

Summer 1993

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Stefanie S. Wepner

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Recommended Citation

Stefanie S. Wepner, The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission through Rape, 26 J. Marshall L. Rev. 941 (1993)

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NOTES

THE DEATH PENALTY: A SOLUTION TO THE PROBLEM OF INTENTIONAL AIDS TRANSMISSION THROUGH RAPE

INTRODUCTION

Rape is unique among acts of violence: it shatters not only a victim's physical well-being but also her emotional world. Psychologists say that the surviving victim's sense of self-esteem, security and basic trust may be irreparably damaged.

Our age has added a new dimension to this trauma; the possibility that a rapist may have transmitted the lethal AIDS virus to his victim. In the past, the rape victim could comfort herself that she had, at least, physically survived the attack. Now the very fact of that survival may remain in doubt.¹

The criminalization² of intentional acquired immune deficiency syndrome (AIDS) transmission is currently receiving much attention, and for good reason. The incidence of AIDS reaches epidemic proportions,³ yet governments worldwide hesitate to develop viable methods of stopping its deadly progress. Their hesitation is based, in large part, on the fear that methods such as mandatory testing may infringe upon the rights of the infected.⁴ Critics have opposed

1. Justice Francis T. Murphy, *Violence Against Women is a Rapidly Rising Crime*, N.Y. L.J., Jan. 23, 1991, at 39.

2. In making conduct a crime, a legislature holds the offender accountable to society for his actions. MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, *DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* 172 (2d ed. 1988).

3. See Centers for Disease Control, *The HIV/AIDS Epidemic: The First 10 Years*, 40 *MORBIDITY & MORTALITY WKLY. REP.* 357, 357-59 (1991) [hereinafter *HIV/AIDS Epidemic*] (predicting that by the end of 1991, AIDS would become the second leading cause of death among men age 25-44, and one of the top five causes of death among women age 15-44). By June 1, 1991, the United States Centers for Disease Control had received reports of 179,136 cases of AIDS. *Id.* at 357. Furthermore, 23% more cases were reported in 1991 than in 1990. *Id.* at 357-59. The Centers for Disease Control projects that by the end of 1994, there will have been as many as 535,000 cumulative AIDS diagnoses in the United States alone. Centers for Disease Control, *Projections of the Number of Persons Diagnosed with AIDS and the Number of Immunosuppressed HIV-Infected Persons - United States, 1992-1994*, 41 *MORBIDITY & MORTALITY WKLY. REP.* 1, 6 (1992).

4. In large part, the right at issue is the right to privacy. For a general discussion of preconviction AIDS testing, see Lisa Simotas, Note, *In Search of a Balance: AIDS, Rape, and the Special Needs Doctrine*, 66 N.Y.U. L. REV. 1881

quarantines⁵ and other public health regulations on the grounds that they violate the right to privacy⁶ and equal protection.⁷ Legislation aimed at homosexuals⁸ and prostitutes⁹ confronts similar obstacles. Moreover, regulation of consensual sexual activity would

(1991). Critics of mandatory AIDS testing urge that such testing is an invasion violating defendants' Fourth Amendment rights. See U.S. CONST. amend. IV (providing that an individual shall be free from unreasonable searches and seizures). *But see* *Schmerber v. California*, 384 U.S. 757, 770 (1966) (noting that the extraction of blood in a hospital setting generally involves "virtually no risk, trauma, or pain" and may serve an important governmental function); *People v. Adams*, 597 N.E.2d 574, 586 (Ill. 1992) (upholding ILL. REV. STAT. ch. 38, para. 1005-5-3(g) (1989), and recognizing that AIDS testing of convicted prostitutes serves an important public health goal which outweighs the privacy interests of sex offenders). See also CAL. PENAL CODE § 1202.6 (West 1992); COLO. REV. STAT. ANN. § 18-7-201.5 (West 1991); VA. CODE ANN. § 18.2-346.1 (Michie 1991).

5. See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1032 (1989) (noting the fear of creating an impression that segregation is desirable and the difficulty of ensuring proper conditions as two pitfalls of "AIDS colonies"); see also *Young v. Quinlan*, 960 F.2d 351, 355-56 (3d Cir. 1992) (describing the inhumane treatment of an HIV-positive prisoner confined to a segregation unit; the prisoner was confined to a "dry cell" for a 96-hour period, told to drink his own urine and defecate on the floor, and eventually tried to commit suicide by cutting his wrist).

6. "While some cultures require a leper to ring a bell to warn the passerby, our Legislature has not so stigmatized the victims of AIDS." *Barlow v. Superior Court*, 236 Cal. Rptr. 134, 140 (1987); see also Alison Howard, *Judge Bars AIDS Test of Suspect; Ruling in Rape Case Cites Limits in D.C.*, WASH. POST, Jan. 3, 1992, at C1 (noting that in modern rape cases, courts face a constant battle between the defendant's presumption of innocence and right to privacy, and the victim's right to know whether she has contracted AIDS); Royce Richard Bedward, *AIDS Testing of Rape Suspects: Have the Rights of the Accused Met Their Match?*, 1990 U. ILL. L. REV. 347, 366-69 (discussing the privacy implications of AIDS testing).

7. The Equal Protection Clause of the Fourteenth Amendment states, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. "Where a quarantine is mapped out along the boundaries of a group that is independently the object of fear, prejudice and hatred, there is reason for skepticism." Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 149 (1988); see also Mary C. Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus*, 34 VILL. L. REV. 909, 917 (1989) (asserting that AIDS serves the dual function in society of both reinforcing existing prejudices against certain social groups and stimulating their exposure). *But cf.* *Harris v. Thigpen*, 941 F.2d 1495, 1500 (11th Cir. 1991) (holding that the disparate treatment of HIV-positive prisoners by prison officials does not violate equal protection under the Fourteenth Amendment).

8. The United States Supreme Court has held that the United States Constitution does not prohibit the criminalization of consensual homosexual activity. *Bowers v. Hardwick*, 478 U.S. 186 (1986). For a general discussion of *Bowers* and related equal protection arguments, see Mitchell Lloyd Pearl, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154, 154-90 (1988). One justification for such a major intrusion upon homosexuals' privacy was that the risk of AIDS is intrinsically linked to sodomy. Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 234 n.105 (1986).

necessarily bring government into the bedroom.¹⁰ For each argument in favor of controlling the behaviors that foster AIDS transmission, there is an equally compelling argument against doing so. As a result, legislatures have moved tentatively in dealing with AIDS, while the disease itself remains largely unchecked.¹¹

Although the transmission of AIDS in "private" contexts falls within a gray area that governments are hesitant to invade, a separate concern demands attention. Specifically, what action will society take against a person who knows he¹² is infected with AIDS¹³ and who decides to spread the deadly virus¹⁴ through a crime of

9. See generally Dunlap, *supra* note 7, at 909 (noting that it is impossible to discuss the AIDS virus "without noticing that this is a disease that discriminates"). But see *World Briefs*, HOUS. CHRON. NEWS SERV., Dec. 14, 1991, at A32 (citing an HIV infection rate of 95% among Parisian prostitutes working in Bois de Boulogne, each of whom potentially infect an estimated 40 clients per day).

10. Sullivan & Field, *supra* note 7, at 161. The regulation of sex brings purely private activity under government inspection. *Id.* Furthermore, questions of adequate precaution, consent, and full disclosure make it quite difficult to create any generalized statement as to what is acceptable consensual behavior. *Id.* Government regulation of sex comes dangerously close to enforced abstinence. *Id.* It also potentially singles out homosexuals. See *infra* note 17 for a discussion of the social burden carried by AIDS sufferers who fit within discernibly "unpopular" social groups.

11. Despite efforts to curb the AIDS virus, the number of infected persons increased substantially from 1989 to 1990. *HIV/AIDS Epidemic*, *supra* note 3, at 359. The groups showing the greatest increase were women, hispanics, blacks, persons living in the South, and heterosexuals. *Id.*

12. Rape is a common law crime traditionally considered to be perpetrated by a man upon a woman. SUE BESSMER, *THE LAWS OF RAPE* 58 (Annette K. Baxter ed., 1976). At common law, many social purposes existed for such a classification, including protection of the female from violence, forced pregnancy, and the impairment of marital eligibility. *Id.* at 71-72.

While the legislatures of Alabama, California, Georgia, Idaho, Mississippi, Nevada, New York, Oregon, and Virginia continue to employ common law definitions of rape, legislatures representing the majority of states use more inclusive terminology. IRVING J. SLOAN, *RAPE* 8-9 (1992).

This Note shall use the terms "rape" and "criminal sexual assault" synonymously, thus broadening the common law definition to encompass any crime of unlawful sexual penetration. However, because male-to-male and male-to-female AIDS transmission occur more frequently than female-to-male transmission, the assumption may be made that the perpetrator of a rape which transmits AIDS will be male. See Gostin, *supra* note 5, at 1022 n.20 (noting that in the United States, women represent the majority of reported cases of heterosexual AIDS transmission); David Kennon Moody, *AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238, 238 n.1 (1990) (noting that rapes of females occur twelve times more frequently than rapes of males).

13. AIDS is treated with the drug azidothymidine (AZT), which is currently the only drug approved by the Food and Drug Administration to treat AIDS. Bedward, *supra* note 6, at 351. AZT has been found to reduce symptoms and prolong the life spans of those infected with AIDS. *Id.* However, it is both toxic and costly, and it is not a cure. *Id.* at 351-52.

14. Actually, to refer to AIDS as a virus is a misnomer. By definition, AIDS is a syndrome which invites secondary infections to thrive in the weakened immune system of the victim. Bedward, *supra* note 6, at 347 n.1. While "AIDS" in

sexual violence (AIDS rape)?¹⁵ The imposition of the death penalty in this setting would serve both the interests of victims and of society as a whole. First, it would deter potential offenders, discouraging them from claiming new victims. Second, it would vindicate the rights of the victim. Third, it would further society's interest in curtailing a deadly epidemic.

By dealing with AIDS rape as ordinary rape, the legislature downplays or even ignores its severity. If the courts treat AIDS rape as ordinary rape, then the legislature has failed to account for the victim's extraordinary suffering although more rights are infringed upon than in the case of ordinary rape. These include the right not to be brutally violated and infected with a fatal disease,¹⁶ the right to live a full, healthy life, and the right not to be stigmatized¹⁷ merely for being the target of another's aggression.

In the United States, legislatures have enacted various new statutes,¹⁸ and have modified old ones,¹⁹ in an effort to criminalize

a medical sense refers to the final stage of the disease, it will be used in this Note to refer to any phase of the infection.

15. This Note discusses intentional AIDS transmission through rape [hereinafter AIDS rape]. Illinois defines the crime of criminal sexual assault as follows:

§ 12-13. Criminal Sexual Assault. (a) The accused commits criminal sexual assault if he or she:

- (1) commits an act of sexual penetration by the use of force or threat of force; or
- (2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
- (3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
- (4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

720 ILCS 5/12-13 (ILL. REV. STAT. ch. 38, para. 12-13 (1991)). Note that Illinois legislation defines "penetration" broadly enough to encompass homosexual rape and sodomy. 720 ILCS 5/12-13 (ILL. REV. STAT. ch. 38, para. 12-13 (1991)).

16. The common law could not have foreseen the torture a victim endures as a result of a crime like AIDS rape when making impairment of marital eligibility a primary justification for criminalizing rape. See SLOAN, *supra* note 12, at 59 for a discussion of how the AIDS issue has injected itself into the common law crime of rape and created many contemporary problems.

17. Aside from the apparent physical burden on its victims, AIDS carries a social burden as well. Since the AIDS high risk groups encompass homosexuals, intravenous drug users, blacks, hispanics, and prostitutes, social stigma is a natural byproduct of the disease. Dunlap, *supra* note 7, at 909; see also Simotas, *supra* note 4, at 1881-82 (noting that people with AIDS have been known to lose their jobs, homes, friends, and insurance as a result of the panic and hysteria surrounding the disease).

18. See, e.g., FLA. STAT. ANN. § 384.24 (West 1986) (making it unlawful to knowingly transmit AIDS or enumerated venereal diseases through sexual intercourse); IDAHO CODE § 39-608 (1988) (providing that a person who intention-

the transmission of HIV.²⁰ However, these statutes are largely insufficient because they fail to vindicate the victim. More importantly, the existing statutes fail to consider that when a rapist transmits HIV, in effect he has sentenced his victim to death.²¹ Additionally, because the AIDS rapist himself has HIV, as noted in Appendix A, these statutes neither rehabilitate him nor deter AIDS rape.

