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## AIDS AND THE CRIMINAL LAW: TRADITIONAL APPROACHES AND A NEW STATUTORY PROPOSAL

*David Robinson, Jr.\**

### INTRODUCTION

This Article is predicated on the belief that we are experiencing a health catastrophe of historic proportions. At present it is thought that perhaps two million Americans<sup>1</sup> are infected with a virus which has variously been termed human T-lymphotropic virus type III (HTLV-III), lymphadenopathy-associated virus (LAV), or AIDS-associated retrovirus (ARV).<sup>2</sup> For simplicity, it will be referred to here as the AIDS virus. As of the beginning of 1986, more than sixteen thousand of these people experienced the terminal phase of the AIDS virus infection—namely, AIDS itself.<sup>3</sup> More than half have already died.<sup>4</sup> Furthermore, the number of new AIDS cases reported in 1985 was more than the number of cases reported since the disease was discovered in 1981, and the number of new AIDS cases in 1986 is expected to be twice as many as in 1985.<sup>5</sup> The average life

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1. Estimates of the number of people in the United States who have been infected with the AIDS virus vary from 500,000 to 3,000,000 or more. See Boffey, *AIDS in the Future: Experts Say Deaths Will Climb Sharply*, N.Y. Times, Jan. 14, 1986, at C1, col. 3. A recent effort reported by the Centers for Disease Control put the figure at 1,765,470. Sivak & Wormser, *How Common Is HTLV-III Infection In The United States?*, 313 NEW ENG. J. MED. 1352 (Nov. 21, 1985) (letter). See J. SLAFF & J. BRUBAKER, *THE AIDS EPIDEMIC: HOW YOU CAN PROTECT YOURSELF AND YOUR FAMILY—WHY YOU MUST 25* (1985).

2. Curran, Morgan, Hardy, Jaffe, Darrow & Dowdle, *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCI. 1352 (Sept. 27, 1985) [hereinafter cited as Curran].

3. Boffey, *supra* note 1, at C1, col. 4.

4. *Id.* See Curran, *supra* note 2, at 1352.

5. Rensberger, *AIDS Cases in 1985 Exceed Total of All Previous Years*, Washington Post, Jan. 17, 1986, at A1, col. 4. See Relman, *Introduction*, in *AIDS: THE EMERGING ETHICAL DILEMMAS*, HASTINGS CENTER REP., Aug. 1985, at 1, 1 (special supplement); Sicklick & Rubenstein, *A Medical Review of AIDS*, 14 HOFSTRA L. REV. 5 (1985) (the disease was first discovered in 1981).

expectancy of an AIDS patient is about fifteen months after diagnosis.<sup>6</sup> Each day, one thousand to two thousand additional Americans may become infected with the AIDS virus.<sup>7</sup> All are believed likely to remain infected indefinitely, perhaps for life.<sup>8</sup> Until recently, it was hoped that only five to twenty percent of those infected would experience full AIDS within five years.<sup>9</sup> Newer evidence indicates that the number may be in excess of one-third.<sup>10</sup> Others will develop debilitating symptoms of AIDS-related complex (ARC), formerly called pre-AIDS.<sup>11</sup> Many of these people will suffer progression to full AIDS.<sup>12</sup>

As a result of the proportions of this health catastrophe, its attendant social costs and human suffering,<sup>13</sup> and the bleak prospects for developing medical solutions in the near future,<sup>14</sup> efforts must be made to stem the rate of the AIDS virus spread. Certain types of human behavior have been found to pose a high risk of transmitting the AIDS virus.<sup>15</sup> At the present time, the most effective and feasible means of limiting the spread of AIDS is behavioral modification.

From the standpoint of epidemiological concerns, persons who are carriers of the AIDS virus but have not developed AIDS are of far greater importance than persons with AIDS because (1) people in the former group are approximately fifty to one hundred times as numerous,<sup>16</sup> (2) their blood tends to contain greater concentrations

6. Rensberger, *supra* note 5, at A1, col. 4. See Goedert & Blattner, *The Epidemiology of AIDS and Related Conditions*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT, AND PREVENTION 1, 7 (1985).

7. Boffey, *U.S. Offers Goal To End Spread of Deadly AIDS*, N.Y. Times, Oct. 1, 1985, at C1, col. 1.

8. See Curran, *supra* note 2, at 1354; Allen, *Epidemiology Of Acquired Immune Deficiency Syndrome and Infection Human T-Lymphotropic Virus/Lymphadenopathy-Associated Virus (HTLV-III/LAV)*, in AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 16, 18 (1985).

9. J. SLAFF & J. BRUBAKER, *supra* note 1, at 48.

10. Boffey, *supra* note 1, at C1, col. 3; Rensberger, *Studies Indicate AIDS, Escalation*, Washington Post, Jan. 10, 1986, at A1, col. 3.

