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Why the Intentional Sexual Transmission of Human Immunodeficiency Virus (HIV) Should Be Criminalized Through the Use of Specific HIV Criminal Statutes

INTRODUCTION

Most people agree that the intentional sexual transmission of the Human Immunodeficiency Virus (HIV) is wrong.¹ This type of transmission occurs when an HIV infected person has consensual sexual intercourse² with an uninfected person without informing them of the presence of the virus. Some people feel criminalization of the intentional sexual transmission of HIV is necessary as a matter of public policy to control the spread of the virus³ while others feel that the criminal law is an ineffective and inappropriate means of controlling the spread of HIV.⁴ However, federal legislation requires that the States enact HIV legislation in order to obtain HIV funding.⁵ Therefore, there is no question of whether the States should legislate on HIV transmission.⁶ The question is simply how.

Many States have public health laws making it a crime to intentionally transmit a sexually transmitted disease (STD) to another

¹ See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1019, 1044 (1989) (reporting that public opinion polls indicated that the public felt that coercive action must be used by the state to prevent HIV infected persons from spreading the virus sexually and also that the intentional sexual transmission of HIV is "blameworthy"); see also Dan Subotnik, "Sue Me, Sue Me, What Can You Do Me? I Love You" *A Disquisition on Law, Sex, and Talk*, 47 FLA. L. REV. 311, 409 (1995) (indicating that 84% of the people surveyed believed that the law should provide for penalties when a sexual partner misrepresents the fact that he or she has HIV or another STD).

² Sexual intercourse includes anal, oral and vaginal intercourse. Gostin, *supra* note 1, at 1021-22.

³ *Id.* at 1038 (upholding that criminalization sanctions blameworthy people for their acts while providing retribution and prevention of future acts).

⁴ *Id.* at 1044 (arguing that the transmission of a virus does not fit into the criminal law profile of a guilty offender and an innocent victim).

⁵ The Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub.L. No. 101-381, 104 Stat. 576 (codified in scattered sections of 42 U.S.C.) (amending the Public Health Service Act of 1970) (hereinafter "CARE").

⁶ If the States do not enact legislation, they do not receive the much needed funding from the federal government. *Id.*

person.⁷ However, these laws are rarely enforced.⁸ Also, most States do not include HIV on their list of sexually transmitted diseases.⁹ Another alternative to using public health laws to punish the intentional sexual transmission of an STD or HIV is to use traditional criminal statutes to punish offenders who knowingly transmit either an STD or HIV.¹⁰ However, these laws are not specifically tailored for this purpose, and as a result, are an undesirable means of prosecution.¹¹ A final and more desirable alternative is the enactment of laws specifically targeted to the intentional sexual transmission of HIV.¹² Although there has not been a U.S. Supreme Court determination on the constitutionality of specific HIV laws,¹³ other Supreme Court decisions indicate that these laws would be found valid.¹⁴

This Note focuses on the need for enactment and enforcement of

⁷ E.g. Stephen V. Kenney, Comment, *Criminalizing HIV Transmission: Lessons From History and a Model for the Future*, 8 J. CONTEMP. HEALTH L. & POL'Y 245, 247 (1992) (noting that the public health laws were enacted over 100 years ago to combat the spread of syphilis).

⁸ *Id.* at 256.

⁹ *Id.*

¹⁰ See Karen E. Lahey, *The New Line of Defense: Criminal HIV Transmission Laws*, 1 SYRACUSE J. LEGISLATION & POLICY 85, 86-88 (1995).

¹¹ *Id.* (noting that the prosecution of individuals under traditional criminal law statutes presents problems such as difficulty proving causation due to the latency period of HIV and difficulty in proving actual transmission since the virus is not transmitted easily). See also Michael L. Closen et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921 (1994) (suggesting that traditional criminal law is not an appropriate route).

¹² See generally, Lahey, *supra* note 10 (advocating that HIV statutes would deter further transmission of HIV); Linda K. Burdt and Robert S. Calwell, *The Real Fatal Attraction: Civil and Criminal Liability for the Sexual Transmission of AIDS*, 37 DRAKE L. REV. 657 (1987/1988) (proposing need for HIV-specific statutes is warranted to keep HIV from continuing to spread in the decades ahead); Amy M. Decker, Comment, *Criminalizing the Intentional or Reckless Exposure to HIV: A Wake-Up Call to Kansas*, 46 U. KAN. L. REV. 333 (1998) (advocating the need for HIV-specific felony statutes to easily enable prosecution of offenders).

¹³ See Kenney, *supra* note 7, at 262-63.

¹⁴ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (allowing States broad discretion to enact public health laws to protect public health and safety); *Love v. Superior Court*, 276 Cal. Rptr. 660 (1990) (upholding a mandatory HIV testing statute to protect public health).

specific laws criminalizing the intentional sexual transmission of HIV since the incidence of HIV is still increasing at epidemic proportions. Section I provides background information on the history of HIV. Section II discusses legislation relating to HIV including the Ryan White Comprehensive AIDS Emergency (CARE) Act; current public health laws governing the intentional sexual transmission of STDs, and the application of traditional criminal laws to the transmission of HIV and why this is also not an effective means to legislate regarding HIV transmission. Section III discusses how STD laws can be used as a framework for HIV laws, the similarities between HIV and syphilis, and the proposition that controlling the spread of STD's would help control HIV. Section IV advocates that specific HIV laws criminalizing the intentional sexual transmission of HIV are the superior method to control the spread of HIV, with emphasis on foreseeability and the duty to warn. Section V discusses when knowledge of HIV should be imputed on a person that does not have actual knowledge they are infected and discusses both the Rock Hudson and Magic Johnson cases. Section VI discusses two incidences of "supertransmitters" which exemplify why HIV-specific laws are needed. Section VII discusses the constitutionality of specific HIV laws in light of its review of STD laws and other related issues. This Note concludes with the assertion that specific criminal laws are needed and are proper in light of public policy and constitutional requirements.

I. BACKGROUND OF HIV, ILLUSTRATING THAT SEXUAL INTERCOURSE IS THE PRIMARY MEANS OF TRANSMISSION

Since the early 1980's when HIV was first identified,¹⁵ HIV has spread dramatically within the United States.¹⁶ HIV attacks a person's

¹⁵ See Thomas W. Tierney, Note, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT'L & COMP. L. REV. 475, 476 (1992). See also Linda K. Burdt & Robert S. Caldwell, Note, *The Real Fatal Attraction: Civil and Criminal Liability for the Sexual Transmission of AIDS*, 37 DRAKE L. REV. 657 (1987/1988) (stating that HIV was first identified in 1981).

