to bring a civil case, “California has not yet decided whether negligent transmission of a sexually transmitted disease is a recognized tort,”⁷¹ making the chances of winning a civil suit all the more difficult.

E. ACHIEVING THE GOAL OF DETERRENCE: UTILITARIANISM IN PRACTICE

Deterrence is the primary goal of HIV transmission/exposure statutes.⁷² The idea is that by putting those who are HIV-positive on notice that certain acts and behaviors are criminally prohibited, they will be deterred from engaging in those acts and behaviors and thus, the transmission of HIV to uninfected persons will be impeded.⁷³

Critics of criminalization of HIV transmission/exposure statutes have argued, however, that these statutes fail to achieve the utilitarian goal of deterrence.⁷⁴ Several empirical studies examining the influence that criminal HIV exposure laws have on deterrence found that there was “little to no evidence that these laws influence individuals’ sexual behavior”⁷⁵ and “that criminal law does not have a disease control function, at least as these laws are now written and enforced.”⁷⁶ I would argue however, that there are several possible reasons that may explain the results of these studies, and so, these studies should not be held as decisive to the issue.

Without successful prosecutions, criminal law has a minimal deterrence effect.⁷⁷ As discussed previously, the reason why the California HIV transmission statute has not been effective, i.e., only ever resulted in one prosecution, is because, among other things, its extremely narrow

67. Hugo Adam Bedau & Erin Kelly, *Punishment*, THE STAN. ENCYCLOPEDIA OF PHIL., Feb. 19, 2010, available at <http://plato.stanford.edu/archives/spr2010/entries/punishment/>.

68. Kiefer, *supra* note 3.

69. *John B. v. Superior Court*, 38 Cal. 4th 1177 (2006); Kiefer, *supra* note 3.

70. Interview with Miles McCormick, in S.F., Cal., (November 5, 2011).

71. 6 Witkin, Summary of Cal. Law, (10th), Torts § 912; *John B.*, 38 Cal. at 1188.

72. J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 442 (1994).

73. *Id.*

74. McArthur, *supra* note 6, at 722–25.

75. *Id.*

76. Burris et al., *supra* note 4, at 507.

77. Strader, *supra* note 72, at 443.

application to those who intend to infect their partner with the HIV virus. If we are unable to successfully bring prosecutions against those whose actions and behaviors we deem wrong and/or criminal, we cannot be surprised that the laws we currently have provide only a minimal deterrence effect. Similarly, public education of the illegality of HIV exposure is paramount to deterrence.⁷⁸ If we fail to give notice to society of actions that we deem criminal, i.e., nondisclosure by a HIV-positive person to his/her sexual partner, how can we expect that particular law to have any significant deterrence on society? In order to maximize deterrence outcomes, we must amend the statute and then give notice to the public regarding changes to the law through existing prevention and education programs.

II. SAN FRANCISCO AND THE AIDS EPIDEMIC

San Francisco is an appropriate venue to bring forth a discussion of amending the California HIV transmission statute because of San Francisco's long and tragic history with HIV/AIDS and its effect on gay residents. In fact, the initial phases of the AIDS epidemic hit San Francisco and its gay community "harder than any other community in the world."⁷⁹

Between 1969 and 1978, approximately twenty-nine thousand gay men flooded the San Francisco gay community, with an average of five thousand more men arriving each year by 1980.⁸⁰ "As a result of this migration, San Francisco had the highest concentration of gay persons of any major city in the United States."⁸¹ It is estimated that between 1979 and 1984, as the epidemic spread, close to half of men in the city's gay community became infected with HIV.⁸² Other estimates put the number of newly infected at two-thirds of the gay community.⁸³ "Public health officials and members of the gay community began discussing ways to reduce the rates of infection."⁸⁴ San Francisco began pouring money into AIDS prevention efforts and was the first city in the nation to locally fund AIDS education.⁸⁵

San Francisco city officials also started to look at the city's gay bathhouses. The city had between twenty and thirty bathhouses and sex establishments offering gay men "places to socialize, to exercise—and to

78. Markus, *supra* note 4, at 879.

79. Katz, *supra* note 36.

80. RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 15 (St. Martin's Griffin rev. ed. 2007).

81. Katz, *supra* note 36.

82. Tom Farley, *Cruise Control: Control: Bathhouses are reigniting the AIDS crisis. It's time to shut them down*, WASH. MONTHLY, Nov. 2002, available at <http://www.washingtonmonthly.com/features/2001/0211.farley.html>.