11. J. SLAFF & J. BRUBAKER, *supra* note 1, at 48. About 5% of these people will suffer progression to full AIDS each year. Grieco, *Medical Facts Related To Legal Issues*, in AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 9, 12 (1985).

12. See J. SLAFF & J. BRUBAKER, *supra* note 1, at 48 (5-20% of infected individuals will develop full AIDS within five years, an additional 25% will develop ARC, and some of these will develop full AIDS subsequently).

13. See *infra* text accompanying notes 15-31.

14. See *infra* text accompanying notes 32-36.

15. See *infra* text accompanying notes 37-49.

16. See Eckholm, *Women and AIDS: Assessing the Risks*, N.Y. Times, Oct. 28, 1985, at A16, col 5 ("Federal experts believe that for every person diagnosed with AIDS, between fifty and one hundred others, most of them healthy, are infected with the virus."). The number of

of virus;<sup>17</sup> and (3), being asymptomatic, they are more likely to be unaware of their infections, and consequently pose a greater danger of unknowing transmission of the virus to others.<sup>18</sup> The diagnosis of persons in the asymptomatic carrier state has been greatly facilitated recently by the development of two types of blood antibody tests.<sup>19</sup> While it is common for the popular press to report that persons whose blood produces a positive response to both tests have been "exposed" to the AIDS virus, the medical community accepts such seropositivity as presumptive evidence of current infection and infectivity.<sup>20</sup>

In 1985, Dr. J. Slaff and J. Brubaker estimated that by the end of the decade the United States will have more than two hundred and fifty thousand full AIDS patients, with more than \$35 billion in direct medical costs.<sup>21</sup> In view of the recent evidence of the high frequency of progression from infection to full AIDS,<sup>22</sup> these figures are subject to substantial upward revision. Furthermore, while AIDS itself is sometimes thought of only as a blood disease, the AIDS virus (in addition to secondary invading agents) adversely affects the central nervous systems of a substantial number of patients.<sup>23</sup> Such patients may become confused, disoriented, and incapable of caring for themselves.<sup>24</sup> Much evidence suggests that the AIDS virus can invade the brain and cause brain damage.<sup>25</sup> Therefore, even if a suc-

AIDS carriers may exceed the number of AIDS patients by 200 times since more than one-half of the reported AIDS patients have died. See Russell, *AIDS First 5 Years, and a Look at Its Future*, Washington Post, June 5, 1986, at A15, col. 1.

17. See Grieco, *supra* note 11, at 12.

18. *Id.* at 12.

19. Marwick, *Blood banks give HTLV-III test positive appraisal at five months*, 254 J. A.M.A. 1681, 1681-83 (Oct. 4, 1985). An initial test, known as ELISA (enzyme-linked immunoassay), detects the presence of antibodies to the AIDS virus, and a second test, known as Western blot, is performed in order to confirm the results of the ELISA test. *Id.*

20. See, e.g., Rensberger, *supra* note 10, at A1, col. 3; J. SLAFF & J. BRUBAKER, *supra* note 1, at 251. See Curran, *supra* note 2, at 1354; Marwick, *supra* note 16, at 1681-83. Studies involving male homosexuals have shown that live virus can be cultured from the blood of about 65% of seropositive persons. Grieco, *supra* note 11, at 12.

21. J. SLAFF & J. BRUBAKER, *supra* note 1, at 80.

22. See *supra* note 10 and accompanying text.

23. Christ & Wiener, *Psychosocial Issues in AIDS*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT, AND PREVENTION 275, 279 (1985).

24. *Id.*

25. Levy, Hollander, Shimabukuro, Mills & Kaminsky, *Isolation of AIDS-Associated Retroviruses From Cerebrospinal Fluid and Brain of Patients With Neurological Symptoms*, LANCET, Sept. 14, 1985, at 586 [hereinafter cited as Levy]; Address by Dr. R. Johnson before the Institute of Medicine of the National Academy of Sciences (Oct. 16, 1985); Langone, AIDS, DISCOVER, Dec. 1985 at 28, 39.

cessful therapy is developed to eliminate the virus in the blood and restore the immune system, we may be faced with a large population of demented patients whose central nervous systems have been gravely damaged by the virus.<sup>26</sup> Effective medication of brain infections is additionally complicated by the blood-brain barrier.<sup>27</sup>

Persons infected with the AIDS virus must endure other heart-breaking costs. Women who are infected are now advised by the Centers for Disease Control to postpone pregnancy.<sup>28</sup> This "postponement" is likely to be lifelong.<sup>29</sup> The danger of infection of fetuses is unquantified but high, possibly fifty percent.<sup>30</sup> Men who are seropositive risk both the infection of their sexual partners and their offspring.<sup>31</sup> Many seropositive individuals will undoubtedly decide not to marry. For all, there is the fear that the infection will progress to ARC or to full AIDS, an illness from which no one has recovered.