¹⁶ Paul Barron et al., *Survey, State Statutes Dealing with HIV and AIDS: A*

immune system,¹⁷ and is transmitted by one of three means: infected blood injected into the bloodstream, unprotected sex with an infected person, and passing from an infected mother to her unborn or newborn baby.¹⁸ However, the most common means of transmission of the HIV virus is through sexual activity.¹⁹ Sexual activity includes oral, anal, and vaginal sex, with anal sex posing the most serious risk and oral sex the least risk.²⁰ As of June 1997, there were 79,512 reported cases of HIV infection in the United States²¹ and 222,704 reported cases of Acquired Immune Deficiency Syndrome (AIDS),²² with the highest rates of infection in New York, California, and Florida, respectively.²³

AIDS refers to the illness a person develops after being infected with, and having their immune system attacked by, HIV.²⁴ HIV may remain dormant in the body from two months to seven years after initial infection.²⁵ During this time the only way a person can detect infection is to be tested for the presence of antibodies to the virus.²⁶ This test would indicate exposure to HIV within two to four months.²⁷

Comprehensive State-By-State Summary, 5 LAW & SEX. 1 (1995) (asserting that "Since the early 1980's, the spread of AIDS and the number of persons diagnosed as HIV positive has been dramatic.").

¹⁷ Tierney, *supra* note 15, at 476.

¹⁸ *Id.*

¹⁹ See *id.* at 482 (indicating that "HIV infection is primarily a sexually transmitted disease."). See also Gostin, *supra* note 1, at 1044 (indicating that "sexual intercourse is a primary mode of transmission of HIV.").

²⁰ Tierney, *supra* note 15, at 482 (reporting that anal and vaginal sex are the most effective modes of transmission while oral sex is the least effective transmission route).

²¹ CENTERS FOR DISEASE CONTROL, SEXUALLY TRANSMITTED DISEASE SURVEILLANCE, (1996) (visited February 26, 1998) <<http://www.wonder.cdc.gov/wonder/STD/STD/STDD101>>.

²² *Id.*

²³ *Id.*

²⁴ Tierney, *supra* note 15, at 476-77 (noting that the term 'AIDS' was defined by the Centers for Disease Control (CDC) in Georgia).

²⁵ This period is known as either the latency period or the dormancy period. *Id.* at 478-79.

²⁶ A positive HIV test result is the only way to detect infection during this period. *Id.* at 479.

²⁷ Tierney, *supra* note 15, at 479 (indicating that the antibodies usually become detectable two to four months after exposure to the HIV virus). Within six months of exposure, 95% of infected individuals yield a positive test result. *Id.*

II. LEGISLATION

A. The Ryan White Act and the Need to Legislate

The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990²⁸ was a catalyst which sparked legislative action to provide a means to prosecute for the intentional transmission of HIV.²⁹ This Federal Act provides emergency AIDS relief grants if a State has statutes which allow a person to be prosecuted for intentionally transmitting HIV to another person.³⁰ The States can fulfill this federal requirement by: amending their public health statutes to include HIV on their list of sexually transmitted diseases;³¹ using traditional criminal law statutes to punish HIV transmission;³² or enacting specific criminal statutes targeted at HIV transmission.³³

B. Current Public Health Laws Addressing STDs

Generally, public health laws impose a duty upon a person who is infected with an STD to warn a sexual partner of infection before sexual contact.³⁴ For example, New York's Public Health Law provides

²⁸ See CARE, *supra* note 5.

²⁹ Kenney, *supra* note 7, at 247.

³⁰ *Id.* at 247. CARE provides emergency assistance to geographical areas that are disproportionately affected by the HIV epidemic. This act makes financial assistance available to States, as well as public and private non-profit entities to fund the development and operation of programs to deliver the essential services to individuals infected with HIV. 42 U.S.C. § 300ff.

³¹ Kenney, *supra* note 7, at 263, 266-68 (advocating that grouping HIV with other STDs is inappropriate).

³² *Id.* at 263-64 (noting the shortcomings of applying these general criminal statutes to HIV).

³³ *Id.* at 263, 268-72 (asserting that "The AIDS-specific statute appears to be the best method to establish a coercive public health response to control the spread of HIV infection.").

³⁴ Eric L. Schulman, Note, *Sleeping with the Enemy: Combating the Sexual Spread of HIV-AIDS Through a Heightened Legal Duty*, 29 J. MARSHALL L. REV. 957, 973 (1996).

that “[a]ny person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor.”³⁵ However, New York does not include HIV/AIDS on its list of sexually transmitted diseases.³⁶ In February 1988, four medical societies petitioned the New York Commissioner of Health to include HIV as a communicable disease and place it on the list of sexually transmitted diseases.³⁷ Since this “would trigger the operation of statutes providing for isolation and quarantine, reporting, testing and contact testing”³⁸ for HIV, the Commissioner denied the request stating that the statutes triggered “would be inappropriate for AIDS or HIV-infected patients.”³⁹ The New York Supreme Court held that the Commissioner was justified in his decision and the Appellate Division affirmed.⁴⁰

Case law states that a person has a duty to warn a sexual partner of the presence of an STD.⁴¹ Case law also proclaims that this duty is not limited to the cases of misrepresentations of the presence of an STD⁴² or

³⁵ N.Y. PUB. HEALTH LAW § 2307 (McKinney 1993).

³⁶ N.Y. COMP. CODES R. & REGS. tit. 10, § 23.1. The list includes gonorrhea, syphilis, non-gonococcal urethritis (NGU), non-gonococcal (mucopurulent) cervicitis, trichomoniasis, genital herpes simplex, PID gonococcal/non-gonococcal, lymphogranuloma venereum, chancroid, ano-genital warts, granuloma inguinale, yeast vaginitis, gardnerella vaginitis, pediculosis pubis, scabies. *Id.*

³⁷ *New York State Society of Surgeons v. Axelrod*, 555 N.Y.S.2d 911 (App. Div. 1990).

³⁸ *Id.* at 912.

³⁹ *Id.* (reasoning that the voluntary cooperation of HIV infected individuals might be lost as well as confidentiality if HIV was added to the statute).

⁴⁰ The New York State Supreme Court dismissed the New York Society of Surgeons' petition on the merits and the Appellate Division concluded that the Commissioner of Health of the State of New York did not exceed his authority or act arbitrarily or capricious when he determined that HIV infection would not be designated as a communicable or sexually transmitted disease. *Id.* at 912-13.

⁴¹ *See, e.g., Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989) (allowing an action for transmission of genital herpes); *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Ct. App. 1984) (allowing an action for failure to inform plaintiff of the presence of an STD).

⁴² *See Maharam v. Maharam*, 510 N.Y.S.2d 104, 107 (App. Div. 1986) (agreeing with lower court statements that, “the thirty-one year marital relationship gave rise to an affirmative ‘legal duty to speak,’ and the allegation that the husband failed to disclose his condition adequately States a cause of action for constructive, if not actual, fraud.”). The court also found that the duty to speak could be predicated on New York's Public Health

instances where there is a confidential or special relationship such as marriage or engagement.⁴³ Since "courts impose a duty to disclose non-life-threatening STDs before engaging in sex,"⁴⁴ it seems that they should also impose the same duty on life-threatening STDs such as HIV. In the late 1900's, States began to use their police power⁴⁵ to contain the spread of many different contagious diseases through the use of quarantine, vaccination, and mandatory physical examinations, as well as through public health statutes which criminalized behavior risking transmission of an STD.⁴⁶ Although the States could now prosecute for behavior which risked transmission of an STD, the public health statutes criminalizing transmission of an STD were rarely enforced.⁴⁷ This may

Law § 2307, which makes it a misdemeanor for a person with an STD to have sex with another person, in finding this duty to warn. *Id.*

⁴³ See *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988) (holding that the defendant did not need to have a confidential relationship with the plaintiff before he owed her the duty to disclose that he had genital herpes). The defendant had a general duty to disclose and it was sufficient that the defendant should have known that harm to the plaintiff was likely. *Id.* Their relationship was merely a romantic one between a doctor and a nurse, not a confidential one. *Id.*

⁴⁴ See A. Samuel Oddi, *Reverse Informed Consent: The Unreasonable Dangerously Patient*, 46 VAND. L. REV. 1417, 1455 (1993).

