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Criminalizing the Sexual Transmission of HIV: An International Analysis

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I. INTRODUCTION

In the absence of a cure, public health authorities maintain that public education and counseling about the modes of transmission and methods of reducing risk, not the criminal law, should be the foremost strategy for preventing the transmission and spread of the human immunodeficiency virus (HIV).1 At the same time, public health authorities and legislators are concerned that certain individuals, knowing that they are infected with HIV, may disregard the risk they pose to others.2 It is conceivable that some people may deliberately engage in behavior that exposes others to HIV.3 When individuals threaten the health of others by such behavior, it has been urged that governments consider criminal prosecutions as an appropriate response when efforts to obtain voluntary compliance have failed.4

This Note begins by examining some of the medical facts relating to HIV infection. The Note then explores some of the arguments for and against the use of the criminal law to limit the spread of HIV. It compares criminal laws relating to the HIV epidemic in the United States, Great Britain, Australia, and New Zealand. Finally, this Note suggests that the traditional criminal approach is inappropriate when dealing with conduct capable of transmitting HIV, and proposes elements for a special


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HIV-specific criminal statute that takes into account the unique characteristics of HIV.

II. MEDICAL FACTS REGARDING HIV TRANSMISSION

Before beginning an analysis of the substantive criminal law relating to HIV transmission, it is necessary to examine the current medical consensus regarding several different aspects of the HIV epidemic in order to make an informed analysis of these laws and the activities they proscribe.

A. Terminology

HIV is a virus that attacks and damages the immune system. It was first identified in the early 1980s. Physicians and scientists have identified at least two strains of HIV: HIV-1 (commonly called HIV), which is prevalent in the U.S. and most of the world, and HIV-2, which is common in parts of West Africa. Most of the illnesses associated with HIV are “opportunistic infections” that take advantage of a person’s weakened immune system, but there are some diseases that are caused by the virus itself.

There are three basic means of transmitting HIV. They are transmission by injection of infected blood, by unprotected sex with an infected person, and from an infected mother to her fetus or newborn child (perinatally).

The most common method of determining whether a person is infected with HIV is to test his or her blood for antibodies to the virus. If antibodies are found, the person is said to be “HIV-positive.” However, the tests are not foolproof.

Acquired Immune Deficiency Syndrome (AIDS) is a medical and
legal term defined by the Centers for Disease Control (CDC) in Atlanta, Georgia. It refers to a specific group of conditions that develop after the function of the immune system has declined substantially due to HIV infection.\(^\text{14}\) This definition has been criticized as arbitrary because many people die as a result of HIV without ever suffering from any of the diseases or conditions specified in the CDC definition of AIDS.\(^\text{15}\)

HIV-positive people suffering from intense symptoms, but ones not meeting the CDC definition of AIDS, have been said to suffer from AIDS-Related Complex (ARC). This term has recently been described as "no longer useful" by public health authorities, who believe that HIV infection itself should be considered a spectrum disease.\(^\text{16}\)

B. Epidemiology

As of December 31, 1991, there were 206,392 confirmed cases of AIDS reported in the United States, resulting in over 133,232 reported deaths.\(^\text{17}\) The CDC has estimated that at least one million people in the United States are infected with HIV.\(^\text{18}\) As of January 1, 1991, the World Health Organization had reported 3,884 AIDS cases in Great Britain, 4,427 in Canada, 2,295 in Australia, and 207 in New Zealand.\(^\text{19}\)

Men who have had sex with other men\(^\text{20}\) and intravenous drug users now make up 83% of the reported AIDS cases in the United States.\(^\text{21}\) Women constitute 12% of adults with AIDS in the United States.\(^\text{22}\) Pediatric cases (children under age 13) form over 1.7% of all cases. People


\(^{16}\) CONFRONTING AIDS UPDATE, supra note 2, at 3. A "spectrum disease" is "a continuum of conditions associated with immune dysfunction." Id.


\(^{20}\) The term "men who have had sex with other men" is used in this Note because the term "gay men" is underinclusive. Many men who are infected with HIV as a result of having sex with other men do not identify themselves as "gay" or even "bisexual."


\(^{22}\) Id.
of color make up 48% of the reported AIDS cases in the United States.\textsuperscript{23}

By the end of 1993, it is estimated that there will have been between 390,000 and 480,000 cases of AIDS in the United States, and two-thirds of these cases will have resulted in death.\textsuperscript{24} The World Health Organization estimates that at least 9 million people worldwide are infected with HIV, a number which will rise to 40 million by the year 2000.\textsuperscript{25} New AIDS cases are increasing at a much higher rate among heterosexual men than among homosexual or bisexual men.\textsuperscript{26} In addition, the impact of AIDS on women, the poor, and people of color will increase, as the number of HIV-infected people from these groups grows dramatically.\textsuperscript{27}

C. Disease Process

HIV invades cells vital to the body's ability to defend against disease,\textsuperscript{28} especially T4 (T-helper) cells which "directly or indirectly regulate[] every aspect of immune function."\textsuperscript{29} The virus destroys these cells and may even suppress the production of new T4 cells. The virus infects a T4 cell, replicates itself, and those replications in turn infect an ever increasing number of T4 cells.\textsuperscript{30}

Impairment or destruction of T4 cells results in a weakening of the immune system, leaving the body susceptible to infection. Familiar infections which normally would not be cause for concern may become extremely difficult to treat.\textsuperscript{31} These infections (or certain types of cancers) give rise to a diagnosis of AIDS. Studies indicate that the median survival time for people with AIDS is 12.5 months after an AIDS diagnosis but that many people have lived with AIDS for as long as 8 years.\textsuperscript{32}

In many people, HIV remains relatively inactive for a significant period of time before causing clinical symptoms or signs. This period of latency or dormancy may last anywhere from two months to seven

23. Id.

24. CDC, HIV Prevalence Workshop, supra note 18, at 117.

25. CDC, HIV/AIDS Epidemic, supra note 21, at 357.

26. Id at 358-59.


28. See generally Mobilizing Against AIDS, supra note 4, at 112-43 (describing which cells the virus invades and its effects on the immune system).

29. Id. at 123.

30. Id. at 117.


32. See, e.g., George F. Lemp et al., Survival Trends for Patients with AIDS, 263 JAMA 402, 403 (1990). Drug treatments may prolong the lives of people with AIDS, so the survival periods should increase as new drugs are developed. See infra text accompanying notes 61-71.
years. During this time, a person has no way of knowing that he or she is infected, unless a test yields positive results.

It is unclear what triggers viral activity after this period of dormancy. Experts speculate that triggers may include exposure to other infectious agents (such as herpes or other sexually transmitted diseases), repeated exposure to HIV, genetic factors, and behavioral habits or other environmental factors.

D. Symptoms and Diseases

1. Symptoms

Within a month of HIV infection, some people experience flu-like symptoms. These symptoms may last from a few days to several weeks, and include fevers, sweats, exhaustion, nausea, headaches, swollen lymph glands, diarrhea, and loss of appetite. Most patients and doctors do not initially recognize the symptoms as being indicative of HIV, however, because they are non-specific and could result from other causes. In addition, many people remain symptom-free during the initial period after infection. Even if a person experiences these initial symptoms, they are commonly followed by a long period during which the patient is asymptomatic (infected with HIV but showing no symptoms of infection).

The type, severity, and onset of HIV symptoms vary greatly among HIV-infected people. When they finally develop symptoms, there are several conditions that may be quite severe and even deadly, but still do not constitute an AIDS diagnosis under the CDC definition. These symptoms are: persistently swollen lymph glands throughout the body, thrush, shingles, drenching night sweats, and sudden, unexplained weight loss ("wasting syndrome").

2. Diseases

The most common diseases that result in a diagnosis of full-blown AIDS are *Pneumocystis carinii* pneumonia (PCP), Karposi's sarcoma (KS), and HIV encephalopathy ("AIDS dementia complex"), but several

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33. MOBILIZING AGAINST AIDS, supra note 4, at 131-32.
35. MOBILIZING AGAINST AIDS, supra note 4, at 59-60.
36. Id. at 131-32.
37. Id.
38. See Lifson, supra note 34, at 1362-63.
39. Id. See also MOBILIZING AGAINST AIDS, supra note 4, at 62.
other diseases are also relatively common.\textsuperscript{40} PCP is a parasitic pneumonia characterized by difficulty in breathing, dry cough, fever, and chest tightness.\textsuperscript{41} It is the most common "life-threatening infection" for people with AIDS in the United States.\textsuperscript{42} KS is a cancer of the blood vessel walls which, when seen externally, is distinguished by blue-violet to brownish skin blotches or bumps, but it may also affect internal organs.\textsuperscript{43} AIDS dementia complex is a degenerative brain disease caused by a direct infection of the brain by HIV.\textsuperscript{44} Early symptoms include diminished concentration, mild memory loss, abnormal motor function, and behavioral problems.\textsuperscript{45} These symptoms vary from mild to severe, and generally worsen over time. In acute cases, seizures, incontinence, partial paralysis, profound memory loss, and psychotic behavior may result.\textsuperscript{46}

\section*{E. Testing}

HIV itself may be directly detected by testing blood for the DNA of the virus, using a test called the polymerase chain reaction (PCR) test.\textsuperscript{47} This test is extremely sensitive, but very expensive, so it is primarily used for research.\textsuperscript{48}

