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CRIMINALIZATION AS A POLICY RESPONSE TO A PUBLIC HEALTH CRISIS

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No one can seriously question that American society now confronts crises it seems ill-prepared to meet. Urban violence and drug addiction, for example, have created an atmosphere of despair among much of the population. The HIV disease epidemic — and related problems, including the dramatic increase in tuberculosis cases — have led to despair among gay and bisexual men, intravenous drug users, hemophiliacs, and others who are at an increased risk for exposure to the virus.

Nor could anyone seriously contend that any of these problems can be effectively addressed without thoughtful, direct intervention by federal, state, and local government. All of these crises, however, are enormously complex. In order for our policy-makers to construct and implement effective policy responses, they must first commit themselves to that goal. A principled commitment, along with the intellectual effort required to formulate a response, often require acts of political courage that many of our elected and appointed officials apparently are not yet willing to undertake.

When faced with the politically risky and intellectually challenging tasks of developing responses to our nation's crises, our policy-makers often opt for politically safe and intellectually easy approaches. In an effort to wipe out violence, drug addiction, and the HIV/AIDS epidemic, policy-makers have increased arrests and prosecutions under existing laws, have created new crimes, and, where the activity is already criminalized, have increased the sentences. Thus, to combat violence, the United States Senate has passed a bill that would create a myriad of new federal crimes.[1] To

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1. Violent Crime Control and Law Enforcement Act of 1993, S. 1607, 139 CONG. REC. S16288 (Nov. 19, 1993). The trend towards federalization of crime is contrary to the general principle that law enforcement falls within the constitutional province of state and local government. Courts have invalidated some earlier attempts to federalize everyday crime as without jurisdictional basis. *See, e.g.*, United States v. Cortner, 834 F. Supp. 242 (M.D. Tenn. 1993) (holding Congress lacked the power to enact the Anti-Car Theft Act of 1992).

combat drug use, Congress and many state legislatures have imposed longer sentences and have reduced or eliminated sentencing discretion.[2] It should come as no surprise, then, that the federal government and many state authorities have likewise turned to the criminal law to help limit the spread of HIV/AIDS.

Nearly half the states have adopted statutes, some of them very broadly worded, making it a felony to knowingly engage in activity that might expose another to HIV. In a number of states without such specific statutes, prosecutors have employed traditional criminal laws to prosecute those with HIV/AIDS. For example, in a recent Texas case,[3] an HIV-positive man who spit on a prison guard was convicted of attempted murder and sentenced to life in prison.

The laws that criminalize HIV exposure may be put to use in a number of contexts, including health care. Under the literal terms of a number of the HIV-specific laws, any HIV-positive health care worker (HCW) who performs, or HIV-positive patient who submits to, an invasive medical procedure is guilty of a crime.

Focusing on the use of criminal law as a weapon against HIV/AIDS, this Article addresses two inter-related issues. First, how will the use of criminal law to combat HIV/AIDS affect HCWs and patients? Second, is the use of criminal sanctions an effective or appropriate way to combat HIV/AIDS?

I. An Overview of the Criminal Law Response

Depending on the jurisdiction, a person with HIV/AIDS may be prosecuted in situations described below, under traditional criminal laws and/or HIV-specific criminal statutes.[4] Although, to date, HCWs and their patients have not been the focus of these prosecutions, they could be liable under both traditional and HIV-specific criminal statutes. In addition, the United States Congress has considered adopting an HIV-specific criminal statute directed at HCWs.[5]

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2. The Sentencing Reform Act of 1984 authorized the United States Sentencing Commission to promulgate mandatory federal sentencing guidelines. 18 U.S.C. §§ 3551-3580 (1991); United States Sentencing Commission, Federal Sentencing Guidelines Manual (1993). The trend to reduce sentencing discretion has been underway in the states for more than a decade. *See* U.S. Dep't of Justice, Report to the Nation on Crime and Justice: The Data 71 (1983).

3. Weeks v. State, 834 S.W.2d 559 (Tex. Ct. App. 1992).

4. *See generally* Michael L. Closen et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Transmission Laws*, 46 Ark. L. Rev. 601 (1994).

5. The Helms Disclosure Proposal, H.R. 2622, 102d Cong., 1st Sess. (1991) (amendment 734), was passed by the Senate 81 to 18. 137 Cong. Rec. 510363 (July 18, 1991). The amendment was deleted from the final bill. H.R. Rep. No. 234, 102d Cong., 1st Sess. 37-38 (1991).