⁴⁵ The Tenth Amendment of the United States Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X, §10. Courts have never clearly defined what the police power of the States is. *Stone v. Mississippi*, 101 U.S. 814, 818 (1880). "Many attempts have been made by this Court and elsewhere to define the police power, but never with entire success." *Id.*

⁴⁶ Kenney, *supra* note 7, at 254-55 (explaining that the States used their police power to control the spread of STDs primarily from the late nineteenth century through World War II). See also David P.T. Price, *Between Scylla And Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 444 (1990) (indicating that the traditional methods of controlling disease was primarily quarantining and segregating individuals infected with contagious diseases). The first reported quarantining in the United States was in New York in 1622 because of smallpox. *Id.* Quarantine is used when a person has been exposed to a disease but has not developed symptoms and segregation is used when a person actually has the symptoms of a disease. Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 56 (1985).

⁴⁷ Kenney, *supra* note 7, at 254-56 (noting that the statutes were mainly enforced against prostitutes). These statutes implicitly criminalized transmission of an STD. See, e.g., N.Y. PUB. HEALTH LAW § 2307 (McKinney 1985) (providing that it is a

be explained due to the fact that enforcement was difficult and the statutes only provided for minor penalties.⁴⁸ Since coercive solutions alone were not enough to control the spread of STDs,⁴⁹ this suggests that education to control disease and encourage the availability of information and treatment⁵⁰ was a necessary addition to traditional public health efforts.⁵¹

Public health laws governing the transmission of sexually transmitted diseases may initially seem narrow enough to adequately impose liability for the intentional sexual transmission of HIV.⁵² However, the statutes would actually become over inclusive if HIV was added to them because they may criminalize some casual contacts which pose no risk of transmitting HIV.⁵³ This results in the public health statutes failing the standard of reasonableness defined by *Jacobson v. Massachusetts*⁵⁴ and therefore may infringe on the right to privacy given

misdemeanor for a person who is infected with an STD to expose another); CAL. HEALTH & SAFETY CODE § 3198 (West 1990) (making it a misdemeanor for a person who is infected with an STD to knowingly expose another); COLO. REV. STAT. § 25-4-401(2) (1989) (providing that it is a crime for a person, who knows, or reasonably should know, that they are infected with an STD to willfully expose or infect another with an STD, or to perform an act which exposes or infects another); VT. STAT. ANN. tit. 18, § 1106 (1982) (making it a misdemeanor for a person who knowingly is infected with a contagious STD to engage in sexual intercourse).

⁴⁸ Kenney, *supra* note 7, at 256.

⁴⁹ *Id.* (suggesting that programs encouraging information and treatment were needed in addition to coercive solutions).

⁵⁰ “[A] comprehensive program of public education that emphasized prevention, recognition of symptoms, and treatment for infection” is needed to reduce the spread of STDs. *Id.*

⁵¹ Price, *supra* note 46, at 444 (indicating that the traditional methods to control disease, included quarantine, mandatory testing and reporting, and enforcement of criminal law).

⁵² See, e.g., OKLA. STAT. ANN. tit. 21, § 1192.1 (West 1991) (criminalizing any action by a person which is likely to cause another to be infected with HIV); FLA. STAT. ANN. §384.24 (West 1991) (including HIV and AIDS to the general STD statute and prohibiting infected persons from engaging in sexual intercourse without informing their partners).

⁵³ Kenney, *supra* note 7, at 266. *But see* Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139 (1988) (asserting that public health statutes which include HIV are under-inclusive because they do not account for other modes of transmission for HIV not associated with other STD's).

⁵⁴ 197 U.S. 11.

by the United States Constitution.⁵⁵ Another problem is that the public health statutes sometimes fail to define what it is to “expose” someone to infection.⁵⁶ Courts have also dismissed many cases because of the difficulties involved in proving the requisite intent to transmit HIV.⁵⁷ Further, the extremely lenient penalties imposed upon violators are insignificant in relation to the results that may arise from the intentional transmission of HIV.⁵⁸ Since HIV differs from STDs in that it is incurable, it demands a more severe penalty to adequately deter risky behavior than those penalties given to curable STDs.⁵⁹ Therefore, it

⁵⁵ Kenney, *supra* note 7, at 266. This happens under *Jacobson* because, although the Court states that the legislation must be reasonable to restrict personal autonomy and does not have to substantiate those measures from a medical standpoint, the Court goes on to note that the legislation must be reasonable “according to the common belief of the people.” 197 U.S. at 34-35. The constitutional right to privacy has been held to include areas involving personal autonomy and intimate contact relating to access to birth control, procreation, and abortion by requiring strict scrutiny of any State law which may infringe on these privacy interests. The Supreme Court has never held that sexual intercourse is included within the right to privacy. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding the right of a woman to choose to have an abortion within the first trimester of pregnancy is a constitutionally protected privacy right); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that unmarried persons have the right to possess contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a married persons use of contraceptives is a privacy right protected by the Constitution). *But see Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there is no constitutional right to engage in homosexual sodomy).

⁵⁶ Alabama law vaguely makes “unlawful the knowing transmission, assumption of the risk of transmission, or performance of any act which will probably or likely transmit a sexually transmitted disease.” ALA. CODE § 22-11A-21 (1990). Oklahoma law makes “unlawful the engagement by a person in any activity with the intent to infect or to cause to be infected another person with HIV.” OKLA. STAT. ANN. tit. 21, §1192.1 (West 1991). These statutes “fail to specify to prescribed acts or to define ‘exposure’.” Kenney, *supra* note 7, at 266.

⁵⁷ Kenney, *supra* note 7, at 267. A study showed that due to the difficulty of proving the requisite intent to transmit HIV, courts dismissed the majority of cases brought under public health statutes. See Lawrence O. Gostin, *Public Health Strategies for Confronting AIDS*, 261 JAMA 1621, 1627 (1989).

⁵⁸ Lenient penalties are usually imposed for minor crimes such as misdemeanors. See Sullivan & Field, *supra* note 53, at 171; *but see* LA. REV. STAT. ANN. §14:43.5 (West 1991) (providing for a maximum fine of up to \$5000 dollars or a maximum prison term of ten years for the intentional exposure of a person to HIV).