83. SHILTS, *supra* note 80, at 491.

84. Katz, *supra* note 36.

85. *Id.*

engage in anonymous sex.”⁸⁶ These establishments were modeled on promiscuity and depersonalization of sex.⁸⁷ Men could choose not to talk or even not to see their sexual partner⁸⁸ by way of “mazes,” which offered pitch-dark pathways where men blindly felt for receptive partners, and “glory hole” booths, where men could engage in anal or oral sex through fist-sized holes cut into plywood boards separating the patrons.⁸⁹ These gay bathhouses were extremely popular in the gay community and served thousands of men per week.⁹⁰ It was these bathhouses that government officials believed served as a catalyst for spreading the AIDS virus.⁹¹

Although officials began to call for the closure of the bathhouses in 1982,⁹² it was not until 1984, amid evidence of continued unsafe sex occurring in bathhouses, and the fact that an estimated ten percent of the city's gay men continued to visit these establishments, that the city's health director⁹³ ordered bathhouses closed⁹⁴ as a matter of public health.⁹⁵ It was an action that supporters of the bathhouses argued was politically

86. Ilana DeBare, *Last Gay Bathhouse in S.F. Agrees to Close Its Doors*, L.A. TIMES, May 8, 1987, available at http://articles.latimes.com/1987-05-08/news/mn-2810_1_gay-bathhouse.

87. SHILTS, *supra* note 80, at 58; See also Farley, *supra* note 81 (illustrating the promiscuity and depersonalization aspects of the bathhouse experience). For additional discussion of gay culture during that time, including the emergence of promiscuity as an effect of sexual liberation and freedom during that time, see generally Crossley, *supra* note 63, at 227.

88. SHILTS, *supra* note 80, at 58.

89. Farley, *supra* note 82 (describing a common gay bathhouse scene:

“Pay \$8 to the clerk behind the Plexiglas window and he'll give you a towel and buzz you in. Inside are hallways of private rooms for sex, each about six by six feet, or just big enough for a thin mattress and a little maneuvering beside it. The rest of the bathhouse is mostly comprised of different areas for men to ‘cruise’--to check out the other bodies and decide which one to bring back to a room. These include a gym (complete with free weights, Nautilus equipment, and aerobic trainers), a sauna, Jacuzzi, and group showers. Elsewhere, gay porn videos play to help men get aroused. For those who like to watch, be watched, or have group sex, there are also orgy areas, including a fantasy ‘jail,’ a picnic table for men to lean over when receiving anal sex, and ‘slings’ into which men can strap themselves to expose their anus for anyone who happens by.”)

90. SHILTS, *supra* note 80, at 89 (one of the largest bathhouses in the city, Club Baths, serviced approximately three thousand gay men a week and up to eight hundred men at one time).

91. DeBare, *supra* note 86.

92. Farley, *supra* note 82.

93. See generally Selma K. Dritz, *The AIDS Epidemic in San Francisco: The Medical Response, 1981-1984: Volume I*, THE REGENTS OF THE UNIV. OF CAL. (1995), available at <http://content.cdlib.org/view?docId=kt2m3n98v1&query=&brand=calisphere>, for an interesting perspective on the events surrounding the San Francisco Bathhouse closures from viewpoint of the acting Public Health Director at that time, Mervyn Silverman, M.D., M.P.H.