Criminalization of antisocial behavior generally serves three purposes: deterrence, rehabilitation, and retribution.²² While rape itself is a violent felony, AIDS rape is far more barbaric. Thus, it serves none of the purposes of criminalization to penalize both crimes in the same manner. AIDS rape is a crime unto itself, and an appropriate criminal sanction must necessarily take into account

ally exposes another to HIV, or attempts to transfer HIV in any way, is guilty of a felony); IND. CODE ANN. § 35-42-1-7 (Burns 1989) (making it a Class C felony to recklessly, knowingly, or intentionally donate, sell, or transfer blood, blood components, and semen that contain HIV; however, if the recipient becomes infected, the act becomes a Class A felony). *But see* Michael L. Closten & Jeffrey S. Deutschman, *A Proposal to Repeal the Illinois HIV Transmission Statute*, ILL. B.J. 592, 594 (1990) (urging the repeal of ILL. REV. STAT. ch. 38, para. 12-16.2 (1989) on the grounds that the statute was overly broad and could set unconstitutionally low standards for conviction).

19. *See, e.g.*, CAL. PENAL CODE § 12022.85 (West 1989) (enhancing criminal sentences for sex offenses when the offender knows [s]he carries the AIDS virus); *see also* Sullivan & Field, *supra* note 7, at 158 n.64 (for further discussion of legislative treatment of AIDS transmission); Hanna W. Rosin, *AIDS: Death Sentence or Deadly Weapon*, N.J. L.J., Dec. 21, 1992, at 7 (noting that the New Jersey government, like that of many other states, must determine whether AIDS shall remain a purely public health issue, or whether it should instead provide a context in which to rethink the issues of criminal intent and the right to privacy).

20. While proposals to criminalize *all* AIDS transmission have been the subject of extensive criticism, criminalization of *intentional* transmission has received widespread public approval, largely because intentional transmission requires a culpable state of mind. *See* Sullivan & Field, *supra* note 7, at 147 (noting that AIDS transmission is often unwitting and that criminalization might inappropriately impose strict liability for merely accidental behavior). *Cf.* Robert O. Boorstinc, *Criminal and Civil Litigation on Spread of AIDS Appears*, N.Y. TIMES, June 19, 1987, at A3 (citing a public opinion poll in which a majority of those polled would support criminal sanctions for AIDS transmission). For an international view of the criminalization issue, see Peter Mosley, *Worldwide Dilemma: Should AIDS Infection Be a Crime?*, REUTER LIBR. REP., June 29, 1992, available in LEXIS, Nexis Library, Reuters File.

21. "Every victim of a violent sexual assault faces the possibility of becoming infected with acquired immune deficiency syndrome ('AIDS')." Moody, *supra* note 12, at 238.

22. GOTTFREDSON & GOTTFREDSON, *supra* note 2, at 173. Deterrence refers to punishing convicted criminals with sentences "explicitly designed to decrease the probability that others will engage in unlawful behavior." *Id.* The aim of rehabilitation, which is sometimes referred to as "treatment," is to decrease the propensity of a particular individual to commit crime in the future. *Id.* at 174. Retribution, or "desert," condemns an individual's past criminal behavior; punishment is imposed proportionately to the gravity of the crime committed. *Id.* at 175-76.

the mental state and actions of the attacker, as well as the peculiarities of his disease, the harm to the victim, and the societal interest in alleviating such harm. As a result, criminal sanctions aimed at AIDS rape cannot serve the purposes of criminalization unless they consider each of these factors and treat AIDS rape as its own entity.

This Note will address the very limited area of knowing and intentional transmission of AIDS through rape. Part I discusses the risk of AIDS transmission, as well as the physical and psychiatric manifestations of infection.²³ Part II addresses the criminalization of AIDS transmission, including the inadequacies of current legislation from the standpoint of the victim, the attacker, and society. It also explains how AIDS rape differs from ordinary rape and why its potential victims deserve extraordinary protection through the criminal law. Part III illustrates how implementation of a model death penalty statute combats the shortcomings of current efforts to legislate against AIDS rape. Part IV overcomes the constitutional and definitional obstacles which impede the imposition of the model legislation. Moreover, it examines the relevant death penalty cases, particularly *Coker v. Georgia*,²⁴ which forbid imposing the death penalty in the context of rape defendants. Furthermore, Part IV contends that it is now necessary to re-examine *Coker*²⁵ in light of the AIDS epidemic. Finally, Part V concludes that an AIDS rape statute imposing the death penalty would satisfy the aims of public policy with respect to sanctioning criminal behavior and protecting public health.²⁶

I. ACQUIRED IMMUNODEFICIENCY SYNDROME

AIDS is a highly infectious disease which develops through several stages²⁷ and for which no known cure exists.²⁸ While it is not

23. One study linked aggravated neurological symptoms to parenteral drug abuse. See, e.g., Renee Malouf et al., *Neurologic Disease in Human Immunodeficiency Virus-Infected Drug Abusers*, 116 ARCH. NEUROL. 1002, 1002 (AMA 1990).

24. 433 U.S. 584 (1977).

25. *Id.*

26. "There are few, if any, interests more essential to a stable society than the health and safety of its members. Toward that end, the State has a compelling interest in protecting and promoting public health and, here, in adopting measures reasonably designed to prevent the spread of AIDS." *People v. Adams*, 397 N.E.2d 574, 580-81 (Ill. 1992). For a discussion of the goals of criminal sanctions, see GOTTFRIDSON & GOTTFRIDSON, *supra* note 2, at 196.

27. Simotas, *supra* note 4, at 1885-86. Initially caused by infection with HIV, or human immunodeficiency virus, the disease progresses through three stages. *Id.* The second stage is known as AIDS-related complex, or ARC. *Id.* Scientists consider AIDS to be the third stage of the disease. *Id.*

28. Bedward, *supra* note 6, at 351.

transmitted through casual contact,²⁹ the speed with which it has spread throughout the population necessarily commands public attention.³⁰ A proper appreciation of the need to criminalize AIDS rape initially requires an understanding of how AIDS is transmitted to its victims and the physical and psychological effects of the various stages of infection.

A. Transmission

AIDS carriers transmit the disease through bodily fluids, particularly blood and semen.³¹ Thus, intravenous drug users who share needles are in one of the highest risk groups,³² as are homosexuals who exchange blood through anal intercourse.³³ The AIDS population is not limited to drug users and homosexuals, however. A mother may unwittingly pass AIDS to her fetus during pregnancy.³⁴ A hemophiliac may receive AIDS through contaminated blood products.³⁵ Heterosexual partners also spread AIDS through intercourse.³⁶

29. "AIDS is spread by acts, not by mere proximity." Sullivan & Field, *supra* note 7, at 156. Interestingly, it is for this reason that criminalizing AIDS transmission is more appropriate than imposing a quarantine or another public health regulation, because criminalization addresses the act committed in the presence of a culpable state of mind. *Id.* Thus, the criminal law may address sexual conduct and intravenous drug use, but it may not address sharing a home with an infected person, eating from the same plate, or hand-holding. Gostin, *supra* note 5, at 1024.

30. *HIV/AIDS Epidemic*, *supra* note 3, at 357.

31. Gostin, *supra* note 5, at 1020-26 (citing engaging in sexual intercourse, intravenous drug use, hitting, kicking, scratching, and splattering of blood as effective means of HIV transmission, but noting that there are no reported incidents of transmission through spitting).

32. Malouf et al., *supra* note 23, at 1002 (noting that parenteral drug abusers comprise the second largest risk group for AIDS infection); Robert F. Schilling, *Developing Strategies for AIDS Prevention Research with Black and Hispanic Drug Users*, 104 PUB. HEALTH REP. 2, 3 (1989) (reporting a 26% infection rate among parenteral drug users, but noting that New York, northern New Jersey, and Puerto Rico cite a prevalence rate of infection among heroin abusers which exceeds 50%).

33. Harold W. Jaffe, M.D., *What Doctors Want to Tell Judges About AIDS*, 29 JUDGES' J. 8, 12 (1990) (noting that by virtue of their sexual practices, homosexuals and bisexuals were among the first recognizable groups to be at risk of AIDS infection).

34. Perinatal, or "mother-to-child," infection occurs either before birth, during birth, or in rare instances, after birth, through a mother's milk. Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome - United States, 1981-1990*, 40 MORBIDITY & MORTALITY WKLY. REP. 358, 361 (1991) (noting that AIDS has become a leading cause of death for children 1-5 years of age).

35. *But see* Jaffe, *supra* note 33, at 13 (noting that while hemophiliacs do comprise a small segment of the total AIDS population, HIV has been almost completely eradicated from the blood supply since 1985, and thus the number of reported cases of infection in recipients of blood products will decrease).

36. *Id.* at 13. While individuals infected through heterosexual intercourse are in the minority of the total AIDS population, their numbers are growing

The risk of contracting AIDS from one incident of sexual intercourse is minimal,³⁷ but it is not negligible. Furthermore, because rape is a nonconsensual crime of violence, the risk of infection from one sexual encounter is arguably higher than in the case of consensual sexual activity.³⁸ When AIDS infection occurs, the victim is presumed to be a carrier for life, and thus capable of transmitting the virus to another.³⁹

B. Infection

While the term AIDS is often used interchangeably with the term HIV, there are actually three stages of infection that an AIDS victim experiences.⁴⁰ First, a retrovirus known as human immunodeficiency virus (HIV) attacks the host by transcribing its own genetic material into human DNA.⁴¹ When the virus integrates itself with the host cells, latent infection occurs.⁴² The period of time between when the virus enters the body and when sufficient antio-

more quickly than in any other risk group. *Id.* Generally, this subcategory consists of Black and Hispanic women who were infected by their partners through vaginal intercourse. *Id.*

37. The risk of infection from one consensual sexual encounter has been placed between 1/500 and 1/1000. *See, e.g.,* Moody, *supra* note 12, at 241. The risk of infection from one consensual sexual encounter using a condom is even lower; it is estimated to be 1/10,000. Gostin, *supra* note 5, at 1022.

38. Benjamin Freedman, *Presence of AIDS May Rewrite Rules of Law*, OTTAWA CITIZEN, Dec. 21, 1992, at A11.

We know the odds of a person contracting HIV infection from a single sexual exposure are low. But we cannot extend any reassurance to the victim of a rape, for rape is not love. The violence surrounding a rape may make the chances of sexual transmission much higher than in an act of lovemaking.

Id.

During a rape, the aggressor is arguably uninterested in the comfort and protection of his victim. Thus, while the incidence of transmission among consenting heterosexual partners is slight, transmission as a result of forcible rape may occur more frequently. This may be attributed to the increased likelihood of coming into contact with infected blood during a rape, be it from biting, scratching, or tearing of vaginal and/or anal membranes. *See* CENTER FOR WOMEN POLICY STUDIES, MORE HARM THAN HELP: THE RAMIFICATIONS FOR RAPE SURVIVORS OF MANDATORY HIV TESTING OF RAPISTS 6 (1991) [hereinafter RAMIFICATIONS FOR RAPE SURVIVORS] (estimating that the risk of contracting HIV from rape is greater than 1/500 "[b]ecause local trauma which dissolves mucosal barriers to infection is expected to increase a woman's risk of HIV infection"). Unfortunately, despite the increased risk of HIV infection of a victim of rape, the potential for such infection has essentially received no attention from the various public health services. *Id.* at 4.

39. *See* Jaffe, *supra* note 33, at 10 (cautioning that while individuals may manifest varying degrees of infectiousness, it is necessary to assume that any AIDS carrier may transmit the disease to another person).

40. Simotas, *supra* note 4, at 1885-86.

41. Jaffe, *supra* note 33, at 9-10.

42. *Id.* at 10.

dies are detectable in a conventional blood test⁴³ is known as the "window period."⁴⁴ The virus's latency period, particularly the window period, poses the most danger to a potential victim, for while the carrier may look perfectly healthy and in fact exhibit no symptoms, the virus is residing within the carrier's body and is capable of being transmitted.⁴⁵ The virus may remain latent for several months, but it presumably never leaves the body.⁴⁶

The second stage, often called AIDS-related complex (ARC), manifests itself in symptoms which may include enlarged lymph nodes, night sweats, weight loss, and fever.⁴⁷ However, none of the symptoms of ARC are life-threatening.⁴⁸ Like HIV, ARC is not fatal until it reveals itself as full-blown AIDS.⁴⁹

AIDS is the final and deadly stage of the virus.⁵⁰ The virus attacks the body's T-helper cells, which are white blood cells crucial to the immune system.⁵¹ This attack on the T-helper cells breaks down the immune system, making it unable to respond to infection.⁵² In addition to substantially weakened immunity, the virus

43. Another term for "HIV positive" is "seropositive." Closen & Deutschman, *supra* note 18, at 594. Seropositivity is determined by a combination of two tests. *People v. Adams*, 597 N.E.2d 574, 578 (Ill. 1992). The enzyme-linked immunosorbent assay (ELISA) is employed to detect whether or not a person has been exposed to HIV. *Id.* It does so by measuring whether antibodies of HIV are present in the blood. *Id.* If the result of that test is positive, such result is confirmed by the Western Blot test. *Id.*

44. See SLOAN, *supra* note 12, at 59 (illustrating that a typical incubation period may be as short as six weeks but is generally no longer than three months).