⁵⁹ Kenney, *supra* note 7, at 266-67. Kenney states that “classification of the proscribed act as a felony would be more appropriate.” *Id* at 267, n.140.

seems reasonable to conclude that grouping incurable HIV together with curable STDs under the existing public health statutes does not adequately fulfill the objective of controlling the intentional sexual transmission of HIV.⁶⁰

C. Traditional Criminal Law Statutes and HIV

Although traditional criminal law statutes seem to reasonably serve the criminal law objectives of punishment and deterrence,⁶¹ they fall short in other areas when applied to the transmission of HIV.⁶² One such instance is the difficulty there would be to prove the requisite intent of most traditional criminal law statutes.⁶³ Another instance is when persons are harshly prosecuted for conduct, which is an extremely unlikely mode of transmission, because there is a slight risk of HIV transmission.⁶⁴ For example, cases involving spitting or biting another person which are not likely means of transmitting HIV may provide harsh penalties for such acts under assault statutes.⁶⁵ These penalties are not appropriate for acts which "may not be criminal in the absence of AIDS"⁶⁶ and, therefore, do not properly reflect the adequate

⁶⁰ *Id.* at 267.

⁶¹ Kenney, *supra* note 7, at 263 (analogizing that since the harm inflicted from the transmission of HIV is similar to that of other criminal behavior, punishment and deterrence would be served by enforcement of these laws when applied to HIV as well).

⁶² *Id.* at 267; *see also* Price, *supra* note 46, at 447 (advocating that a specific statute would avoid many of the problems of using traditional criminal statutes).

⁶³ It would be extremely difficult to prove the state of mind required to purposefully or knowingly infect another with HIV because the likelihood of transmission of HIV to another person as the result of a single sexual encounter is unknown and estimated to be minimal. Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED 1125, 1125-29 (1987); *see also* Gostin, *supra* note 1, at 1022 (citing research which estimates the risk of contracting HIV from a single sexual encounter at 1/1000).

⁶⁴ Kenney, *supra* note 7, at 267 (noting that unlikely modes of HIV transmission include an infected person spitting or biting another person).

⁶⁵ *Id.* MODEL PENAL CODE § 211.1(a) (1962) provides that "a person is guilty of assault if he attempts to cause or . . . causes bodily injury to another[.]" Although biting meets the definition of bodily injury which includes physical pain, illness, or impairment of physical condition, spitting probably does not. *Id.* at 267, n.146.

⁶⁶ Kenney, *supra* note 7, at 267.

punishment.⁶⁷ Further, an additional problem to the use of traditional criminal statutes is the issue of consent.⁶⁸ Under the Model Penal Code, the defense of consent may be utilized under circumstances when the resulting injury is reasonably foreseeable.⁶⁹ However, consent to sexual intercourse does not mean that a person is consenting to possible infliction of bodily injury such as the infection of HIV.⁷⁰ Since the Model Penal Code does not allow a person to consent to illegal activities,⁷¹ the defense of consent may only be asserted if the person is warned of the risk of HIV transmission and adequate precautions to prevent transmission are taken.⁷² This results in statutes criminalizing risks which a person chooses to take since most acts are consensual.⁷³ Specifically providing for informed consent as a defense in HIV transmission statutes would eliminate the disincentive for HIV infected persons to determine their HIV status and likewise promote the use of condoms, thereby discouraging risky behavior.⁷⁴ This can be provided for most efficiently in HIV-specific statutes.⁷⁵

III. HOW STD LAWS CAN BE USED AS A FRAMEWORK FOR HIV LAWS

The laws governing the intentional sexual transmission of an STD provide a good framework for possible HIV transmission laws.⁷⁶ Courts have held that a person has a general duty to disclose the

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 268.

⁷¹ MODEL PENAL CODE § 2.11(2)(b) (1962).

⁷² *Id.* at 268 (indicating that condom use would always be required to provide some protection from the possible chance of infection).

⁷³ Kenney, *supra* note 7, at 268 & n.151 (noting that acts which are not consensual (i.e. rape) are already adequately covered by criminal law).

⁷⁴ *Id.* at 268.

⁷⁵ See Gene Schultz, *AIDS: Public Health and the Criminal Law*, 7 ST. LOUIS U. PUB. L. REV. 65, 107 (1988) (noting that HIV-specific statutes which allow for informed consent would work most effectively).

⁷⁶ Schulman, *supra* note 34, at 972, 973 (analogizing the similarities between the transmission of STDs and HIV).

presence of an STD, such as genital herpes, to a sexual partner and that the duty arises merely if the person knows or should know that the conduct is likely to cause harm to their sexual partner.⁷⁷

The general rule is that one who knows, or should know, that he or she is infected with an STD, has a duty to either abstain from sexual contact with others, or at least warn a sexual partner of the infection prior to sexual contact. The rationale behind such a duty to warn is that persons who have dangerous and contagious diseases have an obligation to protect others with whom they have an intimate sexual relationship and who would be in danger of infection.⁷⁸

Therefore, since courts impose this duty to warn when the disease in question is non-life threatening,⁷⁹ it follows that a similar duty should be imposed to life threatening diseases such as HIV since the means of transmission are similar.⁸⁰

A. Syphilis and HIV

There are similarities between syphilis, an STD, and HIV which make a useful comparison to assess the effectiveness of the imposition of criminal liability for the intentional sexual transmission of HIV.⁸¹ Syphilis and HIV are similar in that they both: have been epidemics; can be sexually transmitted; have long latency periods; have serious

⁷⁷ *B.N.*, 538 A.2d at 1175.

⁷⁸ See Schulman, *supra* note 34, at 974; see also *Berner v. Caldwell*, 543 So.2d 686 (Ala.1989) (dealing with transmission of genital herpes); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App.1988) (dealing with transmission of genital herpes).

⁷⁹ See Oddi, *supra*, note 44, at 1455. See, e.g., *Berner*, 543 So.2d 686 (imposing a duty to warn partner of genital herpes infection); *Kathleen K.*, 198 Cal. Rptr. 273 (imposing a duty to warn plaintiff of the presence of an STD).

⁸⁰ Both STDs and HIV are primarily transmitted sexually. Schulman, *supra*, note 34, at 975.

⁸¹ Kenney, *supra* note 7, at 248. This comparison is useful to assess the effectiveness of "imposing criminal liability on acts that risk HIV transmission" since the modes of transmission of syphilis and HIV are similar as well as the "common sociological and public health consequences" infection imposes. *Id.*

pathological consequences; and created public fear and outcry.⁸² Further, both diseases are primarily spread through sexual contact.⁸³ However, the major difference between the two is that syphilis is now curable while HIV is not.⁸⁴ A prevalent way the spread of STDs, such as syphilis, was controlled was through the enactment of public health laws.⁸⁵

B. Controlling STDs to Control HIV

There is also evidence which indicates that controlling the spread of STDs would also help control the spread of HIV.⁸⁶ Studies show that a person who has both HIV and an STD is two to five times more likely to transmit HIV to a sexual partner.⁸⁷ This trend is clearly exemplified by examining the rates of infection in the Southern United States.⁸⁸ This area has the highest syphilis and gonorrhea rates, as well as the highest rates of HIV among women of child-bearing age, in the entire country.⁸⁹ Further, a study released in June, 1997 by researchers at the University of North Carolina at Chapel Hill indicated that men who had both HIV as well as any other STD transmitted HIV eight to ten times more often than men who just had HIV.⁹⁰ The reason for this seems to be that HIV

⁸² Kenney, *supra* note 7, at 249 (comparing the similarities between syphilis and HIV and noting that: syphilis infected 10% of the population while AIDS accounted for 9% of the total mortality rate; syphilis can have a latency period of up to 6 years while the latency period of HIV is estimated to be around 7.8 years; and the fear and hysteria produced by both syphilis and AIDS emanate from the inability of medicine to provide effective treatment or a cure for the disease).

