DEATH AT FIRST BITE: A *MENS REA* APPROACH IN DETERMINING CRIMINAL LIABILITY FOR INTENTIONAL HIV TRANSMISSION

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Joseph Haines[1] had an advanced case of Acquired Immune Deficiency Syndrome (AIDS) related complex.[2] On August 6, 1987, he slashed his wrists in his apartment.[3] Police officers Dennis and Hayworth, responding to the radio call of a possible suicide, arrived at the scene to find Haines face down in a pool of blood.[4] Dennis attempted to revive Haines and told Haines that they were there to help him.[5]

When Haines heard the paramedics approaching he stood up, ran at Dennis, and screamed that he should be left to die because he had AIDS.[6] As the officers attempted to subdue him, Haines repeatedly shouted that he had AIDS, that he could not deal with it, and that he was going to make Officer Dennis know what it meant to suffer from AIDS.[7] He told Dennis he would "use his wounds" and jerked his arms at Dennis, spraying blood into the officer's eyes and mouth.[8]

Haines then struggled with the paramedics, threatening to infect them with AIDS and spitting at them.[9] Haines bit a paramedic on the upper arm, breaking the skin, and said he was going to show everyone what it was like to

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1. State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989).

2. AIDS is the name given to a complex of opportunistic infections that develop when a person's immune system has broken down. Kenneth Vogel, *Discrimination on the Basis of HIV Infection: An Economic Analysis*, 49 OHIO ST. L.J. 965, 967–68 (1988–89). The virus that causes AIDS has various names in the scientific community: Human T-Lymphotropic Virus Type III (HTLV-III), lymphadenopathy-associated virus (LAV), or AIDS-related complex (ARC). *Id.* at 967 n.18. For simplicity, this Note collectively refers to these strains as AIDS. AIDS occurs in people who have been infected by the Human Immunodeficiency Virus (HIV).

A positive HIV antibody test indicates the individual has produced antibodies in reaction to exposure to HIV. Antibodies usually develop within 6–12 weeks following exposure to the virus. Exchanging of body fluids, sharing of contaminated needles, and transfusion of infected blood are the primary means of transmission. The average life expectancy of a patient who has contracted one of the opportunistic diseases associated with AIDS is approximately fifteen months after diagnosis. Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 884–85 n.14 (1988–89).

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

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. At one point, Haines struck Dennis in the face with a blood-soaked wig splattering blood onto Dennis' eyes, mouth, and skin. *Haines*, 545 N.E.2d at 835.

9. *Id.*

have the disease and die.[10] When Dennis finally handcuffed Haines, the officer was covered in blood.[11] On January 14, 1988, a jury convicted Haines on three counts of attempted murder.[12]

Criminalization of HIV transmission is becoming increasingly popular with state legislatures[13] in the face of a national public health catastrophe.[14] The American public wants to contain this deadly epidemic.[15] National opinion surveys indicate that a majority of respondents support state-imposed restrictions on the activities of known AIDS carriers.[16] Because willful or volitional behavior primarily transmits the virus,[17] actions outside the parameters of acceptable behavior justify legal solutions that hold people accountable.

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10. *Id.*

11. *Id.*

12. *Id.* at 836. Circuit Court Judge Vincent F. Grogg set aside the jury's verdict, declaring that Haines' assault could not "constitute a step, substantial or otherwise, in causing the death of another person, regardless of the intent of the defendant." *Id.* The Court of Appeals reversed and reinstated the jury's verdict, finding that the jury could have concluded beyond a reasonable doubt that Haines took a substantial step toward the commission of murder. *Id.* at 841.

13. *See, e.g.*, FLA. STAT. ANN. §§ 384.24, .34(1) (West Supp. 1988) (criminal offense for person with HIV to knowingly have sexual intercourse with another person, unless first informing that person); IDAHO CODE § 39–608 (Supp. 1988) (felony for any person to expose another with intent to infect or knowing he has HIV, including sexual or shared needle transmission as well as blood donations); 1987 La. Sess. Law Serv., extraordinary session 663 H.B. no. 1728 (West) (criminalizes intentional, sexual transmission of HIV without partner's informed consent); 1988 Wash. Legis. Serv. 206 S.B. 6221 (West Supp.) (a person with intent to inflict bodily harm who exposes or transmits HIV is guilty of assault). *See also* H.R. 345, 100th Cong., 1st Sess. (1987) (crime for a federal employee with HIV to knowingly or recklessly attempt to transfer any body fluids).

14. *See Quarterly Report to the Domestic Policy Council on the Prevalence and Rate of Spread of HIV and AIDS in the United States*, 259 JAMA 2657 (1988). By June 6, 1988, a total of 64,506 cases of AIDS had been reported in the United States; over 14,000 of these had been reported since January 1, 1988, and 36,255 cases had resulted in death. In the previous twelve months, 23,200 cases were reported, representing an increase of 58% over the year before. By the end of 1991 it is projected that there will be more than 270,000 cases, with more than 74,000 of those occurring in 1991 alone. *Confronting AIDS: Directions for Public Health, Health Care and Research*, INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, 8–9, 85–89 (1986); *Confronting AIDS: Update*, INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, 51–52 (1988). Arizona HIV Infection Surveillance Report, October 1, 1990, published by the Arizona Department of Health Services, Division of Disease Prevention, reports 1,255 known cases of AIDS in Arizona. The Asymptomatic HIV Seropositive Surveillance Report lists 2,482 HIV-positive cases in the 2,718,215 population of the 14 counties, at a rate of 91.3/100,000 persons. *Id.* Anonymous testing reported 601 additional HIV seropositive tests. *Id.*

15. Mathilde Krim, *AIDS: The Challenge to Science and Medicine, in* AIDS: THE EMERGING ETHICAL DILEMMAS, HASTINGS CENTER REP., Aug. 1985 at 2, 4, 5 (special supplement). Because antibiotics and other traditional therapies are ineffective against the AIDS virus, medical hope rests heavily on the possibility of developing an effective vaccine. *Id.* The ability of the virus to mutate into varying forms greatly complicates this task, and it is likely that a vaccine effective against some varieties of the virus might be ineffective against others. *Id.*

16. Eleanor Singer et al., *The Polls—A Report: AIDS*, 51 PUB. OPINION Q. 580, 592 (1987). Of people responding to two national opinion polls conducted in November 1985 and January 1986, 58% and 51%, respectively, favored the position that "governmental restrictions should be placed on the sexual activities of people who are known carriers of AIDS." *Id.* These restrictions might include quarantining AIDS victims, or even making it a crime for an AIDS-infected person to have sex with another person.

17. A transmission-type analysis of AIDS cases reported in the United States reveals the following data: (1) 58% from homosexual sex; (2) 23% from intravenous drug use; (3) & (4) 6% from homosexual sex and drug use combined and 6% from heterosexual sex. *Invincible AIDS*, TIME, Aug. 3, 1992, at 33.

This Note examines the four leading cases dealing with criminalization of HIV transmission through AIDS-infected saliva. The first section describes the problems prosecutors encounter in applying traditional criminal law to HIV transmission and summarizes the legal history of the criminal charges involving the transmission of AIDS.[18] The second section explains why traditional public health offense laws fail to provide an appropriate sanction for HIV transmission.[19] The third section reviews the current competing judicial decisions regarding the finding of criminal liability for acts of attempted HIV transmission through the human bite.[20] The final section considers the applicable criminal statutes presently in effect in Arizona and analyzes the Arizona case of aggravated assault via the human bite.[21] It also discusses the legal impact that codification of an AIDS-specific statute would have on this specific area of Arizona criminal law.[22] The Note concludes that legislators, in conjunction with the criminal courts, must take affirmative steps to remedy the existing void in criminal law applicable to HIV transmission.

I. APPLICATION OF TRADITIONAL CRIMINAL LAW TO HIV TRANSMISSION

Criminal acts that create a risk of transmission of the HIV virus have resulted in convictions ranging from assault to murder.[23] The factors unique to AIDS transmission present evidentiary obstacles to pleading and proving criminal AIDS transmission with traditional criminal law.[24] In certain instances prosecutors dropped charges or pled the case for lack of evidence on intent to murder,[25] or because no evidence existed that HIV actually had been transmitted.[26]

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18. *See infra* text accompanying notes 23–107.
19. *See infra* text accompanying notes 108–29.
20. *See infra* text accompanying notes 130–217.
21. *See infra* text accompanying notes 218–43.
22. *See infra* text accompanying notes 244–53.
23. *See* United States v. Moore, 846 F.2d 1163 (8th Cir. 1988) (upholding conviction of Minnesota prisoner for assault with a deadly weapon for biting a guard); Brock v. State, 555 So. 2d 285 (Ala. Crim. App. 1989) (setting aside first degree assault conviction in favor of third degree assault for lack of evidence showing that the human bite is a means capable of transmitting the AIDS virus); Scroggins v. State, 401 S.E.2d 13 (Ga. Ct. App. 1990) (upholding conviction of aggravated assault with intent to commit murder as reasonable because risk of transmitting virus through human bite rendered appellant's bite a "deadly" weapon); State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (upholding attempted murder convictions supported by evidence that defendant knew he had AIDS, believed it to be fatal, and intended to inflict others with the disease).
24. Thomas Fitting, *Criminal Liability for Transmission of AIDS: Some Evidentiary Problems*, 10 CRIM. JUST. J. 69 (1987). Proof of causation of actual transmission from accused to victim is particularly difficult due to the mechanics of how the virus is transmitted and detected. *Id.* at 75. Asymptomatic carriers, those persons who have not yet developed symptoms of AIDS, may be unaware of their infections and represent a group of individuals capable of unknowing transmission of the virus to others. *Id.* at 69–70.
25. Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1040–41. The most celebrated of these cases, Joseph Markowski, was charged with attempted murder for selling HIV-infected blood to a Los Angeles blood bank. *Id.* at 1040. The charges were subsequently dropped for lack of evidence of intent to murder. *Id.*
26. In the overwhelming majority of these early cases, juries acquitted or prosecutors dropped charges because there was no evidence that the accused had actually transmitted to the victim. *Id.* at 1041.