A. Traditional Criminal Laws

In recent years, prosecutors have brought a number of cases alleging that the defendant knowingly or purposefully exposed or, in a few cases, transmitted HIV to another.[6] Most of the cases have been prosecuted as attempted murders or assaults. An attempted murder prosecution is viable in cases where there is sufficient evidence for a jury to find beyond a reasonable doubt that the defendant intended to transmit the virus. Many of these prosecutions arose where the defendant was in custody and lashed out at corrections or police officers by actions such as spitting or biting. These convictions have been sustained even in the absence of proof that HIV has been transmitted by such actions.[7]

Commentators have noted the practical difficulties in bringing murder or attempted murder prosecutions for exposing or transmitting HIV to others. For a murder prosecution, in the rare case where the defendant outlives the victim, the government may have difficulty proving causation, i.e., that the victim's *only* exposure to HIV resulted from the defendant's acts. With attempted murder, the prosecution must prove that the defendant acted with the purpose *to kill*, an element supported by sufficient facts in only rare, though often sensational, cases.[8]

Assault statutes can also be used for prosecuting HIV exposures and transmissions. These statutes punish people who cause or attempt to cause bodily injury to others.[9] In some circumstances,

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6. *See, e.g.*, Brock v. State, 555 So. 2d 285 (Ala. Crim. App. 1989) (defendant, a prisoner with AIDS, charged with attempted murder for biting a corrections officer); State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (defendant with AIDS convicted for attempted murder for spitting at police and paramedics and splattering them with his blood after a suicide attempt); Zule v. State, 802 S.W.2d 28 (Tex. Ct. App. 1990) (defendant with AIDS convicted for aggravated criminal sexual assault for infecting victim with HIV).

For examples of two recent cases, see *Around the Nation*, THE ADVOCATE, Feb. 8, 1994, at 20 (discussing a Missouri case where a defendant who had AIDS was found guilty of violating the state's HIV-exposure law and sentenced to five years for biting a police officer, and a North Carolina case where a defendant who said he was HIV-positive was charged with assault with a deadly weapon for throwing a blood-soaked towel on a police officer).

7. In assault and attempted murder prosecutions, the prosecution may not be required to show that transmission was possible. *See Haines*, 545 N.E.2d at 839 (stating "[i]t was only necessary for the State to show that Haines did all that he believed necessary to bring about an intended result, regardless of what was actually possible"). Even where the prosecution must make such a showing, a remote possibility of transmission may suffice. *See Weeks*, 834 S.W.2d at 562 n.2 (affirming conviction for attempted murder for spitting despite testimony that it is impossible to transmit AIDS by spitting).

8. Thomas W. Tierney, Comment, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT'L. & COMP. L. REV. 475, 493 (1992). *See Haines*, 545 N.E.2d at 834 (the defendant, stating his intention to kill after a failed suicide attempt, was convicted of attempted murder for having spat on, scratched, bitten, and thrown blood on corrections officers).

9. MODEL PENAL CODE § 211.2 (1980).

the state can instead prosecute the defendant under a reckless endangerment statute.[10]

The traditional criminal laws that have substantial penalties, such as murder and attempted murder, would apply to HCWs or patients only in the most egregious circumstances. In the only known instance of HCW-to-patient HIV transmission, five patients of an HIV-infected Florida dentist apparently contracted HIV from dental treatment.[11] The dentist died before the transmission was discovered, and the means of transmission is not known.

Many have speculated, however, that the dentist may have intentionally infected his patients out of anger or despair, or may have been extremely reckless with regard to sterilization of instruments. Either state of mind could provide the basis for a murder prosecution. An attempted murder charge requires proof that the HCW acted with an intent to kill. If the patient died, the HCW could be charged with murder based upon extreme recklessness, manslaughter based upon ordinary recklessness, or negligent homicide.[12] In some circumstances, under traditional criminal laws, a HCW could be charged with a felony for exposing a patient to HIV or transmitting HIV to a patient.

B. HIV-Specific Criminal Statutes

Nearly half of the states have adopted statutes criminalizing activity that exposes others to HIV.[13] A number of commentators have noted that these statutes are largely the product of political pressures on legislators to "do something" to combat the HIV/AIDS epidemic.[14] Indeed, the Ryan White bill, passed by Congress in 1990 to combat HIV/AIDS, conditions the award of certain federal assistance to states on each state's certification that it has criminalized HIV exposure.[15] In addition, the Report of the Presidential Commission on the HIV Epidemic, issued in 1988, recommended the adoption of HIV-specific criminal statutes.