94. Farley, *supra* note 82.

95. DeBare, *supra* note 86.

motivated and yet many felt came too late.⁹⁶ Even so, the following year, the number of gay men newly infected with the HIV virus declined drastically.⁹⁷ San Francisco's actions in closing down the gay bathhouses prompted other cities to follow in attempts to curb HIV infection rates in their own cities.⁹⁸

The debate over the closure of these establishments continued however.⁹⁹ After several bathhouses sued the city, the California Superior Court ruled that the bathhouses could reopen if they complied with certain guidelines including removing the doors of the private rooms and booths and hiring staff, who would supervise patrons and eject anyone who engaged in "unsafe sex practices."¹⁰⁰ Due to the refusal to adopt the court's guidelines or because of decreased customers,¹⁰¹ by 1987, the remaining bathhouses in the city had closed.¹⁰²

The history that San Francisco's gay community has had with HIV/AIDS continues even today. In 2009, the majority of new HIV cases in San Francisco occurred between gay men.¹⁰³ Additionally, San Francisco is ranked third, behind New York and Los Angeles, "among metropolitan areas in cumulative AIDS cases."¹⁰⁴ The political debate over these bathhouses is also ongoing.¹⁰⁵ There have been numerous discussions over the years regarding reopening the bathhouses. Many, including San Francisco's Health Director, have rejected the idea of reopening the bathhouses¹⁰⁶ to once again allow patrons the option to

96. SHILTS, *supra* note 80, at 491.

97. Farley, *supra* note 82 (note that this reduction in HIV infection cases is likely partly due to the prevention efforts by San Francisco officials and community organizations).

98. SHILTS, *supra* note 80, at 491.

99. Farley, *supra* note 82.

100. *Id.*

101. David Salyer, *Reopening San Francisco's Gay Bathhouses*, THE BODY (Sept. 1999), <http://www.thebody.com/content/art32206.html>.

102. DeBare, *supra* note 86; *see generally* STEAMWORKS BATHHOUSE, BERKELEY, CAL., <http://gaytravel.about.com/od/gaynightlifegallerie1/ig/Gay-Bars---Western-U-S--/Steamworks-Berkeley.htm> (last visited Jan. 22., 2013) (although there are no bathhouses in the city, sex clubs operate in San Francisco); Evelyn Nieves, *San Francisco Again Debates Over Bathhouses* N.Y. TIMES (May 29, 1999), <http://partners.nytimes.com/library/national/science/aids/052999aids-frisco-baths.html> (sex clubs are allowed to remain open because they do not have private areas for sex but rather sex is allowed as long as its in the public areas of the facility).

103. Bajko, *supra* note 37 ("The majority of San Francisco's new HIV cases remains among men who have sex with men. It is estimated that 585 gay and bisexual men will become HIV-positive this year, the bulk of whom are likely to be in their 30s.").

104. Katz, *supra* note 36.

105. Salyer, *supra* note 101; Nieves, *supra* note 102.

106. *California: HIV Section Head Nixes Bathhouse Return*, THEBODY.COM (May 1, 2008), <http://www.thebody.com/content/art46507.html>; *see generally* Nieves, *supra* note 101 (however, bathhouses in other areas of the Bay Area, one in Berkeley and one in San Jose, continued operating during the AIDS epidemic and continue to operate today, as the only two bathhouses in the Bay Area).

engage in sexual conduct in private rooms within these establishments.¹⁰⁷ Although city officials continue to argue that this prohibition is based on public safety, bathhouse proponents argue that the opposition is less about preventing the spread of AIDS, and more a result of an “attitude that stereotypes gay men as libertines who cannot be trusted to engage in safe sex without being policed.”¹⁰⁸

Whether the city of San Francisco’s ban on bathhouses¹⁰⁹ is based on the government’s homosexual prejudice, acting under the guise of medical concern, or based on an actual and genuine public health concern that bathhouses encourage unsafe sexual practices which facilitate the spread of the HIV virus, the fact remains that San Francisco and its gay community is still very much in the forefront of the HIV/AIDS story. Its long, tragic, and continuing history with HIV and the AIDS epidemic makes it an ideal venue under which to bring forth a proposal for amending California’s HIV transmission statute, a statute that, if appropriately amended, would add to the effort to curb new cases of HIV infection by deterring those who consider knowingly exposing others to the HIV virus and prosecuting those who actually carry out those actions.

III. AMENDING THE STATUTE

For all these reasons, the California HIV transmission statute should be amended¹¹⁰ in order to help curb new HIV infections and to effectively punish those who knowingly expose others to the risk of HIV infection.

