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Combatting AIDS's Acoustic Shadow: Illinois Addresses the Problems of Criminal Transfer of HIV

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Comment

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I. INTRODUCTION

No modern disease has struck society so stunningly and convincingly[1] as acquired immune deficiency syndrome (AIDS). AIDS is a life-threatening disease that presently has no cure.[2] AIDS's rate of destruction[3] is equalled only by the disease's emotional impact.[4] AIDS has caused world-wide[5] panic and despair[6]

1. *See* Note, Glover v. Eastern Nebraska Community Office of Retardation: *Federal Court Invalidates AIDS Policy*, 57 UMKC L. REV. 369 (1989) (new case of AIDS reported in the United States every fourteen minutes; as of July 1988, there were 69,085 cases of AIDS in the United States alone). Between 1987 and 1988, death from AIDS became the sixth leading cause of years of potential life lost in the United States. *Chronic Disease Reports: Deaths from Nine Chronic Diseases—United States*, 39 MORBIDITY & MORTALITY WEEKLY REP. 17, 19-20 (1990) (according to Dr. Robert A. Hahn, medical epidemiologist in the Centers for Disease Control's Epidemiology Program Office). In July 1989, the Centers for Disease Control announced the 100,000th case of AIDS in the United States. *Id.* A study by the General Accounting Office estimated that at least 300,000 cases of AIDS will be diagnosed by 1991. *Id.*

2. "Successful development and testing of a vaccine against HIV [human immunodeficiency virus] is likely to be a relatively long and arduous task. The first vaccine against hepatitis B virus, a virus that had been recognized and studied for decades, took more than 17 years to develop and test." Young, *The Role of the FDA in the Effort Against AIDS*, 103 PUB. HEALTH REP. 242, 245 (1988).

3. It is estimated that in San Francisco alone, 9966 to 12,767 deaths will result from AIDS by June 1993. Lemp, Payne, Rutherford, Hessol, Winkelstein, Wiley, Moss, Chaisson & Chen, *Projections of AIDS Morbidity and Mortality in San Francisco*, 263 J. A.M.A. 1497 (1990).

4. *See, e.g.*, Raytheon Co. v. Fair Employment & Hous. Comm'n, 212 Cal. App. 3d 1242, 261 Cal. Rptr. 197 (1989); *Psychology and AIDS*, 43 AM. PSYCHOLOGIST 835 (1988) (special issue).

5. Interestingly, such disparate places as China and Massachusetts report increases in AIDS cases. The Chinese government recently admitted that HIV has infected more Chinese citizens than foreign residents and is spreading on the strength of drug addicts in a particular border region. *AIDS in China*, AIDS L. & LITIGATION REP. MONTHLY REV., Apr. 1990, at 22. Similarly, Massachusetts Health and Human Services Secretary Philip Johnston lamented that AIDS "remains the most serious public health problem that we face." *Cases Rise Among Minorities, State Health System Hit Hard*, 5 AIDS Pol'y & L. (BNA) No. 6, at 7 (Apr. 4, 1990). More than 3000 cases of AIDS have been reported in Massachusetts, and 10 times as many state residents are estimated to be infected with HIV. *Id.*

that has lessened[7] only recently in response to the parade of catastrophes of the week, month, and year. Behind the headlines, individuals, families, businesses, scientists, and governments battle a scourge that will not go away.[8]

The impact of AIDS has not escaped the attention of law students, lawyers,[9] judges,[10] law enforcement officials,[11] legislatures,[12]

6. *See* J. SHILTS, AND THE BAND PLAYED ON: PEOPLE, POLITICS, AND THE AIDS EPIDEMIC (1987) (giving an overview of public reaction concerning the AIDS epidemic); Schulman, *AIDS Discrimination: Its Nature, Meaning, and Function*, 12 NOVA L.J. 1113, 1115 (1988) (linking the public's fear of AIDS and human sexuality, helplessness, mental illness, and death).

7. Former Surgeon General C. Everett Koop testified before a United States House of Representatives subcommittee and warned of an increasing national complacency towards AIDS and urged the government to step up its response to the disease. Koop claimed that the federal government was not cooperating closely enough with state and local governments attempting to combat the epidemic. *Koop Warns Congress About AIDS Complacency*, AIDS L. & LITIGATION REP. MONTHLY REV., Feb.-Mar. 1990, at 14.

8. The National Center for Health Services Research and Health Care Technology Assessment projects that 56,000 AIDS cases will be diagnosed in 1990; 70,000 in 1991; 87,000 in 1992; and 104,000 in 1993. *Updated Forecasts for Costs of AIDS*, AIDS L. & LITIGATION REP. MONTHLY REV., Feb.-Mar. 1990, at 16.

9. For example, the New York City Bar Association has called for restricted access to HIV testing results, mandatory on-going education of all criminal justice employees about HIV, the supplying of basic AIDS information at the criminal booking stage, the implementation of a resource bank with the latest scientific information and leading cases available for defendants, and the expeditious and consistent treatment of all HIV infected offenders. AIDS L. REP., Oct. 1989, at 2-3; *see* AM. BAR ASS'N, AMERICAN BAR ASSOCIATION POLICY ON AIDS AND THE CRIMINAL JUSTICE SYSTEM (1989).