The prognosis for an effective vaccine or curative therapy in the foreseeable future is not good. As antibiotics and other traditional therapies are ineffective against the AIDS virus,<sup>32</sup> medical hope rests heavily on the possibility of developing an effective vaccine.<sup>33</sup> With the AIDS virus, this task is greatly complicated by the ability of the virus to mutate into varying forms (as do influenza viruses),<sup>34</sup> and it is likely that a vaccine which might be effective against some varieties of the virus would be ineffective against many others.<sup>35</sup> Dr. J. Slaff and J. Brubaker note that eighteen variants have been isolated thus far and state:

While denial and disbelief are understandable reactions, the notion that medical science is on the verge of a breakthrough that will soon end this epidemic is dangerously delusional.

26. See Levy, *supra* note 25, at 586.

27. The blood-brain barrier prevents the free exchange of substances in the circulation into brain tissue. See Partridge, Olendorf, Concilla & Frank, *Blood-Brain Barrier: Interface Between Internal Medicine and the Brain*, 105 ANNALS INTERNAL MED. 82 (July 1986).

28. *Recommendations for Assisting in the Prevention of Perinatal Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus and Acquired Immunodeficiency Syndrome*, 34 MORBIDITY & MORTALITY WEEKLY REP. 721 (Dec. 6, 1985).

29. See *supra* note 8 and accompanying text.

30. Sande, *Transmission of AIDS—The Case Against Casual Contagion*, 314 NEW ENG. J. MED. 380, 380-81 (Feb. 1986)(editorial).

31. See *supra* note 28.

32. Krim, *AIDS: The Challenge to Science and Medicine*, in AIDS: THE EMERGING ETHICAL DILEMMAS, HASTINGS CENTER REP., Aug. 1985, at 2, 4 (special supplement).

33. *Id.*

34. *Id.* at 5.

35. *Id.*

The truth is that those closest to the problem do not expect an effective treatment program or vaccine within the decade. Presently, an AIDS virus vaccine is inconceivable.<sup>36</sup>

Approximately three out of four American AIDS patients have been homosexual males.<sup>37</sup> The most "efficient" means of transfer of AIDS virus infection (other than blood transfusion) appears to be anal intercourse.<sup>38</sup> The rectum, unlike the vagina, is relatively fragile, with many surface blood vessels and without natural lubrication.<sup>39</sup> The penis is also relatively vulnerable in rectal intercourse.<sup>40</sup> Less efficient means of transmission, though still classified as outside the boundaries of "safe sex," include fellatio,<sup>41</sup> fisting (forcing the fist into the rectum),<sup>42</sup> and anilingus.<sup>43</sup> Although the total number of female AIDS patients is relatively small, evidence indicates that the AIDS virus can also be sexually transmitted between the sexes.<sup>44</sup>

Hypodermic needle drug users comprise the second largest class of AIDS victims.<sup>45</sup> Heroin addicts typically use intravenous injection for the drug's administration, since this produces a pleasurable "rush" and is also the most efficient way to receive the drug.<sup>46</sup> Sharing of syringes can transmit blood infected with the AIDS virus.<sup>47</sup>

36. J. SLAFF & J. BRUBAKER, *supra* note 1, at 6. Recently, optimism has been expressed that vaccines can be developed to create immunity to AIDS virus infections by utilizing genetically-altered existing viruses or other viruses which are similar to the AIDS virus, but which are not thought to cause disease in humans. 1 AIDS POL'Y & LAW (BNA) 4 (Apr. 23, 1986); Wall Street J., Apr. 14, 1986, at 31, col. 4. The AIDS virus itself causes the production of antibodies, but the antibodies are ineffective to prevent further destructive effects of the infection. Even if an effective vaccine can be developed, unique difficulties are likely to be encountered in testing it on human populations. Marketing it and administering it to large populations of uninfected persons—the only ones who could be helped by it—would present additional problems. *Id.*

37. Christ & Wiener, *supra* note 23, at 275.

38. Langone, *AIDS*, DISCOVER, Dec. 1985, at 28, 40, 44. The use of a condom may reduce the risk of contracting the AIDS infection. *AIDS update: what all your patients should know*, MODERN MEDICINE, Nov. 1985, at 154-55 [hereinafter cited as *AIDS update*]. See Goedert & Blattner, *supra* note 6, at 16-17. For the anatomy of AIDS virus vulnerability, see Langone, *supra*, at 40.