A. ALTERING THE MENS REA

One of the main ways in which the HIV transmission statute should be amended is to alter the mens rea from that of specific intent to one of general intent. Instead of punishing those who expose others to HIV only with the specific intent of exposing them to the virus, the statute would punish those who expose others to HIV for other motivations and intentions, such as wanting to engage in sexual activity with that person. This would help to alleviate one of the major problems with the statute that makes it so ineffective.¹¹¹

B. ACTUAL AND CONSTRUCTIVE KNOWLEDGE

Another major change would be to punish not only those who knew they were HIV-positive but also those who had reason to know they were

107. Nieves, *supra* note 102 (“[T]his argument over closed-door versus open-door public sex is an only-in-San Francisco debate.”).

108. *Id.*

109. *Id.* (explaining that the ban is really on private rooms within bathhouses where gay men could engage in unsafe sex practices).

110. *See infra* Part III.H.

111. *See supra* Part I.A.

HIV-positive or, more specifically, had constructive knowledge¹¹² that they were HIV-positive. Under the current California HIV transmission statute, to know you are HIV-positive means that you received a positive test result.¹¹³ The problem with this requirement is that it holds liable only those who have been tested. This could mean that people who believe they may be HIV-positive choose not to get tested as a way to avoid liability and prosecution.¹¹⁴ The question then becomes, how do we define constructive knowledge so that it holds accountable the right group(s) of people?

In holding that constructive knowledge of a defendant's HIV-positive status was sufficient to extend liability to a defendant in a tort action, the Supreme Court of California in *John B. v. Superior Court* noted that constructive knowledge exists when an actor has reason to know of the infection based on the totality of the circumstances.¹¹⁵ More specifically, it exists "when there is sufficient information to cause a reasonably intelligent actor to infer he/she is infected with the virus or that infection is so highly probable that his/her conduct would be predicated on that assumption."¹¹⁶ Moreover, persuasive factors presented by proponents of statutory change for determining whether someone has constructive knowledge of their HIV-positive status include: identifiable symptoms, high-risk sexual behavior, and a previous partner who is HIV-positive.¹¹⁷ Using these factors, someone would have constructive knowledge if they exhibit "identifiable or long-term symptoms," such as lesions or other telling symptoms, "especially when coupled with conduct carrying a high risk of transmittal in the absence of other possible medical explanations for the symptoms."¹¹⁸

Criticism of a constructive knowledge requirement centers on the concern that we may be holding people, particularly those who are uneducated, accountable for knowledge that they truly never had.¹¹⁹ However, this requirement should only encourage people to be proactive in regularly getting tested for HIV in order to avoid possible liability. As the Court in *John B.* noted, "[I]imiting tort defendants to those who have actual knowledge they are infected with HIV would have perverse effects on the spread of the virus. If only those who have been tested are subject to suit, there may be 'an incentive for some persons to avoid diagnosis and

112. BLACK'S LAW DICTIONARY 712 (9th ed. 2009) (constructive knowledge is knowledge "that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person").

113. McArthur, *supra* note 6.

114. Joseph W. Rose, *To Tell or Not to Tell*, 22 J. LEGAL MED. 107, 112-13 (2001).

115. *John B. v. Superior Court*, 38 Cal. 4th 1177, 1190 (2006).

116. *Id.* at 1192.

117. Markus, *supra* note 4, at 865.

118. Markus, *supra* note 4, at 865; *see generally HIV/AIDS Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/resources/qa/definitions.htm> (last updated Nov. 6, 2006) (describing common HIV symptoms).