10. *See generally* Weber, *AIDS: Legal Issues in Search of a Cure*, 14 WM. MITCHELL L. REV. 572 (1988); Lacayo, *Assault with a Deadly Virus: What Should Courts Do When AIDS Is Allegedly Used as a Weapon?*, TIME, July 20, 1987, at 63. The AIDS issue even impacts courtroom behavior. *See, e.g.*, Wiggins v. State, 315 Md. App. 232, 554 A.2d 356 (1989) (appellate court reversed defendant's conviction after the trial judge improperly gave his court officers authority to wear gloves in court while in the presence of the defendant who was a homosexual). *But see* Commonwealth v. Johnson, 777 S.W.2d 876, 880 (Ky. 1989) (agreeing with *Wiggins* that "raising the specter of AIDS, without substantial relevance in bringing this to the attention of the jury, may result in unfair prejudice," but holding that a police officer's testimony that he wore rubber gloves while searching defendant's apartment did not improperly influence the jury), *cert. denied*, 110 S. Ct. 1510, 1823 (1990). *See generally* Earl & Kavanaugh, *Meeting the AIDS Epidemic in the Courtroom: Practical Suggestions in Litigating Your First AIDS Case*, 12 NOVA L.J. 1203 (1988).

11. *See generally* Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990) (upholding regulation of the Bureau of Prisons restricting inmate procreation, including artificial insemination of wives by male inmates, and denying inmate's request to be tested to ensure he was free of sexually transmitted diseases, including HIV); Farmer v. Moritsugu, 742 F. Supp. 525 (W.D. Wis. 1990) (prisoner claimed he was denied equal protection by prison policy that did not allow him to work in food service because of his AIDS condition); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261 (S.D.N.Y. 1990) (prisoner claimed that constitutional rights under eighth amendment violated by being assigned cellmate who tested positive for HIV antibodies); Welch v. Addington, 734 F. Supp. 765

and even plaintiffs.[13] Attempts to curb the spread of AIDS run the gamut from the criminalization of certain conduct believed to transmit the human immunodeficiency virus (HIV) to the wearing of rubber gloves by police officers at gay rallies. Most recently, the Illinois legislature enacted a statute addressing the criminal transfer of HIV.[14] In so doing, the legislature sought to avoid problems associated with using traditional criminal statutes to deter inten-

(N.D. Tex. 1990) (inmate brought civil rights action against jail personnel for allegedly placing him in the same cell as inmate who had tested positive for AIDS); Wilson v. Franceschi, 735 F. Supp. 395 (M.D. Fla. 1990) (inmate seeking relief against physician at correctional facility for delay in administering AZT for treatment of inmate's AIDS-related symptoms); Griner v. United States, No. 89-3493 (D. Kan. Jan. 31, 1990) (WESTLAW, DCT database) (postconviction relief sought by prisoner with AIDS to have sentence reduced due to deteriorating medical condition); Jackson v. Fauver, No. 89-871 (D.N.J. Jan. 18, 1990) (WESTLAW, DCT database) (prisoner infected with HIV sought relief claiming that defendants failed to provide adequate medical care); Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990) (Alabama state prison inmates who were administratively segregated as AIDS carriers brought action against prison officials claiming that Alabama's testing of inmates for AIDS upon induction and discharge from prison violated their constitutional rights); Feigley v. Fulcomer, 720 F. Supp. 475 (M.D. Pa. 1989) (inmate brought action against prison officials alleging that they violated his eighth amendment rights by not protecting him from contracting AIDS); Hawley v. Evans, 716 F. Supp. 601 (N.D. Ga. 1989) (prison inmates who tested positive for HIV brought action alleging that they were not receiving adequate treatment); Rodriguez v. Coughlin, No. 87-1577 (W.D.N.Y. June 2, 1989) (WESTLAW, DCT database) (inmate alleged that employees of New York Department of Corrections violated his constitutional right to privacy by disclosing the fact that he was suffering from AIDS to other prisoners); Doe v. Meachum, 126 F.R.D. 452 (D. Conn. 1989) (inmates challenged policies of Connecticut Department of Corrections regarding inmates infected with AIDS); Cameron v. Metcuz, 705 F. Supp. 454 (N.D. Ind. 1989) (action against prison officials for their alleged failure to protect the plaintiff from attack by another inmate who had been diagnosed as having AIDS); Doe v. Coughlin, 697 F. Supp. 1234 (N.D.N.Y. 1988) (judge enjoined correctional institution from making involuntary transfers of inmates who tested positive for HIV to any separate dormitory set aside for such purposes); Lewis v. Prison Health Servs., No. 88-1247 (E.D. Pa. Sept. 13, 1988) (WESTLAW, DCT database) (granting summary judgment against prisoner who was diagnosed as HIV positive on his claim that he was improperly segregated from fellow inmates in county prison); CAL. PENAL CODE § 7500 (West 1989) (stating that AIDS has the "frightening potential to spread faster within confined areas, such as prison"); Raburn, *Prisoners with AIDS: The Use of Electronic Processing*, 24 CRIM. L. BULL. 213 (1988).

12. *See generally* Clark, *AIDS Prevention: Legislative Options*, 16 AM. J. OF L. & MED. 107 (1990); Comment, *A Legal Guide for the Education of Legislators Facing the Inevitable Question: AIDS: The Problem Is Real—What Do We Do Now?*, 13 J. CONTEMP. L. 121, 131 n.68 (1987).

13. One court has even been faced with an "AIDS phobia" case. In Hare v. State, 143 Misc. 2d 281, 539 N.Y.S.2d 1018 (Ct. Cl. 1989), neither the plaintiff nor the defendant were shown to be HIV-infected. The plaintiff sought recovery for his fear that he might contract AIDS from the defendant's biting of plaintiff. There was evidence that plaintiff had become depressed, had lost thirty pounds, and had become withdrawn from his family. Yet the court refused to award damages for mental anguish, finding that plaintiff's fears were not based on any objective findings.