⁸³ *Id.* at 250.

⁸⁴ *Id.* (suggesting that this also “highlights the fallacious use of public health measures as a short term remedy prior to the discovery of a curative treatment).

⁸⁵ *Id.* at 253 (noting the States were able to and very frequently did legislate using the police power given to them by the Tenth Amendment United States Constitution).

⁸⁶ See *infra* notes 87-96 and accompanying text.

⁸⁷ Kristina Sauerwein, *Health Officials Suspect There are More Like ‘Boss Man’ - The Costs of Sexually Transmitted Diseases*, ST. LOUIS POST-DISPATCH, July 6, 1997, at 8A (citing studies conducted by the “disease agency” and researchers at the University of North Carolina at Chapel Hill).

⁸⁸ The South, which as of 1997 had the highest rates of certain STDs, also had the highest rate of HIV among child bearing women. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

flourishes in the sores and inflammations which are typically caused by an STD.⁹¹ Therefore, “scientists say, people who have an STD and have sex with an HIV positive person are at a greater risk for getting the AIDS virus.”⁹² Other studies have shown that when STD’s are found and treated, HIV transmission rates are reduced by 40 percent.⁹³ Joel Greenspan, an epidemiologist, indicates that there is “a weakness in the community’s HIV and STD prevention” when HIV spreads in epidemic proportions.⁹⁴ This indicates that while HIV laws are indeed needed to control the spread of HIV, something must also be done to control the spread of other STDs, given the research indicating the link between the presence of STDs and the increased likelihood of transmission of HIV.

Even though the United States has made some progress in the prevention of STDs, the rates of STDs in other industrialized countries are still proportionally 50 –100 times lower than in the United States.⁹⁵ This statistic suggests that current STD laws criminalizing the transmission of STDs should be enforced as an additional way to help control the spread of HIV. Helene Gayle, a representative from the U.S. Centers for Disease Control and Prevention’s National Center for HIV, STD and TB (tuberculosis) Prevention, supports this position:

STDs also play an important role in the sexual transmission of HIV infection. HIV clearly walks in the footsteps of other STDs. The behaviors that put people at risk for HIV also place them at risk for over 20 other diseases that can be transmitted sexually. And we have strong scientific evidence that other STDs increase the likelihood of both becoming infected with HIV and of transmitting HIV infection to others. Our challenge is to

⁹¹ *Id.*

⁹² Sauerwein, *supra* note 87, at 8A (noting that the “AIDS virus thrives in inflammations and sores caused by an STD”).

⁹³ *Id.*

⁹⁴ *Id.* Greenspan was referring to Darnell McGee who spread HIV in epidemic proportions in St. Louis, Missouri.

⁹⁵ *Sexually Transmitted Disease Status of STDs in the United States*, AIDS WKLY., Feb. 10, 1997, at 33 (hereinafter “Status”). Most other industrialized countries both provide for and enforce STD transmission laws.

create a synergy between approaches to STD and HIV prevention that will break these deadly ties and bring both epidemics under control. Behavior change approaches that have proven effective in HIV prevention should be applied to prevent all STDs, and STD treatment must clearly play a key role in HIV prevention. The challenge will be for communities to strengthen both approaches with limited resources.⁹⁶

IV. SPECIFIC HIV LAWS

The United States Government has been trying to control the spread of HIV through criminalization of HIV exposure as well as through education and the imposition of civil liability.⁹⁷ Since sexual intercourse is the most common means of transmitting HIV,⁹⁸ statutes targeted at criminalizing the intentional sexual transmission of HIV may fulfill the criminal objectives of punishment and deterrence, as well as the social objectives of prevention, education, and reinforcement of the norms of social behavior.⁹⁹ To effectuate these objectives, the laws enacted must be "clearly drawn and narrowly tailored to proscribe only the behavior that has epidemiologically been demonstrated to transmit HIV"¹⁰⁰ in order to avoid discrimination of HIV infected people and miseducation of the public.¹⁰¹ Because of the problems with the application of traditional criminal law statutes to the transmission of HIV, the Presidential Commission on the Human Immunodeficiency Virus

⁹⁶ *Id.* at 34.

⁹⁷ Schulman, *supra* note 34, at 959 (noting the government attempted to control the spread of HIV by enacting laws criminalizing HIV transmission, educating the public by installing a hotline to provide callers with information on HIV and answer questions, and imposing tort liability for the sexual transmission of HIV).

⁹⁸ *Id.* at 963.

⁹⁹ Tierney, *supra* note 15, at 486 (referring to HIV-specific statutes).

¹⁰⁰ *Id.* at 489.

¹⁰¹ *Id.* at 487-90 (noting that only if these precautions are followed will the criminal law be effective to punish people who engage in behavior which risks transmission of HIV).

Epidemic recommended that States adopt criminal statutes specifically tailored to HIV infection by providing "clear notice of socially unacceptable standards of behavior specific to the HIV epidemic, and tailor punishment to the specific crime of HIV transmission."¹⁰²

Many States responded to the HIV/AIDS crisis by enacting criminal statutes specific to the transmission of HIV as early as 1986.¹⁰³ Other States simply relied on existing criminal statutes and applied them to HIV.¹⁰⁴ But, "The obstacles to prosecuting HIV transmitting activities under traditional criminal law and the inappropriateness of applying public health statutes to AIDS"¹⁰⁵ clearly indicates that the enactment of specific statutes targeted at HIV is clearly the superior method to "establish a coercive public health response to control the spread of HIV infection."¹⁰⁶

These statutes generally impose criminal liability on persons who intend to infect another by committing specific acts that are medically proven modes of

¹⁰² Tierney, *supra* note 15, at 499 (quoting REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS & EPIDEMIC 130 (1988)).

¹⁰³ See 720 ILL. COMP. STAT. ANN. 5/12-16.2 (West 1993) (making it a crime to knowingly transmit the HIV virus to another person). Other States that have enacted similar laws are: ARK. CODE ANN. § 5-14-123 (Michie 1997); IDAHO CODE § 39-608 (1998); LA. REV. STAT. ANN. § 14:43.5 (West 1997); MD. CODE ANN., HEALTH-GEN. I § 18-601.1 (1994); MICH. COMP. LAWS ANN. § 14.15 (5210) (West 1995); MO. ANN. STAT. § 191.677 (West 1996 & Supp. 1999); MONT. CODE ANN. § 50-18-112 (1997); N.D. CENT. CODE § 12.1-20-17 (1997); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 1983 & Supp. 1999).