In their broadest form, these HIV-specific statutes criminalize any knowingly conducted activity that poses a risk of HIV trans-

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10. Id.

11. Jeffery W. Cavender, Note, *AIDS in the Health Care Setting: The Congressional Response to the Kimberly Bergalis Case*, 26 GA. L. REV. 539, 540-41 (1992).

12. *See* MODEL PENAL CODE, *supra* note 9, § 2.02(2) (defining culpability); MODEL PENAL CODE, *supra* note 9, §§ 210.0-.4 (outlining model homicide provisions).

13. Closen et al., *supra* note 4, at 940 n.73.

14. *See* Closen et al., *supra* note 4, at 923 n.8 (explaining that legislatures pass HIV-specific statutes in an effort to reduce the public's fear).

15. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576 (1990).

mission.[16] Of course, such statutes on their face render potentially criminal the performance of invasive procedures by an HIV-positive HCW, or submission to an invasive procedure by an HIV-positive patient.

These statutes raise a number of significant but unresolved issues applicable to HCWs and patients. For example, the statutes generally require that the defendant act with the "knowledge" that he or she is HIV-positive. "Knowledge," as a description of a criminal state of mind, encompasses willful blindness. As the Model Penal Code notes, "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence . . . ."[17] Under this definition, a gay surgeon, or an intravenous drug-user patient, could well be deemed to have constructive knowledge that he or she is HIV-positive.[18] Such a person could then be criminally liable for performing or submitting to an invasive medical procedure.

Moreover, it is not certain that a patient or HCW can consent to undergo or perform the procedure even if the other party discloses his or her HIV status. Many of the criminal HIV transmission statutes do not allow consent as a defense.[19] In states with broadly worded statutes, but no consent defense, *all HIV-positive patients*, even those who disclose their HIV status, will be guilty of a serious crime *whenever* they submit to medical care that poses some risk of HIV transmission. Nor will the patient's consent be a defense to an HIV-positive HCW who performs any procedure that poses even a theoretical risk of HIV transmission.[20]

The willful blindness and consent issues highlight what might charitably be termed the carelessness with which HIV/AIDS has been criminalized. Furthermore, the trend towards criminalization is not likely to abate. Indeed, the United States Senate recently adopted Senator Jesse Helm's proposal — a proposal later defeated in House-Senate conference — to make it a crime for HCWs who know they have HIV to perform invasive medical procedures with-

16. Illinois, for example, proscribes "intimate contact with another," defined as the "exposure of the body of one person to a bodily fluid of another person in a manner that *could* result in the transmission of HIV." 720 ILCS 5/12-16.2 (1991) (emphasis added). The Illinois Supreme Court has held the statute constitutional. People v. Russell, No. 73721, 1994 WL 12502 (Ill. Jan. 20, 1994).

17. MODEL PENAL CODE, *supra* note 9, § 2.02(7).

18. *See* Cooper v. State, 539 So. 2d 508, 511 (Fla. Dist. Ct. App. 1989) (declaring that due to his lifestyle, the defendant knew or should have known he was exposed to HIV, and that by sexual battery on his victim, there was a strong likelihood that the victim would be exposed to HIV).

19. Closen et al., *supra* note 4, at 945 n.87.

20. *Cf.* Michael L. Closen, *When a Doctor Has AIDS*, NAT'L. L.J., Sept. 9, 1991, at 15 (arguing that a patient's knowing consent to submit to health care procedures does not sufficiently protect the patient when the HCW has HIV).

out advising patients of their HIV status.[21] Thus, the issue that the public and their legislators must face is whether the proposed and existing HIV-related criminal statutes effectively address the public health issues raised by the HIV/AIDS epidemic.

II. Possible Rationales for Criminalization

If the HIV-specific statutes have been carelessly drafted, perhaps it is because the legislatures' policy goals in enacting these statutes have been correspondingly unclear. In order to determine whether criminalization of HIV/AIDS is an appropriate response to the epidemic, it is necessary first to analyze possible goals of such criminalization. Specifically, does criminalization meet either retributive or utilitarian goals for criminal punishment?