The most commonly used tests to detect HIV infection are the antibody tests\textsuperscript{49} which detect antibodies formed in reaction to exposure to HIV, rather than the DNA of the virus itself.\textsuperscript{50} Antibodies generally become detectable between two and four months after exposure.\textsuperscript{51} About 95\% of infected individuals will register antibody positive within six months of exposure to HIV.\textsuperscript{52} Tests taken during the "window" period

\begin{itemize}
\item \textsuperscript{40} MOBILIZING AGAINST AIDS, supra note 4, at 65-80.
\item \textsuperscript{41} Id. at 66.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 74-75. More than 95\% of AIDS patients with KS are men who have had sex with other men. Id.
\item \textsuperscript{44} Id. at 63.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} C. Robert Horsburgh, Jr. et al., \textit{Duration of Human Immunodeficiency Virus Infection Before Detection of Antibody}, 2 LANCET 637, 637 (1989).
\item \textsuperscript{48} Sheppard, supra note 12, at 2-25.
\item \textsuperscript{49} The antibody test is frequently called the "AIDS test," a misnomer that falsely equates HIV antibody positivity with AIDS.
\item \textsuperscript{50} The immune system will usually form antibodies to rid the body of viruses and other foreign substances. Unfortunately, antibodies to HIV are not successful in eliminating the virus from the body. However, they are helpful as markers for infection. See MOBILIZING AGAINST AIDS, supra note 4, at 291-94.
\item \textsuperscript{51} Horsburgh, supra note 47, at 638.
\item \textsuperscript{52} Id. at 639. One study even documented that in some cases thirty-five months passed between exposure and seroconversion. David T. Imagawa et al., \textit{Human Immunodeficiency}
between exposure and seroconversion (the time when antibodies to HIV become detectable in the blood) may yield negative results, even though a person is actually infected. The degree to which this person can infect others during this period is unknown.\textsuperscript{53}

The initial screening test for antibodies to HIV is the enzyme-linked immunosorbent assay (ELISA)\textsuperscript{54} because of its low cost and ease of use.\textsuperscript{55} The cutoff point for a test to be considered "positive" is purposely set low so that faint specimens are labelled positive. The low cutoff point protects the blood supply (by eliminating such blood from blood banks) and increases the chance of detecting HIV infection despite a weak antibody response.\textsuperscript{56} However, this low cutoff point also increases the chance for "false positive" results, which are samples that do not contain antibodies but nevertheless produce a positive reaction to the test.\textsuperscript{57}

Because of the social stigma attached to positive test results, public health officials recommend additional testing in most of these cases.\textsuperscript{58} The current practice following an initial positive ELISA test is to require a repeat ELISA. If the repeat also registers positive, a more sophisticated antibody test, such as the western blot or PCR test, is used to confirm the result.\textsuperscript{59} The CDC will only consider a person to be HIV-positive if the more sophisticated test also indicates the presence of antibodies.\textsuperscript{60}

F. Treatment

Progress has occurred both in delaying or preventing the onset of symptoms and in treating the opportunistic infections and cancers associated with AIDS. The use of the anti-viral drug zidovudine (AZT) by asymptomatic individuals has been shown to be effective in staving off further decline,\textsuperscript{61} although the virus may develop resistance to AZT over time.\textsuperscript{62} In addition, although its effectiveness has not yet been estab-

\textit{Virus Type 1 Infection in Homosexual Men Who Remain Seronegative for Prolonged Periods, 320 New Eng. J. Med. 1458, 1458 (1989).}

53. Imagawa, supra note 52, at 1461.

54. See Mobilizing Against AIDS, supra note 4, at 291-92.

55. Confronting AIDS, supra note 1, at 113.

56. \textit{Id.}

57. \textit{Id.} at 113-14.

58. \textit{Id.} at 114.

59. Mobilizing Against AIDS, supra note 4, at 292.

60. \textit{Id.}


62. See Margaret A. Fischl et al., Prolonged Zidovudine Therapy in Patients With AIDS
lished, AZT is being administered to employees in some hospitals after occupational exposure to HIV.\textsuperscript{63} Drugs such as aerosolized pentamidine have been shown to prevent initial and recurrent episodes of PCP.\textsuperscript{64} During the summer of 1991, the Food and Drug Administration (FDA) approved a new anti-viral drug called dideoxyinosine (ddI) that has been shown to increase the number of T4 cells in people being administered the drug.\textsuperscript{65} It also appears to be less toxic than AZT and has been shown to be effective against AZT-resistant strains of HIV.\textsuperscript{66}

However, none of the drugs yet discovered are the magic cure for people with HIV or AIDS. AZT causes some severe side effects, primarily anemia, in some patients, especially those who are already ill.\textsuperscript{67} After twelve to thirty-six months, people taking AZT often show increasing viral resistance to the drug.\textsuperscript{68} The side effects of other drugs are still largely unknown.

No effective vaccine or cure for HIV infection is likely to be available for several years.\textsuperscript{69} Discouraging results from animal studies, as well as legal, social, and ethical obstacles, suggest that the development of a vaccine will be a difficult and time-consuming process.\textsuperscript{70} As a result, “many researchers hope to be able to ultimately describe HIV disease as a chronic manageable condition, like diabetes or many forms of cancer.”\textsuperscript{71}

G. Transmission

1. Major Modes of Transmission

HIV infection is primarily a sexually transmitted disease, and unprotected anal and vaginal sex are the activities most commonly associated with HIV transmission.\textsuperscript{72} If the virus is present in semen it can

\textsuperscript{63} See Josep M.A. Lange et al., Failure of Zidovudine Prophylaxis After Accidental Exposure to HIV-1, 322 NEW ENG. J. MED. 1386, 1386 (1990).
\textsuperscript{64} Jeffrey A. Golden et al., Prevention of Pneumocystis Carinii Pneumonia by Inhaled Pentamidine, 1 LANCET 654, 656 (1989).
\textsuperscript{65} Fischl, supra note 62, at 1387.
\textsuperscript{66} Id. at 1386-87.
\textsuperscript{67} Margaret A. Fischl et al., The Safety and Efficacy of Zidovudine (AZT) in the Treatment of Subjects with Mildly Symptomatic Human Immunodeficiency Virus Type 1 (HIV) Infection: A Double-Blind, Placebo-Controlled Trial, 112 ANNALS INT. MED. 721, 736 (1990).
\textsuperscript{68} Fischl, supra note 62, at 2409; Faucl, supra note 62, at 1386.
\textsuperscript{69} See MOBILIZING AGAINST AIDS, supra note 4, at 223-34.
\textsuperscript{70} Id. at 223.
\textsuperscript{71} Sheppard, supra note 12, at 2-24.
\textsuperscript{72} See MOBILIZING AGAINST AIDS, supra note 4, at 26-33.
enter the body through breaks in the skin or through the mucous membranes in the vagina, rectum, and perhaps even the mouth (although the mouth is a significantly less effective transmission route). While male-to-female transmission is much more common, women may spread HIV to partners during intercourse through vaginal secretions or menstrual blood. HIV cannot pass through unbroken latex condoms, but the problems of breakage and improper use that make condoms less than 100% effective in preventing pregnancy also reduce the effectiveness of condoms in preventing HIV transmission.

HIV is also spread through shared needles during intravenous drug use. Cleaning needles with a bleach solution appears to be effective in inactivating the virus. Therefore, experts suggest that successful education campaigns must urge needle users both to refrain from sharing and to clean their needles with bleach.

Children with HIV are most often infected perinatally. The virus is either transmitted from mother to child during pregnancy, at the time of delivery, or shortly after birth (most likely through breast feeding). Data suggests that there is only a twenty-five to fifty percent chance of transmission from infected mother to infant.

All blood donated in the United States has been tested for HIV since mid-1985, when the HIV antibody test first became widely available. As a result, since 1985 the risk of infection from blood transfusions has been

73. See Lawrence A. Kingsley et al., Risk Factors for Seroconversion to Human Immunodeficiency Virus Among Male Homosexuals, 1 LANCET 345, 348 (1987) ("The absence of detectable risk for seroconversion due to receptive oral-genital intercourse is striking."). On the other hand, there is some debate whether the number of sexual partners is a risk factor. See Andrew R. Moss et al., Risk Factors for AIDS and HIV Seropositivity in Homosexual Men, 125 AM. J. EPIDEMIOLOGY 1035, 1045 (1987) ("AIDS risk was strongly associated with number of sexual partners"); Nancy Padian et al., Male-to-Female Transmission of Human Immunodeficiency Virus, 258 JAMA 788, 790 (1987) ("number of sexual partners was not a risk associated with HIV infection").


78. MOBILIZING AGAINST AIDS, supra note 4, at 42.

79. Id. at 44. See also Samuel L. Katz & Catherine M. Wilfert, Human Immunodeficiency Virus Infection of Newborns, 320 New Eng. J. Med. 1687, 1688 (1989).
2. Casual Contact

HIV is not spread by casual contact and is not contagious in the sense that it is not easily transmitted. It is not spread by droplets in the air, surface-to-skin contact, or skin-to-skin contact. HIV is extremely fragile and cannot survive outside the human body.