¹⁰⁴ See Barron, *supra* note 16, at 2-3 (noting that many States have applied general criminal statutes to situations involving HIV). For example, MODEL PENAL CODE § 211.1(1)(a) (1985) provides that a person is guilty of misdemeanor assault if that person "attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . .". Section (2)(a) provides a felony penalty for aggravated assault 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 . . .". Therefore, when applied to HIV transmission, if a person knows that he/she is infected with HIV and engages in behavior which he or she knows is capable and likely to infect another, that person may be guilty of aggravated assault. Donald H.J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 352 (1990).

¹⁰⁵ Kenney, *supra*, note 7, at 269.

¹⁰⁶ *Id.*

transmitting HIV, or who, knowing of their HIV-positive status, commit such acts even if the intent to infect another is absent . . . [while] also provid[ing] a defense of consent that it met if the actors have informed their partners of their condition and the risks involved.¹⁰⁷

In effect, HIV-specific statutes focus on the act rather than the result by narrowly describing the prohibited conduct and providing a clear warning that HIV positive persons must fully warn a potential sex partner before having sex.¹⁰⁸ The over- broadness of traditional criminal statutes is eliminated by limiting the state of mind prerequisite to that of the highest culpability while not penalizing a person for determining their HIV status.¹⁰⁹ Further, these statutes have a stronger deterrent effect by imposing comparative harsher penalties.¹¹⁰ Finally, HIV-specific statutes would provide for informed consent as a defense, the law would recognize that consensual sexual conduct is the predominant means of transmission and therefore the right to privacy given by the United States Constitution for intimate personal contact is not as likely to be raised as a challenge to the legislation.¹¹¹ Further, when in May, 1987 the President commissioned a report on the public health dangers from the spread of HIV,¹¹² the Commission found that "an HIV-specific statute . . . would provide clear notice of socially unacceptable behavior specific

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see also *supra* note 103 and accompanying text.

¹⁰⁹ Kenney, *supra* note 7, at 269-70. For example, most HIV-specific statutes require a person to knowingly or purposefully engage in behavior which risks transmission of HIV. *Id.* at 270, n.161. Illinois makes it a crime to knowingly transmit the HIV virus to another person. ILL. ANN. STAT. Ch. 38, ¶ 12 – 16.2 (Smith-Hurd 1990).

¹¹⁰ See Kenney *supra* note 7, at 270 (noting that the penalties invoked by HIV-specific statutes should reflect the life threatening consequences of HIV in order to have a deterrent effect). HIV-specific statutes provide for harsher penalties than public health statutes. *Id.*

¹¹¹ *Id.* at 271. This is true because allowing for consent would enable an HIV-specific statute to uphold constitutional privacy challenges which involve personal contact by not penalizing an HIV infected person if their sexual partner consents to contact after being fully informed and knowledgeable about the risks of HIV transmission. *Id.*

¹¹² President's Commission on the Human Immunodeficiency Virus, The Report on the Human Immunodeficiency Virus Epidemic (1988).

to the HIV epidemic and tailor punishment to the specific crime of HIV transmission".¹¹³ In conclusion, "[a]n AIDS-specific statute that limits the proscribed acts, imposes liability for only purposeful or intentional infection, and includes a defense of consent represents the best method to criminalize HIV transmission."¹¹⁴

There is, however, opposition to criminal statutes targeted at HIV transmission.¹¹⁵ Some commentators believe that criminal statutes will not be an effective weapon to control the spread of HIV.¹¹⁶ They claim that the statute may be almost entirely unenforceable because of the highly private nature of sexual activity as well as the difficulty of proving that the person had the requisite knowledge of their infection at the time of the act.¹¹⁷ Further, they claim that if the defense of consent is allowed, the statute does not help control the spread of HIV unless it requires the use of condoms to protect against the transmission of HIV.¹¹⁸ Finally, activity that was once legal would become illegal upon learning that one is infected with HIV, thereby discouraging people from learning their HIV status and thereafter entering into education and treatment programs.¹¹⁹ However, some of these concerns can adequately be rebutted by looking into the foreseeability of harm.¹²⁰

V. WHEN KNOWLEDGE SHOULD BE IMPUTED

Foreseeability is a necessary element to be present before a court will impose a duty to warn a sexual partner.¹²¹ Courts usually require a

¹¹³ *Id.* at 130.

¹¹⁴ Kenney, *supra* note 7, at 271.

¹¹⁵ *Id.* at 270 (noting that criminalizing HIV transmission is controversial); see also Schultz, *supra* note 75, at 113 (noting that criminalization of HIV transmission would be "expensive, ineffective, and counterproductive").

¹¹⁶ *Id.* at 271. Commentators argue that the statute may allow for prosecution when there is merely an attempt to infect another with HIV. *Id.*

¹¹⁷ *Id.* (arguing that the court would have to subpoena medical records in order to prove infection at the time of the act).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 271, 273.

¹²⁰ Schulman, *supra* note 34, at 973.

¹²¹ *Id.* at 973.

person to have either actual knowledge of disease or imputed knowledge of disease in order for the harm to be foreseeable.¹²² A statute can impute knowledge on a person who knows or should know of their HIV status through the use of foreseeability.¹²³ Almost all courts agree that actual knowledge of a disease is enough to impose a duty to warn,¹²⁴ but disagree on what is necessary to impute this knowledge on a person and therefore impose a duty to warn.¹²⁵

A. The Rock Hudson Case

*Christian v. Sheft*¹²⁶ exemplifies the assertion that a person who knows himself to be infected with HIV has a duty to warn a sexual partner of the presence of disease before engaging in sexual intercourse.¹²⁷ This was the earliest and most publicized case involving the sexual transmission of HIV.¹²⁸ Marc Christian, Rock Hudson's lover, brought this action seeking damages because Hudson never disclosed that he was HIV positive to Christian while they were involved in sexual relations.¹²⁹ The jury awarded Christian \$14.5 million dollars in damages

¹²² *Id.* at 973-74.

¹²³ *Id.* at 974.

¹²⁴ See, e.g., *Berner*, 543 So.2d 686 (holding knowledge of genital herpes imposes duty to warn sexual partner); *Doe v. Roe*, 267 Cal. Rptr. 564 (Ct. App. 1990) (genital herpes); *Kathleen K. V. Robert B.*, 198 Cal.Rptr.564 (Ct. App. 1990) (genital herpes); *Gabriel v. Tripp*, 576 So.2d 404 (Fla.Dist.Ct.App. 1991) (genital herpes); *Long v. Adams*, 333 S.E.2d 852 (Ga. Ct. App. 1985) (genital herpes); *In re Marriage of Foran*, 587 N.E.2d 570 (Ill.App.Ct. 1982) (genital warts); *Meany v. Meany*, 639 So.2d 229 (La. 1994) (genital herpes and genital warts); *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988) (genital herpes); *M.M.D. v. B.L.G.*, 467 N.W.2d 645 (Minn.Ct.App. 1991) (genital herpes); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988) (genital herpes); *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986) (genital herpes); *Crowell v. Crowell*, 105 S.E.2d 206 (N.C. 1920) (venereal disease); *G.L. v. M.L.*, 550 A.2d 525 (N.J. Super. Ct. Ch. Div. 1988) (genital herpes); *Maharam v. Maharam*, 510 N.Y.S.2d 104 (N.Y. App. Div. 1986) (genital herpes); *Doe v. Roe*, 598 N.Y.S.2d 678 (N.Y.J.C. 1993) (chlamydia); *Mussivand v. David*, 544 N.E.2d 25 (Ohio 1989) (venereal disease); *Stafford v Stafford*, 726 S.W.2d 14 (Tex. 1987).