14. ILL. REV. STAT. ch. 38, para. 12-16.2 (1989).

tional and reckless transfer of HIV. The boundaries of this statute are sure to be tested on several levels as Illinois prosecutors begin to charge individuals with the criminal transfer of HIV.

This Comment first discusses the various state criminal law responses to the AIDS epidemic. The Comment then focuses on the Illinois legislature's response to the AIDS crisis by examining its criminalization of certain HIV-transmitting behavior. Finally, the Illinois legislature's response to AIDS is evaluated with an eye toward future litigation concerns.

II. Traditional Criminal Responses to HIV Transfer

Traditionally, courts relied primarily on existing criminal statutes to prosecute the criminal transfer of HIV.[15] The charges used range from assault to manslaughter to murder. This approach encountered problems. Courts attempted to confront a unique and modern problem with criminal laws developed to combat age-old problems. An examination of these cases shows that existing criminal laws are ill-suited to the vagaries of HIV transfer. Particular problems arise with (1) proving the requisite intent for the underlying crime, (2) fitting the specific conduct into the narrow framework of existing crimes, and (3) establishing coherent and consistent sentencing procedures.

A. Intent

Courts have had particular trouble defining the intent required to prosecute HIV transfer using traditional criminal sanctions. This problem is apparent in the disparate outcomes in different courts facing similar cases.

15. *See* United States v. Kazenbach, 824 F.2d 649 (8th Cir. 1987) (conviction upheld of inmate with AIDS who scratched, bit, and spat on officers in prison); Brock v. State, 555 So. 2d 285 (Ala. Crim. App. 1989) (defendant guilty of assault after biting prison officer on the arm while confined to AIDS unit); Johnetta v. Municipal Court, 218 Cal. App. 3d 1255, 267 Cal. Rptr. 666 (1990) (defendant charged with felony assault sought to block AIDS test); Barlow v. Superior Court, 236 Cal. Rptr. 134 (Cal. Ct. App. 1987) (defendant tried on two counts of battery against police officer after biting officer in struggle); State v. Sherouse, 536 So. 2d 1194 (Fla. Dist. Ct. App. 1989) (defendant tried on two counts of attempted manslaughter after offering to engage in sex while knowing that she was infected with AIDS); *In re* Anonymous, 156 A.D.2d 1028, 549 N.Y.S.2d 308 (1989) (petitioner tried on attempted murder charges after attempting to infect police officer with HIV by biting him); People v. Durham, 146 Misc. 2d 913, 553 N.Y.S.2d 944 (Sup. Ct. 1990) (defendant committed rape after announcing to victim that he was AIDS carrier); State v. Guayante, 99 Or. App. 649, 783 P.2d 1030 (1989) (defendant's infection with AIDS was aggravating factor in sentencing on charges of sexual abuse, rape, and sodomy).

State v. Haines[16] provides a liberal example of the application of traditional criminal sanctions to the prosecution of potentially HIV-transmitting conduct. In *Haines*, an Indiana appellate court reinstated defendant Donald Haines's conviction for attempted murder after the trial court had found there was insufficient evidence to show that Haines's actions could have transmitted HIV.[17]

Haines had been diagnosed as having AIDS.[18] Distraught, Haines unsuccessfully attempted suicide. When police and paramedics, responding to the report of a possible suicide, arrived at Haines's apartment, Haines screamed that he had AIDS and that he was going to kill anyone who tried to help him.[19] Haines used his slashed wrists to spray blood at a police officer, and he bit and spit blood at two paramedics.[20] Haines was charged with three counts of attempted murder and three counts of battery.[21]

A jury convicted Haines on all charges.[22] The trial court then granted Haines's motion for judgment on the evidence as to the attempted murder conviction.[23] The trial court reasoned that the state had not met its burden because there was no reasonable inference that Haines's conduct constituted a substantial step towards murder.[24]

The appellate court reversed and reinstated the attempted murder conviction.[25] The appellate court held that Haines's conduct need not be capable of effectuating murder.[26] Instead, the court concluded that the prosecution only needed to show that Haines did all that he believed necessary to bring about the intended result, regardless of whether the result actually was possible.[27] The court found that Haines's knowledge of his condition coupled with his words and actions provided sufficient evidence of intent to commit murder.[28]

A California appellate court faced a similar problem but reached

16. 545 N.E.2d 834 (Ind. Ct. App. 1989).
17. *Id.* at 841.
18. *Id.* at 835.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 836.
23. *Id.*
24. *Id.* at 837.
25. *Id.* at 841.
26. *Id.* at 839.
27. *Id.* at 838.
28. *Id.* at 837.

a different result. In *Barlow v. Superior Court*,[29] the court denied the prosecution's request for an order directing the defendant, Brian Barlow, to submit to an HIV test. Barlow had scuffled with police who were monitoring a gay freedom day parade in which Barlow was participating. During the scuffle Barlow told the police that he was a homosexual and that the officers had better beware because he might have AIDS.[30] During the altercation, Barlow bit one policemen on the shoulder and bit another on the knuckle.[31] The police charged Barlow with attempted murder and assault with intent to commit great bodily harm.[32]

The prosecution argued that the HIV test was necessary to show Barlow's intent to kill and to inflict great bodily injury by transmitting AIDS,[33] an essential element of both crimes. In denying the prosecution's request, the court ruled that the test would not reveal evidence of intent.[34] The court reasoned that, because the injuries which Barlow allegedly inflicted occurred five weeks before the test was to be taken, the results would be irrelevant to a showing of intent at the time of the crimes.[35]