A. Wrongdoers Deserve to be Punished

Retributive theories premise punishment upon the view that the guilty party is morally culpable and therefore deserves to be proportionately punished by society.[22] An HIV-positive person who, without revealing his or her HIV status, has unsafe sex with another person certainly is morally culpable.

However, many of the HIV-specific statutes go far beyond this scenario. On their face, many of the statutes criminalize acts that pose virtually no risk of transmission.[23] Further, many of the statutes do not provide a defense if the other party knowingly consents, though it is debatable whether consent should be a defense to a high-risk act.[24] Nor do most of the statutes provide a defense for the use of a condom. Without such defenses, an HIV-positive person is consigned to a sexless life. Engaging in non-risky sexual activities hardly warrants criminal penalties.

With high risk activities, acknowledgement that an HIV-positive person who knowingly engages in such activities is morally culpable does not inevitably lead to the conclusion that the criminal punishment these statutes impose serves retributive goals. With the HIV-specific statutes, and with many of the HIV-exposure prosecutions under traditional criminal laws,[25] it is impossible to avoid

21. H.R. 2622, 102d Cong., 1st Sess. (1991). *See* Cavender, *supra* note 11, at 549.

22. *See generally* Edmund L. Pincoffs, Philosophy of Law: A Brief Introduction 16-19 (1991) (discussing principles and origins of retributive theory).

23. *See supra* note 16 (discussing Illinois HIV transmission statute).

24. *See* Closen et al., *supra* note 4, at 946 (discussing consent as a defense). Due to the nature of the harm, consent is not a defense to murder. Given the potential degree of harm from HIV exposure, some make the argument that consent likewise should not be a defense under the exposure statutes.

25. *See, e.g.*, Weeks v. State, 834 S.W.2d 559 (Tex. Ct. App. 1992) (imposing life sentence on HIV-positive defendant after attempted murder conviction for spitting on a prison guard).

the sense that "retribution" means something very different with HIV than with other communicable diseases. The speed with which the HIV-specific statutes have been enacted, and the fanfare with which the HIV exposure cases have been brought, raises the question of whether the goal of these statutes is primarily to impose proportionate punishment for the criminal act. The statutes, to a substantial degree, stigmatize an accused merely for having HIV and correspondingly, in most cases, for being a member of a socially marginalized group.

Other sexually transmitted diseases, such as syphilis, also created public health crises and produced legislative responses.[26] No other communicable disease, however, has produced the wave of criminalization that HIV has produced. It is useful to compare legislatures' earlier, more-restrained responses to outbreaks of communicable diseases. Beginning in the late nineteenth century, state legislatures used their police powers to enact statutes in order to protect the public health and safety.[27] These statutes provided for physical examinations, vaccinations, and quarantines. Correspondingly, legislatures enacted statutes making it a misdemeanor to knowingly expose others to syphilis and other specified communicable diseases.[28] These quasi-criminal statutes have seldom been enforced.[29]

Exposure to HIV/AIDS is, unquestionably, a terrifying prospect. For centuries, syphilis was also a horrific, life-threatening disease. Syphilis remains a frightening disease, but does not invoke the horror it once did — a horror in some ways comparable to that now produced by HIV/AIDS. Why, then, have a number of states enacted HIV-specific criminal law statutes? The answer must lie beyond retributive principles.

B. Net Benefit to Society

1. General Utilitarian Principles

Most commentators agree that HIV criminalization is justified more by utilitarian than by retributive principles. Utilitarian phi-

26. *See* Stephen V. Kenney, Comment, *Criminalizing HIV Transmission: Lessons from History and a Model for the Future*, 8 J. CONTEMP. HEALTH L. & POL'Y 245, 249 (1992) (stating "[s]yphilis and AIDS possess several commonalities: both have existed in epidemic proportions; each may be sexually transmitted and manifest after a long latency period; the two have severe pathological consequences; and both have created fear and hysteria among the general public") (footnotes omitted).

27. *See id.* at 254 n.50 (discussing specific diseases these laws were designed to address).

28. *See id.* at 255 n.60 (discussing the low level of severity of the punishments imposed for violating these early health laws).

29. Kathleen M. Sullivan & Martha A. Fields, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 170 (1988).

losophy holds that punishment is only justified when the gain to society outweighs the cost to the individual punished.[30] This net positive outcome may be accomplished in several ways. First, while the person is imprisoned, the threat to society is removed by this restraint. Second, the punishment may reform the punished party so that he or she is unlikely to commit the criminal act again. Finally, the punishment itself may deter the individual, and others in society, from engaging in the punishable acts. None of these potential justifications, however, provides a legitimate rationale for broad criminalization of HIV.