The history of the epidemic confirms the extremely remote chance of casual transmission. Not one case has been reported of HIV transmission through air, tears, sweat, or urine. No evidence of infection through bites by mosquitoes, other insects, or animals currently exists. Finally, human bites, even in cases where the skin has been broken, have not resulted in any documented cases of transmission. However, as Doctors Friedland and Klein have noted, "[a]n unrealistic requirement for absolute certainty about the lack of transmission by other routes [besides unprotected sex, needle sharing, and perinatal transmission] persists, despite the knowledge that it is not scientifically possible to prove that an event cannot occur."

3. Exposure to HIV

While the modes of HIV transmission are well-documented, it is not clear how "efficiently" HIV is transmitted during an exposure. Even an instance of direct exposure through needle sharing or unprotected sex does not necessarily result in transmission. Researchers have calculated that the probability of a female seroconverting because of a single act of unprotected heterosexual intercourse with an infected male is about one in five hundred. The probability that an exposure will result
in transmission depends upon a number of factors, including the amount of virus involved. For example, since the amount of HIV present in saliva is extremely low, saliva has not been implicated in HIV transmission, even though the possibility has been studied extensively.

H. Containment of the Epidemic

Public health authorities insist that education about the modes of transmission and methods of reducing risk should be the preeminent strategy for controlling this epidemic. According to the General Accounting Office, there is a consensus among public health officials that the criminal law is not an effective means of controlling the spread of HIV, but "education and prevention activities are the most powerful tools available to reduce the potential impact of the AIDS epidemic."

Unfortunately, education programs are often in conflict with legal and moral prohibitions on the activities through which the virus is transmitted. Many people object to teaching gay men and teenagers how to have sex safely because they believe that these individuals should not be having sex at all. In fact, several states still have laws making sodomy a crime. In addition, many people oppose education of drug users on the grounds that such efforts encourage illegal activity.

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90. Levy, supra note 9, at 3000.
93. See generally Confronting AIDS, supra note 1, at 9-12.
95. Sheppard, supra note 12, at 2-16 to 2-17.
This Note's analysis of the criminal law and HIV is framed against this background of the medical facts, including the modes of transmitting HIV, and the consensus in the public health community that education is central in preventing the spread of the virus.

III. ARGUMENTS FOR AND AGAINST THE USE OF THE CRIMINAL LAW TO PREVENT THE SPREAD OF HIV

One purpose of criminal law is to punish those persons who violate the law.97 Another objective is to deter criminal acts.98 The criminal law therefore provides a means both to educate and to reinforce norms of social behavior.99

Thus, the passage of rules and penalties aimed at preventing the spread of HIV realizes the purposes underlying criminal law. At least one commentator has argued rather persuasively that those persons who purposefully violate laws intended to prevent HIV-transmitting conduct deserve to be punished.100 Moreover, just as other individuals in society are held responsible for their actions when they violate the minimum standards of behavior set by criminal law, HIV-infected individuals who engage in conduct which they know significantly exposes others to HIV infection should be held accountable for their actions.101 Accountability is justified because of the severe consequences of HIV infection.102

101. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130 (1988) [hereinafter REPORT]. In addition, to ensure that individuals who engage in high risk behavior are held accountable, the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2647, 104 Stat. 576, 603, requires that states which apply for federal assistance in providing medical care to HIV-infected persons warrant that their criminal statutes could prosecute a person who has been informed of his or her HIV infection and who either donates blood, semen, or breast milk; engages in sexual activity; or shares hypodermic needles with intent to expose another person to HIV. However, the Act does not require the enactment of HIV-specific statutes, only that a state has adequate criminal statutes to prosecute such conduct.
Laws proscribing HIV-transmitting conduct also fulfill important social objectives. Ideally, they prevent conduct likely to transmit HIV to uninfected people, educate the public about activities likely to spread HIV, and reinforce social norms against behavior that risks HIV transmission. To be effective, however, such laws must be clear in their content and only proscribe behavior that poses a serious public health risk. Unclear laws proscribing more than just behavior that poses a serious public health risk not only frustrate efforts to educate the public about AIDS, they also promote discrimination against HIV-infected persons.

Nevertheless, many people question whether the benefits of criminal laws that outlaw conduct relating to the transmission of HIV outweigh their costs, even if the laws could be closely tailored to forbid only those activities likely to transmit HIV. Using the criminal law to stem HIV transmission may be counterproductive in that it may encourage individuals to eschew testing to avoid establishing a basis for subsequent criminal liability. HIV transmission laws may also foster an adversarial relationship between the public health system and HIV-infected people,

103. Hermann, supra note 100, at 352-53.
105. See Susan Hendricks, Problems and Issues in Criminal Prosecutions, in AIDS PRACTICE MANUAL supra note 12, at 13-1, 13-19 to 13-20. There have been several convictions for attempted murder and assault with a deadly weapon for conduct that has been demonstrated not to transmit HIV (usually biting or spitting). See supra text accompanying notes 81-82. Nevertheless, appellate courts have usually upheld these convictions on appeal. See, e.g., United States v. Moore, 846 F.2d 1163 (8th Cir. 1988) (biting by HIV-infected prisoner of prison guards supported conviction for assault with deadly or dangerous weapon); State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (evidence that defendant with ARC spat at, bit, scratched, and threw blood at police and paramedics who thwarted his suicide attempt supported conviction for attempted murder); State v. Cummings, 153 Wis. 2d 603, 451 N.W.2d 463 (Ct. App. 1989) (bite by HIV-infected prisoner constituted battery of correction officer); State v. Weeks, No. 15-183, (Tex. Dist. Ct., Walker Cty., Nov. 4, 1989) (evidence that HIV-infected prisoner spat at prison guard resulted in life sentence for murder conviction).

These types of convictions surely fuel the misinformation, hysteria, and discrimination surrounding the HIV epidemic, and hurt the criminal law's social objective of educating the public, because they punish behavior that does not risk transmitting HIV. In fact, it has been estimated that one quart of HIV-infected saliva would have to enter the bloodstream of an individual for infection to occur. Theodore M. Hammett, AIDS in Correctional Facilities: Issues and Options 16 (1988). The commentators have been nearly universal in their criticism of the Moore case. See, e.g., Robert Lewis Stauter, United States v. Moore: AIDS and the Criminal Law, The Witch Hunt Begins, 22 AKRON L. REV. 503 (1989); Carlton D. Stansbury, Note, Deadly and Dangerous Weapons and AIDS: The Moore Analysis Is Likely to Be Dangerous, 74 IOWA L. REV. 951 (1989). In Moore, the circuit court repeatedly mixed up AIDS and HIV, infection and antibodies, illustrating that the criminal law in this area is not even educating judges, much less the public.

106. See MOBILIZING AGAINST AIDS, supra note 4, at 153.
thereby discouraging them from seeking treatment.\textsuperscript{107} Therefore, public health authorities insist that public education about the modes of transmission, and not the criminal law, should be the foremost strategy for controlling this epidemic.\textsuperscript{108}

Furthermore, use of criminal laws to control the spread of HIV ignores the traditional failure of the criminal law to compel changes in human sexual behavior.\textsuperscript{109} Criminal laws threaten massive government intrusion into sexual privacy.\textsuperscript{110} For example, if a complainant has recently had sex with partners other than the defendant, the complainant's other sexual partners would also be subject to investigation and surveillance, in order to rule out sources of infection other than the suspect. Therefore, sexual surveillance, as part of the criminal law, would surely encompass a great deal of sexual activity that presents no threat of harm to others in pursuit of the few instances of sexual activity that do. Such a law would sweep too broadly.\textsuperscript{111} Moreover, the Supreme Court has said that government should not be in the business of intruding upon an individual's right to privacy in sexual relationships.\textsuperscript{112}

The right to sexual privacy, however, is not absolute.\textsuperscript{113} Courts have refused to recognize privacy rights of sexual partners as a barrier to criminal convictions arising from sexual conduct even in marriage.\textsuperscript{114} Therefore, the privacy interests of an HIV-infected person engaging in conduct likely to transmit HIV may be outweighed by the interest that the public and the sexual partner have in preventing the spread of HIV infection.\textsuperscript{115}

Finally, criminal laws proscribing behavior likely to transmit HIV may be enforced selectively because such statutes will likely give enforcement discretion to police and prosecuting authorities.\textsuperscript{116} Experts assert

\textsuperscript{109} See Gostin, supra note 104, at 1019, 1041.
\textsuperscript{110} Field & Sullivan, supra note 107, at 54.
\textsuperscript{111} Id.
\textsuperscript{114} See, e.g., State v. Bateman, 547 P.2d 6, \textit{cert. denied}, 429 U.S. 864 (1976) (Arizona Supreme Court upheld a husband's conviction for forcing his wife to perform fellatio on him despite a constitutional claim of a right to privacy by the husband).
\textsuperscript{116} Field & Sullivan, supra note 107, at 54.
that there has been an inappropriate focus upon criminal sanctions as a means of addressing the current crisis because HIV has been associated with traditionally unpopular groups and activities.\(^{117}\) AIDS-specific criminal laws could become a tool of official persecution against gay men and intravenous drug users, because they are the largest groups at risk for AIDS. There is a risk that gay men could be harassed and punished for their sexual orientation rather than for having committed any crime, which could effectively criminalize gay male sex even in those jurisdictions that no longer have sodomy laws.\(^{118}\) Such laws could be counterproductive to preventing the spread of HIV, because they may discourage people at risk from coming forward for testing and treatment. Unfortunately, even though the potential for selective enforcement is substantial,\(^{119}\) it is extremely unlikely that a gay man or an intravenous drug user could successfully assert a selective prosecution defense because of the difficulty in establishing such a claim.\(^{120}\)

The dangers of selective enforcement may be avoided either by public vigilance of police and prosecutorial activity\(^{121}\) or by adding provisions to these laws limiting prosecutorial discretion.\(^{122}\) In addition, the public must be made aware that criminal prosecution of people with HIV will not diminish the danger of infection to those who engage in behavior likely to transmit HIV.\(^{123}\)

In sum, criminal laws proscribing conduct likely to transmit HIV can realize the purposes underlying criminal law and can serve three social objectives: preventing the spread of the virus to uninfected people, educating the public on the types of behavior that will put them at risk, and reinforcing social norms against behavior that risks HIV transmission. However, the laws must be clearly drawn and narrowly tailored to proscribe only the behavior that has epidemiologically been demonstrated to transmit HIV. In addition, the public must be vigilant in preventing the unnecessary invasion of privacy and the problems of selective prosecution in order to prevent discrimination against people with HIV. If these precautions are followed, then the criminal law can be an effective method of punishing those who engage in risky behavior, with-


\(^{118}\) Field & Sullivan, *supra* note 107, at 55.