Finally, a Florida decision dealt with another problem with demonstrating intent in AIDS-related prosecutions for sexual behavior. In *State v. Sherouse*,[36] the court upheld the dismissal of charges based upon the prosecution's failure to prove the intent element of voluntary manslaughter.[37] In *Sherouse*, the defendant, Elizabeth Sherouse, had tested positive for HIV, had been informed that the virus was deadly, and had been told HIV could be transmitted through sexual intercourse.[38] The prosecution claimed

29. 236 Cal. Rptr. 134 (Cal. Ct. App. 1987).
30. *Id.* at 136.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 138.
35. *Id.* In *Johnetta v. Municipal Court*, 218 Cal. App. 3d 1260, 267 Cal. Rptr. 666 (1990), the California Court of Appeal dealt with a similar request and using constitutional analysis, reached a different conclusion. In *Johnetta*, the request for testing was made pursuant to a state statute that specifically provided for AIDS testing of defendants accused of interfering with peace officers by, among other things, inflicting a subcutaneous bite. *Id.* at 1262, 267 Cal. Rptr. at 669. The defendant contested the constitutionality of that statute as an unreasonable search and seizure. The court balanced the state's interest in preventing the spread of AIDS against what it defined as the minimal intrusion of testing. The court held that the state's interest prevailed and upheld the statute's constitutionality. *Id.* at 1282, 267 Cal. Rptr. at 683. For a similar holding and analysis, see *People v. Durham*, 146 Misc. 2d 913, 553 N.Y.S.2d 944 (Sup. Ct. 1990).
36. 536 So. 2d 1194 (Fla. Dist. Ct. App. 1989).
37. *Id.* at 1195 (Cobb, J., concurring).
38. *Id.* at 1194 (Cobb, J., concurring).

that she ignored these warnings and offered to engage in sexual intercourse for money with two men on two separate occasions without informing them of her condition or telling them that the virus could be transmitted.[39]

Sherouse was charged with two counts of attempted manslaughter, but the trial court dismissed the case because it found no evidence that her conduct evidenced an intent to kill.[40] On appeal, the state argued that Sherouse's intent to commit the unlawful act of prostitution while carrying the virus inferred her intent to kill.[41] The state claimed, therefore, that only the intent to commit the precipitating act, prostitution, not the intent to kill, needed to be shown.[42] The court rejected this argument, concluding that intent to kill was an essential element of attempted manslaughter.[43]

B. The Narrow Scope of Existing Criminal Laws

Another major problem courts face when trying to impose traditional criminal sanctions for HIV transfer is that of fitting the unique circumstances of HIV transfer into the traditional definitions of existing crimes. For example, in *United States v. Moore*,[44] the Eighth Circuit Court of Appeals upheld the conviction of defendant, James Moore, for assault with a deadly and dangerous weapon. Moore had tested positive as an HIV carrier.[45] Shortly after learning of his condition, Moore bit two correctional officers during a struggle while Moore was in the hospital.[46]

The indictment charged Moore with two counts of assault with a deadly and dangerous weapon—the deadly and dangerous weapon being Moore's mouth and teeth.[47] Although the court held that the prosecution had not proved whether HIV could be transmitted by a bite, it let the conviction stand because, irrespective of whether HIV could be transmitted by biting, Moore's mouth and teeth could be considered deadly and dangerous weapons.[48]

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39. *Id.* (Cobb, J., concurring).
40. *Id.* (Cobb, J., concurring).
41. *Id.* (Cobb, J., concurring).
42. *Id.* (Cobb, J., concurring).
43. *Id.* at 1195 (Cobb, J., concurring).
44. 846 F.2d 1163 (8th Cir. 1988).
45. *Id.* at 1164.
46. *Id.* "Biting" cases present a common factual scenario in which many of the problems discussed in this article arise. For further examples of this type of case, see United States v. Kazenbach, 824 F.2d 649 (8th Cir. 1987); *In re* Anonymous, 156 A.D. 2d 1028, 549 N.Y.S.2d (1989).
47. *Moore*, 846 F.2d at 1164.
48. *Id.* at 1168.

In *Brock v. State*,[49] the Alabama Court of Criminal Appeals considered whether the defendant's conduct could transmit HIV. The defendant Adam Brock was a prisoner confined to the "AIDS Unit" of a correctional facility.[50] During a routine shakedown, Brock fought with a correctional officer, and after being handcuffed, Brock bit the officer on the arm. The officer's injury was treated and he was tested for HIV. All tests were negative.[51] Brock subsequently was charged with attempted murder for biting and breaking the skin of the officer while knowingly being infected with the AIDS virus.[52]

The jury found Brock guilty of the lesser included offense of assault in the first degree, an element of which was use "of a deadly weapon or a dangerous instrument."[53] Brock appealed his conviction, claiming that the state had failed to present a prima facie case of assault in the first degree.[54]

On appeal, the court took judicial notice that AIDS is a life-threatening disease and that contraction of HIV constitutes a serious physical injury.[55] The court, however, would not take judicial notice that biting was an effective means of transmitting HIV.[56] The court found that, although HIV might be transmittable through a human bite, the trial produced no evidence that such means of transmission was an established scientific fact.[57] Moreover, the court noted the unclear role of saliva in the transmission of AIDS.[58]

In addition, the court found no evidence that Brock's bite caused serious injury or was capable of causing the serious injury necessary for an assault conviction.[59] More importantly, in overturning Brock's conviction, the court stated there was no evidence that Brock knew that HIV could be transmitted through a human bite.[60]

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49. 555 So. 2d 285 (Ala. Crim. App. 1989).
50. *Id.* at 286.
51. *Id.*
52. *Id.* at 287.
53. *Id.* (citing ALA. CODE § 13A-6-20(a)(1) (1975)).
54. *Id.*
55. *Id.* at 287-88.
56. *Id.* at 288.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

C. *Sentencing*

Sentencing defendants for AIDS-related crimes presents three problems. One issue is whether an AIDS victim's diminished life expectancy should be a mitigating sentencing factor. Another question is whether AIDS's demoralizing effect should be a mitigating circumstance for criminal behavior. Finally, courts face the issue of whether intentional transfer of HIV is an aggravating factor in a prosecution for the underlying offense.

