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Are We Outlawing Motherhood for HIV-Infected Women?

Scott H. Isaacman*

I. INTRODUCTION

A popular method of coping with a problem is to make the problem illegal and punish those whose conduct relates to the problem. We attempted to cope with prostitution\(^1\) and drug abuse\(^2\) in this manner, and we now are taking a similar approach to coping with acquired immune deficiency syndrome (AIDS).\(^3\) Section 12-16.2 of the Illinois Criminal Code\(^4\) outlaws the knowing exposure of another person to the human immunodeficiency virus (HIV).\(^5\) This new HIV-specific criminal statute applies to any of the following methods of exposure:

1. intimate contact;
2. blood, semen, and organ donation; and
3. unsterile needle sharing.\(^6\)

Adding a barrier to the spread of infection is a laudable goal, but the premise that punitive laws help stop the spread of disease is not well-founded.\(^7\) Therefore, this Article explores two questions:


2. See, e.g., Cannabis Control Act, id. ch. 56, paras. 701-719.
3. 'AIDS' means the acquired immunodeficiency syndrome, as defined by the Centers for Disease Control or the National Institute of Health.” Ill. Rev. Stat. ch. 111, para. 7353(a) (1989).
6. Id. para. 12-16.2(a).
what does Section 12-16.2 accomplish, and does this statute criminalize childbearing by HIV-infected women?

This Article focuses on the application of Section 12-16.2 to pregnant women for three reasons. First, the statute broadly defines the phrase "[i]ntimate contact with another" 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." This type of exposure occurs during the course of pregnancy. The transmitting person is the mother, and the other person is the infant. The bodily fluid is the maternal blood, which flows to the placenta and hence to the fetus. This type of exposure can transmit HIV. Therefore, vertical transmission satisfies the language of the statute. Thus, childbearing can become a felony.

The second reason for focusing on perinatal transmission is pragmatic. Childbearing women are easy targets. Women generally bear children in hospitals. Blood tests are, or can be, routinely drawn upon hospital admission, from the placenta after delivery, and from the newborn infant. Mothers can be tested,

8. ILL. REV. STAT. ch. 38, para. 12-16.2(b) (1989); cf. id. para. 12-12(b),(e) ("sexual conduct" defined).
10. Because this Article discusses childbirth, there is no need to delve into whether or when a fetus is a person. Exposure to maternal bodily fluids through the placenta occurs until the umbilical cord is clamped. Under ordinary circumstances the infant is delivered before the umbilical cord is clamped and cut.
12. "Vertical transmission" is transmission from mother to fetus and is also referred to as "perinatal transmission."
15. The following are examples of studies using different techniques of obtaining
without their knowledge or consent, merely by withdrawing blood from the placenta at delivery. Infants can be tested for HIV in conjunction with metabolic screening. These procedures are already part of routine practices used to test for syphilis and metabolic disorders. Thus, evidence to identify HIV-infected mothers can be obtained through established medical practices. In this way, a prosecutor readily can support a criminal charge against an HIV-infected mother.

The third and final reason to focus on this application is because the HIV-exposure statute represents yet another law that disenfranchises the disadvantaged members of society. Young, poor, blood for HIV testing: Donegan, Edelin & Craven, HIV Seroprevalence Rate at the Boston City Hospital, 319 NEW ENG. J. MED. 653 (1988) (letter to the editor); Kransinski, Borkowsky, Bebenroth & Moore, Failure of Voluntary Testing for Human Immunodeficiency Virus to Identify Infected Parturient Women in a High-Risk Population, 318 NEW ENG. J. MED. 185 (1988) (letter to the editor); Landesman, Minkoff, Holman, McCalla & Sijin, Serosurvey of Human Immunodeficiency Virus Infection in Parturients: Implications for Human Immunodeficiency Virus Testing Programs of Pregnant Women, 258 J. A.M.A. 2701 (1987).


17. Generally, blood cannot be tested for the presence of HIV without “the written informed consent of the subject of the test.” See ILL. REV. STAT. ch. 111 §, para. 7304 (1989). However, physicians and the state may circumvent the written consent requirement. See id. paras. 7307-7308.