A. Causation

The problem of legal causation arises in respect to both crimes of intention and crimes of recklessness and negligence. The greatest evidentiary hurdle in proving criminal charges in AIDS transmission cases is substantiating the element of causation.[27] Proof of causation has specific requirements.[28] First, the suspect must be HIV positive. Next, the suspect must be implicated in an act that could have transmitted the virus. Finally, the victim must have acquired the infection from the acts of the suspect.[29]

Actual transmission from the defendant to the victim is difficult to establish because the indicia of transmission can arise some time after the act of transmission.[30] Furthermore, proving the accused is a carrier is difficult without direct evidence that the accused is infected.[31] A search warrant to seize test results, or actual blood for testing, may be necessary when the accused refuses to release medical records.[32] A search warrant, however, will require a showing of probable cause of the crime to be charged.[33] Probable cause for possible

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27. "Causation is a fact. A cause is something regarded as a necessary antecedent; something without which the event would not have occurred. The term includes all things which have so far contributed to the result as to be essential to it." William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 375 (1950). The antecedent in the case of AIDS transmission is the act that might result in transmitting the virus to the victim. Proof of causation for AIDS transmission requires a proof that death, or harm, resulted from having contracted AIDS, as the actual consequence of the defendant's act. Fitting, *supra* note 24, at 75 n.35.

28. The defendant's conduct must be the cause in fact of the result, which usually means that but for the conduct the result would not have occurred. WAYNE R. LAFAVE, CRIMINAL LAW 246 (1972). In addition, any variation between the result intended and the result actually achieved must not be so extraordinary that it would be unfair to hold the defendant responsible for the actual result. *Id.* For criminal liability, the defendant's conduct must be both the actual cause and the legal or proximate cause of the result. *Id.* at 248.

29. Fitting, *supra* note 24, at 75. "In the AIDS context, the person must have tested positive for HIV and must know that the particular act would almost certainly transmit the virus." Gostin, *supra* note 25, at 1043. "Knowledge of seropositivity, however, is difficult to prove because many individuals are tested anonymously ... or decline to be tested at all." *Id.*

30. Annamari Ranki et al., *Long Latency Precedes Overt Seroconversion in Sexually Transmitted Human-immunodeficiency-virus Infection*, II LANCET 589, 592 (1987). Indicia of transmission can include (1) seroconversion from a negative to a positive blood test, (2) onset of symptoms of disease, and (3) discovery that the transmitter is a carrier and has the capability to transmit the virus. *Id.* An initial test, known as enzyme-linked immunosorbent assay (ELISA), detects the presence of antibodies to the AIDS virus. A second test, known as Western blot, is performed in order to confirm the results of the ELISA test. *Id.* Seroconversion, meaning a positive reaction to the ELISA method of detection, may not occur for long periods of time after exposure to the virus. *Id.* Periods from six to 14 months can pass between the time that an individual first has an active infection and the time that commercial tests can detect the virus. *Id.*

31. Fitting, *supra* note 24, at 75. In presenting evidence that the accused has the capability to and did transmit the virus, or both, the prosecution must obtain the results of blood tests or medical records to establish that the accused actually has the AIDS virus. *Id.* at 86.

32. *Id.* at 75. The court-ordered testing of the blood of a suspect has been held reasonable and not in violation of Fourth Amendment rights where the state's need for the evidence outweighs the suspect's interest in privacy and security. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 768 (1966) (Fourth Amendment constrains unjustified intrusions into the body).

33. *See* Barlow v. People, D005427 (San Diego, Cal. 1987), *aff'd but decertified in* Barlow v. State, 190 Cal. App. 3d 1652 (1987). At the arraignment, the state sought and received a search warrant authorizing blood tests to determine the presence of the AIDS virus, and to generate evidence in order to show intent to kill or intent to inflict great bodily injury. Although the warrant was granted in municipal court, the Court of Appeals reversed, directing the lower court to vacate its order granting the testing of the blood on the grounds that the

HIV transmission requires a witness or some other evidence of the act.[34] In addition, the uncertainty in determining which particular act transmitted the virus makes it nearly impossible for the prosecutor to prove the accused was the source of the virus.[35] Months or years may pass before the victim discovers the infection, thus further complicating the evidentiary process.[36]

The accused can defend against the charge of causation. He[37] can show that the victim engaged in high risk[38] contact prior to or after the alleged transmission, within a reasonable period, before the onset of symptoms.[39] These defenses prevent the prosecution from meeting its burden of proof so that the state cannot establish beyond a reasonable doubt that the accused was the source of the virus.[40]

B. Requisite States of Mind

In addition to a physical action, a crime also requires a mental component. This state of mind is called *mens rea* or criminal intent.[41] The *Model Penal Code* defines, in descending order of culpability, the states of mind required to establish a crime.[42] Depending on the charge, an HIV-infected person can be accused of an act of transmission which is intentional, knowing, or reckless.[43] The degree of criminal intent required for a particular crime is central to determining whether criminal liability exists, and, if so, how harshly to punish it.[44]

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warrant was issued without probable cause. On further appeal by the state, the court affirmed the lack of probable cause but chose to decertify the case. *Id.*

34. Fitting, *supra* note 24, at 76. For example, the occurrence of consensual sex or the sharing of intravenous needles may be difficult to prove because the only witnesses were the accused and the victim. *Id.*

35. *See supra* notes 24–26 and accompanying text.

36. Robert May & Roy Anderson, *Transmission Dynamics of HIV Infection*, 326 NATURE 137 (1987). It is unpredictable how much time may pass before a given infected person may show signs of infection. Ranki et al., *supra* note 30, and accompanying text.

37. For consistency and simplicity, "he" is used throughout this Note.

38. High risk contact is conduct likely to transmit AIDS. Fitting, *supra* note 24, at 76–77. Such conduct involves the sharing of body fluids with another person who may have the virus, including transfusions, sharing of needles during intravenous drug use, and a variety of sexual practices. *Id.*

39. Since antibodies usually develop within 6–12 weeks following exposure to the virus, this would be a reasonable period. *See supra* notes 2, 29–31, and accompanying text.

40. The defense will charge that the prosecution failed to prove, beyond a reasonable doubt, that the virus came from the accused and not from some other source. Fitting, *supra* note 24, at 77. To further complicate matters, the victim may not have test results that precede the alleged transmission to offer as proof that he was not already infected. *Id.*

41. The Latin maxim *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty) expresses the basic premise that criminal liability requires some *mens rea*. LAFAVE, *supra* note 28, at 192.

42. MODEL PENAL CODE § 210.2(1) (1980) (defining murder as the killing of a human purposely, knowingly, or recklessly "under circumstances manifesting extreme indifference to the value of human life.")

43. Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3 (Winter–Spring 1989). Modern penal codes typically identify only four culpable states relevant to the defendant's liability: purposeful, knowing, reckless, and negligent. *Id.*

44. *See* MODEL PENAL CODE § 2.02(2) (1980). If the defendant is found liable, "a bad motive might aggravate, or a good motive might mitigate, the severity of the defendant's punishment – but the goodness or badness of his motive does not bear on the prior issue of liability." Husak, *supra* note 43, at 3.

1. Intentional or Knowing Transmission

Most crimes today are statutory crimes which require the defendant to intentionally cause a specific result.[45] A person acts intentionally if his conscious objective is to cause the prohibited, harmful result.[46] The *Model Penal Code* uses a subjective standard for criminal attempts so that if the facts were as the person believes them to be, it is an offense.[47] Applying this standard to AIDS, a person could be convicted of attempted murder if the intent is to kill, regardless of whether the method poses a real risk of transmission.[48] If an HIV-infected person uses a means of transmission that has a reasonably significant chance[49] of killing another, that person has violated a legal duty[50] and should bear full responsibility under the criminal law.

Like causation, knowing transmission of the AIDS virus is difficult to prove. A person acts knowingly if he is consciously aware that his conduct will cause harm or death and proceeds nevertheless.[51] In the context of AIDS transmission, the person must have tested positive for HIV and must know that the particular act is exceedingly likely to transmit the virus.[52] If the person knows he is HIV-positive and ignores this knowledge, the courts may find criminal liability without specific intent.[53] For example, an AIDS carrier may know of his carrier status and choose to ignore the attendant dangers of continued sexual relations without ever manifesting an intent to kill.[54]

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45. LAFAVE, *supra* note 28, at 196. A person who acts can intend the result of his act under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result. *Id.*

46. MODEL PENAL CODE § 2.02(2)(a)(i), (ii) (1980) (defining a purposeful act). A maxim of criminal law states that a person is "presumed to intend the natural and probable consequences of his acts." LAFAVE, *supra* note 28, at 202.

47. MODEL PENAL CODE § 5.01(1)(a).

48. Gostin, *supra* note 25, at 1042. Impossibility or low likelihood is not a defense to an attempted murder charge. *Id.* at n.133. The reason such cases are attempted murder is that, according to Justice Holmes, they address "an evil which threatens death according to common apprehension. ..." Commonwealth v. Kennedy, 48 N.E. 770, 771 (Mass. 1897).

49. The criminal law achieves no valid purpose by punishing the nondangerous. Gostin, *supra* note 25, at 1042.

50. Most crimes are committed by affirmative action rather than by non-action. LAFAVE, *supra* note 28, at 183. "Criminal liability does not arise unless the defendant violates a legal duty." Husak, *supra* note 43, at 8.

51. MODEL PENAL CODE § 2.02(2)(b)(ii) (1980). A person acts knowingly with respect to a material element of the offense if he is aware that it is practically certain that his conduct will cause a certain result. *Id.*

52. Gostin, *supra* note 25, at 1043.

53. Fitting, *supra* note 24, at 79. When, by definition, a crime consists of a designated act without reference to an intent to achieve a further consequence, the intent to do the proscribed act makes the crime a "general criminal intent offense." People v. Love, 168 Cal. Rptr. 591, 600 (1980). A "specific intent" offense requires by definition an intent to achieve some additional consequence. *Id.* For HIV transmission, the person's acts may establish the requisite intent required for a murder charge if the actor's reckless disregard for human safety is sufficient to infer his awareness of the high probability that serious bodily injury will result.

54. Fitting, *supra* note 24, at 80. "Malice aforethought" describes the degree of intent that, if present, establishes sufficient intent that liability for murder may be found, even if specific intent to kill is lacking. *Id.* "When a defendant, with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death, he acts with malice aforethought." People v. Cruz, 605 P.2d 830, 835 (Cal. 1980) (citations omitted). "Malice may be established by evidence of conduct which is 'reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'" United States v.