A pair of state court decisions have considered whether a defendant who is afflicted with HIV should be entitled to have his sentence reduced. In *People v. Watts*,[61] the defendant, Michael Watts, was convicted and sentenced to a term of imprisonment in a state correctional facility.[62] On appeal, Watts argued that his sentence should be reduced because he tested positive for HIV.[63] The court denied his request, holding that " 'HIV infection' is not, in and of itself, a ground for reducing the otherwise appropriate and bargained-for sentence which was imposed."[64]

Similarly, in *Commonwealth v. O'Neil*,[65] the defendant Michael O'Neil, who had tested positive for HIV, contended that incarceration of the physically infirm was cruel and unusual punishment under the eighth amendment.[66] O'Neil claimed that his HIV condition ultimately would prove fatal; therefore, the trial court should have considered alternatives to imprisonment because he might die while in confinement.[67] The court rejected O'Neil's argument, concluding that, although it was possible O'Neil would not live out his term, that fact alone did not make his punishment per se cruel and unusual.[68]

Courts also have considered whether a defendant's HIV condition properly can explain why the defendant committed the crime and, thus, justify a reduced sentence. In *Brogdon v. State*,[69] the defendant, Craig Brogdon, claimed he was extremely depressed after learning that he had HIV. His infection, Brogdon alleged,

61. 556 N.Y.S.2d 754 (1990).
62. *Id.* at 754.
63. *Id.*
64. *Id.*; *see also* People v. Chrzanowski, 147 A.D.2d 652, 538 N.Y.S.2d 55 (1989) (holding that the defendant's affliction with HIV did not by itself warrant the reduction of an otherwise appropriate sentence).
65. 393 Pa. Super. 111, 573 A.2d 1112 (1990).
66. *Id.* at 113, 573 A.2d at 1114.
67. *Id.*
68. *Id.* at 116, 573 A.2d at 1115.
69. 781 P.2d 1370 (Alaska Ct. App. 1989).

caused him to drink, leading to the car accident for which he was charged with assault.[70]

On appeal, Brogdon argued that his condition should have mitigated his sentence.[71] The appellate court rejected Brogdon's HIV-induced depression defense and upheld his sentence.[72] In so holding, the court noted that "an insubstantial jail sentence would convey the message that situational stress is an excuse for extreme recklessness."[73]

Conversely, in *State v. Guayante*,[74] the defendant, Joseph Guayante, argued that the trial court impermissibly considered his knowledge of his AIDS affliction as an aggravating sentencing factor.[75] The appellate court found that the trial court had imposed concurrent sentences because Guayante had knowledge of his AIDS affliction, not merely because he had AIDS.[76] Thus, Guayante's knowledge was held to be a proper factor in weighing the sentencing alternatives.[77]

Guayante points out that courts without guidance from HIV-specific statutes still may incorporate the defendant's knowledge of his HIV condition when fashioning criminal sanctions for HIV-related behavior. Therefore, although not convicted on a literal HIV charge, the defendant's HIV condition will be expressly accounted for by these courts.

III. The Illinois Legislature's Response

As the AIDS epidemic has increased as a societal problem,[78] several states have enacted statutes to deal specifically with the problems of prosecuting AIDS transmission and to replace the ill-defined requirements of traditional criminal law.[79] In 1989, the Illinois legislature adopted its version of this modern approach by

70. *Id.* at 1371.
71. *Id.*
72. *Id.* at 1372.
73. *Id.*
74. 99 Or. App. 649, 783 P.2d 1030 (1989).
75. *Id.* at 650, 783 P.2d at 1031.
76. *Id.*
77. *Id.* at 651, 783 P.2d at 1032.
78. It should be noted that even though criminal punishments for the transmission of AIDS flourish, so do AIDS related criminal laws that impose penalties on persons who violate the rights of those infected with AIDS. Albert, Stewart & Vermeulen, *Criminal Law and Procedure*, in AIDS Practice Manual: A Legal and Educational Guide at VI-5 n.1 (2d ed. 1988).
79. These states include Arkansas, Georgia, Idaho, Indiana, Kentucky, Ohio, Texas, and Washington.

enacting a statute that specifically addresses the criminal transmission of HIV.[80] This statute is designed to allow Illinois prosecutors to move away from AIDS prosecutions under traditional criminal statutes and to provide specific sanctions for the criminal transmission of HIV/AIDS. In drafting the statute, the Illinois legislature made certain that it would be applicable only to those who know that they are infected with HIV or any other known causative agent of AIDS.[81]

An individual will be subject to criminal sanctions under the statute by engaging in one of three specified activities. First, a person can be prosecuted for criminal transmission of HIV due to having engaged in intimate contact with another.[82] To be considered intimate contact, the contact must be of a type capable of transmitting HIV[83] (e.g., sexual intercourse). Providing certain body fluids for use by another will also be grounds for prosecu-

80. *See* ILL. REV. STAT. ch. 38, para. 12-16.2 (1989). The statute in full reads as follows:

> § 12-16.2. Criminal Transmission of HIV. (a) A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV:
>
> (1) engages in intimate contact with another;
>
> (2) transfers, donates, or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration to another; or
>
> (3) dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia.
>
> (b) For purposes of this Section:
>
> "HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.
>
> "Intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.
>
> "Intravenous or intramuscular drug paraphernalia" means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.
>
> (c) Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.
>
> (d) It shall be an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.
>
> (e) A person who commits criminal transmission of HIV commits a Class 2 felony.