18. See supra text accompanying note 15.

19. The currently licensed HIV tests, when used on newborn infants, detect the mother’s antibodies, passively acquired through the placenta. The result of the test on the infant’s specimen reflects the maternal infection, not the infant’s. Blanche, Rouzioux, Mascato, Veber, Mayaux, Jaconet, Tricoire, Deville, Vial, Firtion, Crepy, Douard, Robin, Courpotin, Ciraru-Vigneron, Le Deist & Griscelli, A Prospective Study of Infants Born to Women Seropositive for Human Immunodeficiency Virus Type I, 320 NEW ENG. J. MED. 1643 (1989); Mother-To-Child Transmission of HIV Infection: The European Collaborative Study, 1988 LANCET 1041.


22. Id. para. 4903.


24. If the laboratory results return before the mother-to-be actually gives birth, then she knows that she is HIV infected and “engages in intimate contact with another” person in a manner that could result in the transmission of HIV.” ILL. REV. STAT. ch. 38, para. 12-16.2(a)(1),(b) (1989).
and minority women already mistrust the "system," and these women are the persons most affected by AIDS.\(^{25}\) By August 1990, seventy-three percent of the female AIDS cases reported to the Centers for Disease Control (CDC) involved nonwhites.\(^{26}\) Some of these women avoid prenatal care purposefully rather than out of ignorance.\(^{27}\) Some women fear the response from health care personnel who occupy positions of authority over them.\(^{28}\) They fear accusations of child abuse and drug addiction, and lectures about how they are incompetent to raise children.\(^{29}\) This avoidance of prenatal care contributes to America's dismal overall infant mortality rate\(^{30}\) and the even grimmer infant mortality rates for minorities.\(^{31}\)

At first blush, application of the new HIV-transmission statute to pregnant women appears farfetched. Ten years ago, however, application of narcotics laws to pregnant women—charging and prosecuting mothers for child abuse and delivery of controlled substances to minors through the placenta—also seemed farfetched; but these things happen today.\(^{32}\) Pregnant and childbearing wo-


\(^{27}\) For most, the issue is money. \textit{Institute of Medicine, Prenatal Care: Reaching Mothers, Reaching Infants} 4-6 (1988). \textit{But cf.} Roberts, \textit{Drug-Addicted Women Who Have Babies}, 26 TRIAL 56, 58 (1990) (women avoid prenatal care due to fear of prosecution).

\(^{28}\) Nonconsensual testing can only further such perceptions.

\(^{29}\) This sentiment arises from nonspecific fear and mistrust of the system. \textit{See} ACLU, \textit{REPORT OF THE AMERICAN CIVIL LIBERTIES UNION AIDS PROJECT} (1990). Some laws may realistically contribute to that fear. \textit{See, e.g., ILL. REV. STAT.} ch. 37, para. 802-3(b)-(c) (1989) (exposure to HIV/AIDS may be deemed abuse under wording of statute).


\(^{32}\) \textit{See, e.g.}, \textit{In re} Stephen W., 221 Cal. App. 3d 629, 271 Cal. Rptr. 319 (1990) (newborn infant tested positive for drugs and placed in foster care; court reasoned that narcotic addicts are not able to care for child and thus render child susceptible to harm); \textit{In re} Troy D., 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (1989) (newborn infant tested positive for drugs and placed in foster care; court held that prenatal use of drugs is proba-
men are already involuntarily screened for other disorders. Because Illinois allows HIV testing without informed consent under certain circumstances, it is but a small step to make neonatal HIV-testing mandatory.

The federal government, in a cooperative arrangement with local health agencies, now tests blood specimens from newborn infants to determine the prevalence of HIV infection. The federal and some state governments also test childbearing women for drug use. Some prominent groups propose mandatory HIV testing of all newborns. When examined in light of current hospital and

33. Wenstrom, supra note 14, at 558.
35. Id. paras. 7307-7308 (circumstances in which informed consent to HIV testing not necessary); see also Hermann & DeWolfe, HIV Antibody Testing Without Patient's Informed Consent: Illinois Abandons Patients' Rights, 21 J. Health & Hosp. L. 263 (1988). If Illinois joins those states that have added HIV screening to the battery of required neonatal tests, then the issue of consent will become moot.
36. For example, Rhode Island has removed its consent requirement for neonatal HIV testing. See R.I. Gen. Laws § 23-6-HIV-1 (1989) (informed consent not required if person tested is under one year of age).
39. The AMA recommends:

Recommendation 22-C: That AMA support mandatory HIV testing of all newborns in high prevalence areas where treatment modalities with proven benefits for infected neonates are available.