45. Jaffe, *supra* note 33, at 10 (noting that a positive blood test is the only evidence of infection during the latency period); see also Simotas, *supra* note 4, at 1885 (suggesting that the latency period, which usually lasts about four and one-half years, may last as long as ten years). Thus, while the window period arguably poses the greatest risk of infection, since even a carrier who submits to a blood test may feel perfectly healthy and thus have no evidence of infection, the latency period also poses a great risk. Furthermore, because the risk of AIDS infection increases with the incidence of exposure, the risk of AIDS transmission from one consensual sex partner to another may be quite high during this period. Gostin, *supra* note 5, at 1021 (noting that the risk of transmission in an ongoing sexual relationship may be as high as 68%).

46. Jaffe, *supra* note 33, at 10 (recognizing that although infectiousness may vary from person to person, human HIV antibodies are incapable of eradicating the disease).

47. Simotas, *supra* note 4, at 1886.

48. *Id.*

49. *Id.*

50. Sullivan & Field, *supra* note 7, at 140 (recognizing that because AIDS is incurable, it is fatal).

51. Margery M. Tamburro, Note, *The New AIDS "Look Back" Statute: Contact Tracing in the Health Care Setting - A Step in the Wrong Direction*, 25 J. MARSHALL L. REV. 769, 772 n.29 (1992).

52. Jaffe, *supra* note 33, at 10 (calling the ultimate breakdown in an AIDS victim's immune system "the hallmark of AIDS").

causes neurologic symptoms in many AIDS victims,⁵³ including dementia,⁵⁴ paranoia, psychosis,⁵⁵ and depression.⁵⁶ Meanwhile, due to the substantially weakened immune system, a wide variety of opportunistic infections and cancers attack the victim, eventually causing death.⁵⁷

When death is the inevitable outcome of infection from an elusive disease, the resulting public hysteria⁵⁸ is understandable though undesirable. It is easy to see why some states, in an effort to curb the AIDS virus, react with overbroad legislation⁵⁹ while others fail to react at all.⁶⁰ The scope of this Note, however, is limited to the very narrow issue of AIDS rape. The relatively low risk of transmission from a single sexual incident places offenders who actually transmit HIV to their victims in a discernible class,⁶¹ while

53. See Malouf et al., *supra* note 23, at 1002 (reporting the presence of neurologic symptoms in up to 63% of AIDS patients).

54. Karl D. Kiebert et al., *Excitotoxicity and Dopaminergic Dysfunction in the Acquired Immunodeficiency Syndrome Dementia Complex; Therapeutic Implications*, 48 ARCH. NEUROL. 1281, 1281 (AMA 1991) (describing the acquired immunodeficiency syndrome dementia complex (ADC), which is characterized by impaired memory, motor skills, and cognition, as well as an inability to focus attention).

55. Malouf et al., *supra* note 23, at 1002-07. Psychosis is evidenced by grossly abnormal behavior or mood. *Id.* Symptoms may include agitation, combativeness, and violence. *Id.* Psychosis may even lead an AIDS victim to become homicidal. *Id.*

56. Peter M. Marzuk et al., *Increased Risk of Suicide in Persons with AIDS*, 259 JAMA 1333, 1333-37 (1988). The depression may be so severe as to drive a victim to suicide. *Id.* One study estimated that the relative risk of suicide in men with AIDS age 20-59 was over 36 times that of uninfected men in the same age group and over 66 times that of the general population. *Id.*

57. Simotas, *supra* note 4, at 1886. Weakened immunity makes the body of the AIDS victim easy prey to such diseases as pneumocystis carinii and Kaposi's sarcoma, which are often the proximate causes of death. *Id.*

58. Much of society is frantic about the AIDS epidemic. See, e.g., Dunlap, *supra* note 7, at 909 (noting that "[t]he fear of AIDS has both rational and irrational facets"); *Prosecutor Accused of Perpetuating 'AIDS Myth,'* UPI, May 29, 1987, available in LEXIS, Nexis Library, UPI File (quoting South Carolina prosecutor James Anders as saying of an infected defendant, "I'll try him if I have to wear a bubble"). But see *Barlow v. Superior Court*, 236 Cal. Rptr. 134, 140 (1987) (refusing to characterize AIDS victims as a threat to society's interest in public health and safety).

59. See, e.g., Closen & Deutschman, *supra* note 18, at 592-93 (indicating that the acts of crying, swimming, childbirth, and shaking hands are potentially reprehensible under ILL. REV. STAT. ch. 38 § 12-16.2 (1989)).

60. See, e.g., Murphy, *supra* note 1, at 39 (recognizing the irony inherent in a New York law which allows a court to order a convicted rapist to submit to tests for syphilis, gonorrhea, and other sexually transmitted diseases, but not for AIDS); Howard, *supra* note 6, at C1 (noting that Washington D.C. law gives the court no authority to order an AIDS test of a rape suspect).

61. In order to receive the death penalty, the actions and mental state of a convicted criminal must place him in a narrower class of defendants than all of those who were convicted of a specific crime. *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980); *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). "The belief no longer prevails that every offense in a like legal category

their knowing and intentional mental states make their actions criminally culpable.⁶² Because there is no cure for AIDS,⁶³ society must take steps to prevent its transmission,⁶⁴ and it should do so by severely punishing that conduct which is likely to transmit the virus and cause death to a victim.

II. CRIMINALIZATION OF INTENTIONAL AIDS TRANSMISSION: THE INADEQUACIES OF CURRENT LEGISLATION

Because AIDS is a relatively new disease,⁶⁵ legislatures confronted with AIDS-related crime have attempted to manipulate existing criminal laws.⁶⁶ Unfortunately, such efforts fail to directly address those elements of the AIDS-related crimes which distinguish them from conventional crimes. Rather, legislatures attempt to fit crimes like AIDS rape into more traditional categories of crime, such as rape, assault, and attempt murder,⁶⁷ even though the nature of the disease and its effect on its victims makes this categorization inappropriate.

The inadequate treatment of AIDS-related crime by legislatures leaves courts ill-equipped to deal with the peculiar difficulties presented by AIDS-related crimes. A crime and its corresponding sanctions must be appropriate from the points of view of the state,⁶⁸ the victim,⁶⁹ and the attacker.⁷⁰ Furthermore, the sanction appor-

calls for an identical punishment without regard to the past life and habits of a particular offender." *Woodson v. North Carolina*, 428 U.S. 280, 280 (1976) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

62. See Gostin, *supra* note 5, at 1038 (noting that the criminal law seeks to prevent future acts by penalizing individuals with blameworthy minds for the acts they have committed, and suggesting that criminalization of HIV transmission is not unreasonable since AIDS transmission is at least as dangerous as other behaviors the law already proscribes).

63. Bedward, *supra* note 6, at 348.

64. See Ronald Bayer et al., *HIV Antibody Screening: An Ethical Framework for Evaluating Proposed Programs*, 256 JAMA 1768, 1770 (1986) (arguing that the one purpose which justifies the state's use of its public health power is protecting individuals from the spread of AIDS).

65. California reported the first cases of what later came to be known as AIDS to the United States Centers for Disease Control on June 5, 1981. *HIV/AIDS Epidemic*, *supra* note 3, at 357.

66. HIV-positive individuals whose actions have placed others at risk of HIV infection have been charged with assault with intent to commit murder, felonious assault, misdemeanor assault, assault with a deadly weapon, attempt murder, and aggravated sexual assault. Gostin, *supra* note 5, at 1039 n.115.

67. *Id.* For a further discussion of why treating AIDS rape like other traditional crimes is inappropriate, see *infra* notes 72-141 and accompanying text.

68. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (acknowledging the power of a community to safeguard itself against an epidemic which threatens the public health); *State v. Christopher*, 652 P.2d 1031, 1033 (1982) (recognizing that society must be able to protect the security of its citizens by using the criminal law to punish present dangerous behaviors and deter future offenders).

69. "It is quite possible to hold the view that a woman, like a man, should have the right to relax in a place of public recreation . . . without the fear of an

tioned to the criminal defendant must have at least one of the following goals: retribution, rehabilitation, or deterrence.⁷¹ In an analysis of the crime of AIDS rape, the nature of the offense⁷² and the attributes of the offender⁷³ dictate that criminal sanctions and their goals must be the subject of intense scrutiny.

In each of the illustrations below, the criminal sentences were both inappropriate and ineffective. However, the illustrations serve three important, and understandably overlapping, purposes. First, they underscore the need for the state to create more vehement deterrence of potential AIDS rape, and they epitomize the failures of employing current legislation to deal with AIDS rape. Second, they demonstrate that inappropriate criminal sanctions do not vindicate the rights of the victims of AIDS rape. Third, these examples reveal that from the point of view of the defendant himself, current sanctions are unsuited both to the goals of the criminal law and to the mandates of the Constitution.

A. Viewpoint of the State

The state has the responsibility to promulgate the well-being of its citizens. Consequently, when society is threatened by an epidemic of alarming proportions, the legislature must enact laws to keep the epidemic in check. While existing legislation may, on occasion, be sufficient to cope with an unforeseen emergency, AIDS

assault." BESSMER, *supra* note 12, at 73. When this right is violated, the victim of an AIDS rape is entitled to vindication for her mental and physical anguish, as well as for her impending death. See *infra* notes 103-05 and accompanying text for an illustration of the physical and emotional suffering an AIDS rape victim must endure. Stated differently, the AIDS rapist deserves to be punished severely for his irreversible act. See GOTTFREDSON & GOTTFREDSON, *supra* note 2, at 176.

70. An AIDS rapist inflicts incredible torture on his victim. However, he, too, has interests which the legislatures must consider. Those include the right to privacy, the right not to be cruelly or unusually punished, and the right to equal protection under the law. See U.S. CONST. amends. I, VIII, XIV. For a further discussion of the implications of the rights of an AIDS rapist, see *infra* notes 116-41 and accompanying text.

71. See *supra* note 22 (defining these terms).

72. While the consequences of AIDS rape are ultimately lethal, they are also slow and painful in coming. See notes 40-57 and accompanying text (discussing the stages of AIDS infection). Thus, AIDS rape clearly warrants different treatment under the law than does the traditional crime of rape, which is typically not fatal. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (distinguishing murder, in which the victim dies, from rape, in which she does not).

73. In imposing a punishment for the crime of AIDS rape, the legislature must remain cognizant of the fact that the AIDS rapist has the same disease that he has transmitted, that arguably he will not live long enough to be rehabilitated, and that as a result, long prison sentences may be inappropriate. See Sullivan & Field, *supra* note 7, at 159 (recognizing that extensive prison sentences may not deter AIDS-related crime if potential defendants believe that they are going to die anyway).

rape calls for a partial remodeling of the current criminal law. The illustration below demonstrates that in the absence of new legislation, existing legislation fosters neither the goals of criminal sanctions (deterrence, rehabilitation, and retribution) nor society's interest in health and public safety.

Consider the following: two years ago, a man suffering from AIDS was convicted of sodomizing a fourteen-year-old boy.⁷⁴ Under current Ohio law, sodomy carries a maximum penalty of twenty-five years imprisonment.⁷⁵ The judge sentenced the attacker to eight to twenty-five years and fined him \$10,000.⁷⁶

The criminal sentence above evidences several shortcomings of forcing AIDS rape into a conventional criminal category. First, in assessing a fine against a convicted rapist with AIDS, the court assumes that the defendant has the money to pay such a fine.⁷⁷ Furthermore, in this situation, it is quite possible that the rapist's twenty-five year prison sentence will outlast him.⁷⁸ Thus, this sentence serves none of the functions of criminal sentencing. An AIDS rapist's life span may be shortened so substantially because of the disease that *rehabilitation* is impossible.⁷⁹ He is not *deterred* from committing AIDS rape by the threat of a fine that he will not have

74. *AIDS Sufferer Sentenced for Raping Boy*, UPI, Nov. 4, 1990, available in LEXIS, Nexis Library, UPI File. When an assistant prosecutor asked the defendant why he would continue to engage in sexual activity after being diagnosed with the deadly virus, he said he did not know. *Id.*

75. See OHIO REV. CODE ANN. §§ 2907.02, 2907.12 (Anderson 1987) (noting that rape and felonious sexual penetration are aggravated felonies of the first degree).