\(^{119}\) Gostin, *supra* note 104, at 1045.


\(^{121}\) Hermann, *supra* note 100, at 357.

\(^{122}\) Spiegelman, *supra* note 120, at 349-50.

\(^{123}\) Hermann, *supra* note 100, at 357-58.
out becoming fuel for public hysteria and misinformation regarding HIV and AIDS.

IV. CRIMINALIZING SEXUAL TRANSMISSION OF HIV IN THE UNITED STATES

A. Using Traditional Criminal Laws

Only sixteen states have enacted legislation making it a crime to transmit HIV sexually. In the other states, the prosecution of infected people who engage in behavior likely to transmit HIV can only occur under traditional criminal statutes. This section discusses the crimes of sodomy, murder, manslaughter, reckless endangerment, attempted murder, and assault, and examines their application to HIV prosecutions. The discussion outlines the evidentiary problems in prosecuting people who are accused of engaging in conduct likely to result in HIV transmission, especially the difficulty in proving the elements of intent and causation.

1. Sodomy

In most states, sodomy was originally defined as anal intercourse, but has been expanded to also include oral-genital intercourse. Since the Model Penal Code recommended the decriminalization of sodomy in 1962, about half of the states have eliminated their prohibitions against sodomy. Most states that still retain sodomy laws do not limit the reach of these laws either to same-sex or to extramarital relationships.

Despite the trend toward the decriminalization of sodomy, the Supreme Court upheld Georgia's sodomy statute in Bowers v. Hardwick. The Court held that the statute did not violate fundamental rights to privacy as the right applies to consensual adult homosexual sodomy in the home. Georgia argued that a state's police power includes the power to make criminal those acts that may be harmful to the general public, including acts which spread communicable diseases. Georgia's argument is both over-inclusive and under-inclusive as it applies to be-

124. See infra text accompanying notes 198-213.
125. Hermann, supra note 100, at 359.
128. Hermann, supra note 100, at 360.
130. Id. at 191.
131. Hermann, supra note 100, at 360.
havior likely to transmit HIV. First, it is over-inclusive because not all acts of sodomy transmit HIV. Only acts of sodomy without effective barrier protection involving an HIV-infected partner and a non-infected partner may transmit HIV. Public health authorities have advocated that condom use during anal intercourse is an effective way to reduce the likelihood of transmitting HIV. There is also evidence that HIV may not be transmitted by oral sex. Second, sodomy statutes are under-inclusive to the extent that HIV may be transmitted during vaginal intercourse. Vaginal intercourse is an activity that is not forbidden by any sodomy statute.

In addition to the problems of over- and under-inclusiveness, sodomy laws carry problems of selective enforcement. For these reasons, sodomy statutes are not particularly appropriate to punish or deter conduct likely to transmit HIV.

2. Murder

Murder is the most serious criminal offense with which a person can be charged for transmitting HIV. Under the Model Penal Code, the state must prove that the accused had either a purposeful, knowing, or reckless state of mind. In order to establish a purposeful state of mind, the state must establish that the accused was either aware or believed that he or she was HIV-infected, that he or she believed that the virus could be transmitted by the behavior engaged in, and that he or she desired the death of the other person through this behavior. In order to establish a knowing state of mind, the state must prove that the accused

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132. Id.
135. Handsfield, supra note 74, at 1943.
136. See supra text accompanying notes 116-23.
137. But see State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (Missouri Supreme Court found the state’s sodomy statute “rationally related to the State’s concededly legitimate interest in protecting the public health” by inhibiting the spread of HIV).
138. See MODEL PENAL CODE § 210.1 (1985) (because of the wide variety in state laws, the analysis of traditional criminal law will focus on the Model Penal Code).
139. Id.
140. Hermann, supra note 100, at 361-62. See MODEL PENAL CODE § 2.02(2)(a) (1985): 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.
was aware that he or she carried HIV and that he or she was practically certain that his or her actions would almost certainly transmit the virus. In order to show a reckless state of mind, the state must establish that a person acted in conscious disregard of a substantial and unjustifiable risk that he or she was HIV-infected, could transmit HIV, and that transmission could cause the death of another. Finally, a reckless murder must be committed under conditions manifesting extreme indifference to human life.

As with sodomy, using murder statutes to criminalize HIV-transmitting conduct is problematic. First, most murder statutes require the death of the victim. Because death may not occur for a considerable time after transmission, often the accused will die before the victim. Under such circumstances a charge of murder is moot.

Second, the state must prove that the accused was both actually infected and aware of his or her infection at the time that the HIV-transmitting conduct occurred. Since many people are tested anonymously, this will be difficult to prove in most cases. In addition, testing the accused after being charged is irrelevant because he or she could have become HIV-positive after the incident in question. Testing also does not address the situation in which the accused may have the virus but be HIV antibody negative.

Third, proof of the requisite mental state is a substantial hurdle to overcome in a murder prosecution for transmitting HIV. Under either purposeful or knowing murder, the state must prove at least that the accused knew that his or her conduct could transmit HIV, and that he or she either intended to infect and consequently cause the death of another

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 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.

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.


144. Burdt & Caldwell, supra note 102, at 689.

145. Hermann, supra note 100, at 362-63.

146. See supra text accompanying notes 47-60.
or was practically certain that such infection and death would occur.147 Since having sex is "a highly indirect modus operandi for the person whose purpose is to kill,"148 this intent will probably be very difficult to establish. In fact, one commentator has suggested that, in the great majority of situations, the necessity of proving intent will make successful prosecutions impossible.149 Another commentator notes that anal or vaginal intercourse engaged in by an accused who knows that he or she is HIV-positive and that such behavior is risky ought not support a finding of an intent to cause death150 because the actor may hope or believe that no injury will befall his or her partner, or may be indifferent to such a fate.151 Nevertheless, the prosecution should be able to establish the state of mind of recklessness when the accused hopes there will be no injury or is indifferent.152

Finally, even if the state is able to prove the requisite state of mind for murder, establishing causation is probably the greatest obstacle in proving charges for transmitting HIV.153 In addition to proving that the accused is in fact infected and that he or she engaged in conduct that could have transmitted HIV, the state must also prove that the victim acquired the infection because of the acts of the accused.154 Because of the delay period between seroconversion and the onset of symptoms, definitive proof that the victim was not already HIV-positive before the alleged transmitting act will be necessary.155 If the victim did not possess negative test results that precede the alleged transmission, this may be difficult. If the defense is able to show that the victim engaged in any high risk contact with others prior to or after the accused's alleged transmission (but before the onset of symptoms), it would be difficult for a factfinder to decide beyond a reasonable doubt that the HIV came from the accused.156

147. Hermann, supra note 100, at 363.
148. Field & Sullivan, supra note 107, at 47 (emphasis in original). In fact, researchers have calculated that the likelihood of a female seroconverting as a result of a single act of unprotected heterosexual intercourse with an infected male is about one in five hundred. Hearst & Hulley, supra note 89, at 2429.
149. Robinson, supra note 127, at 97.
151. Id. at 90.
153. Id. at 75.
154. Id.
155. Id. at 76.
156. Id. at 76-77.
In sum, due largely to the problems of proving intent and causation, murder prosecutions for engaging in HIV-transmitting behavior are likely to be ineffective and inappropriate.

3. Manslaughter

Under the Model Penal Code, a conviction of manslaughter requires the state to show that the accused consciously disregarded a substantial and unjustifiable risk that he or she was HIV-infected, that he or she could transmit the virus, and that the conduct engaged in could do so. A risk is substantial and unjustifiable when it is of "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." It follows that if a jury found that the risk of HIV infection was due to behavior which grossly deviated from the conduct of a law-abiding person, the state could prove a case of manslaughter even without proving that the accused knew that he or she was infected with HIV at the time of the alleged conduct. One commentator has argued that any urban homosexual who engages in HIV-transmitting conduct without precaution falls outside this standard. Another commentator asserts that the risk of transmission of HIV through anal or vaginal intercourse by an accused who knew he or she was HIV-positive should generally be viewed as "substantial.""15

The difficulties in proving causation in a murder case are equally applicable to manslaughter prosecutions. There is also an additional problem with manslaughter prosecutions. Guilt in such cases turns on how the jury evaluates the ways in which people should act. Consequently, there is a possibility that irrational fear and personal prejudice will taint the jury’s consideration of the legal standards. This is especially true if the accused is a member of a minority or unpopular group whose lifestyle itself is seen as sinful and involving a gross deviation from normal behavior. Misunderstanding by juries is counterproductive in trying to control and educate people about AIDS and should not be the

159. Hermann, supra note 100, at 364.
160. Burdt & Caldwell, supra note 102, at 691.
161. Schultz, supra note 150, at 90.
162. Id. at 92.
163. Hermann, supra note 100, at 365.
basis for criminal prosecution or conviction.\textsuperscript{164} Therefore, manslaughter is also an inappropriate basis for prosecution of HIV-transmitting crimes.