39. Langone, *supra* note 38, at 44.

40. *Id.* at 45.

41. See Goedert & Blattner, *supra* note 6, at 17 (Table 1-7); Leishman, *A Crisis in Public Health*, THE ATLANTIC, Oct. 1985, at 18, 24.

42. See Goedert & Blattner, *supra* note 6, at 17 (Table 1-7); Allen, *supra* note 8, at 19.

43. See Goedert & Blattner, *supra* note 6, at 17 (Table 1-7); Leishman, *supra* note 41, at 24. For a discussion of additional unsafe sexual practices, see *id.*

44. Eckholm, *supra* note 16, at A16, col. 2.

45. See Goedert & Blattner, *supra* note 6, at 9 (Table 1-4).

46. J. KAPLAN, THE HARDEST DRUG: HEROIN AND PUBLIC POLICY 10 (1983).

47. See J. SLAFF & J. BRUBAKER, *supra* note 1, at 25; N.Y. Times, Jan. 14, 1986, at

Contamination of the equipment is sometimes heightened by first injecting a solution of heroin and then drawing blood into the syringe for reinjection, in order to obtain as much of the heroin as possible.

Hemophiliacs and other recipients of blood or blood product transfusions are the remaining recognized high-risk groups.<sup>48</sup> With the recent development of relatively, though not completely, effective blood screening tests,<sup>49</sup> it is likely that new infections from this source will substantially decline.

It is clear that for the indefinite future, the most effective and feasible method of limiting the spread of AIDS is behavioral modification to reduce the rate of spread of AIDS virus infections.<sup>50</sup> The remainder of this Article addresses the question of the role criminal law might play in encouraging such behavioral change. First, traditional criminal offenses relating to behavior which entails the risk of AIDS virus contagion are briefly reviewed. Second, a draft of a new type of statute, prepared by the author, is set forth and discussed.

#### I. TRADITIONAL CRIMINAL OFFENSES WHICH RELATE TO AIDS VIRUS CONTAGION

Homicide offenses are among the most serious which might be invoked in response to AIDS virus contagion. In situations where the transmission of the virus has resulted in the death of the transmittee, murder might be appropriately charged, not only in the rare situations where transmission of the infection was purposeful or knowing, but also where the actor behaved with extreme recklessness, committing the "depraved heart" murder recognized by the common law.<sup>51</sup> Lesser recklessness, or even gross negligence, could lead to a charge of manslaughter.<sup>52</sup> Thus, a prosecution could be maintained for manslaughter even though the particular defendant was unaware of the risk of his virus-spreading conduct. In jurisdictions adopting the homicide grading scheme of the Model Penal Code, a lesser offense of negligent homicide might be warranted.<sup>53</sup>

A major problem with utilizing homicide offenses would be proof of causation. Most of the victims of AIDS have engaged in

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C1, col. 4.

48. See Goedert & Blattner, *supra* note 6, at 9 (Table 1-4).

49. See *supra* note 19 and accompanying text.

50. See Allen, *supra* note 8, at 21.

51. W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 541 (1972).

52. *Id.* at 586.

53. MODEL PENAL CODE § 210.4 (Official Draft 1962).

multiple high-risk activities.<sup>54</sup> Proving that a particular individual was the source of contagion, together with the additional requirement of showing culpability (*mens rea*), would make successful prosecution impossible in the great majority of situations.<sup>55</sup>

A charge of attempted murder might be brought against persons who know that they are suffering from AIDS, AIDS-related complex, or other AIDS virus infections, and who realize that their behavior risks infection of others. Extreme examples of such persons would be infected male and female prostitutes and others who engage in promiscuous, unprotected sexual acts. Unlike the homicide offenses, proof of death of the victim, cause of death, or even transmission of the virus would not be required. Under traditional attempt law, however, a true purpose to kill would have to be shown,<sup>56</sup> and this could not often be done.

Another possibility is prosecution for criminal assault on the theory that even where a physical contact is consented to, contact which transmits a disease (at least in the absence of disclosure of the infectivity of the transferor) is not.<sup>57</sup> While this view seems sound, the cases are mixed.<sup>58</sup> Furthermore, proof of actual transmission attributable to a specific individual would generally be extremely difficult or impossible,<sup>59</sup> and infectivity unknown to the transmittee which does not transmit a disease would not appear to constitute an assault.

Sodomy, originally defined as anal intercourse, but usually expanded to include oral intercourse,<sup>60</sup> is the traditional criminal offense most directly relevant to most acts which transmit the AIDS virus. Nevertheless, since the authors of the Model Penal Code (1962) recommended decriminalization of sodomy, about half of the states have eliminated their sodomy prohibitions, either by legislation or by judicial decision.<sup>61</sup> The theory of the American Law Insti-

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54. See Goedert & Blattner, *supra* note 6, at 16-18.