2. Reckless or Negligent Transmission

Modern statutory crimes also charge defendants with negligently or recklessly committed crimes. A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk."[55] A person acts negligently when he "should be aware of a substantial and unjustifiable risk."[56] For a reckless or negligent act, disregarding a risk must involve a "gross deviation from the standard of conduct that a law-abiding"[57] or "reasonable"[58] person would follow in a similar situation.[59] These acts may subject the accused to charges of criminally negligent battery. The state may claim that harm or death occurred where the suspect failed to warn of a danger of which he knew or should have known.[60]

C. Traditional Charges in Criminal Law for HIV Transmission

The criminal law punishes a culpable act in order to incapacitate and reform the offender while deterring others from committing similar acts. It typically punishes an act, accompanied by a culpable state of mind, that causes or risks causing a serious harm. These requirements, however, are nebulous at best in the context of AIDS transmission.[61]

1. Murder

If an HIV-infected person transmitted the disease to another with the effect of causing that person's death, he could be charged with murder or manslaughter.[62] Murder differs from the lesser offense of manslaughter by the

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Black Elk, 579 F.2d 49, 51 (8th Cir. 1978) (quoting United States v. Cox, 509 F.2d 390, 392 (D.C. Cir. 1974)).

55. MODEL PENAL CODE § 2.02(2)(c) (1980).

56. MODEL PENAL CODE § 2.02(2)(d) (1980).

57. MODEL PENAL CODE § 2.02(2)(c) (1980).

58. MODEL PENAL CODE § 2.02(2)(d) (1980).

59. What is reasonable is usually a question of fact for the jury. The suspect's perception of what acts constitute a high risk means of transmission is important in determining whether his acts were criminally negligent. "[E]stablished and well-known risk factors for AIDS transmission generally include blood transfusions, sharing intravenous needles and certain sexual practices, such as receptive anal intercourse...." Fitting, *supra* note 24, at 79 n.50. "[T]he risks associated with other practices, [however], such as heterosexual intercourse, orogenital contacts or passionate kissing, are less well characterized and thus not generally known." *Id.*

60. *Id.* at 78–79. "Should have known" arises where an actor had sufficient actual knowledge of facts to permit a circumstantial inference that he represented a dangerous risk to others. *Id.* at 79. "The difference between the minimum required *mens rea* of recklessness for manslaughter and criminal negligence for negligent homicide is simply whether the defendant was *aware, but consciously disregarded* a substantial risk the result would happen, or was *unaware but ought to have been aware* of a substantial risk the result would happen." State v. Howard, 597 P.2d 878, 881 (Utah 1979).

61. Martha A. Field & Kathleen M. Sullivan, *Aids and the Criminal Law*, 15 LAW, MEDICINE & HEALTH CARE 46 (Summer 1987). AIDS transmission certainly involves more of an "act" than does transmission of a disease communicable by coughing, sneezing, or other involuntary body functions. *Id.* But the acts most likely to transmit AIDS—sexual intercourse and needle-sharing for intravenous injection of drugs—will rarely be accompanied by a conscious choice or wish to transmit AIDS. *Id.*

62. *Id.* at 47. A problem with accountability in AIDS transmission cases occurs because the victim must die before homicide or manslaughter applies. The period from contraction to symptomatic development, however, is unpredictable. *See supra* notes 2, 29–30, 124, and accompanying text. Furthermore, the accused will probably predecease the victim.

more culpable state of mind that murder requires.[63] Every element of murder requires proof of a purposeful, knowing, or reckless mental state.[64] An AIDS carrier must commit an HIV-transmitting act with the desire to cause his victim to die to be guilty of "purposeful" murder.[65]

A "knowing" murderer causes the death of another if he is consciously aware that he has AIDS or carries the HIV virus, and that his conduct would infect and kill another.[66] For an AIDS transmitter to commit "reckless" murder, he would have to be consciously aware that he carried or was likely to carry[67] the AIDS virus, and that his conduct probably would transmit it to another person and cause that person to die.[68] Moreover, the accused would have to manifest some unusual disregard for human life in addition to that recklessness to be found guilty of reckless murder.[69]

Cases of purposeful or knowing murder by AIDS transmission are conceivable but extremely rare.[70] The AIDS transmitter is rarely certain that an act transmits AIDS, as knowing murder requires.[71] In the unusual situation where the state proves such purpose or knowledge,[72] the person who deliberately used

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63. Field & Sullivan, *supra* note 61, at 47.

64. MODEL PENAL CODE §§ 210.2(1)(a), (b) (1980).

65. Field & Sullivan, *supra* note 61, at 47. "A person commits first degree murder if intending or knowing that his conduct will cause death, such person causes the death of another with premeditation." ARIZ. REV. STAT. ANN. § 13–1105(a)(1) (1989). "Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. ARIZ. REV. STAT. ANN. § 13–1101.1 (1989).

66. A person commits second degree murder if without premeditation:

1. Such person intentionally causes the death of another person; or
2. Knowing that his conduct will cause death or serious physical injury, such person causes the death of another person; or
3. Under circumstances manifesting extreme indifference to human life, such person recklessly engages in conduct which creates a grave risk of death and thereby causes the death of another person.

ARIZ. REV. STAT. ANN. § 13–1104(A)(1)(2), (3) (1989).

67. *See supra* note 38 and accompanying text.

68. Field & Sullivan, *supra* note 61, at 47. Culpable *mens rea* of "recklessly" in context of reckless manslaughter consists of a conscious disregard of a substantial and unjustifiable risk involving a gross deviation from the standard of conduct that a reasonable person would observe in the circumstances. State v. Walton, 133 Ariz. 282, 290–91, 650 P.2d 1264, 1272 (Ariz. Ct. App. 1982).

69. Field & Sullivan, *supra* note 61, at 47. The culpable mental state of "extreme indifference" in context of the crime of second-degree manslaughter is greater in degree of criminality than the culpable mental state involved in the crime of reckless manslaughter. *Walton*, 133 Ariz. at 291, 650 P.2d at 1273.

70. Having sex or sharing needles are highly indirect modus operandi for the person whose intent is to kill. Field & Sullivan, *supra* note 61, at 47.

71. *Id.* Acts which by their very nature are likely to result in death are inherently dangerous. Fitting, *supra* note 24, at 81 n.60. However, although medically demonstrated, the probability of infection and subsequent death from an act that may result in transmission of AIDS is not well established. This obscures any prediction as to whether a court would hold an act that is at risk for AIDS transmission an inherently dangerous act. *Id.*

72. For example, the prostitute who knows he is contagious and continues to solicit sex without using condoms, indifferent to the number of people he fatally infects, or the rapist who knows he has AIDS, who continues to rape and eventually causes the death of his victims. Field & Sullivan, *supra* note 61, at 47.

AIDS to kill is equally as culpable as any other person whose intentional actions resulted in the death of another.[73]

2. Manslaughter

The issue of criminal culpability becomes more clouded in the realm of recklessness and negligence. The application of traditional murder rules becomes more troubling in this area because these two mental states are by far the likeliest to accompany AIDS transmission.[74] Reckless killing can be either murder[75] or manslaughter.[76] When it does not reflect the "extreme indifference to the value of human life" required for reckless murder, the *Model Penal Code* treats it as the lesser offense of manslaughter.[77] A person acts recklessly under the *Model Code* when he "consciously disregards a substantial and unjustifiable risk."[78]

A precise definition of what knowledge suffices as awareness of a "substantial and unjustifiable risk" of AIDS transmission eludes even medical science.[79] Knowledge that one has tested positive to an HIV test or even been diagnosed as having AIDS-related complex (ARC)[80] might be sufficient,

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73. *Id. See* State v. Richmond, 136 Ariz. 312, 318, 666 P.2d 57, 63 (1983), *cert. denied* 464 U.S. 986 (1983) (evidence that the defendant played integral parts in events which caused victim's death, willingly assisted in acts which were intended to cause victim's death, and drove the vehicle that was used to kill the victim was sufficient to support finding that the defendant intended to take a life).

74. Field & Sullivan, *supra* note 61, at 47. For example, a lover consumed by passion who has intercourse without taking precautions against transmission could be guilty of manslaughter if he was aware that he could well be transmitting AIDS to his partner, who later dies. *Id.*

75. MODEL PENAL CODE § 210.2(1)(b) (1980).

76. MODEL PENAL CODE § 210.3(1)(a) (1980).

77. *Id.* A person commits manslaughter by recklessly causing the death of another person. ARIZ. REV. STAT. ANN. § 13-1103(A)(1) (1989). "Manslaughter" is established where a person, aware of a substantial and unjustifiable risk that his or her conduct will cause the death of another, consciously disregards that risk. State v. Fisher, 141 Ariz. 227, 247–48, 686 P.2d 750, 771 (1984), *cert. denied,* 469 U.S. 1066 (1984).

78. MODEL PENAL CODE § 2.02(2)(c) (1980). *See* State v. Marty, 166 Ariz. 233, 801 P.2d 468 (Ct. App. 1990) (defendant's conduct in supplying the driver with drugs and alcohol prior to the accident that killed the driver satisfied the element of conscious disregard of substantial and unjustifiable risk that death of victim would result required for a manslaughter conviction). The state proved that although the defendant knew the driver would be driving during the time in question, he offered him illicit drugs, encouraged the driver's indulgence in them, provided a pipe that enabled the driver to smoke marijuana, and was the conduit through which the driver, a minor, obtained alcohol. *Id.*

79. *See supra* text accompanying notes 29–30. The HIV antibody test does not directly test for AIDS. The Public Health Service recommends that a person be classified as HIV seropositive only after a series of tests. *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY & MORTALITY WKLY. REP. 509, 510 (1987). An initial test, known as ELISA (enzyme-linked immuno assay), detects the presence of antibodies to the AIDS virus. A second test, known as the Western blot, is performed to confirm the results of the ELISA test. Charles Manwick, 254 JAMA 1681, 1681–83 (1985). The result is an occasional false positive. INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCE, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE, AND RESEARCH 113–14 (1986).

80. The current definition of ARC requires at least two clinical symptoms, that must last at least three months, from the following list: lymphadenopathy, diarrhea, fatigue, fever, night sweats and weight loss. In addition, there must be both a low ratio of T-helper to T-suppressor cells and a low number of T-helper cells. Finally, there must be at least one further laboratory finding regarding the blood count: elevated levels of serum globulins, low white cell count, low red cell count, or low platelet count. Centers for Disease Control, *Classification System for*

although persons with ARC symptoms do not always contract full-blown AIDS.[81] Persons incubating the virus in the period before ELISA tests can detect the disease, apparently looking and feeling healthy, may be as contagious as people who have full-blown cases of AIDS.[82] Knowledge of prior participation in high risk activities might suffice, even in the absence of any test or diagnosis.[83] The obvious problem in applying manslaughter provisions to AIDS transmission cases is that it could encompass a number of situations where a person knew a risk of transmitting AIDS existed,[84] but had no desire to kill his or her sexual partner.