It is doubtful that restraint is a legitimate purpose of HIV criminalization. If the goal were truly to restrain those who engage in risky conduct, quarantine under the public health laws would seem to be a more direct approach. Felony convictions for persons with HIV disease often amount to life sentences. Because these persons are placed in environments where there is poor health care, and where there is the risk of HIV transmission to other prisoners, it is doubtful that such restraint produces a net benefit to society.

Nor is rehabilitation a legitimate goal of HIV criminalization. As noted above, felony prosecutions will result in what are effectively life sentences for many with the HIV disease. For those who are released, it is difficult to believe that criminal sanctions could possibly have as significant an effect on sexual behavior or I.V. drug use as much less costly solutions such as education and counseling.

The commentary on HIV criminalization makes it clear that the primary goal is neither restraint nor rehabilitation, but deterrence. The commentators argue that those who are HIV-positive will know that certain acts are criminalized, and will be deterred from engaging in those acts.[31] Criminal prosecutions will thus "prevent conduct likely to spread HIV in order to prevent transmission of HIV to uninfected persons."[32]

Passage of HIV-specific criminal laws, and prosecutions under traditional criminal laws, are therefore designed to serve an explicit public health goal to stop the spread of HIV. Policy-makers see the criminalization of HIV exposure as a medium for a message — by deeming specified behavior as deserving of punishment, the spread of HIV will be stemmed. Presumably, this goal applies equally to HCWs and their patients; the statutes make no distinction.

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30. *See generally* PINCOFFS, *supra* note 22, at 9-19 (discussing utilitarian versus retributive criminal theory).

31. *See, e.g.*, Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1038 (1989); Donald H.J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 352 (1990).

32. Hermann, *supra* note 31, at 352.

The nature of the proscribed activities raises an immediate question about the deterrence rationale. As with sodomy laws, which prohibit private, consensual sexual acts, criminalization of HIV exposure presupposes law enforcement's awareness of private acts. In most circumstances, criminal charges for knowing HIV exposure, like charges under sodomy laws, are unlikely to be brought due to the intimate, private nature of the crimes. Nor are prosecutors likely to have evidence that the accused had the requisite knowledge or intent.[33] In the absence of prosecution, criminal law can be expected to have little deterrent effect.

It is also unlikely that criminal law can deter human beings from acting on their basic sexual desires. Certainly, this is the lesson of sodomy laws.[34] Statutes that criminalize virtually any sexual activity by an HIV-positive person[35] will likely be broadly ignored.

As also noted by many commentators, criminalization may actually have a boomerang effect. Both traditional and HIV-specific criminal laws generally require that, at a minimum, the defendant act with knowledge. Testing and early treatment are considered critical in the response to HIV/AIDS. For those who would rather not face the prospect of living with the knowledge that they carry the virus, there is already a psychological disincentive with respect to testing; criminalization provides yet another reason not to be tested.[36]

It is possible, however, that a carefully drafted criminal statute could affect behavior in a constructive way. A statute that criminalized only specified, risky activities where protective measures such as condoms were not used, and where the other party had not provided informed consent, could produce the desired result.[37]

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33. *See* Gene Schultz, *AIDS: Public Health and the Criminal Law*, 7 ST. LOUIS U. PUB. L. REV. 65, 110 n. 212 (1988) (noting the problem in the availability of medical records as evidence of knowledge).

34. *See* J. Kelly Strader, *Constitutional Challenges to the Criminalization of Same-Sex Sexual Activities: State Interest in HIV-AIDS Issues*, 70 DEN. L. REV. 337, 354 & n.37 (1993) (discussing the ineffectiveness of sodomy laws).

35. *See, e.g.*, 720 ILCS 5/12-16.2 (1992) ("intimate contact"); LA. REV. STAT. ANN. § 14:43.5 (West Supp. 1993) (sexual contact); MICH. COMP. LAWS § 333.5210 (1992) (sexual penetration - "emission of semen not required"); MO. REV. STAT. § 191.677 (Supp. 1992) ("create a grave and unjustifiable risk . . . through sexual or other contact"); NEV. REV. STAT. ANN. § 441A.180 (Michie 1992) ("any manner likely to expose others").