Id.

81. *Id.* para. 12-16.2(a). The legislature avoided the patently unfair, and perhaps unconstitutional, criminalization of innocent transmission.

82. *Id.* para. 12-16.2(a)(1).

83. *Id.* para. 12-16.2(b).

tion.[84] Besides blood, tissue, semen, and organs, the statute includes "potentially infectious body fluids."[85] This catchall language gives the statute flexibility to respond to the latest medical information regarding means of transmitting HIV. For instance, saliva could fit under the catchall if it were found definitively capable of transmitting HIV. Finally, certain drug-related activity, such as sharing nonsterile, intravenous, or intramuscular drug paraphernalia, will precipitate prosecution under the statute.[86]

Although one diagnosed with HIV must engage in one of the three enumerated activities to be subject to prosecution under the statute, the statute does not require that an HIV infection actually result from the activity.[87]

Furthermore, as a defense, the accused may claim that the person alleged to have been exposed to HIV consented to the exposure.[88] This defense forbids those who engage in reckless conduct themselves from being complaining witnesses after voluntarily agreeing to engage in such conduct. Moreover, this provision avoids embroiling the state in highly charged consensual sexual relations cases. The statute is given teeth by penalties ranging from three to seven years in an Illinois penal institution.[89]

The statute's specificity in dealing with AIDS-related problems suggests that the statute is an attempt to improve upon the traditional methods of AIDS prosecutions. Therefore, the Illinois statute's potential effectiveness must be analyzed with respect to prior AIDS prosecutions under traditional criminal sanctions.

IV. Analysis: The Illinois HIV Statute

The statute contains several ambiguities that may create issues in future litigation. First, the statute does not define how a person obtains "knowledge" of his HIV condition. Furthermore, the statute fails to specify all of the various methods through which HIV can be transmitted. Although this lack of specificity may provide flexibility, it may in some cases become problematic. Finally, as with other crimes, sentencing under the statute is subject to some judicial discretion, but the statute does not address whether the

84. *Id.* para. 12-16.2(a)(2).
85. *Id.*
86. *Id.*
87. *Id.* para. 12-16.2(c).
88. *Id.* para. 12-16.2(e).
89. *Id.*

judge is to weigh one's HIV condition as an aggravating or mitigating factor to his offense.

A. Knowledge Under the Illinois HIV Statute

The provision of the HIV statute open to the most criticism is the requirement that HIV be transmitted by one who has knowledge of his HIV condition. Knowledge is a familiar requirement in the criminal law, but in the HIV setting, knowledge may cause unique problems.

The Illinois legislature emphasizes confidentiality of those tested for HIV to encourage high risk groups to be treated for HIV.[90] The legislature recognizes that people's misunderstanding of the test or fear of involuntary disclosure of results often deters them from being tested for HIV. The HIV statute may add another deterrent. It is plausible that individuals who are at a high risk of exposure[91] may shy away from testing if they know that knowledge of a positive result may make them susceptible to future criminal prosecution for their actions. Even people who pose a low risk of HIV exposure and who otherwise would submit to testing rightfully may be wary of their HIV test results being shared with local and national law enforcement officials.

Thus, at first glance, the statute appears at odds with the Illinois legislature's emphasis on the informed, voluntary, and confidential use of tests to reveal HIV infection. Arguably, the knowledge re-

90. The Illinois legislature sought to ensure the confidentiality of AIDS test results through the "AIDS Confidentiality Act." *See* ILL. REV. STAT. ch. 111 1/2, paras. 7301-7316 (1989). The Act provides in pertinent part:

> § 2. The General Assembly finds that:
>
> (1) The use of tests designed to reveal a condition indicative of Human Immunodeficiency Virus (HIV) infection can be a valuable tool in protecting the public health.
>
> (2) Despite existing laws, regulations and professional standards which require or promote the informed, voluntary and confidential use of tests designed to reveal HIV infection, many members of the public are deterred from seeking such testing because they misunderstand the nature of the test or fear that the test results will be disclosed without their consent.
>
> (3) The public health will be served by facilitating informed, voluntary and confidential use of tests designed to reveal HIV infection.

Id. para. 7302.

91. The percentage of AIDS patients in high-risk groups has remained relatively stable since 1981: 65% are homosexual or bisexual; 17% are intravenous drug users; 8% are members of both groups; 4% have had heterosexual contact with a person with AIDS or at risk for AIDS, or were born in foreign countries where heterosexual transmission is common; 3% are hemophiliacs or have had transfusions; and 3% could not be categorized. Hellinger, *Forecasting the Personal Medical Care Costs of AIDS from 1988 Through 1991*, 103 PUB. HEALTH REP. 309, 310 (1988).

quirement actually may encourage people who might be deterred from transmitting the disease to remain without knowledge of their condition in an effort to avoid criminal prosecution.

Upon closer inspection, this argument ignores the reality of what people actually know. The deterred testing argument presupposes that those who are at risk know of the existence of the statute. The statute is certainly not publicized, and the perceived odds of actually being prosecuted under the statute arguably appear remote to those targeted. Moreover, with the perceived odds of prosecution low and the public awareness of the AIDS danger high, people will continue to have ample incentive to be tested regardless of the potential criminal consequences.

Even if people do not abstain from being tested, the statute's knowledge requirement poses other problems. One problem is that prosecutors face the daunting task of showing that the party actually had knowledge of his HIV condition at the time of the alleged transmission. This problem is compounded by scientific uncertainty about AIDS's incubation period. It is unclear how these problems will be resolved, and they should prove to be major battlefields for future litigation under the HIV statute.