¹²⁵ *Schulman*, *supra*, note 34, at 974.

¹²⁶ *Christian v. Sheft*, 267 Cal. Rptr. 564 (Super. Ct. 1989).

¹²⁷ *Schulman*, *supra* note 34, at 979.

¹²⁸ *Id.*

¹²⁹ *Aetna Casualty & Surety Co. v. Sheft*, 756 F. Supp. 449, 450 (C.D. Cal.

because Hudson's conduct was "outrageous".¹³⁰ The court found a duty to warn a sex partner when a person has actual knowledge that they are infected with HIV.¹³¹ However, the court did not address the question of whether a person has a duty to warn when they do not have actual knowledge of HIV infection.¹³²

In the past, courts have been reluctant to impose a duty to warn a sexual partner because it was not reasonably foreseeable to the person that he may have HIV because of the "scant amount of information available about HIV-AIDS."¹³³ Today, however, "HIV-AIDS awareness is at a heightened level. Thus, someone who experiences symptoms commonly associated with HIV-AIDS, and who has previously engaged in high risk activity should be imputed to have knowledge of the disease,"¹³⁴ thereby imposing a duty to warn upon the person.¹³⁵

B. *The Magic Johnson Case*

"Here I am saying it can happen to anybody, even me, Magic Johnson."¹³⁶

The more recent case involving Earvin "Magic" Johnson also

1990).

¹³⁰ *Id.* at 450. In this case, Hudson, knowing that he had AIDS, intentionally misrepresented that fact to Christian during the time the two were involved in sexual relations. *Id.* The damages were awarded for "intentional misrepresentation, concealment, and intentional infliction of emotional distress". *Id.*

¹³¹ Since Hudson had actual knowledge of his infection, the court applied the law based upon that state of mind. *Aetna Casualty & Surety Co. v. Sheft*, 756 F. Supp. 449.

¹³² Since Hudson had actual knowledge, this question was not presented for consideration. *Id.*

¹³³ Schulman, *supra* note 34, at 980.

¹³⁴ *Id.*

¹³⁵ *Id.* A person who has knowledge of the presence of disease has a duty to warn a sexual partner before engaging in sexual activity. See *supra*, note 124 for cases upholding this principle.

¹³⁶ Charles Leerhsen, *Magic's Message*, NEWSWEEK, Nov. 18, 1991, at 58 (stating that most people do not understand exactly what HIV/AIDS is and how it is spread, which leads to the false assumption that they can not get infected); see also Sylvia Jung Earnshaw, Comment, An Ounce Of Prevention Where There Is No Cure: AIDS And Public Health In Wyoming, 27 LAND & WATER L. REV 471, 473 (1992).

deals with HIV transmission and also elaborates the imputed knowledge principle.¹³⁷ In this case, the plaintiff sued Johnson for wrongful transmission of HIV alleging that knowledge should be imputed upon Johnson because of his promiscuous lifestyle and therefore, Johnson had a duty to warn.¹³⁸ Although Johnson admitted he had unprotected sex with many women, Johnson did not know of his HIV infection nor did he have any symptoms of HIV.¹³⁹ The key issue was whether Johnson's level of knowledge of HIV enabled him to foresee the possibility of harm to the plaintiff and thereby give rise to the duty to warn.¹⁴⁰ The court also looked at other factors such as the likelihood of transmission of HIV, the burden on the defendant, the societal interest, the relationship of the parties involved, and the severity of risk of transmission.¹⁴¹ The court finally held that there are three instances which give rise to a duty to warn a sexual partner that one may have HIV: 1) actual knowledge of HIV infection; 2) the presence of symptoms associated with HIV/AIDS; and 3) actual knowledge that a previous sex partner is infected with HIV.¹⁴² The court would not impose a duty to warn solely on the basis that a person has engaged in high risk activity by having many sex partners, holding that "a defendant who has had unprotected sexual encounters with multiple partners does not have a legal duty to inform a plaintiff of his or her past sexual activity."¹⁴³

The *Johnson* Court did clarify under what situations a duty to warn a sexual partner exists.¹⁴⁴ Clearly one would be deemed to have actual knowledge of HIV by either testing positive for HIV or by a doctor's diagnosis.¹⁴⁵ However, it is not clear when knowledge should

¹³⁷ *Doe v. Johnson*, 817 F. Supp. 1382 (W.D. Mich. 1993) (holding that knowledge of HIV infection will not be imputed on a person solely because the person engaged in unprotected sex with multiple partners).

¹³⁸ *Id.* at 1385.

¹³⁹ *Id.* at 1387.

¹⁴⁰ *Id.* at 1388.

¹⁴¹ *Id.* at 1382.

¹⁴² *Doe*, 817 F. Supp. at 1391-92.

¹⁴³ *Id.* at 1393.

¹⁴⁴ *Id.* at 1386, 1389-90.

¹⁴⁵ Schulman, *supra* note 34, at 984. Black's Law Dictionary defines actual knowledge as positive knowledge of a fact and for the purposes of warning another person

be imputed upon a person because they have constructive knowledge of HIV.¹⁴⁶ Constructive knowledge of a fact is when a person, by the exercise of reasonable care, could have known of such a fact.¹⁴⁷ “By imputing constructive knowledge of HIV-AIDS . . . sexually transmitted HIV-AIDS is subject to a greater degree of control than under the status quo.”¹⁴⁸

The *Johnson* case holds that a person who has symptoms of HIV/AIDS has the duty to warn one’s sexual partner.¹⁴⁹ However, it is necessary to define exactly what those symptoms are since the symptoms associated with HIV/AIDS are usually not indicative of infection.¹⁵⁰ When a person has the obvious, serious symptoms associated with HIV/AIDS,¹⁵¹ then it is clear that a duty should be imposed upon that person to warn a sexual partner.¹⁵² However, when the symptoms are more obscure and can possibly be attributed to another ailment, the person should then have the duty to investigate the cause of these symptoms before engaging in sexual intercourse.¹⁵³ However, it would seem to follow that until the person fully investigates and determines the cause of the symptoms, the duty to warn should still be imposed on them.

The *Johnson* case also holds that a person has the duty to warn a sex partner if one has knowledge that a previous sexual partner has HIV/AIDS.¹⁵⁴ This standard should be clarified to include all types of sexual relations, including vaginal, anal, and oral sex.¹⁵⁵ The *Johnson*

“embraces those things of which the one sought to be charged has express information”. BLACK’S LAW DICTIONARY 873 (6th ed. 1990).

¹⁴⁶ *Id.* at 987. For example, the *Johnson* Court’s determination of when the duty to warn is imposed on a person is unclear when a person learns that a previous partner is infected with HIV and when a person merely engages in high risk activity.

¹⁴⁷ Schulman, *supra* note 34, at 987.