76. *AIDS Sufferer Sentenced for Raping Boy*, UPI, Nov. 4, 1990, available in LEXIS, Nexis Library, UPI File.

77. The judge told the defendant that the fine would go toward the treatment and care of his victim. *Id.* Unfortunately, it is very possible that the fine was never paid. By definition, an AIDS rapist himself has AIDS. See *infra* Appendix A. Thus, the rapist may be paying for his own treatment. See Bedward, *supra* note 6, at 352 (noting that AZT, which is currently the only drug available to combat the symptoms of AIDS, is quite costly). He may have lost his job and his insurance. Simotas, *supra* note 4, at 1881-82. He may spend his money to engage in drug abuse. Malouf et al., *supra* note 23, at 1002. Or he may simply have no money.

78. The AIDS-infected defendant, if convicted, will probably die before his first sentence is up. See *People v. Adams*, 597 N.E.2d 574, 577 (Ill. 1992) (stating that "AIDS is a fatal illness for which there is no known cure"). Typically, the time period between infection and the onset of symptoms lasts seven years; however, once an individual has full-blown AIDS, it is possible that he may die suddenly, as a result of opportunistic infection. Sullivan & Field, *supra* note 7, at 140 n.2. Thus, the absolute absurdity of a lengthy prison sentence is readily apparent. See *AIDS Rapist Receives Three Life Terms*, WASH. POST, Apr. 27, 1993, at D5 (reporting that a rapist with AIDS had received a sentence of three life terms plus 75 years upon conviction).

79. See Sullivan & Field, *supra* note 7, at 140 n.2 (discussing the incurable and fatal nature of AIDS).

to pay⁸⁰ or by a prison sentence replete with the proper medication and medical attention.⁸¹ While a prison sentence may allow him to receive proper medical care, such care is provided at the taxpayers' expense.⁸² He is clearly not getting what he *deserves*.⁸³ Thus, this example underscores the urgency with which the legislature must respond to the growing menace of AIDS rape. The state must ensure that in punishing an AIDS rapist, the sentence meted out is compatible both with the crime committed and with the man who committed that crime.⁸⁴

When a Manhattan rapist promised to be tested for AIDS and to notify his victims of the results,⁸⁵ yet another miscarriage of justice resulted. In exchange for his agreement to be tested for AIDS, the New York district attorney reduced his sentence by up to ten years.⁸⁶ Thus, the rapist used the very element which potentially made his crime so heinous as a bargaining tool at sentencing.⁸⁷ In effect, the prosecutor compromised the state's interest in deterring AIDS rape by compromising its position on punishing this violent crime.

Some states statutorily mandate AIDS testing of accused rapists.⁸⁸ In the above example, however, a defendant plea-bargained

80. See *supra* note 77 (contending that the imposition of fines is not practical in the context of AIDS rape).

81. See, e.g., Shawn Marie Boyne, *Women in Prison With AIDS: An Assault on the Constitution?*, 64 S. CAL. L. REV. 741, 757 (1991) (recognizing that many states do provide quality medical care for HIV-infected prisoners).

82. See Bill Lohmann, *AIDS in Prison; Will AIDS Make Prison Sentences Death Sentences?*, UPI, Dec. 1, 1985, available in LEXIS, Nexis Library, UPI File (reporting that New Jersey taxpayers spend an estimated \$67,000 per year on HIV-infected correctional inmates; by comparison, a healthy prisoner costs New Jersey taxpayers \$16,000 per year).

83. GOTTFREDSON & GOTTFREDSON, *supra* note 2, at 176 (explaining that as a result of his offense, the offender deserves punishment). See also *Tison v. Arizona*, 481 U.S. 137, 148-49 (1986) (stating that the rationale of retribution is that criminal punishment of the defendant must be in proportion to his personal culpability).

84. "[J]ustice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

85. William Glaberson, *Fear of AIDS With Rape: How a Case Was Affected*, N.Y. TIMES, July 9, 1990, at B1.

86. *Id.*

87. See *id.*; see also *People v. Durham*, 553 N.Y.S.2d 944, 947 (1990) ("The defendant's argument that his HIV status is irrelevant and prejudicial to the instant case, is ludicrous in that the defendant cannot cite Aids [sic] as both a sword and a shield at the same time.").

88. See, e.g., CAL. HEALTH & SAFETY CODE § 199.96 (West 1990); COLO. REV. STAT. § 18-3-415 (1992 Cum. Supp.); IDAHO CODE § 39-604(3) (1992 Cum. Supp.); TEX. CRIM. PROC. CODE ANN. § 21.31 (West 1989).

using an AIDS test as leverage.⁸⁹ Due to a lack of specific AIDS rape legislation, the state compromised the criminal law goals of deterrence and retribution for the mental and physical well-being of the victim. Thus, it would be in the state's best interests to have in place some mechanism which would facilitate the societal goals of health and public safety without sacrificing the criminal law goals of deterrence and retribution.⁹⁰

Society's interest in promoting public health and welfare are not vindicated by placing an AIDS rapist within the confines of the prison system. In *People v. Thomas*,⁹¹ a New York county court took judicial notice that AIDS exposure is especially prevalent in the prison system, particularly when compared to the incidence of exposure among the general population.⁹² In fact, due to the current overcrowding in metropolitan⁹³ prisons, incarcerating a rapist with AIDS may ultimately contribute to the further magnification of the epidemic.⁹⁴ Taking this argument one step further, if we assume that one prisoner may transmit AIDS to another inmate⁹⁵

89. Glaberson, *supra* note 85, at B1. Elizabeth M. Schneider, a women's rights advocate, criticized the plea bargain. *See id.* "What it says to defendants is that rape cases will be treated less seriously because reliance on the protections of confidentiality gives the defendant an added bargaining chip." *Id.* Thus, this case evidences a conflict in the law between the defendant's right to privacy and the rights of the victim.

90. *See, e.g.,* Simotas, *supra* note 4, at 1882-83 nn.13-16 (recognizing that many states do enforce mandatory AIDS testing, either at the preconviction or postconviction stage, of those charged with or convicted of sex-related offenses).

91. 529 N.Y.S.2d 429 (1988).

92. *Id.* at 431. *See also* Centers for Disease Control, *HIV Prevention in the U.S. Correctional System, 1991*, 41 MORBIDITY & MORTALITY WKLY. REP. 389, 391 (1992) [hereinafter *U.S. Correctional System*] (recognizing that the risk of HIV infection may be higher in larger prisons, or in prisons where inmates serve long-term sentences); Lohmann, *supra* note 82 ("An abnormally high percentage of prison residents - particularly those who participate in homosexual activity and intravenous drug use - are perfect prey for the mysterious killer that has no cure"); Francis X. Clines, *Freeing Inmates with AIDS in Time to Die*, N.Y. TIMES, Jan. 5, 1993, at A1 (noting that AIDS kills more New York prisoners than all other causes of death combined).

93. Jaffe, *supra* note 33, at 11 (noting that major metropolitan areas within California, Florida, New Jersey, New York, and Texas account for approximately two-thirds of all AIDS cases in the United States); Lohmann, *supra* note 82 (urging that although "[t]he states with top figures of prisoners with AIDS also lead the nation in overall [sic] cases of AIDS," southern and midwestern states, and the more sparsely populated states should be wary, as the epidemic is spreading steadily).

94. Between 1985 and 1987, a survey of 39 state and federal prisons reported a 156% increase in inmate AIDS infection. Boyne, *supra* note 81, at 750.

95. While AIDS infection of prisoners is often a result of intravenous drug use, violence and prison rape also contribute to the epidemic within the correctional system. *See, e.g.,* Harris v. Thigpen, 941 F.2d 1495, 1499 n.1 (11th Cir. 1991) (acknowledging that prison officials must deal with difficult AIDS issues including, but not limited to, rape and other "violent victimization"); Bob Dart, *Jails Holding Mentally Ill, Report Says*, HOUS. CHRON., Sept. 10, 1992, at A17 ("[W]e found that physical beatings and rape by other inmates are not rare

who is subsequently released, another AIDS carrier is placed back into society, where he may potentially transmit the disease to new victims.⁹⁶

Legislatures have the discretion to enact statutes in order to protect public health and safety.⁹⁷ In *Jacobson v. Massachusetts*,⁹⁸ the Supreme Court held that it was within the police power of an individual state to enact legislation providing for compulsory smallpox vaccination.⁹⁹ The principles enumerated in *Jacobson* are still applicable today. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."¹⁰⁰ Today, that disease is AIDS.

events"); Alvin E. Bessent, *Inmate Sues Over HIV-Infected Bite*, NEWSDAY, Mar. 13, 1991, at 29 (describing a Long Island prison inmate who sued the state of New York when an infected inmate whom prison officials should have known to be violent attacked him and bit off the tip of his finger); Lohmann, *supra* note 82 (noting that fear of AIDS is increasing in United States prisons, "where restlessness and paranoia run deep, and drug use and homosexual rape are ever present"); *Guard Union Warns of AIDS Epidemic in Prison System*, UPI, Feb. 15, 1993, available in LEXIS, Nexis Library, UPI File (noting ironically that despite the ever-present reality of AIDS transmission through drug use and prison rape, Michigan continues to outlaw condoms and needles in its prisons because "drugs and sexual activity are forbidden by prison rules"); Emily Sachar, *Parolee Indicted on Sodomy, Kidnap in HIV Rape of Boy*, NEWSDAY, Jan. 18, 1992, at 10 (citing anal intercourse as one of the riskiest forms of sex because of the potential for ruptured blood vessels, through which HIV may pass).

96. A released prisoner may unwittingly transmit AIDS through consensual sexual intercourse. If he is an intravenous drug user, he may transmit the virus through a shared needle. See, e.g., Barry Bearak, *A Room for Heroin and HIV*, L.A. TIMES, Sept. 27, 1992, at A1 (describing heroin addicts as those who "take part in a kind of microbiological roulette, sharing the lethal hardware of contaminated needles"). However, there are also other possibilities. A combination of the violent propensities attributed to ADC, discussed *supra* note 54, and an extended prison term may lead a released prisoner to unleash his fury on innocent victims. See *infra* note 119 for a further discussion of the psychological status of released prisoners with AIDS.

97. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); *People v. Adams*, 597 N.E.2d 574, 579 (Ill. 1992) (noting that when state action is designed to protect the public health and well-being by controlling the spread of a disease [AIDS], it falls within the state's police power).

98. 197 U.S. at 11.

99. *Id.* at 28. In *Jacobson*, the petitioner challenged a Massachusetts regulation which required that all persons not previously protected by a smallpox vaccine submit to vaccination. *Id.* The Supreme Court noted:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29.

100. *Id.* at 27.

B. The Viewpoint of the Victim

The victim of an AIDS rape has perhaps the strongest interest in seeing her attacker severely punished. Her interest in being vindicated, which is one of the goals of criminal sanctions,¹⁰¹ is especially justified since, due to the AIDS rapist's actions, she is losing her health and her life. Thus, a criminal sentence which does not take her suffering into account does not serve the victim's interests.

In the following example, the unjustifiably favorable treatment an attacker received under the law was an affront to his victim. In 1987, a nine-year-old girl was raped at a slumber party by a babysitter who later tested positive for HIV.¹⁰² Three years later, she found out that he had infected her with AIDS.¹⁰³ A jury sentenced the offender to a mere three years and five months in jail,¹⁰⁴ yet the young girl will inevitably die.

This example demonstrates that many state legislatures still fail to address the ramifications of the AIDS epidemic on the current criminal law with the seriousness these ramifications deserve.¹⁰⁵ An attacker who rapes a nine-year-old girl¹⁰⁶ perpetrates a serious offense. However, an attacker who transmits AIDS to a young girl gives her more than the physical and emotional pain of a rape.¹⁰⁷ Rather, he transmits to her a disease which slowly debilitates her, strips her of her dignity, and ultimately destroys her.