4. Reckless Endangerment\textsuperscript{165}

Assuming that HIV infection constitutes a serious bodily injury, reckless endangerment is another traditional crime that a seropositive accused might face.\textsuperscript{166} In establishing reckless endangerment, the state must prove only that the accused, with conscious disregard of a risk to another, engaged in conduct which either placed or may have placed another person in danger of serious bodily injury.\textsuperscript{167} The factors for determining recklessness are similar to the manslaughter factors. However, a showing that the victim was actually harmed is not necessary.\textsuperscript{168}

In addition, proof of the accused's infection may not even be necessary under a reckless endangerment prosecution.\textsuperscript{169} For example, assume that a sexually active homosexual male experiences swollen lymph nodes, which he knows to be symptoms of HIV infection as well as several other common medical problems. If he takes no steps to determine his serostatus and nevertheless engages in unprotected anal intercourse (an activity which he knows risks transmission), then it may be argued that he consciously disregarded a risk to another by engaging in conduct which may have placed another person in danger of serious bodily injury. Since the risk disregarded must be evaluated in light of the circumstances known to him, such a scenario is at least plausible.\textsuperscript{170}

If actual infection is not a condition for reckless endangerment, the scope of reckless endangerment prosecutions could be enormous.\textsuperscript{171} There are potentially millions of people who are members of high risk groups who could face criminal charges.\textsuperscript{172} Use of the crime of reckless endangerment against people who engage in HIV-transmitting conduct also carries several dangers. First, as with manslaughter, there is an in-

\begin{footnotesize}
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\item[164.] Schultz, supra note 150, at 92.
\item[165.] The Model Penal Code also provides for a negligent state of mind to be the basis of criminal culpability. \textit{MODEL PENAL CODE} § 210.4 (1985). Since the author believes that negligence should be confined to tort law and not criminal law, however, negligent crimes will not be discussed in this Note.
\item[166.] \textit{See MODEL PENAL CODE} § 211.2 (1985): "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."
\item[167.] Hermann, supra note 100, at 369.
\item[168.] Schechter, supra note 117, at 8.
\item[169.] Schultz, supra note 150, at 103.
\item[170.] \textit{Id}.
\item[171.] Gostin, supra note 104, at 1052.
\item[172.] \textit{Id}.
\end{enumerate}
\end{footnotesize}
herent danger that juries may be prejudiced by the status of the accused. Evidence that a person is a member of a high risk group, however, should not suffice because conduct and not status creates a risk of infection.173 Second, the state could attempt to admit highly prejudicial evidence of the accused's sexual history in order to establish that the risk of transmitting HIV had been disregarded. Third, an approach based on recklessness could target more people than those who engage in truly blameworthy behavior,174 thereby frustrating efforts to educate the public about the means by which HIV is transmitted. Finally, the crime is considered a misdemeanor, which may reduce its efficacy as a device to punish or deter this type of behavior, which is one of the justifications for resorting to the criminal law in the first place.175

5. Attempted Murder

In order to prove attempted murder under the Model Penal Code, the state must prove that the accused acted with the purpose of causing death or a belief that death would result.176 The advantage of using the charge of attempted murder to deter HIV-transmitting conduct is that the state does not have to prove causation, the death of the victim, or actual transmission of HIV.177 However, attempted murder requires proving the most demanding state of mind: purposeful or knowing intent.178

Some unique defenses exist to a charge of attempted murder. First, some states require that the accused's expectation of causing death not be unreasonable.179 In these states, if an accused's belief that a particular activity would cause the death of another is unreasonable (i.e., by spitting at another person), then he or she has a defense to a charge of attempted murder. Other states have retained the defense of legal impossibility, which would provide a defense to an accused whose behavior has been medically proven to be incapable of transmitting HIV.180 In such states, any activity other than anal or vaginal intercourse (and the sharing of

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173. Schultz, supra note 150, at 104.
175. Hermann, supra note 100, at 369.
177. Hermann, supra note 100, at 365.
178. MODEL PENAL CODE § 5.01(1) (1985): "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 ... [acts] with the purpose of causing or with the belief that it will cause [a particular] result ... ." (in this case the death of the victim).
180. See, e.g., ARK. CODE ANN. § 5-3-101 (Michie 1987) (affirmative defense that conduct inherently unlikely to result in crimes).
needles) could fall under this defense. Indeed, because of the remote possibility of transmission from one act of vaginal intercourse, this defense may even be appropriate in such a case.

The Model Penal Code has eliminated the defense of impossibility for all crimes, including attempted murder, but has added sections to prevent the unjust application of the criminal law. Section 5.05(1) of the Code makes attempt a crime of "the same grade and degree as the most serious offense that is attempted," except that an attempt to commit a capital crime or a felony of the first degree is a felony of the second degree.181 Where the conduct charged as constituting the attempt is "so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under [section 5.04]," section 5.05(2) authorizes the Court to reduce the grade of the offence or dismiss the prosecution.182 The Code also directs the court to dismiss prosecutions when it finds that the accused's conduct either did not threaten the harm "sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction."183 Because of public misunderstanding concerning the risks of transmission and prejudice against members of high risk groups, however, there is the danger that a jury may be too willing to find that particular behavior could kill.184 As a result, courts ought to dismiss prosecutions where the evidence reveals no substantial danger of transmitting the virus.185

Attempted murder is not an appropriate basis for deterring HIV-transmitting behavior because the state is required to prove the most demanding state of mind, which is possible only in rare cases. The person with HIV who has sexual intercourse with another person with a conscious desire that the partner become infected and die is not the typical case.186

6. Assault

Under the Model Penal Code, a person can be guilty of assault if he or she "attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . . ."187 Such assaults are a misdemeanor. The

182. MODEL PENAL CODE § 5.05(2) (1985).
184. Schultz, supra note 150, at 100.
185. Id. at 105.
186. Field & Sullivan, supra note 107, at 49.
Code provides for a felony penalty for aggravated assault if the accused "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 . . . ." In the context of HIV, an accused may be guilty of aggravated assault if, while aware that he or she is infected with HIV and is capable of infecting others, he or she engages in behavior likely to transmit HIV while knowing that such behavior is likely to facilitate transmission of HIV.

The state faces the same problems of proof as in most of the other crimes previously discussed. It must prove that the accused was aware of his or her HIV status, believed that his or her conduct could transmit HIV, and that it is in fact possible to transmit HIV by the conduct in which the accused engaged.

The Model Penal Code provides that consent is a defense to assault. However, this defense is only available when the conduct and the injury are "reasonably foreseeable hazards of joint participation in . . . concerted activity not forbidden by law . . . ." Therefore, in the context of HIV, simple consent to sexual intercourse is not enough. Only informed consent will suffice. Therefore, disclosure by an infected person to a potential sex partner of his or her serostatus and of the danger of transmission through sexual contact would be necessary to make such transmission "reasonably foreseeable." Allowing a defense of consent would encourage disclosure and reward responsible behavior, while denying this defense would leave a person with HIV the choice of either sexual abstinence or potential criminal liability. However, assault prosecutions are not the best way to punish HIV-transmitting behavior because, in addition to problems of proving intent and causation, they do not specifically describe the behavior to be avoided or educate the public about the activities likely to spread HIV.

In conclusion, because of problems of proving the requisite intent, establishing causation, the danger of overbroad application, and their inability to educate the public about behavior that risks transmitting HIV, traditional crimes such as sodomy, murder, manslaughter, reckless endangerment, attempted murder, and assault are neither appropriate nor

189. Hermann, supra note 100, at 367.
190. **Model Penal Code** § 2.11(2)(b) (1985) (Presently, this section has only been used in the context of sports activities. However, it foreseeably could apply to situations involving HIV.).
191. Field & Sullivan, supra note 107, at 49.
192. Schultz, supra note 150, at 106.
193. *Id.* at 107.
effective as a means for prosecuting HIV-infected persons who engage in behavior likely to transmit HIV.\textsuperscript{194} Therefore, several states have begun to enact new HIV specific criminal statutes that seek to avoid the problems inherent in traditional crimes.

**B. HIV-Specific Statutes**

The Presidential Commission on the Human Immunodeficiency Virus Epidemic, in its final report in 1988, recommended that states adopt criminal statutes specific to HIV infection.\textsuperscript{195} Its reasoning was based on the problems in applying traditional criminal law to HIV transmission.\textsuperscript{196} According to the Commission, an HIV-specific statute should provide "clear notice of socially unacceptable standards of behavior specific to the HIV epidemic, and tailor punishment to the specific crime of HIV transmission."\textsuperscript{197}

In the last several years, twelve states have passed statutes making it a crime for an HIV-infected person knowingly to engage in behavior likely to transmit HIV.\textsuperscript{198} Six states have enacted statutes that criminalize HIV transmission behavior only in the context of prostitution.\textsuperscript{199} Two states have criminalized conduct likely to transmit HIV both gener-

\textsuperscript{194} Hermann, \textit{supra} note 100, at 369.