3. Negligent Homicide

A person acts negligently when he "should be aware of a substantial and unjustifiable risk."[85] Negligent homicide under the *Model Penal Code* requires only that the actor disregard a risk he "should be aware" of, even if he is not aware of such a risk.[86] The requirement of "conscious disregard" in reckless crimes does not attach to negligent homicide. The Code limits negligence for this crime to "*gross* deviation from ordinary standards of conduct."[87]

Prosecutors could treat many examples of transmissions of AIDS as negligent homicide despite this strict requirement.[88] A person who does not actually know that he has AIDS, or that he carries the AIDS virus, or even that AIDS is deadly and transmittable by some acts he engages in, is vulnerable to prosecution for negligent homicide.[89] A jury could convict if they believed that a "reasonable person" in similar circumstances should have known these facts, even if the defendant genuinely did not.[90] The crime of negligent homicide is therefore susceptible to bias, when the fears and misconceptions of juries influence their judgment as to what conduct is "reasonable" for an HIV-infected person.[91]

Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection, 105 ANNALS OF INTERNAL MED. 234 (1986).

81. *Id.*

82. *See* Deborah M. Barnes, *Grim Projections for AIDS Epidemic*, 232 SCIENCE 1589–90 (1986). There is a second epidemic of persons who harbor the virus and who show few or no symptoms. The number of persons infected with HIV in the United States is estimated to be between 945,000 and 1.4 million people. *Id.*

83. Gostin, *supra* note 25, at 1051. Opinion polls show that most of the population think that gays and IV drug users are at high risk for AIDS. Singer et al., *supra* note 16, at 588–89. However, AIDS is spreading at an exponential rate through the general population, which indicates that the traditional "high risk" group is disappearing.

84. Field & Sullivan, *supra* note 61, at 48. It is conceivable that the criminal law would hold high risk category persons accountable not only for what they know, but also for what they reasonably should know. Gostin, *supra* note 25, at 1051. If a person has engaged in high risk behavior and has failed to be tested for AIDS, the courts could put him in the same position as if he knew he were seropositive. *Id.*

85. MODEL PENAL CODE § 2.02(2)(d) (1980).

86. *Id.*

87. MODEL PENAL CODE § 210.4 (1980), cmt. 3, at 86. The defendant's failure to perceive a risk that he will cause death must involve a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." MODEL PENAL CODE § 202(2)(d) (1980).

88. Field & Sullivan, *supra* note 61, at 48.

89. *Id.*

90. *Id.* Whether an action is reasonable is a question of fact for the jury.

91. *Id.* This possibility illustrates the quintessential danger of 20/20 hindsight.

4. Attempted Murder

The typical attempt statute requires an act toward the commission of some offense.[92] A guilty verdict for attempted murder turns principally on the intent of the accused.[93] Because attempted murder does not require the death of the victim, the liability inquiry scrutinizes the intent of the actor. By focusing on intent, the factor most closely correlated with culpability in the transmission of AIDS,[94] "attempt" crimes may be more appropriate for AIDS transmission crimes than homicide.

Attempted murder applies where the victim has not yet died of AIDS, and even where the victim has not yet become infected with the virus.[95] The *Model Penal Code* provides for attempt liability where one "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be."[96] As long as the transmitter had AIDS or believed he did,[97] engaged in conduct that could transmit the disease, and did so with the requisite state of mind, he could be guilty of an attempt to kill.[98]

5. Assault

Assault may be the most appropriate charge for AIDS transmission because the victim need not die for the offense to be complete. A person can be guilty of misdemeanor assault if he "attempts to cause or purposely, knowingly or recklessly causes bodily injury to another."[99] Aggravated assault, a second degree felony, occurs if a person "attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life."[100]

An assault is an unwanted or offensive touching.[101] Consent of the victim, therefore, is relevant in assault cases charging HIV transmission.[102] The common law regards consent as a complete defense to assault because consent viti-

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92. LAFAVE, *supra* note 28, at 431.

93. One of the basic premises of the criminal law is that bad thoughts alone cannot constitute a crime. *Id.* This is no less true as to an attempt, and thus it is not enough that the defendant intended to commit a crime. He must act, but not any act will suffice. *Id.*

94. *See supra* notes 50–54 and accompanying text.

95. Field & Sullivan, *supra* note 61, at 48.

96. MODEL PENAL CODE § 5.01(I)(a) (1980).

97. The common-law doctrine of "factual impossibility" might provide a defense if one's belief that one was an AIDS carrier proved in fact to be mistaken, so that one's "attempt" proved futile. Many jurisdictions, however, have abandoned that defense because it makes liability of equally culpable persons turn on fortuity.

98. *See* Field & Sullivan, *supra* note 61, at 48.

99. MODEL PENAL CODE § 211.1(I)(a) (1980).

100. MODEL PENAL CODE § 211.1(2)(a) (1980). Use of a deadly weapon is the typical conduct manifesting the required indifference. Aggravated assault was one of the crimes charged in a military court-martial on the theory that the AIDS virus is a deadly weapon. *HIV Positive Private Charged with Assault*, AM. MED. NEWS, May 22–29, 1987, at 1 (case of Army Pfc. Adrian Morris, Jr., who faced a court-martial for sexual relationships while infected with HIV).

101. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 10, at 43 (5th ed. 1984).

102. Consent of the victim is a defense only when it negatives an element of the offense or precludes infliction of the harm to be prevented by the law defining the offense. LAFAVE, *supra* note 28, at 408.

ates the element of offensiveness.[103] The *Model Penal Code*, in contrast, treats consent as a defense in some cases but not in cases of serious bodily harm.[104]

Informed consent is critical. Consent to sexual activity should not constitute consent to contract AIDS.[105] Rather, the victim must agree to sex with the transmitter knowing that the potential partner has AIDS or tested positive for HIV exposure for consent to preclude a prosecution for assault.[106] The *Model Penal Code* allows no consent defense, even in cases of consensual sex where AIDS is transmitted, because it legally precludes consent to an assault resulting in serious bodily injury, like being infected with a deadly virus.[107]

D. Conclusion

A major problem with using traditional criminal offenses in prosecuting HIV transmission crimes is proof of causation. Most of the victims of AIDS have engaged in multiple high-risk activities. 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. Furthermore, proof of actual transmission attributable to a specific individual would generally be extremely difficult or impossible. A careful analysis of traditional homicide and assault offenses shows that established criminal law is an inappropriate method for treating AIDS transmission as a crime.

II. APPLICATION OF PUBLIC HEALTH STATUTES TO HIV TRANSMISSION

Public health offenses present an alternative to criminal prosecutions for HIV transmission. Old infectious disease and venereal disease statutes often contain criminal offenses. Several states have long had statutes making it a criminal offense for a person with a communicable disease to willfully or knowingly expose another person to that disease.[108] In addition, many states

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103. Field & Sullivan, *supra*, note 61, at 49.

104. MODEL PENAL CODE § 2.11(2)(b) (1980) (permitting consent as a defense to serious bodily injury only where such injury is a "reasonably foreseeable hazard" of participation in sports or athletic contests). The rationale given for the general rule that consent of the victim is not a defense in a criminal prosecution is that a criminal offense is a wrong affecting the general public, at least indirectly, and consequently cannot be licensed by the individual directly harmed. LAFAVE, *supra* note 28, at 408.

105. It is no defense to a charge of murder that the victim, upon learning of the defendant's homicidal intentions, furnished the defendant with the gun and ammunition. Martin v. Commonwealth, 37 S.E.2d 43, 47 (1946). Nor is it a defense to the statutory offense of fraternity "hazing" that the pledges consented to the activity. People v. Lenti, 260 N.Y.S.2d 284, 287 (1965).

106. If the crime is defined in terms of the victim's lack of consent, the consent of the victim is obviously a bar to conviction. LAFAVE, *supra* note 28, at 408. For example, a woman's consent to sexual intercourse negates an element of the offense of rape, thereby precluding any prosecution for rape. *Id.*

107. *See supra* note 104 and accompanying text.

108. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4419b-1, 6.01-6.07 (West 1986) (repealed 1989) (making it a third degree felony for a person to knowingly conceal or attempt to conceal the fact that he has been exposed to or is a carrier of a communicable disease that constitutes a threat to the public health, and a misdemeanor for a person with such a disease to attend or attempt to attend a public or private place or gathering).

have specifically criminalized willfully or knowingly exposing another to sexually transmitted diseases.[109]

These public health statutes proscribe specific sexual acts that transmit venereal diseases.[110] A constitutional analysis of any form of sexual regulation requires a balancing test. One must balance the government's right to control the spread of disease through maintaining the health and welfare of the general population[111] with the individual's right to privacy and freedom in sexual intimacy.[112] When balancing these two competing interests, the courts have found sexual regulation constitutionally permissible where the government demonstrates a compelling justification for intruding behind closed doors.[113] However, the United States Supreme Court has recognized, at least in marriage, an individual's privacy in and freedom to have sexual intimacy.[114]

A constitutional analysis of AIDS-related behavioral regulation similarly requires a delicate balancing of these two compelling interests. The Supreme Court has declared that the government has the right to control the spread of disease.[115] The courts traditionally have been highly deferential to public health measures, including isolation and quarantine.[116] No state has seriously proposed

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109. Significantly, the Federal Government has recognized the threat that AIDS poses to the general population. As of May 8, 1987, the Department of Health and Human Services added AIDS to the list of dangerous contagious diseases. 42 C.F.R. § 34.2(b) (1986) now includes HIV, chancroid gonorrhea, granuloma inguinale, infectious leprosy, lymphomagranuloma venereum, infectious syphilis and active tuberculosis. *See also, e.g.*, CAL. HEALTH & SAFETY CODE § 3198 (West 1990) (making it a misdemeanor for any person afflicted with a venereal disease to willfully expose himself to others, and for any person to willfully expose to others a person afflicted with the disease); COLO. REV. STAT. § 25-4-401 (1990) (making it unlawful for any person who has knowledge or reasonable grounds to suspect that he is infected with a venereal disease to willfully expose or infect another, or to knowingly perform an act that exposes or infects another person with venereal disease); FLA. STAT. ANN. §§ 384.23, 384.24 (West 1993) (making it a second-degree misdemeanor for any person infected with venereal disease to have sex with a person of the opposite sex or to expose another to infection); N.Y. PUBLIC HEALTH LAW, §§ 2307, 2309 (McKinney 1993) (making it a misdemeanor for anyone who knows he has an infectious venereal disease to have sexual intercourse with another).

110. *See supra* note 109.