Bd. of Trustees, Am. Medical Ass'n, HIV Policy for the '90s, at 11 (1989). Currently, there are no treatment modalities with proven benefits for neonates. However, the AMA recommendation is not conditioned upon time—the word “when” is not used.

For other discussions in the debate, see Hearings on Children and HIV Infection Before
governmental practices, and medical recommendations, the potential application of the HIV-exposure statute to pregnant women is not farfetched at all.


41. Gwinn, Pappaioanou, George, Hannon, Wasser, Hoff, Grady, Willeghby, Novello, Peterson, Dondero & Curran, Prevalence of HIV Infection in Childbearing Women in the United States, Surveillance Using Newborn Blood Samples, 265 J. A.M.A. 1704 (1991); Dondero, supra note 37, at 213; Pappaioanou, supra note 37, at 113. The CDC maintains that although "[e]thically, a study of HIV infection in identifiable persons must be done with informed consent and must permit refusal to participate, ... [b]linded surveys are consistent with ethical norms because no participants are placed at risk of identification." Dondero, supra note 37, at 215. Indeed, the CDC claims that because there is no risk to persons, informed consent falls under an exemption in 45 C.F.R. § 46.101 (1988). A close reading of the regulation allows exemption when the research deals with using existing diagnostic specimens if the information is tabulated in a manner that preserves the anonymity of the subjects. Id. §§ 46.101(b)(1)-(iii), (b)(4)(i)-(iii), 46.201 et seq. (1989). See Isaacman, Neonatal HIV Testing: Governmental Inspection of the Baby Factory, 24 J. MARSHALL L. REV. — (1991).

II. THE CRIMINALIZATION OF CHILDBEARING

The new HIV-exposure statute unwittingly\(^4\) makes childbearing a felony\(^3\) for HIV-infected women. The statute provides: "A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV... engages in intimate contact with another."\(^4\) Therefore, to commit this new felony, a person must know his or her HIV status.\(^4\) Any woman who, prior to or during pregnancy, discovers that she is HIV positive\(^7\) satisfies the first element of the offense.

The second element is that the HIV-infected person must engage in "intimate contact with another."\(^4\) One might assume that intimate contact refers to sexual contact, but according to the basic rules of statutory construction, the terms are not synonymous. The legislature knows what "sexual conduct" is. The preceding section of the Illinois Criminal Code\(^4\) used that phrase and the Code expressly defined "sexual conduct" in Section 12-12.s


44. ILL. REV. STAT. ch. 38, para. 12-16.2(e) (1989).
45. Id. para. 12.16-2(a)(1).
49. Id. para. 12-15.
50. "'Sexual conduct' means any intentional or knowing touching or fondling by the
cordingly, the phrase "intimate contact" as used in Section 12-16.2 cannot be synonymous with "sexual conduct." Therefore, "intimate contact" must include both sexual conduct and other, nonsexual contact. Transplacental exposure is "exposure of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV" through nonsexual contact.

Apparently, no one considered this possible application of Section 12-16.2. The most disturbing aspect of researching this Article was the revelation that standard legislative operating procedure fails to involve public health authorities in the formulation or design of public health laws. Apparently, no public health professionals provided any input into the drafting of this legislation. Instead of a pro-active partnership in effective and efficient lawmaking, what exists is a sophisticated bureaucratic array of reactive responses to the very independent actions of representatives. This practice is incomprehensible because input from government experts, the Illinois Department of Public Health, and the State's Attorney's Office is free. Input from private organizations, such as the Illinois State Medical Society and the Illinois Hospital Association is also available, without charge, to the legislature. In addition, special interest groups supply opinions on such matters without charge. This failure to utilize free resources leaves the taxpayers to pay the tab for the legislature's ill-considered acts.