119. Markus, *supra* note 4, at 865.

treatment in order to avoid knowledge of their own infection.”¹²⁰ This “would be contrary to the public policy of encouraging testing for and preventing the spread of HIV.”¹²¹ “Extending liability to those with constructive knowledge of the disease, on the other hand, ‘will provide at least a small incentive to others to use proper diagnostic techniques and to alter behavior and procedures so as to limit the likelihood of HIV transmission.’”¹²² Such constructive knowledge is used in tort actions for negligent transmission in every jurisdiction in the United States.¹²³ Moreover, the existence of variable sentencing, present in California’s current HIV transmission statute, allows the court to take into account as a mitigating factor the defendant’s knowledge and whether he/she had actual or constructive knowledge.¹²⁴

Critics have also argued that HIV-specific criminal statutes discourage those at risk of infection from getting tested and those infected from seeking treatment, thereby undermining public health efforts.¹²⁵ The argument the Court in *John B.* made seems to fit here as well.¹²⁶

C. EXPANDING COVERED SEXUAL ACTIVITIES

Yet another change includes adding oral sex onto the list of sexual activities the statute covers. While oral sex does not have as high of a rate of HIV transmission as does vaginal or anal sex, the activity still has potential to transmit the HIV virus.¹²⁷ In order to make a statute that is comprehensive and effective, it is important to include activities that reasonably could transmit HIV.

D. UNPROTECTED AND PROTECTED SEXUAL INTERCOURSE

The current California HIV transmission statute only criminalizes unprotected sex.¹²⁸ In this respect, the use of a condom acts as a defense.¹²⁹ Although condoms, when used correctly and consistently do decrease the chances of HIV transmission, recent studies place that effectiveness between eighty percent and ninety-five percent.¹³⁰ Thus, using condoms are not always effective¹³¹ against protecting against HIV transmission.

120. *John B.*, 38 Cal. at 1190.

121. *Id.* at 1192.

122. *Id.* at 1190.

123. *Id.* at 1198.

124. McGuire, *supra* note 4, at 1809.

125. McArthur, *supra* note 6, at 722–25.

126. *John B.*, 38 Cal. at 1190.

127. Galletly & Pinkerton, *supra* note 15, at 328.

128. *Id.* at 334.

129. Markus, *supra* note 4, at 870–71.

130. ROBERT A. HATCHER, MD, MPH, CONTRACEPTIVE TECHNOLOGY 303 (Contraceptive Technology Communications Inc. rev. ed, 2009).

131. *Male Latex Condoms and Sexually Transmitted Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/condomeffectiveness/latex.htm> (last visited Jan. 22, 2013).

Therefore, someone who is HIV-positive could have sex with their partner, use a condom, and still end up infecting their partner who has no idea that the HIV-positive person is infected, and not be held liable under the current HIV transmission statute. Holding liable those who failed to disclose their status with their partner, regardless of whether they engaged in protected or unprotected sex is more appropriately related to the intent of the statute as created by the California legislature.¹³² The person with whom the HIV-positive person is having sexual contact should be given the opportunity to choose whether to engage in protected, as well as unprotected sex, with an HIV-positive person.

E. CONSENT AS AN AFFIRMATIVE DEFENSE

Additionally, consent should be added to the statute as an affirmative defense for the defendant, requiring not only that the defendant disclose his/her HIV-positive status but also that the sexual partner consent to the exposure.¹³³ Obtaining a partner's consent was something that the Presidential Commission on the Human Immunodeficiency Virus Epidemic recommended.¹³⁴ Requiring the partner's consent acts as an additional protection for the partner against situations such as an "inaudible disclosure, and when the partner is not cognitive enough to understand and appreciate the carrier's disclosure."¹³⁵ It also serves to protect "the HIV-infected individual because a partner's consent to the dangerous risks insulates the carrier from criminal liability."¹³⁶ However, "because the ramifications of falsely convicting a defendant are so serious, the burden of proving consent should . . . remain on the prosecution."¹³⁷

Some may argue that by allowing someone who knowingly infects their partner with HIV to avoid criminal prosecution if they received consent from their partner, a loophole is created and this loophole ultimately defeats the goal of curbing the spread of the HIV virus. This point may be particularly valid given the idea that some gay men are intentionally seeking out the virus and thus, affirmatively and eagerly consent to being infected.¹³⁸

Case law concerning the criminalization of HIV transmission when the partner has consented to unprotected sex with an HIV-positive individual has only yet been addressed through the military courts, with the leading case being *United States v. Bygrave*.¹³⁹ The Bygrave court upheld the

132. CAL. HEALTH & SAFETY CODE § 121050 (West 2012).

133. Rose, *supra* note 114, at 113.

134. McArthur, *supra* note 6, at 715.

135. Rose, *supra* note 114, at 113.

136. *Id.*

137. Markus, *supra* note 4, at 870–71.

138. *About the Film*, *supra* note 48.