111. Gostin, *supra* note 25, at 1030. The state's interest in protecting the public from serious harm is compelling. *Id.*

112. The interest of the individual grows in proportion to the level of coerciveness of the public health measure to be applied. *Id.* at 192.

113. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia statute criminalizing consensual sodomy). The Court found the Georgia law had a sufficient rational basis in notions of morality "deeply rooted in this Nation's history and tradition." *Id.* at 192.

114. Courts often give constitutional protection against state interference to rights associated with intimate conduct. *See* Loving v. Virginia, 388 U.S. 1 (1967) (affirming right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state criminal law barring even married couples from using contraceptives); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (protecting right of procreation).

115. *See, e.g.*, Jacobsen v. Massachusetts, 197 U.S. 11 (1905) (government can force people to receive smallpox vaccinations by way of its police power); O'Connor v. Donaldson, 422 U.S. 563 (1975) (government has the right to confine contagious people).

116. *See* Scott Burris, *Fear Itself: AIDS, Herpes, and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479 (1985); William J. Curran et al., *AIDS: Legal and Policy Implications of the Application of Traditional Disease Control Measures*, 15 LAW, MED. & HEALTH CARE 27, 32 (1987). Disease-based isolation or quarantine, however, impacts directly on individual rights of liberty and travel protected by the Constitution, as recognized by the state. Addington v. Texas, 441 U.S. 418, 425 (1979) (standard of proof for civil commitment for the mentally ill). Under strict scrutiny, the state must have a compelling interest and achieve that interest by narrowly

a general isolation statute, and it is generally agreed that such a program would be held unconstitutional under modern doctrine.[117]

At present, spreading a venereal disease is criminal in about half the states in the nation.[118] Most treat such willful communication of disease as a misdemeanor punishable by fines or by imprisonment for no more than a year.[119] While the state cannot punish people simply for having a certain disease, the state can criminalize participating in acts in which disease is a factor.[120]

These types of venereal disease statutes are well tailored to culpability in the AIDS context because most include only persons who know they have the disease and who willfully or knowingly expose another.[121] The scope of these statutes, however, contains no language specific to AIDS transmission. Consequently, these enactments are an improper vehicle for prosecution of HIV transmission. Contagious disease statutes are overinclusive with respect to AIDS because they construe exposure as casual contacts that pose no risk whatsoever of spreading the virus.[122] On the other hand, venereal disease statutes are underinclusive because AIDS can be spread by means other than sex, such as needle-sharing and blood transfusions.[123]

The most important factor the public health statutes fail to consider is the deadly nature of the virus.[124] AIDS is incurable and fatal. The venereal and contagious disease statutes may impose only misdemeanor liability because modern medicine can cure most, if not all, of the diseases in such statutes.[125] These statutes preclude felony liability for the highly culpable cases of purposeful, knowing, or reckless-and-indifferent AIDS transmission.[126]

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tailored and minimally restrictive means. Korematsu v. United States, 323 U.S. 214, 218 (1944) (only the gravest imminent danger to public safety can justify removal from one's home).

117. *See generally*, Larry Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 468–71 (1986); Note, *Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1281–84 (1986). However, disease-based isolation has already occurred in Cuba and is an option considered valid by other countries. Robert Betancourt, *Cuba's Callous War on AIDS*, N.Y. TIMES, Feb. 11, 1988, at A35, col. 2.

118. The majority of these statutes address only syphilis, gonorrhea, and chancroid. *See* Louis A. Alexander, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101, 116 n.95 (1985).

119. *See* CAL. HEALTH & SAFETY STAT. §3198 (West 1990); COLO REV. STAT. § 25–4–401 (1988); FLA. STAT. ANN. §§ 384.23, 384.24 (West 1992); N.Y. PUBLIC HEALTH LAW §§ 2307, 2309 (McKinney 1985). *See also*, Alexander, *supra* note 118, at 116 n.95.

120. Robinson v. California, 370 U.S. 660 (1962). The United States Supreme Court held that the Eighth Amendment barred conviction of a person based merely on his status as a narcotics addict. The Court reasoned that the narcotics addiction was "apparently an illness which may be contracted innocently or involuntarily." *Id.* at 667. The Court stated that while it could not be a crime "to be mentally ill, or a leper, or to be afflicted with venereal disease. A State might determine that the general health and welfare requires that the victims of these ... afflictions be dealt with by compulsory treatment, involving quarantine [involuntary], confinement, or sequestration" and by imposition of penal sanctions for failure to comply with compulsory treatment. *Id.* at 666.

121. *See supra* notes 108–09 and accompanying text.

122. Field & Sullivan, *supra* note 61, at 50.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

On the other hand, the very deadliness of AIDS makes the public health statutes too harsh in other respects.[127] Most of these venereal statutes impose a sentence of temporary abstinence until antibiotics cure the infected person.[128] For the person infected with HIV or AIDS, these statutes demand abstinence for life. Such an interpretation is not only unrealistic, but also unfair. Society never has had success in enforcing outright bans on human behavior in the past.[129] In conclusion, traditional public health offenses, like traditional criminal offenses, are also inappropriate to prosecute cases of AIDS transmission.

III. ANALYSIS OF CASE LAW INVOLVING INTENTIONAL HIV TRANSMISSION

In this present atmosphere of public health crisis, with no prospect of early marketing of preventative vaccines for HIV, state prosecutors have turned to compulsory state powers as a legal remedy for intentional transmission of HIV.[130] The relentless nature of the epidemic and the fact that the virus is transmitted predominantly through volitional behavior fuels political and public pressure for the use of coercive powers.[131] Because the HIV carrier can control his actions which transmit the virus, the state prosecutors' purpose in seeking criminal penalties for irresponsible and dangerous behavior is to limit the spread of AIDS.[132]

A. Judicial Ambiguity in Early Adjudications of Willful HIV-Exposure Bite Cases

A Michigan court dealt with the issue of HIV transmission in one of the earliest reported decisions dealing with AIDS. In 1986 in Flint, Michigan, John Richards spat on police officers during his arrest for a traffic violation.[133] The state subsequently charged Richards with felony assault with intent to commit murder after discovering that Richards had been diagnosed as having AIDS and was aware of this fact.[134]

To establish Richards' alleged intent to commit murder, the prosecutor had to prove that the ability of saliva to transmit AIDS was common knowledge. The court ultimately dismissed the case because the prosecution presented no documentation that AIDS could be transmitted through saliva.[135] The *Richards* case effectively resolved the standard of proof for AIDS transmission.[136] The court needed medical evidence to substantiate HIV transmission through saliva. The question remained, however, exactly what evidence would convince the

127. *Id.*
128. *Id.*
129. Gostin, *supra* note 25, at 1057–58.
130. *Id.* at 1018–19.
131. *Id.*
132. *Id.*
133. People v. Richards, No. 86–36743–FH (Flint, Mich. 1986). In the course of the arrest he stated that he was going to die and that he was going to take the officers with him.
134. *Id.*
135. *Id.*
136. Fitting, *supra* note 24, at 74.

court of the reasonable likelihood of viral transmission occurring through a human bite.[137]

The New York courts handled a similar bite case the following year.[138] In 1987, Miriam Sanders bit a police officer while resisting arrest for prostitution, and then told him she had AIDS.[139] The prosecutor that submitted her statement proved the purpose of her bite was to transmit a virus she believed she had.[140] The state sought to establish that teeth and saliva of an AIDS carrier could qualify as a lethal instrument, based on medical reports that scientists isolated the AIDS virus in saliva.[141]

This time the prosecution was prepared to offer the court the documentary evidence *Richards* lacked.[142] However, when a medical exam revealed the victim's skin had not been broken and the bite could not have transmitted the virus, the state reduced the charges to misdemeanor third-degree attempted assault.[143] This reduction of charges left unresolved the question of whether the saliva of an AIDS carrier qualified as a lethal instrument.

That same year in California, Brian Barlow bit a police officer while resisting arrest.[144] At the hospital the police asked Barlow, prior to any *Miranda*[145] warnings, if he was a homosexual and if he had AIDS.[146] The state charged Barlow with battery against a police officer and resisting arrest. At the arraignment, the municipal court granted the state a search warrant authorizing blood tests to determine the presence of the AIDS virus.[147] The court of appeals reversed the lower court's ruling and held the warrant violated the defendant's

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137. Despite the fatal nature of the virus, transmission of the AIDS virus had yet to be construed as great bodily injury. In *People v. Johnson*, however, the court held that a finding of great bodily injury can be based upon the transmission of a different virus, the herpes simplex type II. 181 Cal. App. 3d 1137, 1140 (1986).

138. People v. Sanders, (N.Y. 1987), *reported in* METROPOLITAN NEWS (Los Angeles), June 11, 1987, at 16, col. 2.

139. *Id.* The state charged her with first-degree assault and first-degree reckless endangerment.

140. *Id.*

141. Fitting, *supra* note 24, at 72.

142. *Id.*

143. Without blood-saliva contact evidenced by broken skin, the prosecution lacked sufficient grounds to go forward with first degree assault. The prosecution could not establish that Sanders had the present ability to transmit the virus without obtaining a warrant to compel the taking of a blood sample. Furthermore, the defendant refused to submit to an AIDS test and insisted after the arrest that she was not infected. METROPOLITAN NEWS (Los Angeles), June 15, 1987, at 5, col. 2.

144. Barlow v. Superior Court, 236 Cal. Rptr. 134 (1987) *aff'd but decertified in* Barlow v. Superior Court, 190 Cal. App. 3d 1652 (1987). The record states that Brian Barlow was marching in a Gay Pride Parade when he got into a scuffle with the officers policing the event. During the struggle Barlow bit one officer on the shoulder and the other on the knuckles, drawing blood in each case.

145. Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda* the Court held that since a custodial interrogation contains inherently compelling pressures, a suspect in custody and facing interrogation must be informed, prior to interrogation, of his constitutional rights against self-incrimination according to the Fifth Amendment and the right to counsel according to the Sixth Amendment.

146. Barlow answered that he was a homosexual and that they "better take it that [he did have] AIDS for the officer's [sic] sake." In response to that statement, the hospital took samples of Barlow's blood for analysis of AIDS over his objection and without a warrant. *Barlow*, 190 Cal. App. 3d at 1653 (omitted from published reporters).

147. The state needed the blood sample to show Barlow's intent to kill or intent to inflict great bodily harm. *Id.*

right to freedom from unreasonable search and seizure.[148] Although the appellate court decided the case on the narrow issue of insufficient probable cause,[149] it noted post-bite blood tests were inadmissible to prove Barlow's state of mind or intent at the time of the bite.[150] Thus the court avoided deciding the issue of whether a positive AIDS test would provide sufficient evidence to show intent to kill or intent to inflict great bodily injury.