55. For a discussion of AIDS-related criminal cases, see Galante, *AIDS' Expanding Legal Frontier*, Nat'l L. J., Feb. 3, 1986, at 3, col. 1.

56. Thacker v. Commonwealth, 134 Va. 767, 114 S.E. 504, 505 (1922); MODEL PENAL CODE § 5.01(1) (1962); W. LAFAVE & A. SCOTT, JR., *supra* note 51, at 428.

57. State v. Lankford, 29 Del. 594, 595, 102 A. 63, 64 (1917).

58. See Reginal v. Clarence, 22 Q.B.D. 23 (1888); Lynch, *Criminal Liability for Transmitting Disease*, 1978 CRIM. L. REV. 612.

59. See *supra* notes 54-55 and accompanying text.

60. R. PERKINS & R. BOYCE, CRIMINAL LAW 465-66 (3d ed. 1982).

61. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980); MODEL PENAL CODE AND COMMENTARIES § 213.2 commentary at 364-65 n.30 (Official Draft and Revised Comments 1980).

tute was that sodomous conduct was not thought to be dangerous to the participants or to the public.<sup>62</sup> At the same time, the American Law Institute recommended that the prohibition of prostitution be retained because of the danger of the spread of venereal disease.<sup>63</sup> In *Doe v. Commonwealth's Attorney*,<sup>64</sup> the United States Supreme Court summarily affirmed a lower court decision upholding the constitutionality of a Virginia statutory proscription of sodomy. Yet, in *People v. Onofre*,<sup>65</sup> decided six months before the first AIDS cases were reported in the United States, the New York Court of Appeals held that the state consensual sodomy prohibition was violative of the federal right to privacy because "there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct."<sup>66</sup> In *People v. Uplinger*,<sup>67</sup> the same court—relying on *Onofre*, and without rethinking its rationale in the light of the then emerging AIDS crisis—struck down a statute prohibiting loitering in a public place for the purpose of engaging in or soliciting deviate sexual intercourse. The focus of recent decriminalization efforts has shifted to the federal courts, where three United States Courts of Appeals and the Supreme Court have recently issued opinions bearing on the constitutionality of sodomy prohibitions. In *Dronenberg v. Zech*,<sup>68</sup> the court ruled, in the course of upholding the Navy's discharge of Dronenberg for committing homosexual acts, that the rights of privacy and equal protection of the laws do not protect homosexual conduct.<sup>69</sup> *Baker v. Wade*,<sup>70</sup> which involved an attack on a Texas criminal statute, is in accord. On the other hand, in *Hardwick v. Bowers*,<sup>71</sup> the court declared sodomy to be a fundamental right, leaving it open to the state to show that a compelling state interest is narrowly served by the statute. The Supreme Court reversed in a closely divided vote, holding that the sex-neutral Georgia sodomy statute which was the subject of attack did

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62. MODEL PENAL CODE § 207.5, at 277-78 (Tent. Draft No. 4, 1955).

63. MODEL PENAL CODE AND COMMENTARIES § 251.2, at 458 (Official Draft and Revised Comments 1980).

64. 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

65. 51 N.Y.2d 476, 415 N.E.2d 936 (1980).

66. *Id.* at 941.

67. 58 N.Y.2d 936, 447 N.E.2d 62 (1983).

68. 741 F.2d 1388 (D.C. Cir. 1984).

69. 741 F.2d at 1397.

70. 769 F.2d 289 (5th Cir. 1985).

71. 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986).

not implicate a fundamental right of privacy, as applied to consensual adult homosexual sodomy in the home.<sup>72</sup>

Prostitution by both males and females appears to be a potential source of contagion of the AIDS virus. AIDS virus infections have been linked to heterosexual prostitution involving female prostitutes,<sup>73</sup> although the total number of suspected female to male transmissions is smaller than the suspected male to female transmissions.<sup>74</sup> Prostitution may be a more efficient mode of transferring the AIDS virus than most noncommercialized sexual encounters; prostitutes are often intravenous drug abusers, and multiple partners of prostitutes present greater opportunities for spreading the prostitutes' infections. Moreover, previously-deposited semen may itself be contacted by subsequent male patrons in the course of a prostitute's work. Thus, deterrence of some behavior which risks spreading AIDS could be attempted through vigorous enforcement of laws against prostitution and patronizing prostitutes.