101. GOTTFRIDSON & GOTTFRIDSON, *supra* note 2, at 190 (noting an increased acceptance of desert as "the fundamental purpose of sentencing and justification of punishment"); see also David Foster, *A Child's Nightmare: Molested and Maybe Infected with HIV*, L.A. TIMES, Dec. 6, 1992, at A1 (quoting the mother of a nine-year-old boy who was molested by a man with AIDS as saying, "I'd like to see him get the death penalty").

102. Linda Shaw, *Coping With AIDS Virus at Age 12 — Girl May Have Been Exposed in Rape at Slumber Party*, SEATTLE TIMES, Oct. 8, 1990, at A1.

103. *Id.* Mary [not her real name] fought to recover from the emotional pain of the rape as well as injuries to her back as a result of the attack. *Id.* She was strong enough to testify against her attacker. *Id.* "And just when she thought the battles were over, Mary is now fighting for her life." *Id.*

104. *Id.* Because there was no such law in place at the time Mary was raped, Mary's attacker was not required to submit to AIDS testing. *Id.* Thus, the prosecutor was unable to use the test results to argue for a longer sentence for Mary's attacker, and the three-year, five-month sentence could not be changed after the fact. *Id.* Washington state law now requires that convicted sex offenders submit to AIDS testing, but only *after* they are sentenced. WASH. REV. CODE ANN. § 70.24.340 (West 1988).

105. California, for example, provides for a three-year enhancement of the criminal sentence of a defendant who knows he has AIDS and nonetheless commits rape. CAL. PENAL CODE ANN. § 12022.85 (West 1988).

106. Shaw, *supra* note 102, at A1.

107. See generally Murphy, *supra* note 1, at 39 (arguing that the rape victim's physical and emotional pain warrant public recognition); Moira Welsh, *Rape Victim with AIDS Protests Funding Freeze*, TORONTO STAR, Feb. 12, 1993, at A2 (quoting a victim of AIDS rape as saying, "I can't even begin to tell you what went through my mind when I was diagnosed. I felt like I was given a death sentence and I wanted to die").

Thus, the example illustrates that current criminal legislation often fails to vindicate the victim, particularly because defendants are not properly punished.

The law does not vindicate the victim's rights when an AIDS rapist is inappropriately sentenced.¹⁰⁸ While she has received the equivalent of a death sentence, her attacker will be cared for in jail,¹⁰⁹ arguably at the taxpayers' and her own expense.¹¹⁰ Meanwhile, the victim herself may be unable to obtain comparable care.¹¹¹ Who is to pay the victim's medical costs?

When a three-year sentence may give an AIDS rapist time to get out of prison and potentially commit the crime of AIDS rape again,¹¹² the justice system fails. The sentence simply does not punish him with the severity he deserves.¹¹³ The victim is certainly being punished, merely for being in the wrong place at the wrong time. Her rights must be vindicated. As the Supreme Court noted in *Furman v. Georgia*:¹¹⁴

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy, of self-help, vigilante justice, and lynch law.¹¹⁵

In other words, the punishment must fit the crime.

108. "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). That is, there are times when society realizes how gravely a victim has been wronged, and through process of law it vindicates her. *Id.* Consequently, when a victim suffers at the hands of an AIDS rapist, society must acknowledge that the only adequate response is imposition of the death penalty.

109. See *U.S. Correctional System*, *supra* note 92, at 390 (showing that health departments in 42 states, Puerto Rico, and the District of Columbia provide HIV counseling and testing services in approximately 430 correctional facilities).

110. In terms of costs to taxpayers, the distinction between healthy and HIV-infected prisoners is startling. See *supra* note 82 for a comparison of costs.

111. An AIDS victim may lose her health insurance, as many companies either restrict coverage or completely deny it. Simotas, *supra* note 4, at 1907 n.180. Furthermore, the American Civil Liberties Union has documented interference with AIDS victims' access to Medicaid, Medicare, and Social Security income. *Id.* at 1907 n.181.

112. See, e.g., Shaw, *supra* note 102, at A1 (lamenting that the defendant's sentence was far too lenient in comparison to the gravity of the harm Mary endured). See also Lohmann, *supra* note 82 (reporting that society is often fearful of an AIDS rapist bearing a grudge).

113. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2605 (1991) (noting that the seriousness of an offense and the gravity of the harm caused as a result of the offense serve as standards by which to measure the severity of the punishment to be imposed).

114. 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

115. *Id.*

C. *The Viewpoint of the Defendant*

Prison sentences are inadequate to deal with the crime of AIDS rape. Because the disease has shortened the life span of the AIDS rapist as well as impacted upon him psychologically, rehabilitation is impossible. Furthermore, in the absence of proper medical attention, a lengthy prison sentence may constitute cruel and unusual punishment under the Eighth Amendment.¹¹⁶ Because prison sentences undercut the goals of criminal sanctions, failing to rehabilitate (as well as to vindicate and deter), legislatures must implement harsher penalties if they wish to effectively combat AIDS rape.

An AIDS rapist knows he has a deadly disease, and he knows he can transmit that disease.¹¹⁷ His actions evince elements of cruelty and depravity which simply escape traditional definition.¹¹⁸ The mental state of the AIDS rapist is especially noteworthy here. Psychosis and other behavioral manifestations of the AIDS virus, as well as a general desire to get even,¹¹⁹ may lead an AIDS carrier to

116. The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. For a discussion of how sentencing an AIDS rapist to a lengthy prison term might constitute cruel and unusual punishment, see *infra* note 135.

117. By definition, an AIDS rapist has actual knowledge of his physical condition. See Appendix A, *infra*. Recent case law lends support to this definition. See *State v. Farmer*, 805 P.2d 200, 209 (Wash. 1991) (en banc) (noting the defendant's "deliberate cruelty" in sodomizing two minors when he was aware that he had AIDS); *Zule v. State*, 802 S.W.2d 28, 32 (Tex. Ct. App. 1990) (observing that despite previously testing positive for HIV, defendant continued to engage in oral and anal intercourse with minor boys); see also *Foster*, *supra* note 101, at A1 (quoting a man with AIDS who was accused of molesting eight children as saying, "They gave it to me. I'm going to give it back"); *Clines*, *supra* note 92, at A1 (lamenting that despite the relative success of a New York program, in terms of safety, which permits some prisoners with AIDS to be released in time to die, there are still those whose quest for illegal drugs would potentially lead them to kill one last time); *AIDS Rapist Receives 3 Life Terms*, WASH. POST, Apr. 27, 1993, at D5 (portraying just one of the many people who rape with AIDS despite full comprehension of the lethal effects of doing so).

118. Traditional definitions of rape cannot comprehend the mental state of an AIDS rapist. For example, the New York legislature defines rape in the first degree as "when [a male] engages in sexual intercourse with a female . . . [b]y forcible compulsion" N.Y. PENAL LAW § 130.35 (McKinney 1987). "Forcible compulsion" involves "use of physical force" or "a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself, or another person . . ." N.Y. PENAL LAW § 130.00 (McKinney 1987) (emphasis added). Note, however, that the definition of "forcible compulsion" fails to reflect the fear of the slow, torturous death to which a victim of AIDS rape would certainly fall prey. The New York rape statute, which defines a "traditional" crime, does not encompass such suffering.

119. See *State v. Haines*, 545 N.E.2d 834, 838 (Ind. Ct. App. 1989) (noting that the defendant in this case committed "biological warfare" upon his rescuers); *Lohmann*, *supra* note 82 (speculating whether "inmates with AIDS or exposed to the virus might take out their grudges against society by trying to infect as many people as they can"); *Mosley*, *supra* note 20 (describing an infected prison

attempt to inflict his disease on others through biting, scratching, cutting, or rape.¹²⁰

In *State v. Haines*,¹²¹ the Indiana Court of Appeals upheld an attempt murder conviction in the case of a man who knew he had AIDS and intended to inflict others with it through biting, scratching, and throwing his blood.¹²² His targets were the police officers who answered a call about his suicide attempt.¹²³ When the police finally got the man to the hospital, he announced that he was going to show everyone what it was like to have AIDS and die, then he bit a paramedic in the arm.¹²⁴ The court likened his behavior to "a sinking ship firing on its rescuers."¹²⁵

The analogy drawn by the *Haines* court is perfectly consistent with the ideas embraced by this Note.¹²⁶ The defendant's behavior illustrates the mental depravity or psychosis that often occurs in AIDS carriers. While ordinarily a criminal sentence may rehabilitate an uninfected criminal defendant,¹²⁷ it is highly improbable that the same sentence would have a rehabilitative effect on a rapist who is infected with HIV. As a result, any sanction imposed against an infected rapist must serve the dual functions of deterring future dangerous behavior¹²⁸ and vindicating the rights of the victim as a

inmate who boasted that "he would take all the women he could with him to the grave").

120. For an informative look at the means of HIV transmission, see Gostin, *supra* note 5, at 1020-23; Jaffe, *supra* note 33, at 12-13; see also *People v. Thomas*, 529 N.Y.S.2d 429, 431 (1988) (taking judicial notice that AIDS is spread through bodily fluids). *But see Harris v. Thigpen*, 941 F.2d 1495, 1503 (11th Cir. 1991) (conceding that virtually no evidence exists that HIV is spread through casual contact, inanimate objects, toilet seats, water, or eating utensils, among other things).

121. 545 N.E.2d at 841.

122. *Id.* (concluding that "Haines had knowledge of his disease and that he unrelentingly and unequivocally sought to kill the persons helping him by infecting them with AIDS").

123. *Id.* at 835; see also Marzuk et al., *supra* note 56, at 1333 for a discussion of the incidence of suicide among HIV-infected males.

124. *Haines*, 545 N.E.2d at 835.

125. *Id.* at 838.

126. *Id.* An AIDS rapist does not solicit treatment, nor can he be rehabilitated. He is, quite simply, a very dangerous person. See *supra* note 119 (discussing the AIDS rapist's violent propensities).

127. It is important to note that rehabilitation is only one goal of criminal sentencing. GOTTFREDSON & GOTTFREDSON, *supra* note 2, at 173. Rehabilitation must be considered, not in isolation, but rather in addition to retribution, restraint, and deterrence. *State v. Christopher*, 652 P.2d 1031, 1034 (Ariz. 1982). In *Christopher*, the court noted that because in many cases rehabilitation simply does not work, it must not become the primary goal of criminal sentencing. *Id.*

128. GOTTFREDSON & GOTTFREDSON, *supra* note 2, at 173. See *Christopher*, 652 P.2d at 1033 (asserting that society must prevent further criminal conduct if it wishes to guarantee the well-being of its citizens).

member of society,¹²⁹ since rehabilitation of the offender is unlikely due to time constraints and the mental depravity caused by the disease.¹³⁰ Minor sentence enhancements are irrelevant when AIDS is an element of a crime,¹³¹ as are fines or other penalties.¹³²

Stiff prison sentences are inappropriate from the defendant's point of view as well. Although some prison systems provide medical treatment for inmates,¹³³ the AIDS rapist could conceivably be left to die in isolation and without necessary medical care.¹³⁴ This alternative is absolutely intolerable, as it strips the AIDS rapist of all dignity and ultimately condones the same torture of a human being that the prison sentence was designed to deter.¹³⁵ By imposing a lengthy prison term for the crime of AIDS rape, the state hopes to deter potential offenders from inflicting an agonizingly painful disease on innocent victims.¹³⁶ Unfortunately, leaving an AIDS rapist to suffer and die in isolation is almost as barbaric as the

129. GOTTFREDSO & GOTTFREDSO, *supra* note 2, at 175. On the other hand, imposition of the death penalty would fulfill two of the goals of criminal sentencing. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting that the death penalty serves the important social purposes of deterrence and retribution).

130. *See, e.g., Sullivan & Field, supra* note 7, at 140 n.2 (noting that death is imminent for a defendant with AIDS); Malouf et al., *supra* note 23, at 1002 (reporting that violence is not uncommon among AIDS patients).

131. In the case of AIDS rape, the imposition of an extensive prison sentence will arguably have no effect upon the AIDS rapist. He may die in prison, but not without magnifying the epidemic within the prison system before his demise. Lohmann, *supra* note 82. *See supra* notes 92-95 and accompanying text for a discussion of AIDS behind prison walls.

132. *See supra* note 77 and accompanying text (illustrating that an AIDS rapist may simply have no money with which to pay a fine).

133. *U.S. Correctional System, supra* note 92, at 390 (describing efforts on the part of United States prisons to curb the AIDS epidemic).