In summary, the courts did not answer whether a positive AIDS blood test means the defendant has the present ability to inflict harm.[151] In addition, they did not decide whether the transmission of the AIDS virus, once accomplished, constitutes a force likely to produce great bodily injury.[152] Nor did they resolve the issue of whether AIDS-infected blood constitutes a deadly weapon.[153]

B. Courts Confront HIV Transmission: Any Method to the Madness?

In 1988, the Eighth Circuit Court of Appeals distinguished itself from the morass of judicial indecision of the lower courts in *United States v. Moore*.[154] In *Moore*, the court affirmed the appellant's conviction of assault with a deadly or dangerous weapon, his mouth and teeth, when he bit two federal correctional officers.

1. Eighth Circuit Affirms Mouth and Teeth as Deadly and Dangerous Weapons

Appellant Moore tested positive for HIV.[155] A prison doctor told him the disease could be fatal and that HIV could be transmitted by way of blood.[156] Despite this knowledge, Moore bit two correctional officers during a struggle, holding his mouth against the bites from five to seven seconds.[157]

In *Moore*, a jury convicted the appellant on two counts of assault with a deadly and dangerous weapon upon federal correctional officers engaged in their official duties.[158] On appeal Moore asserted the evidence at trial was insufficient to sustain a finding that his mouth and teeth were a deadly and dangerous weapon.[159] Moore also claimed the district court committed reversible

148. On defendant's appeal, the court held the warrant invalid for lack of probable cause. On further appeal by the state, the court affirmed the lack of probable cause but chose to decertify the case. *Id.*

149. *Id.* Any violation of Fifth and/or Sixth Amendment rights against self-incrimination will result in the suppression at trial of the incriminating statements made by the suspect. In AIDS transmission cases, if the defendant is not properly warned, any incriminating statements he makes supporting probable cause for blood tests will be suppressed. Should the blood test determine the defendant has AIDS, that evidence still is excluded. Fitting, *supra* note 24, at 89.

150. *Barlow*, 190 Cal. App. 3d at 1653. "[T]o constitute crime there must be unity of act and intent, in every crime there must exist a union ... of act and intent, or criminal negligence." CAL. PENAL CODE § 20 (West 1985 & Supp. 1987).

151. *See supra* notes 138–50 and accompanying text.

152. *See supra* note 137 and accompanying text.

153. *See supra* notes 133–37 and accompanying text.

154. 846 F.2d 1163 (8th Cir. 1988).

155. *Id.* at 1164.

156. *Id.*

157. *Id.* at 1165. Moore later claimed he "wanted to hurt [the officers] bad, wanted to kill the bastards" and hoped "the wounds that he inflicted on the officers when he bit them were bad enough that they get the disease that he has." *Id.*

158. *Id.* at 1164.

159. *Id.*

error by refusing to instruct the jury that if the government failed to prove AIDS could be transmitted by means of a bite, then it failed to prove Moore's mouth and teeth were a deadly and dangerous weapon.[160]

The Eighth Circuit defined a "deadly and dangerous weapon" as an object "used in a manner likely to endanger life or inflict serious bodily harm."[161] It concluded "what constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to 'endanger life or inflict great bodily harm.'"[162] The court noted further that it was the "*capacity* for harm in the weapon and its use that [was] significant, not the *actual* harm inflicted."[163] Moore used his mouth in a way that could have transmitted disease, the court observed, and it was only a fortuity that he did not do so.[164]

An expert medical witness testified he agreed with a manual that stated AIDS could be transmitted only through contact involving the exchange of bodily fluids.[165] He further testified that while the virus has appeared in saliva, no one has shown it to spread through contact with saliva.[166] The doctor also stated that a human bite, apart from the AIDS context, can be very dangerous and can result in a serious infection.[167] From this testimony, the court found the evidence sufficient to support the jury's finding that Moore used his mouth and teeth as a deadly and dangerous weapon.[168] Since a human bite has the capacity to inflict serious bodily harm, the court noted, the mouth and teeth are a deadly and dangerous weapon regardless if the harm inflicted was insubstantial.[169]

However, the *Moore* court found the state's medical evidence failed to establish the mode of transmission.[170] The Eighth Circuit held the testimony was insufficient to convince the court of the reasonable likelihood that viral transmission could occur through a human bite.[171] The court reasoned that for legal purposes, the "possibility of AIDS transmission by means of a bite was too remote to support a finding that the *mouth* and *teeth* may be considered a deadly and dangerous weapon."[172] The state failed to prove causation.[173] The court did not, however, resolve whether the AIDS virus alone could be considered a dangerous and deadly weapon in attempted murder or aggravated assault charges.

160. *Id.*
161. *Id.* at 1166.
162. *Id.* (quoting United States v. Johnson, 324 F.2d 264, 266 (4th Cir. 1963)).
163. *Id.* at 1167.
164. *Id.*
165. *Id.* at 1165.
166. *Id.*
167. *Id.*
168. *Id.* at 1167.
169. *Id.*
170. *Id.* at 1168.
171. *Id.* at 1167–68.
172. *Id.* at 1168 (emphasis added).
173. *See supra* notes 27–40 and accompanying text.

2. *Alabama Appellate Court Rejects Judicial Notice of Biting as Means of HIV Transmission*

In *State v. Brock*,[174] the Alabama Court of Criminal Appeals addressed the question left unanswered by the Eighth Circuit in *Moore*. The court concluded that Alabama's assault statutes did not preclude a finding that the AIDS virus itself could meet the statutory requirements of proving assault with a deadly weapon or a dangerous instrument capable of causing serious physical injury.[175] The court found, however, that the state failed to carry its burden of proof.[176] The court held that a defendant could not be convicted of first-degree assault[177] on the basis of serious physical injury without evidence that the defendant was aware that AIDS could be transmitted through the human bite or that the human bite had the capacity to cause serious physical injury.[178]

The Alabama criminal statutes define "deadly weapon" as anything "designed, made or adapted for the purposes of inflicting death or serious physical injury."[179] The criminal code defines a "dangerous instrument" as anything, "which under the circumstances [in which it is] used, attempted to be used or threatened to be used, is highly capable of causing death or serious physical injury."[180] The statute defines "serious physical injury" as an injury that "creates a substantial risk of death."[181]

The state argued that because the defendant had the AIDS virus, the defendant's using his mouth to bite the officer met the requirements of use of a deadly weapon or dangerous instrument causing serious physical injury.[182] Alabama charged Brock with one count of attempted murder[183] and two counts of second degree assault.[184] The appellate court, however, noted that the state presented absolutely no evidence as to the nature of AIDS or the manner in which it can be transmitted.[185] The state did not demonstrate that Brock knew, or had been told, that AIDS could be transmitted through a human bite.[186] Consequently, the state failed to prove that the defendant used his mouth and

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174. Brock v. State, 555 So. 2d 285 (Ala. Crim. App. 1989).
175. *Id.* at 288.
176. *Id.*
177. The statute provides that a person commits first-degree assault if: (1) with the "intent to cause serious physical injury to another person, he causes serious physical injury to any person by means of deadly weapon or dangerous instrument." ALA. CODE § 13A–6–20(a)(1) (1975).
178. *Brock*, 555 So. 2d at 288. While the court noted that AIDS may very well be transmitted through a human bite, it did not believe such transmission was an established scientific fact. *Id.*
179. ALA. CODE § 13A–1–2(11) (1975).
180. ALA. CODE § 13A–1–2(12).
181. ALA. CODE § 13A–1–2(9).
182. *Brock*, 555 So. 2d at 287. Appellant Brock was a prisoner confined to the "AIDS Unit" of the Correctional Facility. A registered nurse at the prison told Brock that he was infectious to other people. During a routine cell search, Brock scuffled with a prison official. After the officer handcuffed Brock, Brock bit the officer on the arm. *Id.* at 286–87.
183. ALA. CODE §§ 13A–4–2, –6–2 (1975).
184. ALA. CODE § 13A–6–21 (1975). The jury convicted Brock on first degree assault on count one, second degree assault on count two, and third degree assault on count three. *Brock*, 555 So. 2d at 286. The appellate court, however, reversed the conviction of Appellant Brock for first-degree assault. *Id.* at 289.
185. *Brock*, 555 So. 2d at 288.
186. *Id.*

teeth under circumstances "highly capable of causing death or serious physical injury."[187]

While the Alabama court took judicial notice that AIDS is a life-threatening disease and that contraction of the virus constitutes a serious physical injury, it did not take judicial notice of biting as a means of spreading AIDS.[188] Without evidence at trial to the effect that AIDS can be transmitted through a human bite, the court was constrained from finding transmission of HIV through a bite as an established scientific fact.[189] *Brock*, therefore, is reminiscent of *Richards*. The prosecution again failed to provide evidence sufficient to convince the court that HIV could be transmitted through the human bite.

3. Present Ability to Transmit HIV Unnecessary to Finding of Criminal Culpability

In *State v. Haines*[190] the Indiana court concluded that the intent of the defendant in biting the police officers was the critical element in determining criminal liability. In *Haines*, the state charged the defendant with three counts of attempted murder and the jury returned guilty verdicts.[191] The judge, however, granted the defendant's motion to vacate the judgment and he entered a judgment of conviction on three counts of battery as Class D felonies.[192] On appeal, the Indiana Court of Appeals affirmed the defendant's attempted murder convictions and reinstated the jury's verdict.[193]

The defendant claimed the state failed to meet its burden in showing that Haines' conduct constituted a substantial step toward murder.[194] The Indiana Court of Appeals, however, observed that its attempted murder statute clearly rejects the defense of impossibility.[195] When the defendant has done all that he believes necessary to cause the particular desired result, regardless of what is actually possible under existing circumstances, he has committed an attempt.[196] The state did not have to prove that Haines' conduct could actually have killed.[197]

The appellate court held that the evidence at trial that the defendant carried the AIDS virus, was aware of the infection, believed it to be fatal, and intended to inflict others with the disease by spitting, biting, scratching and

187. ALA. CODE § 13A-1-2(12). "[T]he state failed to prove that the defendant intended to cause serious physical injury when he bit [the officer]." *Brock*, 555 So. 2d. at 288.

188. *Brock*, 555 So. 2d at 287–88.

189. *Id.*

190. 545 N.E.2d 834 (Ind. Ct. App. 1989). *See supra* notes 1–12 and accompanying text.