36. If a person is found to be willfully blind to his or her HIV-positive status, however, that person could be liable even in the absence of actual knowledge. *See* MODEL PENAL CODE, *supra* note 9, § 2.02(7).

37. Without the consent defense, the statutes send a clear message that the proscribed sexual activities are unworthy of any protection. *See* Michael L. Closen, *Mandatory Disclosure of HIV Blood Test Results to the Individuals Tested: A Matter of Personal Choice Neglected*, 22 LOY. U. CHI. L.J. 445, 454-55 (1991); Closen et al., *supra* note 4, at 947-48 (Professor Schultz argues that, because society permits other dangerous activities ranging from elective sur-

2. Utilitarian Goals in the Health Care Context

In the health care context, the deterrence issue becomes much more complex. Medical procedures are not private in the same sense that consensual sex acts in the home are private. State authorities would not have to investigate extensively to learn the types of procedures being performed by a HCW whom the authorities believed to be HIV-positive.

As discussed above, some of the HIV-specific statutes encompass any act that carries any possibility of HIV transmission. The statutes require that an accused person prove a negative proposition: that it was not possible to transmit HIV in a particular case. Given the uncertain state of medical knowledge, and the availability of experts who will testify for the government that transmission is *possible* in a wide range of circumstances, this is a nearly impossible task.

Thus, any invasive procedure, ranging from major surgery to routine gynecological or prostate examinations, or examinations of the ears, nose or throat, could be found to violate a broadly worded HIV-specific statute.[38] Therefore, assuming consent is not a defense to a criminal charge of HIV exposure, every invasive act could constitute a serious crime under these statutes. Likewise, in the absence of a consent defense, an HIV-positive patient would be unable to submit to treatment without risking criminal prosecution. A person with HIV/AIDS would therefore risk prosecution for seeking medical care, a result that hardly supports the public health goal of limiting the impact of HIV in the health care setting.[39]

HCWs and patients have rarely, if ever, been prosecuted under the HIV-specific statutes or under traditional criminal laws for exposing or transmitting HIV to another. Yet, it would be easier for prosecutors to locate potential offenders in the health care context

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gery to violent sports, criminalizing knowing, consensual sexual activities devalues that activity). For an argument why consent should perhaps not be a defense for knowing HIV exposure, see Closen et al., *supra* note 4, at 944 n.86.

38. *See, e.g.*, ARK. CODE ANN., § 5-14-123(c) (Michie 1992) (defining sexual penetration to include "any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body"); 720 ILCS 5/12-16.2 (1992) ("intimate contact"); LA. REV. STAT. ANN. § 14:43.5 (West Supp. 1993) (sexual contact); MICH. COMP. LAWS § 333.5210 (1992) (sexual penetration - "emission of semen not required"); MO. REV. STAT. § 191.677 (Supp. 1992) ("create a grave and unjustifiable risk . . . through sexual or other contact"); NEV. REV. STAT. ANN. § 441A.180 (Michie 1992) ("any manner likely to expose others").

39. Health care workers have a duty to treat those with HIV, and to use precautions when doing so. *See generally* Mary Anne Bobinski, *Risk and Rationality: The Centers for Disease Control and the Regulation of HIV-Infected Health Care Workers*, 36 ST. LOUIS U. L.J. 213 (1992) (discussing legal issues surrounding the center for the CDC's guidelines on HCWs and HIV). Therefore, it is not clear that a consent defense in this context would provide significant additional protection.

because the provision and receipt of health care are not private in the sense that consensual sexual activities are private. Presumably, therefore, prosecutors have exercised their discretion not to invoke the full powers of the criminal law in this context. The absence of prosecution means that even though HCWs and patients face a risk of being criminally charged, that risk in practice is too insubstantial to deter the proscribed acts.

In the health care context, then, the deterrence/health care rationale for criminalizing HIV exposure is even more dubious than is vis-a-vis the general public. Further, HCWs and patients face the possibility of civil liability if they fail to disclose their HIV-positive status prior to an invasive procedure.[40] This prospect is likely to be a more significant deterrent than a merely theoretical possibility of criminal prosecution.

There are other, more compelling reasons why the threat of criminal punishment is inappropriate for HCWs. The Federal Center for Disease Control's guidelines require HCWs who perform invasive procedures to be tested for HIV. If these HCWs test HIV-positive, the guidelines forbid them to perform certain procedures without permission from a review panel.[41] These guidelines seem to be a far more direct and effective way to reduce the risk of exposing patients to HIV. Criminalization is at best an ineffective means of reducing the spread of HIV. This conclusion applies both to the general population and to HCWs and their patients.