Ancillary statutes proscribing assisting in commercialized sex are also common, such as prohibitions on pimping, solicitation for prostitution, and maintaining a house of prostitution.<sup>75</sup> All of these types of prohibitions on commercialized sex have presented severe enforcement problems over the years.<sup>76</sup> Nevertheless, expansion of such prohibitions to include specific proscription of sex-facilitating emporia such as homosexual "bathhouses" should be considered.<sup>77</sup> The drafting of a statute specifically proscribing maintaining such

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72. *Bowers v. Hardwick*, 196 S. Ct. 2841 (1986). The opinion of the Court does not address possible additional claims which might be made under the eighth or ninth amendments or under the equal protection clause, although it does not provide a basis for believing a majority of the Court would accept the latter two claims in a later case. Justice Powell, who joined the opinion of the Court and supplied the crucial fifth vote for rejecting the due process privacy claim, also filed a concurring opinion indicating that the eighth amendment might, in his view, prohibit a substantial sentence to confinement for conviction of private consensual sodomy. *Id.* at 2846-47. See his opinion for the Court in *Solem v. Helm*, 463 U.S. 277 (1983).

73. Van de Perre, Carael, Robert-Guroff, Freyens, Gallo, Clumeck, Nzabihimana, De Mol, Butzler & Kanyamupira, *Female Prostitutes: A Risk Group for Infection with Human T-Cell Lymphotropic Virus Type III*, LANCET, Sept. 7, 1985, at 524; Boffey, *supra* note 1, at C9, col. 5.

74. Eckholm, *supra* note 16, at A16, col. 5.

75. R. PERKINS & R. BOYCE, *supra* note 60, at 469-71; MODEL PENAL CODE AND COMMENTARIES § 251.2, at 453-73 (Official Draft and Revised Comments 1980).

76. MODEL PENAL CODE AND COMMENTARIES § 251.2, at 456-57 (Official Draft and Revised Comments 1980).

77. For a recent account of the continuation of unsafe behavior in a homosexual bathhouse in New York City, see Weiss, *Inside a Bathhouse*, THE NEW REPUBLIC, Dec. 2, 1985, at 12.

premises, while safeguarding genuine bathhouses, motels, and other places of public accommodation, would present a significant challenge. The history of enforcement efforts to date suggests that the prospects of actually forcing closure of bathhouses may be bleak.<sup>78</sup>

The nonmedical use of illicit drugs which are taken by needle presents opportunities for AIDS virus infection second only to sexual activity.<sup>79</sup> Illicit drugs are the subject of extensive federal and state statutory proscriptions. Federally, the Controlled Substances Act<sup>80</sup> creates five categories of drugs to be regulated, depending on the risk of abuse, extent of currently accepted medical usage, safety of use under medical supervision, and potential to lead to psychological or physical dependence.<sup>81</sup> Opium derivatives, including heroin, appear to be among the most abused and dangerous drugs,<sup>82</sup> and are the subject of the most severe penalties.<sup>83</sup> The great majority of the states have adopted the Uniform Controlled Substances Act, which is patterned on the federal legislation and permits the states to prosecute similar offenses.<sup>84</sup> Subsidiary legislation, such as that prohibiting the possession of nonmedically-approved hypodermic syringes,<sup>85</sup> may be counterproductive in the context of the AIDS virus transmission problem. The ready availability of needles may either reduce their being shared, or it may increase the use of intravenous drugs and, ultimately, the sharing of needles as well.

## II. A PROPOSAL FOR A NEW STATUTORY PROHIBITION

Enforcement of traditional criminal statutes, while helpful, may not provide the sort of specific guidance needed by infected individuals and public officials. The writer has prepared a draft of a new type of statute designed to proscribe specified conduct which appears

78. The courage of political officials, public health officers, and the judiciary has been less than remarkable in responding to often intense opposition of members of the homosexual community and owners of bathhouses. See, e.g., Note, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE LAW & POL'Y REV. 479, 504-16 (1985); 2 *Cities Consider a Bathhouse Ban*, N.Y. Times, Nov. 22, 1985, at B13, col. 1; Bottorff, *County Backs Off Plan to Shut Gay Bathhouses*, L.A. Daily J., Nov. 13, 1985, at 20, col. 1.

79. Goedert & Blattner, *supra* note 6, at 7 (Table 1-2).

80. Controlled Substance Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

81. *Id.* at § 812(b).

82. *Id.* at § 812(c).

83. *Id.* at §§ 812 and 841.

84. Only Maine, New Hampshire, and Vermont have not enacted the Uniform Controlled Substances Act. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 117-18 (West Supp. 1985).

85. See, e.g., N.Y. PUB. HEALTH LAW § 3381 (McKinney 1985).

to serve as the primary means of AIDS virus transmission. The draft follows:

*Transfer of Bodily Fluid Which May Contain the AIDS Virus*

(1) *Offense Defined.* A person is guilty of an offense if, knowing that he is or has been afflicted with acquired immune deficiency syndrome (AIDS), or AIDS-related complex, or pre-AIDS, or is or has been infected with the virus which causes AIDS (HTLV-III/LAV), or has been reliably informed that he has been found to have antibodies to such virus, he purposely, knowingly, or recklessly transfers or attempts to transfer any of his bodily fluid to another person.