There is yet another problem with the statute's knowledge requirement. It is unclear whether courts will define knowledge objectively (e.g., through production of a documented HIV test) or subjectively (e.g., construed from being in a high risk group). The Illinois courts may take an objective approach and construe knowledge to mean an actual test result. This approach may prove costly and elusive because it would require law enforcement officials to track a person's medical history to find out if he had ever submitted to a test. The accused may not fully disclose where or when he received medical aid or testing, and a one-time visit for a test would be difficult to track. Therefore, prosecutors would be faced with a fifty state search that would be nearly impossible for them to pursue when saddled with large case loads and limited resources.

The task of officially documenting a single test is further complicated by the foreseeable reluctance of testing agencies to violate a tested person's right to confidentiality and privacy by informing the prosecution of the test results or even admitting that the accused actually had been tested. The testing agency might require the accused's consent before it releases testing information. On a more practical level, Illinois courts and law enforcement officials may not be able to coerce the release of test results held in other jurisdictions.

Conversely, Illinois courts may fashion a subjective approach in which a person's knowledge of his medical condition, symptoms, prior sexual encounters, or shared drug use would put him on notice of his HIV infection. This approach would be difficult to manage. This type of inquiry could not be totally subjective because courts still would have to decide whether a "reasonable person" would know of his infected status based on his prior activities or present condition. Moreover, to establish subjective knowledge would require detailed findings of fact and could reveal damaging personal information, which could be barred at trial as highly inflammatory and prejudicial in front of a jury.

However, despite the potential ambiguity of the knowledge requirement, the statute is an improvement on AIDS-related prosecutions under existing criminal laws. Most importantly, the statute avoids the pitfalls of having to show "intent" to commit the underlying crime as required under traditional criminal law proceedings. The problems associated with having to show intent are aptly demonstrated by *State v. Sherouse*[92] and *Barlow v. Superior Court*.[93]

In *Sherouse*, voluntary manslaughter charges were dismissed against the defendant who, despite her knowledge that she had tested positive for HIV and that HIV could be transmitted by sexual intercourse, still attempted to engage in prostitution without warning her potential clients. The dismissal was based on a failure to show that Sherouse's actions evinced an intent to kill. Similarly, the *Barlow* court denied the prosecution's motion to compel an HIV test, despite the fact that Barlow had threatened his victims with the possibility that he might have AIDS. Again, the ruling was based on the belief that, even if the defendant had HIV, this would not evince the intent requirement of the underlying crime.

The Illinois HIV statute largely avoids the problems of *Sherouse*, *Barlow*, and other cases that require intent to commit another specific crime. Under the Illinois statute, the HIV-related behavior is prosecuted directly. The state need not show that the defendant's actions brought about another crime or were meant to achieve another crime. Thus, the prosecutor is not faced with the dilemma of deciding with which crime to bootstrap the defendant's conduct.

The HIV statute's improvement on the frustrating approach

92. 536 So. 2d 1194 (Fla. Dist. Ct. App. 1989), discussed *supra* text accompanying notes 36-43.

93. 236 Cal. Rptr. 134 (Cal. Ct. App. 1987), discussed *supra* text accompanying notes 29-35.

used in cases such as *Sherouse* can be demonstrated by looking at how the HIV statute would work given the facts of *Sherouse*. Using the Illinois HIV statute, prosecutors easily could achieve conviction for criminal transmission by showing that Sherouse knew that she was infected with HIV. Sherouse's intent would not even be an issue. The state would carry no burden of showing what Sherouse was trying to do when she engaged in her HIV-related conduct. Sherouse knew that she was infected, and she knew that HIV could be spread through sexual intercourse. At the least, she could be convicted for a Class 2 felony under the Illinois HIV statute.

Additionally, the statute does not foreclose the prosecutor from pursuing other specific intent crimes; rather, it provides a clear-cut choice for prosecution, while simultaneously providing a fallback position if it becomes clear that the more severe, specific intent crime were not provable.

B. The Broad Scope of the Illinois Statute

1. Adaptability to Scientific Evidence

The apparently broad scope of the Illinois statute should be a fertile battleground for prosecutors seeking to exploit its use and for defendants seeking to narrow its application. The statute allows for prosecution of the criminal transmission of HIV when a party engages in "intimate contact with another."[94] "Intimate contact," in turn, is defined as the "exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV."[95] The statute makes no mention of any specific manner by which HIV might be transmitted.

In making its determination as to whether the contact was "in a manner that could result in the transmission of HIV," the court apparently must rely on the available state of medical and scientific knowledge. This assumption is consistent with current reliance on a wide array of "scientific" evidence that courts now use, such as fingerprinting and DNA testing. Conceivably, a court could take judicial notice that certain conduct constitutes "a manner that could result in the transmission of HIV."[96] A court would, however, still need to make complex factual determinations in deciding whether the bodily fluids were actually transmitted in a manner that meets the statutory requirements for transmission. As a re-

94. ILL. REV. STAT. ch. 38, para 12-16.2(a)(1) (1989).
95. *Id.* para. 12-16.2(b).
96. *See supra* text accompanying note 55. *But see supra* text accompanying note 56.

sult, prosecutions under the statute will most likely turn into experts' battles about the possibility of transmission based on the facts of the case.