\textsuperscript{195} \textit{REPORT}, \textit{supra} note 101, at 130.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.}


\textsuperscript{199} \textit{See}, e.g., \textsc{Cal. Penal Code} \S 647f (West Supp. 1992) (felony to engage in prostitution or solicit prostitute after previous conviction, but only upon being tested for HIV and informed of positive test results after previous conviction); \textsc{Colo. Rev. Stat.} \S\S 18-7-201.7, 18-7-205.7 (Supp. 1990) (felony either to commit prostitution or patronize prostitute after previous conviction of same crime and tests positive as result of such previous conviction); \textsc{Fla. Stat. Ann.} \S 796.08(5), (6) (West Supp. 1992) (misdemeanor to either commit prostitution or procure another to commit prostitution "in a manner likely to transmit HIV" after positive HIV test and knowledge of transmitting activities); \textsc{Ky. Rev. Stat. Ann.} \S 529.090 (Baldwin Supp. 1990) (felony to either commit prostitution or procure another to commit prostitution "in a manner likely to transmit HIV" after positive HIV test and knowledge of transmitting activities, and misdemeanor to commit prostitution after testing positive but without engaging in activity likely to transmit HIV); \textsc{Nev. Rev. Stat. Ann.} \S 201.358 (Michie Supp. 1989) (felony to either engage in prostitution or to work in licensed house of prostitution after receiving notice of positive HIV test); \textsc{Tenn. Code Ann.} \S 39-13-516 (Supp. 1991) (felony to engage in sexual activity as a business or to loiter in a public place for the purpose of being hired to engage in sexual activity after knowledge of HIV infection).
ally and in the context of prostitution. Finally, two states have provided for the enhancement of sentences for crimes which involve conduct likely to transmit HIV.

Of the states which have made it a crime for an HIV-infected person to engage in behavior likely to transmit HIV, all but two have made the offense punishable as a felony. This is intended to deflect criticism that the criminal law is too lenient when the transmitting behavior is engaged in knowingly or intentionally. Most states do not require specific intent, thereby eliminating the difficult problems of proof arising in traditional criminal offenses. These states only require proof that the behavior took place. Only one state, Missouri, requires proof that the accused knew that the conduct in question created a risk of transmitting HIV.

In theory, the advantage of HIV-specific laws is that they are narrowly drafted to address specific conduct that is likely to transmit HIV. The laws that have been passed, however, are neither narrowly drafted nor do they prohibit specific conduct. Several of the statutes are drafted so that they clearly proscribe conduct that poses no risk of transmitting HIV. Others are written so broadly that they either do not require proof that the unlawful conduct poses a medically recognized risk of HIV transmission, or are so vague that it is not clear what conduct is


203. Hermann, supra note 100, at 371.


206. See, e.g., ARK. CODE ANN. § 5-14-123(c) (Michie Supp. 1991); MICH. COMP. LAWS ANN. § 333.5210(2) (West Supp. 1991) (prohibits "sexual penetration" that involves "any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body"). See also IDAHO CODE § 39-608 (Supp. 1991) (prohibits the transfer of saliva); TEX. PENAL CODE ANN. § 22.012 (West Supp. 1992) (prohibits transfer of bodily fluids through the other person's skin, among other things).
Criminalizing the Sexual Transmission of HIV

Therefore, these laws, on the whole, do not fulfill the social objectives of the criminal law.

The vagueness of the Illinois statute is typical. The statute prohibits "intimate contact with another" in a manner that could result in transmission. This is defined as the exposure of the body of one person to the bodily fluid of another. This definition proscribes such safe-sex activities as mutual masturbation, where the semen of one person comes into contact with the skin of another person. In addition, the meaning of "intimate contact" is broader than mere sexual contact. Two commentators have concluded that the Illinois statute encourages abortion by criminalizing childbirth for HIV-infected mothers.

No state, with the possible exception of Missouri, allows as a defense evidence that the accused was never given any counseling on the behavior that risks transmission of HIV or that the accused did not know that the behavior engaged in was a high risk one. Without such a counseling defense, people could be punished for activities that they did not know to be risky. Additional defenses are provided in other states: prior disclosure of serostatus, the informed consent of the "victim," and evidence that a licensed physician advised the accused that he or she was noninfectious.

These HIV-specific statutes, for the most part, have eliminated the


211. See supra note 210.

problem of proving the accused's intent by abolishing any requirement of purposeful or knowing intent to transmit HIV. The causation problem is avoided because none of the statutes require proof that the victim was infected by the accused. However, these statutes have fallen short of the objective of educating the public about the means of transmitting HIV. Many are also overbroad in that they proscribe behavior that does not transmit HIV. In addition, some of the statutes may be challenged as unconstitutionally vague because they fail to adequately define prohibited conduct, and thereby do not give fair notice. In sum, although these statutes are an improvement in this area over the traditional criminal law, they are far from perfect.

V. INTERNATIONAL STATUTES

This Note now analyzes some international criminal statutes and compares them to American statutes. The analysis is then synthesized and the Note suggests the creation of an HIV-specific statute that combines the best of the statutes from around the world.

A. Great Britain

For over one hundred years, British statutory and common law has imposed criminal sanctions upon those individuals who knowingly transmit a contagious disease. For the crimes of murder and manslaughter, the British still follow the rule that the victim must die within a year and a day of the unlawful act for such a prosecution to proceed. Since people with HIV often do not even exhibit symptoms in the first year after they seroconvert, much less die, a prosecution for murder or manslaughter is extremely rare. If a murder prosecution does occur, the British requirement for the accused's mens rea is similar to that of the Model Penal Code.

In addition to murder with purposeful or knowing intent, British law also proscribes a form of "insensitive" recklessness, which involves

213. Hendricks, supra note 105, at 13-25. Other constitutional challenges could include violations of equal protection (by singling out for prosecution gay men or intravenous drug users).


"a conscious taking of the risk of resultant death." An accused may be guilty of murder (or attempted murder) if the accused knows of his or her positive serostatus and how HIV is transmitted, has sexual intercourse with another person either with the intent to infect them or with indifference to whether the partner contracts HIV, and if that person does become HIV infected and dies within a year and a day. If the victim does not die within a year and a day, the accused may be charged with attempted murder.

Manslaughter in Britain is described as the unlawful killing of a person where there is no specific subjective or legal intention to kill. In the context of HIV, one commentator has suggested that a person (a male homosexual prostitute, in his example) may be guilty of manslaughter if he or she is a member of a high risk group, knows about HIV and how it is transmitted, is HIV-positive but does not know it, and, without doing anything to ascertain his or her serostatus, engages in high risk sexual behavior. If one of his or her partners dies within a year and a day of the contact with the accused and causation can be established, then the accused may be held culpable.

Assault is also a potential basis of liability for HIV-transmitting behavior under British law. In the 1867 case of Regina v. Sinclair, the court sentenced the defendant to a year in prison for transmitting gonorrhea to a thirteen-year-old girl. The court reasoned that even if the girl could have consented to sexual intercourse, her consent was ineffective because she was not aware of the defendant's condition. The court, relying on Regina v. Bennett, invoked the proposition that "fraud vitiates consent." The English Court of Appeal, however, seriously questioned Bennett and Sinclair twenty years later in the case of The Queen v. Clarence, in which a husband transmitted gonorrhea to his wife through sexual intercourse, without informing her of his condition. The husband was charged with unlawfully and maliciously inflicting grievous bodily harm on his wife, and assault occasioning actual bodily harm, in violation of sections 20 and 47, respectively, of the Offenses Against the

217. Id.
218. Id.
220. Taitz, supra note 216, at 219. However, this reinforces the mistaken belief that high risk groups alone are responsible for the spread of HIV. See Laurie, supra note 215, at 316.
221. 13 Cox's Crim. Cases 28 (Eng. 1867).
222. Id. at 29.
224. 22 Q.B.D. 23 (1888).
Person Act (OAPA) of 1861.\textsuperscript{225} The court in \textit{Clarence} quashed the conviction. A plurality of the court in \textit{Clarence} stated that "the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification."	extsuperscript{226} Among the rationales for this decision was the judges' belief that a marital relationship itself implied in law the wife's consent to all marital relations,\textsuperscript{227} and that sections 20 and 47 of the OAPA were not intended to encompass behavior such as this.\textsuperscript{228} Despite its age and seemingly unjustifiable result, commentators believe that \textit{Clarence} would be followed today in the context of AIDS.\textsuperscript{229} Therefore, prosecutions against spouses for inflicting grievous bodily harm and assault causing actual bodily harm under sections 20 and 47 of OAPA will probably be unsuccessful unless \textit{Clarence} is overruled by a court of appeal. \textit{Clarence}, however, may not be considered by courts to be as persuasive in situations where the alleged victim is not married to the accused.\textsuperscript{230}

Section 23 of the OAPA is the British law under which a criminal prosecution\textsuperscript{231} for transmitting HIV would most likely be successful. Although no case has been brought under this section, it is the most appropriate section.\textsuperscript{232} Section 23 prohibits maliciously administering to another person any poison or other destructive or noxious thing so as thereby to endanger the other person's life or to inflict upon him or her grievous bodily harm.\textsuperscript{233} In \textit{Clarence}, the plurality opinion stated that

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\textsuperscript{225} Id. Offenses Against the Person Act, 24 & 25 Vict., ch. 100, §§ 20, 47 (1861) (Eng.).