134. Boyne, *supra* note 81, at 758 (recognizing that a shortage of prison medical staff, as well as fear, ignorance, and overcrowding all work against the prisoner with AIDS, who often receives completely inadequate medical care in prison). For an illustration of absolutely intolerable treatment of an AIDS-infected prisoner, see *Young v. Quinlan*, 960 F.2d 351, 355-56 (3d Cir. 1992).

135. One goal of sentencing is to deter future unlawful conduct. GOTTFREDSO & GOTTFREDSO, *supra* note 2, at 173. Thus, one reason that legislatures punish grave offenses severely is to discourage future offenders. *Id.* However, a punishment may be neither barbaric nor grossly disproportionate to the crime committed. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2700 (1991). When a prisoner with AIDS is left to rot in jail without medical care, subject to abuse by prison personnel and fellow inmates alike, he is in effect being tortured by the prison system in violation of the Eighth Amendment. *See U.S. CONST. amend. VIII* (recognizing an individual's right to be free from cruel and unusual punishment). If this occurs, then the system has perpetrated a double standard, making deterrence of unlawful conduct a sham by treating the AIDS rapist unlawfully.

136. *See Payne v. Tennessee*, 111 S. Ct. 2597, 2605 (1991) (stating "[T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment").

crime itself. In fact, this alternative verges on "cruel and unusual punishment," which is prohibited by the Eight Amendment.¹³⁷

Legislatures must take careful but bold steps toward controlling AIDS rape. Due to the unique psychological characteristics of the AIDS rapist,¹³⁸ he is a dangerous individual who will not be rehabilitated by a prison sentence,¹³⁹ yet the deadly results of his actions clearly warrant severe punishment. Imposition of capital punishment would meet the goals of both deterrence and retribution.¹⁴⁰ The states must not forget that AIDS is a disease which not only infringes upon the rights of the victim and society,¹⁴¹ but also shortens the life of the attacker himself. The attacker must be deterred from committing AIDS rape, or in the failure of deterrence, he must be forcefully punished.

III. HOW IT WORKS: THE MECHANISM OF MODEL LEGISLATION

Instead of enacting new AIDS-specific legislation, several states have applied existing criminal law to AIDS-related offenses.¹⁴² As a result, they often draw imprecise analogies between AIDS rape and other crimes. For example, a Fifth Circuit prosecutor formally charged a man who had AIDS with rape, and assault and battery with intent to kill.¹⁴³ In doing so, he likened AIDS to a deadly weapon.¹⁴⁴ He stated further that if the victim later contracted AIDS and died, he would bring murder charges against the man and seek the death penalty.¹⁴⁵

AIDS rape is distinct by definition from other criminal offenses. As discussed in Part IV, AIDS rape has deadly conse-

137. See *supra* note 116 (providing the text of the Eighth Amendment).

138. See *supra* note 117 (discussing the AIDS rapist's awareness of his dangerous condition).

139. See *supra* note 73 for a further discussion of why rehabilitation of AIDS rapists necessarily fails.

140. *Gregg v. Georgia*, 428 U.S. 153, 185 (1976). "[T]here are some categories of murder . . . where other sanctions may not be adequate." *Id.* While AIDS rape does not fit the definition of murder, but is rather a distinct crime, it remains nonetheless one such category in which nothing less than capital punishment will constitute sufficient retribution.

141. See *Simotas*, *supra* note 4, at 1884 (noting that the state has an interest in safeguarding public health and in helping the [AIDS] rape victim's physical and psychological recovery).

142. See *supra* note 66 (discussing various crimes with which AIDS-infected defendants have been charged).

143. *AIDS Sufferer Arraigned for Rape with Intent to Kill*, REUTERS N. EUR. SERV., June 4, 1987, available in LEXIS, Nexis Library, Reuters File. According to the victim in this case, the defendant asked for a knife to get some pus out of his finger, then threatened her with the blood before raping her. *Id.*

144. *Id.* The prosecutor noted that the AIDS virus was "as much a deadly weapons [sic] as a gun or knife." *Id.*

145. *Id.*

quences which completely distinguish it from traditional rape.¹⁴⁶ On the other hand, it has all the elements of murder except, temporarily, the dead body.¹⁴⁷ Proceeding on that premise, new legislation is necessary to ensure that all parties to an AIDS rape are treated fairly and appropriately. Implementing the model legislation set forth in Appendix A permits those states which adopt it to directly treat the issue of AIDS rape, rather than attempt to use attenuated reasoning by applying inadequate current statutes.

In order to determine whether the model legislation will be successful, it is applied to a hypothetical set of facts. Consider the case of a New York parolee, infected with HIV, who was recently indicted on charges of attempt murder, kidnapping in the second degree, and sodomy in the first degree.¹⁴⁸ His victim was an eleven year-old boy, whom he forced into his apartment, then stripped and sodomized.¹⁴⁹ All of the crimes for which the defendant was indicted carry roughly the same penalties.¹⁵⁰ If convicted, the defendant will receive a harsh prison sentence which will almost certainly survive him,¹⁵¹ and he will arguably continue to commit sodomy within the walls of the prison.¹⁵²

Such a result is intolerable. The boy was victimized and risks infection with the AIDS virus.¹⁵³ His attacker faces up to twenty-five years in jail, where taxpayers must pay for his food, shelter, and medical care.¹⁵⁴ Furthermore, because the attacker was a parolee, one may easily draw the inference that he was neither rehabilitated nor deterred the first time he was in prison. While in prison, the attacker, who has AIDS, will arguably rape again, thereby potentially infecting more persons with the deadly dis-

146. See *infra* note 189 (noting that indeed, life is over for the victim of an AIDS rape).

147. See *infra* note 214 for a discussion of the requirement that there be a dead body as an essential element of the crime of murder.

148. Sachar, *supra* note 95, at 10.

149. *Id.*

150. *Id.* In the state of New York, attempt murder, kidnapping in the second degree, and sodomy in the first degree are Class B violent felonies, each carrying a maximum sentence of 25 years. N.Y. PENAL LAW §§ 110.05, 130.50, 135.20 (McKinney 1987).

151. See Sullivan & Field, *supra* note 7, at 140 n.2 (discussing the incurable and fatal nature of AIDS).

152. See *supra* notes 94-95 (illustrating that rapes do not cease when an AIDS rapist is imprisoned).

153. Because of his age and his status as a victim, the boy's test results have not been published. Sachar, *supra* note 95, at 10. However, we must assume for the purposes of the model legislation that the youth did become infected with HIV.

154. See *supra* notes 81-82 and accompanying text (discussing the fact that while many prison systems do provide medical care for inmates, the cost of medical treatment for AIDS-infected prisoners is prohibitive).

ease.¹⁵⁵ Yet, the victim may not live to get his driver's license.

On the other hand, the model legislation proposed by this Note will deal solely with the very specific crime of AIDS rape. Its purpose is consistent with the primary goals of sentencing. It proscribes very specific conduct, extending only to a defendant who actually knows that he is infected with HIV or AIDS and nonetheless intentionally or recklessly *transmits* the disease through *rape*. The model statute is designed to deter potential behavior, and in doing so, it ideally deters more incidents of AIDS rape than it punishes.

As a general proposition, a prosecutor must prove each element of a crime beyond a reasonable doubt.¹⁵⁶ Because there are several components of the model legislation, it is fitting to briefly examine each one as applied to the above example. First, the defendant committed sodomy, which is a form of rape for the purposes of the model.¹⁵⁷ Furthermore, the defendant knew that he was HIV-positive.¹⁵⁸ Because he knew that he had AIDS and that AIDS is transmitted by sodomy, he behaved with depraved indifference to human life when he raped his young victim.¹⁵⁹ Due to the boy's young age, the jury may infer *beyond a reasonable doubt* that he had not previously contracted AIDS from other sexual contacts or from intravenous drug use. Assuming that the boy's contraction of the AIDS virus was proximately caused by the actions of the defendant,¹⁶⁰ the defendant could be convicted of AIDS rape. Then, in the absence of a jury finding of sufficient mitigating circumstances,¹⁶¹ he could theoretically be sentenced to death, subject to automatic state supreme court review.¹⁶²

155. See *supra* note 95 for a further discussion of AIDS transmission within the walls of a prison.

156. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause protects a criminal defendant from conviction of an offense except where every fact of the offense has been proven beyond a reasonable doubt).

157. See *infra* Appendix A. The Illinois legislature's definition of sexual penetration states that sodomy is "any contact, however slight, between the sex organ of one person and the sex organ, mouth or anus of another person." 720 ILCS 5/12-12 (1992) (ILL. REV. STAT. ch. 38, para. 12-13 (1991)).

158. Sachar, *supra* note 95, at 10.

159. See *infra* text accompanying note 210 (discussing MODEL PENAL CODE § 210.2 (Official Draft 1962)).

160. The boy's infection was a direct result of the actions of the AIDS rapist. See *infra* text accompanying note 217 for a further discussion of proximate cause.

161. A criminal defendant has the right to introduce any relevant evidence at the time of sentencing which will afford him the opportunity to receive a lesser sentence than death. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

162. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (noting that automatic appeal of death sentences to the state supreme court is "[a]n important additional safeguard against [the] arbitrariness and caprice" prohibited in *Furman v. Georgia*, 408 U.S. 238, 274-77 (1972) (Brennan, J., concurring)).

The model legislation proposed in this Note fills the gap left when courts apply traditional criminal law sentences to AIDS rape. Properly enforced, it provides a mechanism through which society may redress the injury to the victim of such a serious, life-threatening crime. Furthermore, recognizing that an AIDS rapist often cannot be rehabilitated, it treats AIDS rape with the severity that it deserves and is an important step toward curbing the AIDS epidemic.

IV. RAPE AND CAPITAL PUNISHMENT: OVERCOMING THE OBSTACLES

The model legislation proposed in this Note will encounter many obstacles because it imposes the death penalty. Capital punishment is a punishment of last resort. It is reserved for those instances when all other efforts at deterrence and rehabilitation have failed, and when the suffering of the victim is such that to prescribe any other penalty would produce an inequitable result. The permanence of capital punishment makes it the subject of constant constitutional attack on Eighth and Fourteenth Amendment grounds.¹⁶³ Nonetheless, capital punishment is an appropriate penalty for the crime of AIDS rape because while other sanctions frustrate the goals of criminal law, the death penalty achieves them.

A. Constitutional Concerns

While the Eighth Amendment forbids cruel and unusual punishment,¹⁶⁴ imposition of the death penalty is neither cruel nor unusual when it is not grossly disproportionate to the crime committed.¹⁶⁵ Obviously, the death penalty is unlike any other means of punishment, because once it has been invoked, it is irrevocable.¹⁶⁶ For this reason, it is necessary to evaluate each death penalty case on an individual basis.¹⁶⁷ Furthermore, the class of defendants upon whom courts impose the death penalty must be a

163. See *supra* note 70 (discussing constitutional obstacles confronting the punishment of an AIDS rapist).

164. U.S. CONST. amend. VIII. For the full text of this amendment, see *supra* note 116. Cf. *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (noting that "[w]hatever the arguments may be against capital punishment, . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it can not be said to violate the constitutional concept of cruelty.").

165. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701 (1991) (citing *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976)).

166. *Furman*, 408 U.S. at 306 (Stewart, J., concurring) (noting that the death penalty, which rejects rehabilitation as a basic goal of criminal punishment, differs from other capital sentences not merely in degree but in kind).

167. *Harmelin*, 111 S. Ct. at 2701 (citing *Woodson*, 428 U.S. at 304).

sufficiently narrow segment¹⁶⁸ of the population of defendants who have committed a given crime. When properly employed, the death penalty decreases the number of capital defendants by deterring potential criminals from engaging in the penalized activity.¹⁶⁹

To begin an examination of the law of capital punishment, it is necessary to examine the relevant case law at its foundation. In *Gregg v. Georgia*,¹⁷⁰ the United States Supreme Court upheld the imposition of a capital sentence where the crime committed was murder, provided the sentence was statutorily imposed and subject to specific guidelines.¹⁷¹ In order to impose a death sentence after convicting the defendant of murder, the Court required that the jury hear additional arguments and evidence to determine whether the death penalty was proper under the circumstances.¹⁷² The Court also set forth a two-part test to determine whether a punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment. A punishment is "barbaric" or "excessive" if either of the following factors are present: (1) it serves no useful purpose in deterring criminal behavior, involving merely "unnecessary and wanton infliction of pain";¹⁷³ or (2) it is "grossly out of proportion to the severity of the crime."¹⁷⁴ Furthermore, the

168. See *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (noting that there must be a "principled way [for the jury] to distinguish . . . case[s], in which the death penalty was imposed, from the many cases in which it was not").