III. THE ILLINOIS STATUTE IS CONSTITUTIONALLY OFFENSIVE

Under the express terms of the statute, HIV transmission is not an element of the criminal offense. Instead of creating a criminal offense for person-to-person HIV transmission, legislators created a criminal offense for person-to-person HIV exposure. Therefore,
an HIV-positive woman commits a felony by becoming pregnant and carrying her pregnancy to term regardless of whether she infects her infant. This application infringes upon liberty interests and fundamental rights of women without serving a compelling state interest.54

A. Childbearing Is a Fundamental Right and a Liberty Interest

We naturally assume that all adult citizens have reproductive autonomy, a “right” to engage in consensual sexual activity,55 and a “right” to conceive children.56 Societies that have required, prohibited, or limited childbearing have been scorned, ridiculed, and made the object of anti-utopian fiction.57 Laws that regulate marriage,58 extramarital sex,59 and prostitution60 have existed in most cultures for centuries, but nations today do not ordinarily forbid members of society from having children.61

In our society, the right to bear children is “implicit in the concept of ordered liberty”62 according to the United States Supreme Court.63 By denying HIV-infected women the freedom to conceive and bear children, the Illinois statute deprives these women of a liberty interest.64 They are no longer free to raise a family. HIV-

54. Arguments could also be made using the vagueness and overbreadth doctrines, and asserting violations of privacy, equal protection, and due process rights. For brevity, this Article focuses on the deprivation of a fundamental right and liberty interest.

55. See Carey v. Population Servs. Int’l 431 U.S. 678, 686 (1977) (regulations imposing burden on whether to bear or beget a child may be justified only by compelling state interest and must be narrowly drawn to express only those interests); Roe v. Wade, 410 U.S. 113, 155 (1973) (regulation limiting fundamental right must serve a compelling state interest); Eisenstadt v. Baird, 405 U.S. 438 (1972) (freedom from government intrusion into decision to bear or beget a child is fundamental right); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (privacy in marriage is fundamental right); Skinner v. Oklahoma, 316 U.S. 535 (1942) (marriage and procreation are “basic civil rights of man”). But see Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (prohibition of consensual sexual activity between adult males).


57. See, e.g., A. Huxley, Brave New World (1936); N. Menerats, Birth Control and Foreign Policy 59, 157 (1976) (Indian and Chinese policies); G. Orwell, 1984 (1949); World Population and Development: Challenges and Perspectives, ch. 14, (P. Hauser, ed. 1979).


59. See, e.g., id. ch. 38, paras. 11-7 (adultery), 11-8 (fornication), 11-12 (bigamy).

60. See, e.g., id. para. 11-14.

61. But see, e.g., id. ch. 40, para. 212 (prohibited marriages).


63. See supra notes 55-56 and accompanying text.

infected pregnant women lose childbearing choices.

This loss of childbearing choices also constitutes a deprivation of a fundamental right. Basic aspects of life that derive from the "inherent dignity" of the human person do not need to be explicit in the federal or state constitution in order to exist or to be protected. The fundamental right to "bear and beget children" is not expressly included in the federal constitution, but is recognized by the international community.

Independent of that legal basis, the United States Supreme Court held that childbearing is a fundamental right. The right to bear children is also implicit in the Illinois constitution, and the of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause").


68. Article 16 of the 1948 Universal Declaration of Human Rights states:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriages shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.


69. "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

70. See Ill. Const. art. I, §§ 1, 2, 6, 18, 24.
state supreme court recently stated that "parents have a liberty interest in bearing and raising their children."\textsuperscript{71}

\textbf{B. The Illinois Statute Violates the Fundamental Right and Liberty Interest of Childbearing}

The HIV-exposure statute effectively denies HIV-infected women the right to have children because it makes maternal-infant perinatal transmission a felony offense.\textsuperscript{72} A woman who is HIV seropositive is considered to be infected with HIV.\textsuperscript{73} Such an HIV-positive individual may not become ill for a number of years after becoming infected.\textsuperscript{74} AIDS, when it develops, may take a number of years to cause debilitating illness and years more to cause death.\textsuperscript{75}