139. Amanda Weiss, *Criminalizing Consensual Transmission of HIV*, U. CHI. LEGAL F. 389, 399 (2006).

assault conviction of an HIV-positive defendant against his partner who, despite having knowledge of his HIV-positive status, consented to the unprotected sexual intercourse. In doing so, the court held that

[T]he government's interest in the health of the defendant's sexual partner was "not negated by the fact that [she] chose to put her own health in danger by having unprotected sex with an HIV-positive partner." By compromising her own health, she also risked compromising the health of others. The Government's interests in the present case are not limited to the health of [this woman], but also encompass the health of any sexual partners she may have in the future, any children she may bear, and anyone else to whom she may potentially transmit HIV through nonsexual contact.¹⁴⁰

The welfare of the public is, and should be, a significant factor informing HIV prevention efforts. However, adults who possess knowledge of the risks and consequences of having unprotected sex with an HIV-positive person should be able to exercise their right to choose this course of action, even if that ultimately ends in a detriment to them. Prosecuting someone who receives consent would be holding him or her just as accountable as someone who failed to alert his/her partner about his/her HIV-positive status which significantly decreases the deterrence effect. Additionally, giving no weight to a partner's consent is essentially diminishing their partner's free choice, which does not seem constitutionally acceptable.

F. MITIGATING FACTORS FOR SENTENCING

The current California HIV transmission statute, as well as the amended one I propose below, offer three different sentencing schemes of three, five, or eight years.¹⁴¹ However, there are several mitigating factors that judges should consider when sentencing defendants who have been found guilty under this HIV transmission statute. These include: whether the defendant's knowledge of his/her HIV-positive status was actual or constructive, the level of risk of HIV exposure caused by the defendant's behavior, i.e., what was the sexual activity involved and was a condom used during the sexual encounter, and what were the defendant's motives in exposing the victim to HIV, i.e., did the defendant engage in the sexual activity with the intention of deliberately exposing the victim to HIV or with the intention of having sex with the victim.

Critics of the criminalization of HIV contend that there has been a failure to link culpability and punishment to the risk imposed by the HIV-positive person's behavior.¹⁴² In response to this point, the level of risk of

140. Weiss, *supra* note 139, at 399.

141. CAL. HEALTH & SAFETY CODE § 120291(a) (West 2012); *see inra* Part III.H.

142. Burris et al., *supra* note 4, at 485–87.

HIV exposure should include the sexual activity involved and whether a condom was used during the sexual encounter. As discussed above, different sexual activities carry different risks of HIV transmission¹⁴³ and the use of a condom can significantly decrease the risk of HIV transmission.¹⁴⁴ Defendants who engage in lower risk sexual activities and who used a condom would be found less culpable and therefore should receive a less harsh punishment.

Furthermore, promoting safe sex practices is a current and central public health message,¹⁴⁵ and so the use of condoms by those who are HIV-positive should serve as a mitigating factor as a means to reinforce this message.

Finally, although any intentional failure to disclose one's HIV-positive status to their partner is a paramount wrong and should be criminalized, the difference in culpability of doing so with an intent to infect them versus merely an intent to have sexual contact with that person is separate and distinct. This difference should be reflected in the harshness of the punishments incurred, such that the former case receives a stricter sentence as compared to the latter.¹⁴⁶

G. CONFORMING TO THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC

This statute as amended also conforms to many recommendations of Reagan's Presidential Commission on the Human Immunodeficiency Virus Epidemic as far as the form of an HIV-specific criminal statute should take.¹⁴⁷ Specifically, an HIV-specific statute should: target those who know they are infected with HIV, define criminal behaviors clearly and avoid criminal prosecution of those behaviors which carry no scientific risk of transmission, impose a duty on HIV-positive persons to disclose their positive status to, and obtain consent from, their sexual partners, and make the statute in the form of a public health law ("to allay public health professionals' fears that HIV-specific criminal statutes would interfere with protecting the public health").¹⁴⁸