(2) *Definitions.* For purposes of this section:

(a) Bodily fluid includes semen (irrespective of the presence of spermatozoa), blood, saliva, vaginal secretion, urine, and fecal material.

(b) Transfer includes engaging in sexual intercourse per anum, per os, per vagina; or permitting reuse of a hypodermic syringe, needle, or similar device without sterilization; or giving blood or semen to a person, blood bank, hospital, or other medical care facility for purposes of transfer to a person.

(3) *Defenses.*

(a) *Married Persons.* It is an affirmative defense for the actor to prove that the conduct was sexual intercourse between married persons with consent after full disclosure of the risk.

(b) *Use of a Condom.* It is an affirmative defense for the actor to prove that the transfer of bodily fluid was apparently prevented by the use of a condom, after consent following full disclosure of the risk, including informing the potential transferee that the condom may be ineffective to prevent contagion.

(c) *Medical Advice.* It is an affirmative defense for the actor to prove that the transfer of bodily fluid occurred after advice from a licensed physician that the actor was noninfectious.

(4) *Defenses Precluded.* Except as provided in subsections 3(a) and 3(b) consent of the transferee or previous AIDS virus infection of the transferee is no defense to a prosecution under this section.

(5) *Grading.* The offense under this section is a felony in the second degree.

### III. DISCUSSION OF THE PROPOSAL

At present, nearly half of the states have misdemeanor statutes proscribing the transmission of a venereal disease.<sup>86</sup> The draft, while constructed with the same purpose, significantly differs from present laws in that it (1) proscribes the transfer or attempted transfer of presumptively infective bodily fluids (rather than requiring proof of transfer of infection itself); (2) attempts to provide more specific standards of unacceptable conduct related to AIDS virus transfer; and (3) substantially raises the penalty for the offense defined. The latter is believed to be justified by the gravity and incurability of AIDS virus infections.

The form of the draft in general follows that of the Model Penal Code. In part, this is in order to facilitate its integration into the criminal codes of the majority of the states which have revised their codes with the assistance of the Model Penal Code.<sup>87</sup> More important, the draft uses the careful general structure of the Code, particularly its culpability provisions.<sup>88</sup> Thus, it is intended that such terms as "purposely," "knowingly," and "recklessly" be understood in the same way as they are defined in the Code. However, alternative words such as "intentionally" could have been substituted for "purposely."

In view of the presumptive infectivity of those who have AIDS, ARC, or AIDS virus antibody seropositivity, purposeful, knowledgeable, and reckless transfer to another person would be prohibited. It is arguable that awareness of a substantial and unjustifiable risk that the actor is infectious should not be required, and that negligence should suffice, given the gravity of the peril. The draft could be easily modified to so provide. This would raise the problem of whether people engaged in hazardous sexual activity or other fluid transferring behavior should seek blood testing for the HTLV-III/LAV antibody.

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86. The state statutes are collected in Prentice & Murray, *Liability for Transmission of Herpes: Using Traditional Tort Principles to Encourage Honesty in Sexual Relationships*, 11 J. CONTEMP. L. 67, 100 n.215 (1984). Only the Oklahoma statute imposes felony liability for the intentional or reckless transmission of certain infectious diseases. 21 OKLA. STAT. ANN. § 1192 (West 1983). See Note, *HERPES—A Legal Cure—Can the Law Succeed Where Medicine Has Failed?*, 61 U. DET. J. URB. L. 273, 274 n.8 (1984). The Soviet Union has a similar provision, imposing a penalty of incarceration for up to three years or correctional tasks for up to one year. Criminal Code of the RSFSR, art. 115, in SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 194-95 (H. Berman & J. Spindler trans. 1966).

87. The state statutes are collected in MODEL PENAL CODE AND COMMENTARIES, pt. I, §§ 1.01 to 2.13, at xliii—li (Official Draft and Revised Comments 1985).

88. MODEL PENAL CODE § 2.02 (Official Draft 1962).

While it is surely arguable that they should, particularly if they are in high risk groups, the question is one on which opinion is divided,<sup>89</sup> and the draft conservatively declines to provide for felony penalties for negligence. In this sense it is consistent with most traditional Anglo-American criminal law.