Prior cases provide a glimpse of how courts without an HIV specific statute wrestled with the problems associated with the manner of transmission. For example, *Brock v. State*[97] specifically addressed the issue of transmission. The *Brock* court struggled to determine whether biting could transmit HIV and whether saliva was truly a transmitting agent. In its final analysis, the court found the evidence too ill-defined and thus required that the HIV-transmission potential of saliva be specifically demonstrated. This case illustrated the fact that courts will be reluctant to impose sanctions when the prosecution cannot provide scientific evidence that an activity truly can transmit AIDS.

The Illinois courts similarly will be required by the HIV statute's mandate to find that the intimate contact be of a kind scientifically capable of transmitting the disease. The problems of *Brock* have not been solved. The Illinois legislature's approach, however, is adaptable to medical advancements in HIV-transmission research and will encourage a greater overlap between the medical and legal communities. Illinois courts will only be able to impose HIV-related penalties for activities that definitively can result in the potential transmission of HIV. Thus, Illinois courts can accept new information about HIV transmission while not appearing to endorse misinformation about the spread of the disease.

2. Preventing Overly Broad Prosecutions

Allowing prosecutions when the defendant's conduct was not even capable of transmitting HIV can only serve to increase the mistrust of criminal sanctions for the containment of AIDS and fuel charges of insensitivity and discrimination by the legal system. Moreover, the spread of AIDS will not be deterred by prosecution of those incapable of transmitting the disease.

The problems of overly broad prosecution appeared in *State v. Haines*.[98] Haines was found guilty of attempted murder after the court held that his actions, coupled with his belief that his actions were capable of transmitting HIV, satisfied the substantial-step-towards-murder requirement. The court so ruled after a jury had

97. 555 So. 2d 285 (Ala. Crim. App. 1989), discussed *supra* text accompanying notes 49-60.

98. 545 N.E.2d 834 (Ind. Ct. App. 1989), discussed *supra* text accompanying notes 16-28.

held that there was insufficient evidence of intent to murder. The jury's decision, presumably, was made in part on the lack of concrete evidence that Haines's conduct—spitting and spraying blood—was capable of transmitting HIV.

The Illinois statute takes a more enlightened approach to prosecuting AIDS-related conduct. The Illinois statute specifically requires that the contact be "in a manner capable of transmitting HIV." This broad wording provides a flexible alternative that allows prosecution when the defendant's acts are capable of transmitting HIV, but are not neatly categorized, for example, as assault with a deadly weapon.

The accused's subjective belief about whether his actions are capable of transmitting infection is of no consequence. Prosecutors should prefer this approach because the prosecutor need not show that the accused has any particular expertise on the subject. On the contrary, the prosecutor need only show that the accused knew of his condition. Defendants should also prefer this approach because they will not be subject to prosecutions when their subjective belief does not comport with objective reality.

C. Sentencing

A violation of the Illinois HIV statute is a Class 2 felony.[99] Thus, the Illinois legislature specifically has provided statutory guidelines for sentencing a party under the HIV statute. In jurisdictions without HIV-specific statutes, courts have addressed whether a defendant's HIV condition served as either an aggravating or mitigating factor in sentencing.[100]

Clearly, courts have not reached a consensus on these issues. They may never reach a consensus. Illinois' statutory approach is in keeping with this uncertainty. Cases from other jurisdictions demonstrate the novel theories that may arise in HIV-related cases at the sentencing stage. The sentencing considerations, therefore, can be seen as especially fact-intensive in HIV-transmission cases. Accordingly, Illinois' HIV statute, which provides a range of penalties, provides the needed flexibility for these fact-intensive cases.

V. CONCLUSION

Although it is difficult to measure AIDS's societal impact, AIDS

99. The sentence for a Class 2 felony shall be not less than 3 years and not more than 7 years. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(5) (1989).

100. *See, e.g.*, People v. Watts, 556 N.Y.S.2d 754 (1990), discussed *supra* text accompanying notes 61-64.

has entered everyone's world. Politicians pledge that funding for research and treatment will be bolstered. Billboards urging safe sex appear on the public transportation systems in Chicago and cause a political uproar over the messages that they convey. "AIDS babies" are being brought into the world already marked with the affliction.

AIDS dramatizations are especially prevalent: a young man, Ryan White, touches the hearts of the nation, including the nation's heroes, and once again lights the fires of compassion towards AIDS victims; a tabloid screams at the unfairness that befell a young, clean-living, upscale girl who contracted HIV and did not even know it for several years. These high profile events transpire while news reports relate that AIDS is spreading faster among the heterosexual population and in smaller cities.

The Illinois legislature has provided state law enforcement officials with a valuable tool in combatting the knowing and deliberate spread of HIV. The statute is broadly worded so that once a party is aware of his HIV affliction, he can be subject to criminal sanctions for all behavior that is capable of transmitting the disease. By failing to specify how the disease may be transmitted, the statute strikes a healthy balance with future scientific knowledge. Illinois courts will be able to interpret how the disease can be transmitted by using the latest medical evidence. Most importantly, the statute is backed with a testing policy to ensure enforcement. The statute is not a cure-all, and it has its problems, for example, with the knowledge requirement and the restrictive sentencing provisions. Yet the statute can alert those who threaten to spread a plague that Illinois will not condone such reckless conduct.

The statute is but a minor player in today's world AIDS controversy. The statute will not markedly deter the spread of AIDS, but it does send a societal message that those who choose to engage in deliberately damaging behavior that can have multiple, long-range consequences will themselves share the consequences.

Overall, what is needed is greater education about the dangers of HIV and AIDS in schools, in churches, and even in prisons. Perhaps a liberalization of thought will promote greater awareness of the affliction, what to do to avoid its wrath, and what to do once stricken. The discussions concerning AIDS need to extend beyond those actually afflicted and permeate our world of thought and discussion.

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