191. IND. CODE § 35-41-5-1, -42-1-1 (1985 & Supp. 1992); *Haines*, 545 N.E.2d at 836.

192. *Haines*, 545 N.E.2d at 836; IND. CODE § 35-42-2-1(2)(A) (1985 & Supp. 1992).

193. *Id.* at 841.

194. *Id.* at 838.

195. *Id.* Indiana has no requirement of present ability to complete the crime, nor that the crime be factually possible. "It is no defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted." IND. CODE § 35-41-5-1(b) (1985).

196. *Haines*, 545 N.E.2d at 839. "Haines repeatedly announced that he had AIDS and desired to infect and kill others. At the hospital, Haines was expressly told by doctors that biting, spitting, and throwing blood was endangering others." *Id.*

197. *Id.*

throwing blood supported the jury's verdict.[198] The inference that Haines' conduct amounted to a substantial step toward murder was reasonable.[199] The criminal liability of the defendant, as decided by the *Haines* court, turned on his purpose as manifested through his conduct.[200] The Illinois court refused to exonerate the defendant's *mens rea* simply because he might not have successfully infected the police officer with the fatal virus.

4. Intent to Transmit HIV Constitutes the Crime of Attempt

In a 1990 decision,[201] the Georgia Court of Appeals followed the *mens rea* rationale of the *Haines* court in affirming a defendant's conviction for aggravated assault with intent to murder.[202] "Appellant [Scroggins] contend[ed that] the state did not prove the bite was a 'deadly weapon' as it was required to do."[203] The court, however, found that appellant misconstrued the code provisions.[204] "The statute deliberately set[s] out the offense of having *intent* as disjunctive to an assault *with a deadly weapon.*"[205] "The law expressly proscribes, as a discrete offense, not the *attempt* to murder, but an *assault* made 'with *intent* to murder.'"[206]

The court observed that "the concept of requiring proof that appellant's bite and/or saliva constituted a deadly weapon [was] irrelevant to the offense charged and [did] nothing but confuse the determination of the offense."[207] The indictment did not charge use of a weapon likely to produce death. The common law "offense of assault with intent to murder[208] ... never required proof of use of a deadly weapon or any weapon at all," nor did the statute.[209]

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198. *Id.* at 841.
199. *Id.*
200. "His biological warfare with those attempting to help him is akin to a sinking ship firing on its rescuers." *Id.* at 838.
201. Scroggins v. State, 401 S.E.2d 13 (Ga. Ct. App. 1990). Officer Crook responded to a domestic dispute call and attempted to subdue appellant Scroggins at the scene. Crook got Scroggins down to the ground and straddled him. Crook heard Scroggins making noises with his throat as if to bring up spittle, when Scroggins sat up and bit Crook on the forearm. "The bite was strong enough to tear through the officer's long-sleeved shirt, and [it] left distinct, full-mouth bite wounds which took ten months to heal." *Id.* at 15. At the hospital Scroggins told a nurse he was HIV positive. When Crook asked him if he had AIDS, Scroggins just looked at him and laughed. Just two months earlier, doctors had diagnosed Scroggins as HIV-positive. *Id.*
202. GA. CODE. ANN. §§ 16-5-21(a)(1)-(2) (Harrison 1990). "A person commits the offense of aggravated assault when he assaults: (1) *With intent to murder*, to rape, or to rob; *or* (2) With a deadly weapon *or* with any object, device or instrument which ... is likely to or actually does result in serious bodily injury." (emphasis added).
203. *Scroggins*, 401 S.E.2d at 16. The appellant contended that the evidence did not support a verdict of guilty for aggravated assault with intent to murder. He argued that the state presented no evidence that the HIV virus could be transmitted by human saliva. He further noted an expert witness testified that at best only a theoretical possibility exists of transmitting the virus via human saliva. *Id.*
204. *Id.*
205. *Id.* "[T]here is no requirement that the assault must be with a deadly weapon in order to convict of this offense.'" *Id.* (quoting Thadd v. State, 203 S.E.2d 230, 232 (Ga. 1974)).
206. *Id.* "The law has an indisputable interest in censuring assaultive behavior committed with the *intent* to do another, more serious crime, irrespective of the method of assault." *Id.*
207. *Id.* at 16-17.
208. *See* Wright v. State, 148 S.E. 731 (1943).
209. *Scroggins*, 401 S.E.2d at 17. The statute did not "define what constitutes the offense, but merely upgraded its status from misdemeanor to felony." *Id.*

Here, the state indicted the appellant for assault with intent to commit murder, which was all it needed to allege.[210] "There was no requirement to prove the method of assault was deadly or likely to inflict serious bodily injury."[211] "The assault, coupled with the intention to do worse, [was] the crime."[212]

"Evidence that the appellant sucked up excess sputum before biting ... Crook" supports the jury's finding of "intent to murder."[213] This action showed a "deliberate, thinking act, rather than [a] purely spontaneous[]" act.[214] Appellant's laughter when the officer asked him if he had AIDS also supports the verdict.[215] The court concluded that "[e]vidence of an intent to murder, coupled with the assault, exist[ed] beyond a reasonable doubt in this case."[216] The court believed the "appellant's assault amounted to such wanton and reckless disregard as to whether he *might* transmit the disease, that the jury could infer a malicious intent ... to murder."[217]

In short, all of the courts examined the defendant's intent to harm in determining criminal culpability. In *Moore*, the court found that the defendant had the capacity to inflict harm and held him liable for his actions. In *Brock*, the court concluded that the defendant lacked the requisite intent to cause serious physical injury required by the first degree assault statute because the state did not establish that a human bite could transmit AIDS. Nevertheless, the court affirmed the conviction for third-degree assault. The *Haines* court also looked at the defendant's clear intent to cause harm in finding accountability. And the *Scroggins* court, like the *Moore* and *Haines* courts, punished the defendant's *mens rea* in affirming his conviction for aggravated assault with intent to murder.

Although these criminal statutes did not specifically provide for liability for intentional HIV transmission, the courts nevertheless reached their desired result. If the criminal law is to operate effectively in this area, however, a criminal statute specific to AIDS would be the most efficient and fair means of regulation.

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210. *Id.*
211. *Id.*
212. *Id.* at 17. The court distinguished its decision from both *Moore* and *Brock*. In *Moore*, the defendant was convicted of assault with a deadly and dangerous weapon, not of assault with intent to commit murder. There, "the federal court found that under the evidence presented in that case, it could reasonably [find] a human bite was a deadly and dangerous weapon without regard to whether it might transmit the AIDS virus." *Id.* at 18. And the first-degree assault statute in *Brock* required serious physical injury by means of a deadly weapon or dangerous instrument. "The Alabama statute, unlike the Georgia statute, is not aimed at a mere assault [combined] with intent to murder," and therefore bears no relation to *Scroggins* or to Georgia law. *Id.* at 18.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 19. "The jury could either find specifically that appellant believed he could transmit the disease in this fashion *or that he did not care whether he transmitted the deadly disease.*" *Id.* Where the accused's attempt "was, under the attendant circumstances, factually or legally impossible of commission if such crime could have been committed had the attendant circumstances been as the accused believed them to be," the court will find liability. GA. CODE ANN. § 16-4-4 (Harrison 1990).

IV. ARIZONA'S ASSAULT STATUTES AND HIV TRANSMISSION

Arizona's criminal statutes are similarly ill-equipped to handle AIDS-specific offenses. In Arizona, a person commits assault[218] by "intentionally placing another person in reasonable apprehension of imminent physical injury." A person commits aggravated assault[219] if he causes serious physical injury[220] to another, or uses a deadly weapon[221] or dangerous instrument[222] in the course of committing the assault.

A. Is AIDS a Deadly Weapon or Dangerous Instrument?

Whether AIDS is a dangerous instrument or a deadly weapon within the scope of Arizona's criminal statutes is a question of first impression. No reported decision has answered this question. In 1990, however, the Pima County Attorney's Office charged Mark Anthony Volkoff with two counts of aggravated assault.[223] The first count alleged that he committed an aggravated assault merely by biting a police officer.[224] The second count alleged use of a dangerous instrument,[225] the AIDS virus. The pleadings of this Pima County Superior Court case are instructive of future interpretations by the Arizona judiciary of criminal assault statutes[226] in relation to HIV transmission.

The state alleged Officer Goss went to a downtown Tucson nightclub to investigate a disturbance involving defendant Volkoff.[227] After another policeman arrived at the scene, the two officers transported Volkoff to a community hospital. While the officers were removing Volkoff from the car, Volkoff bit Goss on the leg and said "I hope you get AIDS and die."[228] Officer Goss testi-

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218. ARIZ. REV. STAT. ANN. § 13–1203 (1989). The crime of assault by intentionally placing another person in reasonable apprehension of imminent physical injury is an act complete in itself. State v. May, 137 Ariz. 183, 186, 669 P.2d 616, 619 (Ct. App. 1983).

219. ARIZ. REV. STAT. ANN. § 13–1204 (Supp. 1992).

220. "'Serious physical injury' includes physical injury which creates a reasonable risk of death, or which causes a serious and permanent disfigurement, or serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." ARIZ. REV. STAT. ANN. § 13–105(31) (1989).

221. ARIZ. REV. STAT. ANN. § 13–1204(A)(2) (Supp. 1992). "'Deadly weapon' means anything designed for lethal use. The term includes a firearm." ARIZ. REV. STAT. ANN. § 13–105(10) (1989).

222. ARIZ. REV. STAT. ANN. § 13–1204(A)(2) (Supp. 1992). "'Dangerous instrument' means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." ARIZ. REV. STAT. ANN. § 13–105(8) (1989).

223. State v. Volkoff, No. CR–29981 (Arizona Superior Court, Pima County, February 20, 1990). Count three of the indictment, attempted first degree murder, was dismissed.

224. ARIZ. REV. STAT. ANN. § 13–1204(A)(5) (Supp. 1992). A person commits aggravated assault if "such person commits the assault knowing or having reason to know that the victim is a peace officer, or a person summoned and directed by such officer while engaged in the execution of any official duties." *Id.*

225. ARIZ. REV. STAT. ANN. § 13–1204(A)(2) (Supp. 1992).

226. ARIZ. REV. STAT. ANN. §§ 13–1203, 1204 (1989 & Supp. 1992).

227. *Volkoff*, No. CR–29981. When Goss arrived, he found Volkoff lying face down in front of the club, screaming and pounding his head against the pavement. Volkoff's head was cut and bleeding. At this point Officer Goss learned that Volkoff had AIDS.