169. See *Gregg v. Georgia*, 428 U.S. 153, 185 (1976) (leaving the question of whether the death penalty actually has a deterrent effect to the individual legislatures, but acknowledging that in some cases other sanctions may not be appropriate); see also *THE DEATH PENALTY IN AMERICA* 93 (Hugo Adam Bedau ed., 3d ed. 1982) for an elucidated discussion of the deterrence debate.

170. 428 U.S. at 189-95.

171. *Id.* The Supreme Court, affirming the mandates of *Furman*, 408 U.S. at 310 (Stewart, J., concurring), urged that jury discretion in imposing the death penalty must be both limited and directed in order to minimize the risk of "wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. The Georgia system properly divided the issues of guilt and of punishment for the jury. *Id.* at 192. Furthermore, it enumerated aggravating circumstances which the jury must find before imposing the death penalty on a convicted criminal. *Id.* at 197. It also provided that capital defendants receive automatic sentence review. *Id.* at 198. As a result, the Supreme Court held that sentencing under the new Georgia statutory scheme facially satisfied the edicts of *Furman* and was constitutional. *Id.* at 206.

172. See *Gregg*, 428 U.S. at 190-91 (recommending that a bifurcated proceeding, in which the jury does not hear any unduly prejudicial evidence until the defendant's guilt has been established in conformity with the rules of evidence, ensures more rational sentencing of convicted criminals).

173. *Id.* at 173 (citing *Furman*, 408 U.S. at 392-93 (Burger, J., dissenting)).

174. *Gregg*, 428 U.S. at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). The test of severity of a criminal sentence was more recently expanded upon in *Solem v. Helm*, 463 U.S. 277, 290-92 (1983), overruled on other grounds by *Harmelin v. Michigan*, 111 S. Ct. 2680, 2686 (1991). In *Solem*, the Supreme Court made an important distinction between violent and nonviolent crimes. 463 U.S. at 292-93. The court looked at the threat of harm to the victim in relation to the culpability of the defendant. *Id.* It also noted that the primary

Court noted that "capital punishment is an [appropriate] expression of society's moral outrage at particularly offensive conduct."¹⁷⁵ However, it did not determine the appropriateness of applying the death penalty to crimes other than murder.¹⁷⁶

*Coker v. Georgia*¹⁷⁷ held that imposition of the death penalty is unconstitutional for the crime of rape. Thus, this is the biggest obstacle to the proposition that courts may impose death sentences upon AIDS rapists.¹⁷⁸ However, *Coker* is not insurmountable.

The defendant in *Coker* escaped from a Georgia prison and subsequently raped a woman in the course of committing an armed robbery.¹⁷⁹ A jury sentenced him to death,¹⁸⁰ based on its finding that two statutory aggravating circumstances existed at the time the crime was committed.¹⁸¹ A mere plurality of the Supreme Court overturned the sentence, finding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."¹⁸² In doing so, it did not distinguish between degrees of rape, however.

In light of the AIDS epidemic, *Coker* requires a much closer examination. There the Supreme Court urged that when a rape is accompanied by a murder which warrants a capital sentence in and

goal of the criminal law is protecting *people*. *Id.* Thus, while an unarmed accomplice to a felony may be convicted of murder under a felony-murder rationale, a death sentence is disproportionate to his culpability and therefore unconstitutional. *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (reversing the conviction of an accomplice to a felony who neither attempted nor intended to take human life). Arguably, an AIDS rapist may be one who attempts or intends to take a life. Under an *Enmund* rationale, therefore, he may be sentenced to death.

175. *Gregg*, 428 U.S. at 183.

176. The Supreme Court in *Gregg* addressed the question of whether the death penalty constituted cruel and unusual punishment for the crime of murder. *Id.* The Court held that imposition of the death penalty for the crime of murder was not per se unconstitutional. *Id.* at 183-87.

177. 433 U.S. 584, 597 (1977) (plurality opinion).

178. *Id.*

179. *Id.*

180. *Id.* at 586-87. The statute under which the defendant received the death penalty stated, in relevant part, "A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." GA. CODE ANN. § 26-2001 (Michie 1972).

181. *Coker*, 433 U.S. at 598-99.

182. *Id.* at 592. *But see* *Ormond v. State*, 599 So. 2d 951, 953 n.1 (Miss. 1992) (reviewing a conviction under MISS. CODE ANN. § 97-3-65 (1972), which makes it a capital offense to rape a child under 14 years of age). While statutory rape is concededly a heinous offense perpetrated against a child, AIDS rape is also atrocious, and may be even more so when the two crimes overlap. *See, e.g.*, *Shaw*, *supra* note 102, at A1 (describing an occasion in which a young girl received AIDS from the man who raped her). Thus, if the Mississippi statute withstands *Coker*, 433 U.S. at 591, so may an AIDS rape statute imposing capital punishment.

of itself, it becomes academic to impose a death sentence for the rape.¹⁸³ The Court also discussed the element of "moral depravity,"¹⁸⁴ which it believed to be generally present in murder but lacking in rape. Ironically, the Court also noted that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'"¹⁸⁵ Furthermore, the Court added that the rapist demonstrates a nearly total contempt for the personal integrity of his victim.¹⁸⁶ Based on its own acknowledgement that the crime of rape is an extremely serious offense,¹⁸⁷ the *Coker* holding is surprising.

In light of the AIDS epidemic, such a bright line distinction between rape and murder is erroneous.¹⁸⁸ The difference between killing a victim outright after raping her and infecting a victim with AIDS by raping her may be measured only in terms of time.¹⁸⁹ In fact, while life may end quite abruptly for a murder victim,¹⁹⁰ a rape victim must deal with more than the initial pain of being raped.¹⁹¹ The victim also faces the fear of contracting AIDS and, in the worst scenario, death at the hands of AIDS. The incidence of suicide among AIDS victims, which is well-documented,¹⁹² is indicative of the suffering that AIDS victims endure. The tremendous suffering of AIDS victims is far more compelling than anything the

183. *Coker*, 433 U.S. at 599 n.16.

184. *Id.* at 598.

185. *Id.* at 597.

186. *Id.*

187. *Id.*

188. *Coker*, 433 U.S. at 591. *But see id.* at 601-03 (Powell, J., dissenting) (noting that the plurality drew an inappropriate "bright line," failing to take into account that a rapist may be even more vicious than a murderer, and that based on the wide range of potential physical and psychological impacts on the victim, the death penalty may not always be so grossly disproportionate to the crime of rape as to violate the Eighth Amendment).

189. That is, it may take longer for a victim of AIDS rape to die than it does for a traditional murder victim, but ultimately, the results of both crimes are the same. *See Sullivan & Field, supra* note 7, at 140 n.2 (discussing the incurable and fatal nature of AIDS, as well as the symptoms that a person infected with HIV ultimately experiences).

190. *Coker*, 433 U.S. at 598 (noting that "[l]ife is over for the murder victim; for the rape victim, life may not be nearly so happy as it was, but it is *not over and normally not beyond repair*") (emphasis added). While the Court correctly distinguishes between murder and "traditional" rape, its analysis does not encompass AIDS rape, the results of which are, arguably, a life beyond repair and an inevitable death.

191. *See Shaw, supra* note 102, at A1 (describing the physical and psychological pain a child victim of AIDS rape endured). *See also State v. McMillin*, 783 S.W.2d 82, 103 (Mo. 1990) (en banc) ("There is evidence . . . to believe that the victim experienced physical and psychological torture and experienced a period of time to anticipate and reflect upon her own death . . .").

192. *See Marzuk et al., supra* note 56, at 1333-37 (discussing the potential for suicide among AIDS victims).

Supreme Court considered when it decided *Coker* in 1977.¹⁹³

Another flaw in the *Coker* decision is that the Court failed to acknowledge one of Georgia's statutory aggravating circumstances when it reviewed the constitutionality of imposing the death penalty for *Coker's* crime.¹⁹⁴ The aggravating circumstances the Court noted were: (1) prior conviction for a capital felony; and (2) commission of the rape while the defendant was engaged in another capital felony.¹⁹⁵ The Court determined that neither of the aforementioned circumstances were sufficient to change its position that the crime of rape did not warrant the imposition of capital punishment.¹⁹⁶ However, an additional aggravating circumstance was enumerated, yet ignored, in the decision: "(3) the rape 'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.'" ¹⁹⁷ Thus, the Court left open the question whether the death penalty would violate the Eighth Amendment as cruel and unusual when a rape is committed in such an abhorrent manner as to fall into the third category of aggravating circumstances.

When a rapist knows or should know that he harbors the deadly AIDS virus but nonetheless rapes someone and does transmit AIDS to his victim, such behavior is itself so "outrageously or wantonly vile, horrible or inhuman in that it involve[s] torture, depravity of mind, or aggravated battery to the victim."¹⁹⁸ Thus, it withstands both the precedent set by *Coker* and the *Coker* Court's Eighth Amendment analysis.

AIDS rape warrants the imposition of capital punishment for two reasons. First, it involves such torture and battery to the victim as to outweigh any mitigating evidence offered by the defendant.¹⁹⁹ Second, because of the difficulties involved in proving that AIDS rape was the proximate cause of a victim's infection, the group of defendants who will ultimately be convicted of AIDS rape will be small enough to withstand the threat of capriciousness in sentencing.

193. *Coker*, 433 U.S. at 599 (refusing to subject a rapist to the death penalty on the theory that the rapist does not take the life of his victim).

194. *Id.* at 598.

195. *Id.*

196. *Id.* at 599.

197. *Id.* It is interesting to note that the language of the aggravating circumstance that the Supreme Court never addressed seems to aptly illustrate the distinction between AIDS rape and "traditional" rape.

198. *Coker v. Georgia*, 433 U.S. 584, 599 (1972) (plurality opinion).

199. A criminal defendant has an absolute right to provide a defense at trial. See U.S. CONST. amend. VI. This includes the right, at sentencing, to present any evidence which might lessen the severity of his sentence. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

ing.²⁰⁰ Therefore, the AIDS rapist is placed into an exceedingly small category of criminal defendants by the very nature of his crime.²⁰¹

The mental state of an AIDS rapist is virtually identical to that of a murderer.²⁰² In order to receive the death penalty, a defendant must have either killed, attempted to kill, or contemplated that life would be taken,²⁰³ or at the very least, had a culpable mental state of reckless indifference to human life.²⁰⁴ An AIDS rapist may intend to kill his victim slowly by infecting her with the lethal AIDS virus, yet legislatures are unwilling to equate his actions with murder.²⁰⁵ Furthermore, an AIDS rapist displays at least a reckless indifference to human life when he rapes knowing that he may transmit AIDS to his victim. When the victim ultimately dies as a result of AIDS, for all intents and purposes her attacker has committed murder.

200. See *infra* note 219 and accompanying text (discussing the difficulty of proving that the AIDS rapist infected the victim); *Nightmares of Uncertainty: HIV Test is Proper on Accused or Convicted Rapists*, MONTREAL GAZETTE, Jan. 10, 1993, at B2 ("[I]n a strange irony, the legal system places the burden [of discovering AIDS infection] squarely on the victims of rape"); RAMIFICATIONS FOR RAPE SURVIVORS, *supra* note 38, at 6 ("[R]esearch seems to assume that a rape survivor may already be infected with HIV, thus emphasizing the survivor's sexual history while de-emphasizing the crime of rape"). Cf. Shaw, *supra* note 102, at A1 (recognizing that Mary's attacker was the source of her infection because she had never used drugs, never had a blood transfusion, and never engaged in sexual intercourse). But see FED. R. EVID. 412(b)(2)(A) (precluding admission of evidence of a rape victim's past sexual behavior except as to the issue of whether the accused rapist was the source of the victim's injury).

201. The presence of certain aggravating circumstances must necessarily outweigh any mitigating evidence offered by the defendant at the time of sentencing in order to narrow the class. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). The aggravating circumstance requirement, however, was formulated in the context of the crime of *murder*. *Id.* at 185. By definition, however, AIDS rape is not murder.

202. See *infra* Appendix A (defining the elements of the crime of AIDS rape); cf. MODEL PENAL CODE § 210.2 (Official Draft 1962) (defining the offense of murder).