Once a woman knows that she is seropositive for HIV, she fulfills the intent requirement of the HIV-exposure statute.\textsuperscript{76} If she then becomes pregnant, she exposes "another person" to her "infected bodily fluids."\textsuperscript{77} Further, this kind of exposure is "in a manner that could result in the transmission of HIV."\textsuperscript{78} Her only options are to forgo childbearing for the remainder of her life\textsuperscript{79} and abort any pregnancy, or to violate the law. The statute narrows a woman's childbearing choices and thereby deprives her of liberty\textsuperscript{80} and of the fundamental right to bear children.\textsuperscript{81} The statute out-

\textsuperscript{71} People v. R.G., 131 Ill. 2d 328, 342, 546 N.E.2d 533, 540 (1989).
\textsuperscript{72} See ILL. REV. STAT. ch. 38, para. 12-16.2(a)(1) (1989); see also supra notes 4-12 and accompanying text.
\textsuperscript{73} Public Health Guidelines, supra note 48, at 510. See also generally AIDS AND OTHER MANIFESTATIONS OF HIV INFECTION 270-87 (G. Wormser ed. 1987).
\textsuperscript{74} Levy, Human Immunodeficiency Viruses and Pathogenesis of AIDS, 261 J. A.M.A. 2997 (1989) (disease caused by HIV has long incubation period).
\textsuperscript{76} ILL. REV. STAT. ch. 38, para. 12-16.2(a) (1989).
\textsuperscript{77} Id. para. 12-16.2(a)(2).
\textsuperscript{78} Id. para. 12-16.2(b) (definition of "intimate contact with another"); see also supra notes 8-12, 45-51 and accompanying text.
\textsuperscript{79} This is, in effect, involuntary sterilization. See Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).
laws ordinary conduct by effectively criminalizing childbearing for HIV-infected women.

C. The Statute Has No Reasonable Basis

Superficially, the HIV-transmission law appears to be a gesture to combat AIDS. Combating a public health problem is a legitimate health and welfare power of the state, and AIDS is a public health problem of monumental concern and proportion. Health and welfare laws, now more appropriately called exercises of "police power," can be very broad. These laws provide state agencies the power to compel physical examination and treatment, to quarantine, and to destroy livestock and property. The exercise of this power—the ability to cast aside an individual's rights—is conditioned upon its serving a legitimate public health goal.

The enactment of Section 12-16.2 was motivated by politics rather than by health concerns. Section 12-16.2 fails to promote family health. A pregnant, HIV-infected woman can only avoid

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82. "Once the legislature determines that a problem exists and acts to protect and promote the general welfare of its citizens, the legislation is presumed to be a valid exercise of the State's police power." Illinois Gamefowl Breeders Ass'n v. Block, 75 Ill. 2d 443, 453, 389 N.E.2d 529, 532 (1979).


84. See, e.g., ILL. REV. STAT. ch. 34, paras. 5-20001 to -20003 (1989); id. ch. 111§, paras. 15, 17, 22 (enumerating power of local boards of health).

85. See, e.g., ILL. REV. STAT. ch. 111§, paras. 22-24 (1989); id. ch. 127, paras. 55-55.58 (outlining the powers and duties of the Illinois Department of Public Health).

86. See, e.g., People ex rel Baker v. Strautz, 386 Ill. 360, 366-67, 54 N.E.2d 441, 444 (1944); People ex rel Barmore v. Robertson, 302 Ill. 422, 429, 134 N.E. 815, 819 (1922).


88. See, e.g., id.; see also Zucht v. King, 260 U.S. 174, 176 (1922); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

89. See e.g., ILL. REV. STAT. ch. 111§, para. 7407 (1989) (authorizing isolation of a person to prevent the spread of a sexually transmitted disease); see also, e.g., Compaigne Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380, 387-88 (1902).


91. See, e.g., id. ch. 24, para. 11-31-1 (authorizing demolition of dangerous and unsafe buildings).


93. Enacting a HIV-specific criminal transmission statute transfers a portion of the responsibility in the battle against AIDS to the State's Attorney's Office and diverts attention from the Illinois Department of Public Health's failure to combat the disease. Moreover, the State's Attorney may exercise prosecutorial discretion by not charging some prostitutes who are seropositive with a violation of the statute, despite the possible adverse health effects of such a decision.
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violating the law only by terminating her pregnancy, because having the child violates the statute whether or not she transmitted HIV to the infant. An HIV-infected woman can avoid violating the law only by surrendering reproductive autonomy.