228. Volkoff had blood in his mouth and his bite broke the skin on Goss' leg. *Id.*

fied that these events caused him to fear that he had in fact been given AIDS by Volkoff.[229]

The Pima County Public Defender's office moved to dismiss the second count of the indictment, which charged the use of a deadly weapon, the AIDS virus.[230] The defense argued that the efficiency of transfer of the AIDS virus was an additional element the State must establish to prove the aggravated assault charge.[231] Expert testimony at the preliminary hearing documented the risk of AIDS infection from AIDS infected needles as one in 250.[232] The court concluded that a person who intentionally stabs a person with an AIDS infected needle could not commit the aggravated assault of causing serious physical injury to another based on the one in 250 transmission ratio established by the expert testimony.[233] If an intentional needle prick could not constitute aggravated assault, the court reasoned, then neither could Volkoff's bite.[234]

In December of 1990 the State moved to reconsider the court's adverse ruling.[235] The State argued if efficiency of injury were a factor in proving aggravated assault, then prior aggravated assault cases would have been decided on a presently unheard of area of testimony.[236] The State claimed the Arizona Court of Appeals *State v. Morgan*[237] decision precluded the interpretation the defense urged.[238] The court, however, found the statutory language "readily capable of causing death or serious physical injury"[239] irreconcilable with the "reasonable apprehension of physical injury" standard articulated in *Morgan*.[240]

The State then argued that the deadly nature of the virus is accepted as fact by the scientific community.[241] If medical evidence conclusively establishes that everyone who contracts AIDS will eventually die, then certainly the virus creates a reasonable risk of death under the statute defining "serious physical

229. *Id.*
230. *Id.* The defense argued that the AIDS virus was not "readily capable of causing death or serious physical injury" as required by ARIZ. REV. STAT. ANN. § 13-105(8). Volkoff's attorney claimed the State had failed to meet this burden of proof. *Id.*
231. The Pima County Public Defender's office claimed that the likelihood of injury was a factor which must be considered in deciding whether the AIDS virus qualified as a dangerous instrument under ARIZ. REV. STAT. ANN. § 13-105(8).
232. *Volkoff*, No. CR-29981.
233. *Id.*
234. *Id.*
235. State's Trial Memorandum, *Volkoff*, No. CR-29981. The State asked the court to rule specifically on whether the State had produced substantial evidence to show that the AIDS virus was a dangerous instrument. *Id.*
236. *Id.* The State posed the following hypothetical assault case to the Court: Volkoff is alleged to have assaulted Goss with a bow and arrow. Under the court's reasoning, the State submitted, Volkoff could call his hunting buddies as witnesses to say that Volkoff is a lousy shot and only hits what he is aiming at once in every 250 shots to defeat the aggravation enhancement for use of a deadly weapon or dangerous instrument. *Id.*
237. 128 Ariz. 362, 625 P.2d 951 (Ct. App. 1981). The Court of Appeals held "it is not a necessary element of aggravated assault that the victim be in actual substantial risk of imminent death or physical injury. All that is required is that the victim be in reasonable apprehension of physical injury." *Id.* at 367, 625 P.2d at 956.
238. *Volkoff*, No. CR-29981.
239. ARIZ. REV. STAT. ANN. § 13-105(8) (1986).
240. *Volkoff*, No. CR-29981.
241. *Id.*

injury."[242] Because the AIDS virus causes death, the State concluded, it is necessarily a dangerous instrument.[243]

Volkoff's deteriorating health forced the Pima County Attorney to drop the charges against him prior to the court's decision.[244] The court's earlier ruling, however, indicates its reluctance to find the AIDS virus a dangerous instrument within the scope of the Arizona aggravated assault statute. This unwillingness to broaden the reach of the criminal statutes is not surprising, however, as courts traditionally defer to the plain language of the statute. The Arizona legislature must amend the criminal code to include AIDS in its definitions of deadly weapon or dangerous instrument before the courts will recognize HIV-specific assaults.

B. Codification of an HIV-Specific Statute

Any proposed legislation should be an AIDS-specific statute designed to proscribe conduct that spreads the AIDS virus.[245] Language from a model statutory proposal defining the offense of "Transfer of Bodily Fluid Which May Contain the AIDS Virus"[246] may be helpful to legislators in drafting HIV-specific criminal statutes:

> Transfer of Bodily Fluid Which May Contain the AIDS Virus:
>
> (1) Offense Defined.
>
> A person is guilty of an offense if, knowing 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 purpose of this section:
>
> (a) Bodily fluid included 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

242. ARIZ. REV. STAT. ANN. § 13–105(31) (1986).
243. *Volkoff*, No. CR–29981.
244. *Id.* Volkoff has since died.
245. *See supra* notes 38, 59, and accompanying text.
246. David Robinson, Jr., *Aids and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91, 101 (1985).

> 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.

The most effective means limiting the spread of AIDS is behavioral modification.[247] The model statute provides specific standards of unacceptable conduct related to the AIDS virus transfer.[248] It proscribes the transfer or attempted transfer of presumptively infective bodily fluids, rather than requiring proof of transfer of infection itself. The deadliness of AIDS justifies the substantial penalty of a felony classification.[249]

This statutory prohibition is constructed with the same purpose as current criminal statutes, but tailored specifically to HIV transmission. Since the majority of states revised their criminal codes in accordance with the *Model Penal Code,*[250] the form of the draft follows the *Model Penal Code* to facilitate its integration into the state codes. Furthermore, the draft uses the careful general structure of the Code, particularly its culpability provisions.[251]

In view of the presumptive infectiousness of AIDS, ARC, or HIV-virus antibody seropositivity,[252] the model statute prohibits purposeful, knowledgeable, or reckless transfer to another. One can argue, however, that awareness of a substantial and unjustified risk that the actor is infectious should not be required, and that negligence should suffice given the gravity of the peril. An inclusion of the negligence standard, however, raises 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.[253] While it is arguable that they should, particularly if they are in high-risk groups, the draft is consistent with traditional Anglo-American criminal law and does not provide for felony penalties for negligence.[254]

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247. *See supra* notes 38, 59, and accompanying text.

248. Robinson, *supra* note 246, at 102.

249. Medical hope rests heavily on the possibility of developing an effective vaccine. Wendy K. Mariner & Robert C. Gallo, *Getting to Market: The Scientific and Legal Climate for Developing an AIDS Vaccine,* 15 LAW, MED. & HEALTH CARE 17 (1987). Scientists, however, do not expect an effective vaccine before the twenty-first century. Even if an effective vaccine can be developed, testing on humans will present unique difficulties, such as administering it to large populations of uninfected persons, the only ones who could be helped by it. *Id.* at 17–21.

250. The state statutes are collected in MODEL PENAL CODE & COMMENTARIES, pt. I, §§ 1.01–2.013, at xliii–li (Official Draft and Revised Comments 1985).

251. Thus, the terms "purposely," "knowingly," and "recklessly" in the AIDS-specific statute are understood the same way they are defined in the Code.

252. *See supra* notes 2, 29–30, 73–78, and accompanying text.

253. Robinson, *supra* note 246, at 103.

254. *Id.*

V. CONCLUSION

HIV transmission should only be made a criminal offense if it serves some public purpose. Experts are sharply divided over the issue of creating a statute specific to AIDS offenses. Critics of the criminalization approach observe that people who transmit AIDS are infected themselves and will probably die from AIDS.[255] They point out that punishment would be sought against a terminally-ill defendant,[256] and note that a long prison sentence is unlikely to deter a person who has only months or years to live.[257] Supporters of criminalization, in contrast, submit that imposition of criminal penalties for HIV transmission will serve as a valid deterrent in preventing dangerous behavior.[258]

Other commentaries on AIDS-related criminal prosecutions express concern that the use of coercive state powers will encourage AIDS-infected persons to conceal their status to avoid criminal charges.[259] Some argue that enactment of laws which apply only to AIDS will serve only to further stigmatize carriers and raise apprehension among the public.[260] They claim that AIDS carriers will go unreported, the virus will spread, and the epidemic will worsen because the vulnerable populations will not cooperate with public health programs of education, counseling and treatment.[261]

It is very possible that persons acting outside the law will hide their crimes and continue with their actions, resulting in further spread of the epidemic.[262] It is also true, however, that this lethal and devastating virus can be inflicted upon an innocent victim by means of a willful criminal act.[263] Compassion for the terminally-ill HIV-infected person should not excuse that person from accountability for his criminal actions.[264]

The unique characteristics of AIDS have created an unprecedented challenge to criminal law. Complex evidentiary obstacles arise in attempting to prove criminal liability for transmission of the HIV virus. The "beyond a reasonable doubt" standard applied in criminal law makes proof of causation particularly difficult because of the idiomatic biological aspects of AIDS infection and transmission.

The fundamental *mens rea* rule of criminal liability requires a showing of *some* degree of intent to transmit the virus before the state can file a charge of criminal AIDS transmission. Thus, proof of criminal intent will most often

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255. Gostin, *supra* note 25, at 1056.
256. In the *Volkoff* prosecution, for example, the defendant died before the case could go to trial.
257. Gostin, *supra* note 25, at 1056.
258. Fitting, *supra* note 24, at 97.
259. *Id.*
260. Gostin, *supra* note 25, at 1056.
261. *Id.*
262. Lawrence Gostin, head of the U.S. AIDS Litigation Project, recommends education and counseling for HIV-infected people to convince them that they have a responsibility to tell others about their condition: "I don't believe for a minute that harsh criminal punishment is making people change their behavior." *Possession of a Dangerous Weapon*, TIME, Dec. 14, 1992, at 23.
263. Parolee Terry Boatwright raped and also injected his ex-girlfriend with his own tainted blood because he wanted her to know what it was like to live with HIV. *Id.* A Portland, Oregon, judge sentenced Alberto Gonzalez to 113 months in prison for having unprotected sex with a 17-year-old girl in 1991. Gonzalez knew he had the AIDS virus since 1988. *Id.*
264. Fitting, *supra* note 24, at 98.

involve demonstrating reckless disregard of human safety where the accused knows of his carrier status, but chooses to disregard the risk. Consequently, prosecutions will occur only in justifiable cases where a person acts maliciously to place another's life in jeopardy by deciding to use the virus to kill.

AIDS law, formally speaking, does not exist. AIDS is a new phenomenon and AIDS-related crimes are even newer. The occasion, and therefore the need, has arisen in the criminal law to find criminal liability for criminal acts of AIDS transmission. Legislators must draft new statutes to establish a proper deterrence precedent for HIV carriers who choose to use the virus to threaten a person's life. The gravity and incurability of the AIDS virus demands these legislative steps.