H. CALIFORNIA HIV TRANSMISSION STATUTE AS AMENDED

Rewriting the statute in these ways would promote disclosure, shifting to an effort towards safer sex and regular HIV testing which protects both partners: the HIV-positive partner from possible liability, and the HIV-negative partner from the possibility of unknowingly becoming infected with the HIV virus. This would serve the public health concern of

143. Galletly & Pinkerton, *supra* note 15, at 328.

144. *Id.*

145. *Id.* at 335-36.

146. *Id.* at 335.

147. McArthur, *supra* note 6, at 715.

148. *Id.*

preventing HIV transmission¹⁴⁹ and also more effectively punish those who knowingly transmitted HIV to others.

I propose that the amended California HIV transmission statute read as follows:

(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in protected or unprotected sexual activity when the infected person knows, or has constructive knowledge that, at the time of the sexual activity he or she is infected with HIV, and has not disclosed his/her HIV-positive status to the other person, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years.

(b) As used in this section, the following definitions shall apply: (1) "Sexual activity" means insertive vaginal, anal, or oral intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal or oral intercourse on the part of an infected man or woman with a male partner. (2) "Protected sexual activity" means sexual activity with the use of a condom. (3) "Unprotected sexual activity" means sexual activity without the use of a condom. (4) "Constructive knowledge" means sufficient information to cause a reasonably intelligent actor to infer he or she is infected with the virus or that infection is so highly probable that his/her conduct would be predicated on that assumption. Factors to consider when determining if someone has constructive knowledge of their HIV-positive status include: identifiable symptoms, high-risk sexual behavior, and a previous partner who is HIV-positive.

(c) Consent to the exposure shall be an affirmative defense.

IV. CONCLUSION

From bearing the brunt of the initial phases of the AIDS epidemic, to the city's controversial closure of its many, and very popular, gay bathhouses, San Francisco and its gay community have had a long, tragic, and political history with the AIDS epidemic. San Francisco has also continued to remain in the forefront of the HIV/AIDS discussion, as it continues to encounter one of the highest rates of AIDS cases in the nation. In these respects, San Francisco serves as an ideal venue from which to bring forth a proposal for amending California's HIV transmission statute in an effort to curb new infections and prosecute those who knowingly expose others to the HIV virus.

149. CAL. HEALTH & SAFETY CODE § 121050 (West 2012).

The way in which the current statute is written is ineffective in that it, for practical purposes, creates such a narrow mens rea requirement that only an extremely small segment of people who expose others to HIV through sexual activity could be held culpable. The amended statute that I have proposed would be more effective as it would be aimed at prosecuting those who *knowingly* expose others to HIV without disclosing to them their HIV-positive status, as opposed to the current HIV transmission statute which only prosecutes those who *intentionally* expose others to HIV. In this way, those who intentionally deceive their partner by not disclosing their HIV-positive status for whatever reason would be held criminally liable.

From a retribution standpoint, this serves the victims who have been exposed to this virus and who want justice for the wrongdoer's actions. From a utilitarian standpoint, I would argue that coupled with targeted public education, a well-written HIV transmission statute that encompasses a constructive knowledge element would serve as a significant deterrence for those who would otherwise act in a way that puts others at risk of unknowingly contracting the HIV virus. It is this deterrent effect that would assist in the effort to curb new cases of HIV infection.

Although early prevention methods following the initial onset of the AIDS epidemic were successful in many ways, what has followed has been a general complacency in the gay community. While this complacency can be attributed to many factors, including AIDS fatigue and the glamorization of HIV due to its perceived manageability under current HIV medical treatments, the fact that this complacency exists shows not only that HIV needs to continue to be a topic at the forefront of national discussion, but also that more needs to be done to prevent and deter these transmissions, particularly for those who have innocently been infected by a partner who fails to disclose his/her HIV-positive status. Currently, this can best be accomplished by amending California's HIV transmission statute.