The definition of bodily fluid includes the major apparent vehicles of virus transfer, semen and blood, as well as other fluids which are believed likely to contain the AIDS virus.<sup>90</sup> The presence of spermatozoa is excluded from the definition of semen because there is no evidence that *coitus interruptus* constitutes a safe sexual practice. Lesser bodily fluids, especially saliva, arguably should be eliminated. While AIDS virus has occasionally been cultured from saliva, it is not clear that saliva presents a significant source of infection.<sup>91</sup>

Intrahousehold studies, which fail to indicate transmission of the infection among household members who share dishes and sometimes food, indicate that at least at present, very small amounts of saliva do not appear to transfer AIDS virus infection.<sup>92</sup> Furthermore, social kissing is very much part of our culture. At the same time, massive transfers of saliva presumably are not routine among nonintimate household members and, therefore, would not be covered in such studies. Since there may be a significant risk in some kissing, it may be justified to include saliva transfers in the draft.

The need to include contaminated hypodermic syringes and needles is obvious and does not require additional discussion. With respect to the blood bank or other medical blood donation problem, it must be recognized that although the screening tests for HTLV-III/LAV antibodies are highly useful, a significant number of false negative results occur.<sup>93</sup> As a result, the Red Cross and other collectors of blood significantly rely on screening of donors, in addition to screening of blood itself.<sup>94</sup> Transfers prior to birth are not covered;

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89. See, e.g., Levine & Bayer, *Screening Blood: Public Health and Medical Uncertainty*, in AIDS: THE EMERGING ETHICAL DILEMMAS, HASTINGS CENTER REP., Aug. 1985, at 8, 11 (special supplement).

90. *Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 682 (Nov. 15, 1985).

91. *Id.*

92. *Id.*

93. Dr. M. Essex of the Harvard School of Public Health has stated that at least 5% false negative reports occur in laboratory-controlled tests, and that in mass blood bank screening the number of false negatives may be much higher. *Stopping Heterosexual AIDS Moves to the Fore*, MEDICAL WORLD NEWS, Nov. 11, 1985, at 42.

94. Address of K. Gebbie, Live Interactive Satellite Video Teleconference presented by

the draft requires the transferee to be a person.

A defense is provided for married persons who obtain consent of their spouses after full disclosure of the risk because of the sensitivity of any effort to proscribe normal relations between married persons, as well as possible constitutional concerns.<sup>95</sup> The requirement of full disclosure of the risk seems to be compelled by considerations of honesty as well as infectivity.

While the efficacy of condoms in preventing AIDS virus infection has not been proven<sup>96</sup> (and, in any event, is surely incomplete due to occasional imperfections, tearing, and coming off), there is reason to believe that they may significantly reduce the likelihood of infection if they are properly used.<sup>97</sup> In view of the powerful impulse of those who are clinically well to continue to have sexual relations, the better choice may be to attempt simply to encourage condom use rather than to seek to mandate celibacy.

No defense is provided where the parties to the fluid transfer know that each is seropositive, since there is some reason to believe that repeated infections may increase the possibility of progression to full AIDS.<sup>98</sup>

It is arguable that immunity should be provided for statements made to medical personnel in the course of research, treatment, or control efforts. Infected individuals may be more reluctant to reveal their sexual or other possibly infectious contacts if they believe that this may lead to their prosecution. On the other hand, the need for evidentiary privileges to encourage confidential communications is easily overstated,<sup>99</sup> and existing doctor-patient privileges may suffice for this purpose. If not, an immunity clause could easily be added. The problem is not limited to newly proposed prohibitions; existing sodomy statutes, for example, present the same problem. Thus, if treatment or research concerns are deemed to warrant it, a general immunity for disclosures to medical personnel would be the more appropriate response.

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the American Hospital Association Media Center (Jan. 23, 1986).

95. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute prohibiting the use of contraceptives by married couple held unconstitutional restriction on protected right of marital privacy).

96. *AIDS update*, *supra* note 38, at 155.

97. *Id.*

98. Eckholm, *supra* note 16, at A16, col. 4; Address by Dr. A. Fauci Before the National Institute of Medicine, National Academy of Sciences (Oct. 16, 1985).

99. See MCCORMICK ON EVIDENCE 170-72 (3d ed. 1984); J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 527-28 (McNaughton rev. 1961).

### III. CONCLUSION

It is fully realized that the efficacy of the criminal law in the effort to stem the rate of AIDS virus transmission is likely to be relatively limited. Powerful impulses and entrenched practices make it likely that high-risk activity will often continue to take place irrespective of the objective risk. Enforcement of publicly approved norms has had limited success with respect to consensual criminal conduct in the past.<sup>100</sup> Nevertheless, we must do what we can, for each AIDS case prevented will not only avoid much private misery and public expense, but it will also save human life.

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100. See MODEL PENAL CODE § 207.5 commentary at 278 (Tent. Draft No. 4, 1955).