203. *Enmund v. Florida*, 458 U.S. 782, 799 (1982). In *Enmund*, the defendant was convicted of murder under the felony-murder rationale, yet he neither killed nor attempted to kill. *Id.* at 787. The Supreme Court held that the death penalty was excessive in such a case. *Id.* at 797. The Court suggested, however, that "[i]t would be very different if the likelihood of a killing . . . were so substantial that one should share the blame for the killing if he somehow participated in the felony." *Id.* at 799. The crime of AIDS rape creates more than a substantial likelihood of killing; it ultimately ends in death. Thus, as illustrated in note 174, *supra*, an AIDS rapist, who may intend to transmit the disease but who has not necessarily pondered the results of his actions, is not protected from the death penalty by the *Enmund* decision. See *infra* Appendix A.

204. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (expanding upon *Enmund* to include in the group of death-eligible defendants those whose actions manifest a "reckless indifference to human life").

205. See Gostin, *supra* note 5, at 1039 n.115 for an illustration of how courts have utilized criminal law in an attempt to deal with AIDS rape.

Application of the death penalty to the crime of AIDS rape falls well within the boundaries set by the Eighth Amendment for a decent society.²⁰⁶ This is true despite the plurality holding in *Coker v. Georgia*.²⁰⁷ However, just as the severity of AIDS rape places it outside the realm of the traditional crime of rape,²⁰⁸ so it must be treated as distinct from the crime of murder.

B. Murder: Definitional Concerns

The transmission of AIDS through rape has been likened to attempt murder by some commentators.²⁰⁹ The Model Penal Code defines murder as a criminal homicide committed purposely or knowingly, "[or] recklessly under circumstances manifesting extreme indifference to the value of human life."²¹⁰ Furthermore, if the defendant is engaged in the commission of a felony such as rape, recklessness and indifference are presumed.²¹¹ Other definitions of murder may include the term "malice aforethought."²¹² Each definition includes the necessary elements of causation²¹³ and a dead body.²¹⁴ Thus, the problems with equating AIDS rape and the crime of murder are two-fold: first, causation must be proven beyond a reasonable doubt,²¹⁵ and second, the victim may not die for several years.²¹⁶

According to the Model Penal Code definition, conduct is the cause of a result when "it is an antecedent but for which the result

206. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (urging that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

207. 433 U.S. 584, 597 (1977) (plurality opinion).

208. *See, e.g.*, Glaberson, *supra* note 85, at B2 (urging that "[t]he AIDS epidemic has turned the crime of rape, which is a horrifying and damaging crime under any circumstances, into one that is potentially fatal").

209. Sullivan & Field, *supra* note 7, at 157.

210. MODEL PENAL CODE § 210.2 (Official Draft 1962).

211. *Id.*

212. Coke defined the common law notion of murder as the following: "When a man of sound memory and of the age of discretion unlawfully kills any reasonable creature in being, and under the King's peace, with *malice aforethought*, either express or implied by the law, the death taking place within a year and a day." MODEL PENAL CODE § 210.2 cmt. (1980) (emphasis added).

213. The criminal agency must be the proximate cause of death. *See infra* note 217 and accompanying text (providing the Model Penal Code definition of proximate cause).

214. At common law, if the victim was not dead within a year and a day of the act inflicting injury, there could be no prosecution for murder. *State v. Vance*, 403 S.E.2d 495, 498 (N.C. 1991). Clearly, a murder prosecution still requires a dead body, but scientific advances have made the "year and a day rule" obsolete. *Id.* at 499.

215. *In re Winship*, 397 U.S. 358, 364 (1970) (noting that the reasonable doubt standard is crucial in ensuring that innocent men are not condemned).

216. *See* Sullivan & Field, *supra* note 7, at 140 n.2 (discussing the stages of infection that a person infected with HIV experiences).

in question would not have occurred."²¹⁷ In other words, the rape must be the conduct which transmits AIDS to satisfy the element of causation. Critics urge that the criminalization of AIDS transmission is inappropriate because the victim may already have contracted AIDS prior to her contact with the rapist.²¹⁸ However, while some people do fall into a gray area of uncertainty as to the source of AIDS infection,²¹⁹ there are those individuals who, prior to the attack, had never been exposed to the AIDS virus. The jury would ultimately determine, beyond a reasonable doubt, whether such individuals did in fact contract the virus from the AIDS rapist.

The real difficulty involved in equating AIDS rape and murder comes about because the victim's death is not immediate. At common law, in order to prosecute a criminal homicide, the victim's dead body had to be discovered within a year and a day.²²⁰ Although most states no longer adhere to the common law rule, many states do, nonetheless, have statutes of limitations.²²¹ Problems arise with treating AIDS rape as murder when the victim outlasts the statute. If she survives beyond the prescribed time limit, the rapist cannot be guilty of murder, yet at the time of infection she is doomed to die.²²²

On the other hand, when an attacker knows that he has AIDS and intends to transmit it to the victim through rape, or when he is aware of the possibility of transmission but acts with a reckless disregard to that probability, the mens rea element of the Model Penal Code definition of murder is satisfied with ease.²²³ In many cases of

217. MODEL PENAL CODE § 2.03 (Official Draft 1962).

218. Sullivan & Field, *supra* note 7, at 159-61 (noting that because many AIDS carriers are asymptomatic, they may unintentionally transmit the disease to others through consensual intercourse).

219. While it will often be difficult to determine whether the AIDS rapist caused his victim's infection, such a determination is left to the trier of fact. *Winship*, 397 U.S. at 364 (recognizing that in litigation, there is always a margin of error, and that the factfinder must be persuaded by the evidence as to the ultimate truth); *see also supra* note 44, (noting that the window period is usually no longer than three months).

220. *See, e.g., State v. Vance*, 403 S.E.2d 495, 499 (N.C. 1991) ("So long as the death occurred within the specified time frame, it was then presumed the blow or injury caused the death for purposes of a homicide prosecution."); *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987) ("The reason advanced for the rule at common law was that if the person alleged to have been murdered dies after the expiration of a year and a day, 'it cannot be discerned, as the law presumes, whether he died of the stroke, or poison, etc., or a natural death.'").

221. Statutes of limitations limit the time frame in which a cause of action may arise. BLACK'S LAW DICTIONARY 927 (6th ed. 1990). *See State v. Brown*, 318 A.2d 257, 262 (Md. Ct. Spec. App. 1974) (affirming a lower court decision which enforced the common law "year and a day rule").

222. *See Sullivan & Field, supra* note 7, at 140 n.2.

223. *See supra* text accompanying note 210 (discussing the mens rea required by the Model Penal Code if a criminal homicide is to be prosecuted as murder).

this nature, the attacker intends to kill.²²⁴ Furthermore, he is fully aware that the victim's death will be torturous and painful.²²⁵ Thus, while AIDS rape does not technically fit within the conventional definition of murder, its peculiarities nonetheless beseech its prosecution as a capital offense. For that reason, as well as those illustrated above, the legislature has a duty to implement appropriate criminal sanctions.

V. CONCLUSION

AIDS rape is emerging as a significant threat to modern society which warrants close scrutiny and unwavering condemnation by the law. The AIDS rapist is perhaps even more lethal an enemy than the AIDS epidemic itself, since the rapist, unlike the disease, cognitively chooses its victims. Because both the AIDS rape victim and the rapist are doomed to die, the law must do its part to deter AIDS rape before it occurs with threats of stringent punishment expediently enforced. An AIDS rapist cannot be rehabilitated in prison, and society cannot tolerate the disproportionate and prolonged suffering of his victims. Thus, capital punishment is a suitable alternative to lengthy prison terms and their collateral fines, both of which are ineffective.

Capital punishment is the only suitable consequence for the crime of AIDS rape, which is far more heinous than "traditional" rape. A victim of "traditional" rape typically survives the attack; a victim of AIDS rape suffers slow physical and psychological deterioration and eventually succumbs to an excruciating death. Thus, while AIDS rape is not murder, it is an equally lethal crime, the effects of which are slower and even more devastating to both the victim and society. Clearly, an attacker who inflicts immeasurable agony upon his victims deserves stringent retribution.

The model legislation proposed in this Article is consistent with the aims of public policy with respect to both the goals of criminal sentencing and the curtailment of a virus which is epidemic in nature. It attempts to curtail the spread of AIDS through AIDS rape by considering each element of this new crime and punishing the defendant accordingly. To confront the AIDS epidemic, however, the state must be prepared to move boldly, as it is up against a lethal enemy.

Furthermore, the court system must accommodate the prosecution of AIDS rape. Because each element of the offense is so diffi-

224. See *infra* Appendix A for a definition of the AIDS rapist's mental state.

225. See, e.g., Dunlap, *supra* note 7, at 909 (describing the discrimination an AIDS victim faces); Marzuk et al., *supra* note 56 (reporting that many AIDS victims are driven to take their own lives). See also notes 47-57 and accompanying text (describing the pain an AIDS victim must endure).

cult to prove, and because the imposition of capital punishment will have a deterrent effect, the courts must be prepared to expedite the judicial process when cases of AIDS rape do occur. If they do so, the capital sentence will have the effect it is intended to have from the perspectives of the state, the victim, and the rapist himself.

Stefanie S. Wepner

APPENDIX A: MODEL LEGISLATION

MANDATORY CAPITAL SENTENCING FOR PERSONS CONVICTED OF
KNOWING AND INTENTIONAL HIV TRANSMISSION VIA
RAPE

(1) PURPOSE

The purpose of this legislation is threefold: to deter the willful dissemination of the human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS) through rape, to vindicate the victim of the rape, and to proclaim society's interest in public health.

(2) DEFINITIONS

- (A) A person perpetrates a "rape" if he or she:
- (1) commits an act of sexual penetration by the use of force or threat of force; or
 - (2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
 - (3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
 - (4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.²²⁶
- (B) "Cure," discussed in section (4) below, shall refer either: (i) to an inexpensive vaccine, widely available and universally known to the public as a whole, for HIV or AIDS; or (ii) to inexpensive medication or medications meeting the availability requirements of section (2)(B)(i), which will completely and permanently cure HIV and/or AIDS as well as eradicate symptoms of AIDS-related complex (ARC), in a human being when administered according to standard, reasonable procedures.
- (C) "Capital sentence," discussed in section (5) below, refers to the death penalty.

(3) PROCEDURE

A person may be convicted of AIDS rape if:

- (A)(i) he has actual knowledge that he is a carrier of either HIV or AIDS, or (ii) if he has actual knowledge that he has symptoms attributable to any stage of AIDS; and
- (B) he commits rape: (i) with the intent to transmit the virus to his victim; or (ii) with the intent to cause death to victim through infection with the virus; or (iii) manifesting a depraved indifference to human life by committing the rape despite actual knowledge that he has the

226. 720 ILCS 5/12-13 (1992) (ILL. REV. STAT. ch. 38, para. 12-13 (1991)).

virus; or (iv) with the intent to commit grievous bodily harm to the victim by transmitting AIDS to her; and

(C) the rape is the antecedent but for which the infection with HIV or AIDS would not have occurred.²²⁷

(D) The State shall have the burden of proof beyond a reasonable doubt as to all of the aforementioned elements.

(4) LIMITATION

In the event that a cure for HIV and/or AIDS as defined in section (2)(b) is effected, it will be the duty of the legislature to re-examine this legislation in order to determine whether its provisions continue to be germane to the purposes for which it was enacted.

(5) SENTENCING

(A) A person convicted of AIDS rape as defined in section (3) shall receive a capital sentence if, in the face of any mitigating evidence presented by the defense at the time of sentencing, the jury fails to find that such mitigating circumstances existed as would sufficiently outweigh the accused's conduct.

(B) The prosecutor may also offer any evidence it deems appropriate to the sentence of the defendant, within the boundaries of the law.²²⁸

(C) The imposition of a capital sentence is subject to automatic review by the state supreme court.

(D) Due to the precarious nature of the AIDS rapist, supreme court review in an AIDS rape death penalty case shall be governed by the rules of expediency and given priority over all other cases awaiting appeal.²²⁹

227. See MODEL PENAL CODE § 2.03 (Official Draft 1962) (defining causation).

228. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (holding that the Eighth Amendment does not *per se* bar the states from allowing victim impact statements to be admitted at the time of sentencing). "[I]t was never held or even suggested in any of our cases . . . that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed." *Id.* at 2607.

229. While the road to the death penalty is commonly known to be a slow process, the very nature of the crime of AIDS rape beseeches expediency. See *supra* note 73 (noting that AIDS rapists are not deterred by the threat of long prison terms since they will not live long enough to complete them). Furthermore, because the elements of AIDS rape will be difficult to prove, the class of defendants seeking judicial review will be necessarily limited. Because notice of the death penalty will deter potential AIDS rapists, the burden on the courts will be minimal.