From the infant's perspective, the law equally fails to promote health. Birth to an HIV-infected mother carries only a thirteen to twenty-seven percent chance of HIV transmission and subsequent death. Abortion offers certain death. The statute favors abortion because that is the only way for a pregnant woman to avoid committing an offense. The statute therefore fails to promote a legitimate public health interest and, in fact, promotes a less healthy alternative.

Outside of the maternal-child dyad, the statute arguably acts to deter the commission of sex offenses and to discourage needle sharing. However, quarantine statutes already allow for indefinite imprisonment. In addition, no impediment exists to bringing criminal charges under previously existing law against individuals who willfully expose others to HIV through sexual and needle-sharing activity. HIV-infected persons who engage in sexual conduct for money or who intentionally engage in sexual conduct to harm another can be charged with prostitution, assault, battery, attempted murder, and perhaps even murder. HIV-infected persons who engage in needle sharing can be charged with a drug of-

94. Id. para. 12-16.2(c).
95. Such forced sterilization does not promote women's health.
96. European Collaborative Study, Children Born to Women with HIV-1 Infection: Natural History and Risk of Transmission, 33 LANCET 253 (1991) (600 children born to HIV-infected mothers observed; nearly 13% rate of transmission); Blanche, Rouzioux, Moscato, Veber, Mayauz, Jacomet, Tricoire, Deville, Vial, Firtion, Crepy, Douard, Robin, Courpotin, Ciararu-Vigneron Diest, & Griscelli, A Prospective Study of Infants Born to Women Seropositive for Human Immunodeficiency Virus Type 1, 320 NEW ENG. J. MED. 1643 (1989) (308 children of HIV-infected mothers observed; 27% rate of transmission).
99. See id. ch. 38, paras. 8-4 (attempted murder), 9-1 (murder), 11-14 (prostitution), 12-1 (assault), 12-3 (battery); see also, e.g., United States v. Moore, 846 F.2d 1163 (8th Cir. 1988) (HIV-infected inmate who bit correctional officers convicted of assault with a dangerous and deadly weapon); Cooper v. State, 539 So. 2d 508, 511 (Fla. Dist. Ct. App. 1989) (court upheld sentence in excess of sentencing guidelines for assailant who, knowing that he was infected with HIV, sexually assaulted a minor).
fense, assault, battery, attempted murder, or murder. Adding an HIV-specific criminal statute appears superfluous.

Section 12-16.2 is redundant and can only serve to produce confusion among lawyers and judges. Although legislation is presumed to be constitutional, a cursory examination demonstrates the infirm reasoning behind the HIV-exposure statute.

D. The Law Does Not Withstand Strict Scrutiny

The application of the HIV-exposure statute to HIV-infected pregnant women touches both “liberty” and “fundamental rights” classifications. The federal and state courts apply strict scrutiny to such legislatively created deprivations. Accordingly, the statute must serve a compelling state interest and the state must employ the least intrusive means to achieve that purpose.

State interests are weighed against individual interests in challenges to police power laws. The articulated state interest must be significant and must be reached through the permissible exercise of police power. As articulately stated by Justice Jackson in his concurrence in Skinner v. Oklahoma: “There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority.” The Illinois legislature, in enacting Section 12-16.2, gave no consideration to this statute’s impact on women who, although HIV positive, wish to raise a family.

Further, even if the statute legitimately intended to prevent in-
tentational sexual and drug-related transmission of HIV, it is superfluous because such conduct is already subject to criminal sanction.\textsuperscript{109} Clearly the statute is not narrowly tailored to achieve that purpose. Additionally, as this Article has shown, Section 12-16.2 deprives HIV-infected women of a fundamental right and a liberty interest. These deprivations do not serve a compelling state interest,\textsuperscript{110} nor is this deprivation the least intrusive means available to decrease the spread of AIDS. The law, as it currently stands, should be declared unconstitutional if challenged by a pregnant woman with HIV.\textsuperscript{111}

IV. Conclusion

The new HIV-exposure statute transplants a health problem from the state department of health to the criminal justice system. To make matters worse, the language of the statute applies to mother-infant transmission.