\textsuperscript{226} 22 Q.B.D. at 43 (opinion of Stephen, J., joined by Mathew, Smith, Grantham and Huddleston, J.J., and Coleridge, C.J.). However, in Scotland consent is only a defense if given with full knowledge of all material facts. See Laurie, \textit{supra} note 215, at 314.

\textsuperscript{227} 22 Q.B.D. at 37 (opinion of Smith, J.), 64 (opinion of Pollock, J.).

\textsuperscript{228} 22 Q.B.D. at 36 (opinion of Wills, J.), 41, 46 (opinion of Stephen, J.).


\textsuperscript{230} Sullivan, \textit{supra} note 113, at 494.

\textsuperscript{231} Public Health Act (Control of Disease Act), 1984, § 37 provides that a person can be indefinitely confined to a hospital if a judge is satisfied, after an ex parte hearing, that the person is not taking proper precautions to prevent the spread of infection and causes a serious risk of infection to other persons. Although this is not a criminal statute but a public health one, it is difficult to imagine a more intrusive regulatory scheme. The criminal law, no matter how unfair, always allows the accused an opportunity to be heard. For commentary on this and other sections of the Public Health Act, see Ronald Elsberry, Note, \textit{AIDS Quarantine in England and the United States}, 10 \textit{HASTINGS INT’L & COMP. L. REV.} 113, 126-27 (1986); Marlene C. McGuirl & Robert N. Gee, \textit{AIDS: An Overview of the British, Australian, and American Responses}, 14 \textit{HOFSTRA L. REV.} 107, 110-13 (1985); Braham, \textit{supra} note 229, at 192; and R.G.S. Aitken, \textit{AIDS: Some Myths and Realities}, 84 \textit{LAW SOCIETY’S GAZETTE} 239 (1987).


\textsuperscript{233} Offenses Against the Person Act, 24 & 25 Vict., ch.100, § 23 (1861) (Eng.).
"[i]nfection is a kind of poisoning. . . ." If they are correct, then the statute should apply to HIV transmission. Consent is a defense to prosecutions under section 23.

Section 23 would perhaps be more effective if used in conjunction with the Criminal Attempts Act of 1981. Combining these two would allow prosecution without actual proof of transmission to the victim. The prosecution would then only have to prove that the accused was HIV-positive at the time of the conduct in question, although this may be difficult. The victim, if he or she had seroconverted, would not need to establish that it was the accused who transmitted HIV to him or her.

In Scotland, a prosecution for engaging in HIV-transmitting conduct may also be brought under the law of "real injury," which makes intentional infliction of physical injury a criminal offense. Prosecutions under this law would be based on the 1983 case Khaliq v. H.M. Advocate, where the High Court of Justiciary refused the appeal of two shopkeepers who had been charged with "real injury" after they sold glue-sniffing kits to children.

In Khaliq, the court found a "real injury" simply in the inhalation of glue and did not require the government to prove that any of the children were actually injured by the glue-sniffing kits supplied by defendants. Therefore, prosecutors may no longer have to prove that any harm actually resulted from the accused's actions. This case also reduces the prosecutor's burden of proving causation. In convicting the shopkeepers of causing injury to the children, the court found that the voluntary inhalation of the fumes from the glue by the children did not relieve the shopkeepers of liability.

In the context of HIV, then, prosecutions could be brought for "real injury" without the necessity of showing that actual transmission occurred and regardless of the blameworthiness of the "victim." Since

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235. Forlin & Wauchope, supra note 215, at 884.
236. Criminal Attempts Act, 1981, §§ 1-4, 6 (Eng.).
237. Forlin & Wauchope, supra note 215, at 885.
238. See supra text accompanying notes 153-56.
239. Forlin & Wauchope, supra note 215, at 885.
240. Orr, supra note 232, at 391.
241. 1984 J.C. 23 (Scot).
242. 1984 J.C. at 24, 36.
244. Laurie, supra note 215, at 315.
246. Laurie, supra note 215, at 315.
prosecutions for “real injury” are not limited to risky behavior, however, they fail to provide clear notice of the conduct proscribed and do not educate the public about risky behavior. One commentator also contends that “real injury” prosecutions put the accused at the mercy of the moral indignation of the trier of fact.247

Unfortunately, the British criminal law as it relates to HIV suffers from the same problems as its American counterpart. There are no statutes that clearly describe the behavior that is unlawful and all are susceptible to the prejudices of the prosecutor and the trier of fact. Problems of proving intent and causation are also present. As a result, British law does not furnish a model for future HIV-related criminal law in the United States.

B. Australia

Australian common law offenses are much like those of Great Britain, and therefore the same drawbacks apply to their use in punishing behavior likely to lead to HIV transmission. Four provinces have passed legislation that specifically criminalizes the transmission of HIV from one person to another.248 Unfortunately, the governments of Queensland and New South Wales enacted their legislation in response to public demands for government action to stop the spread of AIDS in the early days of the epidemic. As such, the laws have been condemned by scholars as ill-considered actions.249

Queensland passed the Health Act Amendment Act (No. 2) in 1984. This law imposes a penalty of $10,000 (AustL), two years imprisonment, or both on any person who knowingly infected any other person with HIV.250 This law imposes strict liability for specific conduct.251 The only defense allowed is if, at the time of transmission, the accused was either the spouse or the “connubial” of the “victim,” who knew of the accused’s serostatus, and voluntarily ran the risk of being infected.252

247. Id. (quoting GERALD H. GORDON, THE CRIMINAL LAW OF SCOTLAND ¶ 2-5 (2d ed. 1978)).
Criminalizing the Sexual Transmission of HIV

This statute did not specifically regulate a particular mode of transmission.253

In 1988, the Queensland Health Act Amendment was repealed and replaced with another Health Act Amendment Act.254 The new Act is almost identical to the 1984 Act, except that it adds two provisions to ensure privacy: criminal proceedings under the law are to be held in camera, and “no report shall be made or published concerning the proceedings unless authorized by the court or contained in a law report.”255

Commentators have criticized the criminal provision in New South Wales even more extensively than the Queensland Act.256 The New South Wales statute makes it a crime for a person with AIDS to have sexual intercourse with another person.257 The accused's only defense is if the other person was informed of the risk of contracting AIDS before intercourse and voluntarily agreed to accept that risk.258 The penalty for violation is $5,000 (Austl.).259 There is no provision for imprisonment.260

The New South Wales statute does not define “sexual intercourse,” thereby failing to provide clear guidelines as to the proscribed behavior. It is also both overbroad and underinclusive. It is overbroad because it arguably proscribes activities that have not been shown to transmit HIV.261 It is underinclusive since it does not prohibit non-sexual high risk behavior, like sharing needles. For these reasons, commentators believe the statute was aimed solely at homosexual activity.262

South Australia and Victoria have also passed legislation criminalizing the transmission of HIV. South Australia’s law requires that persons suffering from AIDS or ARC take all reasonable measures to prevent transmission of the disease to others.263 The penalty for violating the law is a fine of $10,000 (Austl.).264 The law does not define the term “reasonable measures” and does not mention whether it is possible for the un-

253. Lansdell, supra note 249, at 212.
254. See Queensl. Health Act Amendment Act (No. 3), 1988, § 48 (Austl.).
255. Id.
256. See Lansdell, supra note 249, at 213.
257. N.S.W. Public Health (Proclaimed Diseases) Amendment Act, 1985, § 3 (Austl.) (inserting § 50N(3) into the N.S.W. Public Health Act of 1902).
258. Id.
259. Id.
260. McGuirl & Gee, supra note 231, at 120.
261. Lansdell, supra note 249, at 213.
262. Oral-genital intercourse, or vaginal or anal intercourse with a condom, for example.
263. Lansdell, supra note 249, at 213.
265. Id.
knowing transmission of HIV to be penalized.\textsuperscript{266}

In Victoria, in 1988, the state made it an offense to knowingly or recklessly infect another person with an infectious disease, including HIV.\textsuperscript{267} The penalty for a violation is $20,000 (Austl.).\textsuperscript{268} The only defense is when the "victim" knew and voluntarily accepted the risk of being infected.\textsuperscript{269}

There are many problems with Victoria's and South Australia's statutes. First, they do not clearly define the prohibited conduct and are not narrowly tailored to that conduct. Therefore, the accused is not given notice as to what conduct is acceptable and what is unlawful. In addition, these statutes do not educate the public about which activities are high risk and which are safe. Finally, the statutes of all four provinces are vague, thereby creating a danger that prejudice will color both the decision to prosecute and the one to convict. Nevertheless, the portion of the 1988 Queensland statute that ensures the privacy of the accused and "victim" should serve as a model for laws discouraging HIV-transmitting conduct.

C. New Zealand

New Zealand has passed several different laws that may be applied to behavior which is conducive to the sexual transmission of HIV. First, section 92 of the Health Act of 1956 prohibits a person from either knowingly infecting or knowingly doing or permitting any act likely to infect another person with a venereal disease.\textsuperscript{270} Under the knowingly infecting prong, an infection must result and the state must prove that the accused intended to transmit the infection.\textsuperscript{271} Under the knowingly doing or permitting prong, it is possible that an accused could be convicted without knowing that he or she is a disease carrier or that transmission could occur as a result of the conduct.\textsuperscript{272} The Act provides for a fine of £100 (N.Z.) or imprisonment for as long as one year upon conviction.\textsuperscript{273} To date, this law has not been applied to HIV.