III. The Message in HIV/AIDS Criminalization

It is clear that HIV/AIDS has been criminalized in an unprecedented fashion. The broadest HIV-transmission statutes criminalize virtually any sexual activities for those carrying the virus. The statutes are so broad that they encompass the provision of health care services and the receipt of health care treatment by those with HIV in a wide range of circumstances.

Despite the foregoing, many would argue that enacting HIV-specific criminal statutes, and prosecuting under those statutes and traditional criminal laws, nonetheless sends an important message to all those with HIV, including HCWs and patients: When those persons engage in acts that could transmit the virus, they are acting in contravention of the moral force of criminal law. Therefore, those who know, or should know, they have HIV and who engage in proscribed acts are subject to criminal sanction.

As criminal law commentators have long noted, society's power over individuals is nowhere more intrusive, nor its moral condem-

40. *See* Closen et al., *supra* note 4, at 952 n.111 (noting recent suits brought against HCWs and patients infected with HIV).

41. *See* Bobinski, *supra* note 39, at 226-29 (discussing CDC guidelines).

nation more profound, than when society stigmatizes and punishes individuals as criminals. Therefore, even if the criminal law is not often enforced in the HIV context, it sends a message and is justified solely on that basis.

This is the same argument that advocates of sodomy laws invoke. These laws are rarely enforced, and it is doubtful that laws can deter sex in any event. The proponents of those laws argue, however, that even though sodomy laws cannot provide effective deterrence, they do provide an important message to the effect that those who commit sodomy are deserving of society's moral condemnation.[42]

People with HIV/AIDS are likewise subject to condemnation. Gay and bisexual men, prostitutes, and I.V. drug users — the groups generally perceived to be at risk of HIV-infection[43] — are not popular groups. When associated with a disease that most perceive as inevitably fatal, these groups become worthy of condemnation essentially for being who they are.

The criminal law is designed to protect society from harm and to ensure justice. When the law ceases to play that role, but instead becomes a vehicle for society's most basic prejudices, something is amiss. As Professor Kadish has written, this approach "corrupts both citizenry and police and reduces the moral authority of the criminal law, especially among those portions of the citizenry — the poor and subcultural — who are particularly likely to be treated in an arbitrary fashion."[44]

That is not to say that criminal sanctions should never be imposed when a person knowingly engages in behavior that carries a substantial risk of exposing another to HIV. A carefully drafted statute, clearly defining risky acts and providing the defenses of consent and use of a condom, could be a fair and direct way of addressing the issue. But carefully defining sex acts and applicable defenses requires a legislature to acknowledge that people should be able to engage in same-sex sexual activities except in limited circumstances. It is far easier for legislatures to forbid undefined risky activities and to omit discussion of defenses than to craft such a statute.

The general HIV exposure statutes, and broad application of traditional criminal laws, thus sweep so broadly that they encompass activity that carries no real risk of HIV transmission. Instead, the laws provide broad condemnation of large groups of society. In the process, criminalization also taints acts that promote the public

42. Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986) (finding justification for sodomy laws in the state's interest in regulating morality).

43. Closen et al., *supra* note 4, at 924 n.10.

44. SANFORD H. KADISH, BLAME AND PUNISHMENT 24 (1987).

health goal of treating HIV — providing health care to those with HIV.

What is needed, then, is more thought and less reaction. The HIV/AIDS epidemic can be contained by more effective and less costly means than enacting and enforcing new criminal statutes. Education and counselling, beginning with schools and directed both to the general public and to at-risk communities, are surely a more effective use of public resources. Although politically difficult, a serious response to the disease demands more than a misuse of the criminal law.

Criminalization, in this context and others, sometimes indicates an unwillingness to tackle issues directly. Through criminalization, legislatures and prosecutors are sending a message not primarily based upon the legitimate criminal law goals of retribution and deterrence. Instead, the message seems designed both to convince voters that government is attacking this issue, and to deem those who carry the virus to be worthy of condemnation for having the disease. Such an approach, which strays from the basic criminal law goals of protecting society and ensuring justice, undermines the legitimacy of the criminal law itself. Finally, such an approach does not serve the goals of preventing the spread of HIV and treating those infected with the disease. Our elected representatives should be expected to do better.