The application of the new HIV statute to pregnant women aptly demonstrates the law's overreaching. This example of constitutional infirmity, unfortunately, is not an academic exercise. A number of children are born to HIV-infected women in this state, and the numbers are increasing.\textsuperscript{112}

The approach of criminalizing transmission is based on a spurious premise and specious reasoning. The majority of those who are at risk—young, poor, and minority women\textsuperscript{113}—are completely

\textsuperscript{109} See supra note 99 and accompanying text.

\textsuperscript{110} Even if the goal was to prevent HIV spread through sexual and needle-sharing activities, an HIV-specific criminal transmission law must be specifically tailored toward those goals and not so broadly written. See supra notes 102-03 and accompanying text.

\textsuperscript{111} For standing requirements, see People v. Wagner, 89 Ill. 2d 308, 311, 433 N.E.2d 267, 269 (1982); Illinois Gamefowl Breeders Ass'n v. Block, 75 Ill. 2d 443, 450-52, 389 N.E.2d 529, 531 (1979).

\textsuperscript{112} In 1989, the Illinois Department of Health recorded 13 cases of HIV infections in children. AIDS, FACTS FOR LIFE, AIDS/HIV SURVEILLANCE REPORT (December 29, 1989). In 1990, the agency recorded 67 cases. AIDS CHICAGO, SURVEILLANCE PROGRAM: OFFICE OF AIDS PREVENTION, CHICAGO DEPARTMENT OF HEALTH 35 (December 1990). The City of Chicago recorded 44 cases of HIV infection in children under 13. Id. at 7. On a national level, the Center for Disease Control recorded 462 infants in 1988, and 598 in 1989. The cumulative pediatric (less than 13 years old)cases totaled 2,963 as of March 1991. HIV/AIDS SURVEILLANCE REPORT 8 (April 1991).

\textsuperscript{113} See Gayle, supra note 25, at 23-30; see also Distribution of AIDS Cases, by Racial/Ethnic Group and Exposure Category, United States, June 1, 1981-July 4, 1988, 37 MORBIDITY & MORTALITY WEEKLY REP. 1, 2 (Supp. SS-3 1988) (disproportionate percentage of AIDS patients are black or Hispanic); First 100,000 cases of Acquired Immunodeficiency Syndrome—United States, 38 MORBIDITY & MORTALITY WEEKLY REP. 561, 561 (1989) (disproportionate percentage of AIDS patients are black or Hispanic, particularly among intravenous drug users with AIDS); Update: Acquired Immu-
unaware of the law.\textsuperscript{114} Even if these women were aware of the law, there is no support in any epidemiologic study that criminalization of HIV transmission will influence sexual conduct and childbearing decisions.\textsuperscript{115} For centuries, laws forbid consensual sexual activity between adults outside the sanctity of marriage. Nevertheless, society remains far from chaste. Many authorities believe that such laws are ineffectual.

An analogy may be drawn to society's fight against drug abuse. Despite the long history of criminalization of drug use, current harsh laws, and mandatory sentencing, the drug problem persists. In fact, drug use has risen to epidemic proportions. Treating the problem as a crime rather than an illness makes life more miserable for those who already lead miserable lives. Punitive approaches to health issues alienate those suffering from drug addiction, disease, and poverty, and erect barriers to obtaining needed medical services.

The newly enacted HIV-exposure statute leaves much to be desired. AIDS is a very real threat but a broadly worded, HIV-specific criminal transmission statute may be counterproductive.\textsuperscript{116} Our prisons are bursting at the seams. Those seams are part of the fabric of society.\textsuperscript{117} Criminalizing childbearing for drug-addicted or HIV-positive women stresses that fabric further.

If the goal of the legislature is really to stem the spread of this disease, several approaches to the AIDS crisis must be considered. All facets of the issue warrant analysis and input from medical, social, and legal authorities. Formulating an effective policy re-


quires integration and comprehensive evaluation of past and current public health approaches to infectious diseases.

We need to look before we leap when enacting new laws, for as Justice Chase once said: "An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." We cannot take a shortcut by criminalizing the problem. We must begin to prevent and treat disease—rather than punish the diseased—if we honestly care about social justice and the health of all citizens.


119. As Justice Holmes said in the context of a statute impairing freedom of contract: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
12-16.2 CRIMINAL TRANSMISSION OF HIV

§ 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.