Second, the legislature enacted several provisions of the Crimes Bill of 1989, amending the Crimes Act of 1961, in response to the need for

\begin{itemize}
  \item \textsuperscript{266} Lansdell, \textit{supra} note 249, at 214.
  \item \textsuperscript{267} Vict. Health (General Amend.) Act, 1988, § 120(1) (Austl.).
  \item \textsuperscript{268} \textit{Id}.
  \item \textsuperscript{269} \textit{Id.} § 120(2).
  \item \textsuperscript{270} N.Z. Health Act, 1956, § 92 (N.Z.).
  \item \textsuperscript{272} \textit{Id}.
  \item \textsuperscript{273} N.Z. Health Act, 1956, § 92 (N.Z.).
\end{itemize}
specific legislation providing for criminal liability for transmitting HIV.\textsuperscript{274} The 1989 provisions do not specifically mention HIV, but were clearly intended to encompass HIV.

Analysis of the Crimes Act of 1961 illuminates what the 1989 Bill is amending. For murder and manslaughter prosecutions, the Crimes Act of 1961 contains the common law requirement that death must occur within a year and a day of the act.\textsuperscript{275} Because of the death and intent requirements, the likelihood of success of a homicide prosecution for transmitting HIV is so low as to be not worth the attempt.\textsuperscript{276} Prosecution for attempted murder also requires proof of specific intent to commit the offense of murder.\textsuperscript{277} The acts must have been committed for the purpose of accomplishing the offense.\textsuperscript{278} Neither factual nor legal impossibility is a defense,\textsuperscript{279} and the occurrence of actual transmission is irrelevant.\textsuperscript{280} As with murder, successful prosecutions of attempted murder are unlikely.

Several assault statutes in the Crimes Act of 1961 also may be relevant to punishing HIV-transmitting behavior.\textsuperscript{281} Sections 188 and 189 prohibit causing grievous bodily harm with either the intent to do so or with reckless disregard for the safety of others. Assuming HIV qualifies as a grievous bodily harm, the intent requirement results in the same barrier to successful prosecution as the requirement does with murder. Recklessness has never been defined in any situation analogous to the sexual transmission of HIV, but it would seem to include the situation in which the accused knows of his or her infection and knows what types of behavior are high risk, but engages in such behavior anyway.\textsuperscript{282} In addition, section 190 provides for liability for injury in circumstances where, had death occurred, the accused would be guilty of manslaughter. The requisite intent is, again, at least recklessness.\textsuperscript{283} Informed consent would be a defense under such statutes.\textsuperscript{284}

The Crimes Act of 1961 also makes it a crime to infect another per-
son with a disease.\textsuperscript{285} Section 201 prohibits a person from willfully and without lawful justification causing a disease or sickness in any other person.\textsuperscript{286} The intent requirement is the same as in a murder prosecution, and thus this law involves the same problems of proof.

The Crimes Bill of 1989 makes several substantive changes to the Crimes Act of 1961, several of which are applicable to the context of the sexual transmission of HIV. Section 122 on homicide was amended to remove the requirement that the victim die within a year and a day. The new mental intent requirement only mandates that the accused "mean" to cause bodily injury, knowing it likely that the act will cause death or serious bodily injury.\textsuperscript{287} Nonetheless, the victim must still die, and problems in proving causation remain.\textsuperscript{288}

The 1989 amendment to the assault provisions removes the requirement that the victim be injured or infected.\textsuperscript{289} The new provision provides for a five year prison term for anyone who "heedlessly" commits any act which is likely to cause injury or to endanger the health and safety of another.\textsuperscript{290} Heedlessness occurs where there is a risk of the consequence "obvious to any reasonable person" even if not obvious to the accused, and under the circumstances it was unreasonable to take the risk.\textsuperscript{291} This section has potentially unlimited reach. It gives the trier of fact practically unlimited discretion to determine whether the risk of a consequence that has already occurred is "obvious." The personal prejudices of the trier will almost certainly color his or her judgement.

At least one commentator has concluded that New Zealand criminal law, as applied to HIV, is deficient.\textsuperscript{292} The law leaves too much discretion to prosecutors, thereby encouraging selective enforcement. In addition, the law is much too susceptible to being adversely affected by the personal prejudices of the trier of fact. Therefore, the criminal law of New Zealand cannot serve as a model for a statute criminalizing behavior that is likely to transmit HIV.

\section*{VI. PROPOSAL FOR A NEW STATUTE}

The problem for criminal laws that proscribe HIV-transmitting be-
havior is not one of how they can best curb the disease's spread, but rather how to best influence people to avoid behavior that is dangerous to themselves and to others. Both traditional and HIV-specific criminal statutes in force in many countries today are far from perfect. The traditional statutes are problematic because they were not designed to encompass conduct involving the sexual transmission of HIV. HIV-specific statutes have been passed most often as political measures to calm the fears of the populace at the beginning of the epidemic. The hastiness of the drafting of these statutes makes them less than ideal. Many are vague, thereby creating the danger of selective enforcement against high risk groups. Others prohibit conduct that has been medically demonstrated not to transmit HIV, thereby failing some of the social objectives of criminal law: to educate the public as to risky behavior and to encourage people to modify their behavior. This Note proposes a model statute which avoids the weaknesses and injustice of laws now in force around the world.

First, a model statute should require the state to prove the accused knew that he or she was HIV-positive at the time of the conduct in question. Establishing that the accused "should have known" is not enough, because otherwise there is too great a danger that the moral judgement of the factfinder will result in discriminatory treatment of unpopular groups. Second, the state must show that the accused was counseled by a health care professional or public health official not to engage in high risk sexual or needle-sharing behavior. This requirement could be realized by requiring that test sites counsel persons who have tested positive, on either a confidential or an anonymous basis, upon the receipt of any positive test results.

Second, to prove the requisite mental state for punishing conduct as a felony, the state must establish that the accused purposely intended to infect another. Otherwise, the conduct should be punished as a misdemeanor. The purpose of the law is to set behavioral boundaries to prevent the transmission of disease, not to be overly concerned with moral judgment and culpability.

Third, a model statute must be clear in the definition of behavior

293. Laurie, supra note 215, at 312.
294. Id. at 313.
295. This should not discourage people from being tested because new drugs have increased the life expectancy of people with HIV, so the medical benefits of being tested early and often outweigh the disincentive of a statute basing criminal liability on knowledge of HIV infection. See Hermann, supra note 100, at 375.
296. See Gostin, supra note 104, at 1054.
297. Id.
which is to be controlled, so offenses should be narrow and clearly defined.\textsuperscript{298} The contact must be of a type epidemiologically demonstrated to transmit HIV. The activities proscribed should be limited to anal/genital, vaginal/genital, and possibly oral/genital\textsuperscript{299} contact that involves an exchange of semen, blood, or vaginal fluids only.\textsuperscript{300}

Finally, in an attempt to eliminate the danger of selective enforcement, the statute should only be enforced if a victim complains to law enforcement authorities. The requirement of a victim’s complaint prevents prosecutors from rounding up and charging members of high risk groups.

Several affirmative defenses must be provided for by a model statute. First, consent by the partner after full disclosure of the risks associated with the activity should be a defense. Second, the use of appropriate barrier protection against the exchange of bodily fluids, unless the contact was for the purpose of conceiving a child, should be a defense. Third, it should also be a defense that the accused was given bona fide medical advice either that he or she was noninfectious at the time of the contact in question, or that the activity engaged in was not a high risk one.

There is a growing consensus among public health authorities that if the criminal law is to be used at all to help prevent the spread of HIV, then a narrowly focused, nonpunitive approach is preferable.\textsuperscript{301} A statute encompassing such ideas will prove to be both more effective than, and free from the problems of, the statutes now in force in the United States and in the other nations discussed in this Note.

\section*{VII. CONCLUSION}

The efficacy of the criminal law of the United States in stemming the spread of HIV is likely to be limited. Public health measures that educate the public and encourage those at risk to come forward to be tested and counseled will be much more successful in preventing the spread of HIV. There will, however, be cases where individuals, knowing that they are infected, still choose to engage in behavior that risks the infection of others. In these cases, criminal prosecution is entirely appropriate. Traditional criminal offenses are ill-suited to these situations. Properly drafted HIV-specific statutes provide a more legitimate and effective

\begin{footnotes}
\begin{footnote} \textsuperscript{298} Howie & Webb, \textit{supra} note 215, at 45, 46. \end{footnote}
\begin{footnote} \textsuperscript{299} Studies have shown that receptive oral-genital contact has an extremely limited risk for seroconversion. \textit{See} Kingsley, \textit{supra} note 73, at 348. \end{footnote}
\begin{footnote} \textsuperscript{300} As well as needle sharing. \end{footnote}
\begin{footnote} \textsuperscript{301} \textit{See} REPORT, \textit{supra} note 101, at 130. \end{footnote}
\end{footnotes}
means for criminalizing HIV-transmitting behavior. The HIV-specific statutes must not be vague or overbroad and must not be used for the purpose of selectively prosecuting and harassing members of high risk groups.