¹⁴⁸ *Id.*

¹⁴⁹ *Doe v. Johnson*, 817 F. Supp. 1382.

¹⁵⁰ Schulman, *supra* note 34, at 987.

¹⁵¹ Schulman, *supra* note 34, at 988 (citing obvious symptoms as substantial weight loss, fatigue, fevers, night sweats, persistent diarrhea, enlarged lymph glands, and other common long-term symptoms associated with HIV/AIDS).

¹⁵² *Id.*

¹⁵³ *Id.* at 989 (citing obscure symptoms as fatigue or weight loss).

¹⁵⁴ *Doe*, 817 F. Supp. 1382, 1393.

¹⁵⁵ See Schulman, *supra* note 34, at 990. Broadening this rule makes it clear

Court refused to impose a duty based solely on past sexual behavior, no matter how promiscuous or risky.¹⁵⁶ These are circumstances in which a person does not have actual knowledge of one's HIV status and has no reason to suspect that they have contracted HIV.¹⁵⁷ Some commentators feel that a duty should be imposed upon people who have been involved in high risk activities because they present a profound risk of transmitting HIV to their sexual partners due to their past promiscuity.¹⁵⁸ However, the *Johnson* Court, does not agree with that reasoning.¹⁵⁹ This duty would entail foreseeing merely the *possibility* of disease, not the probability or the actual presence of it.¹⁶⁰ This would include a multitude of people who had unprotected sex and therefore impose a duty too broad and far reaching.¹⁶¹ Further, it would be extremely difficult to define exactly how much risky behavior is needed and where to draw the line.¹⁶² The law would not be determinable and not forewarn a person of when the duty arises. It would unreasonably intrude on a person's right to privacy.¹⁶³ Further, these commentators argue that the public policy would impose this duty on a person who has engaged in risky behavior.¹⁶⁴ For the same reasons, this again is too burdensome a duty to place on a person, even given the strong public policy to prevent the spread of HIV.¹⁶⁵

exactly what type of sexual intercourse is included and forecloses every possible route of sexual transmission. *Id.*

¹⁵⁶ *Id.* at 983.

¹⁵⁷ *Id.* at 991 (stating the example of having no symptoms or no knowledge of previous partners being infected).

¹⁵⁸ *Id.* at 991. It is argued that when a person's past conduct reaches a high level of risk for contracting HIV, a reasonable person would realize the possibility of having contracted HIV and therefore owes a duty to a person they are about to become sexually involved with. *Id.*

¹⁵⁹ *Id.* at 983 (noting that the *Johnson* Court does not impose a duty solely based on past conduct).

¹⁶⁰ Schulman, *supra* note 34, at 991.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Schulman, *supra* note 34, at 992.

¹⁶⁵ *Id.* at 992.

VI. "SUPERTRANSMITTERS"

To date, there have only been a few cases in which a person infected with HIV intentionally spread the virus to a half-dozen or more people.¹⁶⁶ The U.S. Centers for Disease Control labeled these individuals "supertransmitters".¹⁶⁷

A. Darnell "Boss Man" McGee

In 1992, in East St. Louis, Missouri, Darnell "Boss Man" McGee, an HIV positive man, had sex with approximately 100 women,¹⁶⁸ thereby spreading the HIV virus to dozens of sexual partners.¹⁶⁹ He has been linked to approximately 30 cases of HIV by the Missouri Department of Health and approximately 100 HIV positive women claim that he spread the virus to them.¹⁷⁰ McGee was shot and killed in January 1997 by a gunman who still has not been captured.¹⁷¹

B. Nushawn Williams

A more recent supertransmitter is a 20 year old man from New York known as Nushawn Williams¹⁷² or Shyteek Johnson,¹⁷³ among other aliases. Williams found out over a year before his arrest¹⁷⁴ that he was HIV-positive and claims that he had sex with at least 70-80 women

¹⁶⁶ *Id.* at 8A. These cases include those of Darnell McGee and Shyteek Johnson. *Id.*

¹⁶⁷ *Id.* at 8A. "Supertransmitters" refers to a person who has spread HIV to more than 6 people. *Id.*

¹⁶⁸ Jim Dwyer, *Carrier of Death*, DAILY NEWS, October 28, 1997, at 7.

¹⁶⁹ Sauerwein, *supra* note 87, at 8A.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 8A. Since McGee cannot be brought to trial, the courts will not have a chance to rule on the legality of his acts. *Id.*

¹⁷² See Jorge Fitz-Gibbon, *AIDS? A Lie, He Thought*, DAILY NEWS, Nov. 4, 1997, at 21.

¹⁷³ See Corky Siemaszko, *Say at Least 11 Infected by Bronx Man*, DAILY NEWS, Oct. 4, 1997, at 7.

¹⁷⁴ Johnson was arrested for attempted robbery and various drug offenses. *Id.*

during that time.¹⁷⁵ At least 11 people have been infected by Williams and at least 17 others are known to have been exposed to HIV by him and then had sex with at least 53 other partners.¹⁷⁶

Williams was arrested and held for charges unrelated to his transmission of HIV.¹⁷⁷ The New York State Attorney General as well as Governor Pataki are now discussing the possibility of criminal prosecution for the intentional transmission of HIV.¹⁷⁸ However, since New York's Public Health Statutes do not include HIV on their list of sexually transmitted diseases, and traditional criminal laws such as reckless endangerment do not specifically address this conduct, the effort for criminal prosecution is hampered.¹⁷⁹

Only now after Williams infected dozens of women with HIV do New York lawmakers want to enact laws directed at anyone who deliberately infects another with HIV.¹⁸⁰ The proposed law would create the offense of aggravated reckless endangerment and provide for up to 15 years in prison to anyone who intentionally exposes a sexual partner to HIV.¹⁸¹ However, in order to enact this law, the HIV confidentiality laws must be relaxed so that when someone tests positive for the virus, victims may be notified.¹⁸² New York Health officials had to go to court to get an unprecedented waiver of New York's confidentiality laws¹⁸³ under the "imminent danger" provision of Public Health Law in order to

¹⁷⁵ *Id.* at 7.

¹⁷⁶ *Id.* at 20.

¹⁷⁷ *Id.* at 7.

¹⁷⁸ Siemaszko, *supra* note 174, at 20.

¹⁷⁹ This is because transmission of HIV is not addressed in any New York statute. *Id.*

¹⁸⁰ Owen Moritz, *Pols Want Change in HIV Privacy Law*, DAILY NEWS, Nov. 4, 1997, at 21.

¹⁸¹ *Id.* at 21.

¹⁸² For example, New York Law provides that HIV related information may not be disclosed to a third party without a court order, and a court may not grant such an order unless there is a compelling need for disclosure in a civil or criminal proceeding, a clear and eminent danger to an innocent individual, or the person is otherwise lawfully entitled to the information. N.Y. PUB. HEALTH LAW §§ 2780-90 (1989).

¹⁸³ Moritz, *supra* note 181, at 21. N.Y. PUB. HEALTH LAW §§ 2780-90 (1989) were enacted in 1988 to encourage treatment of diseases by providing for confidentiality.

track down William's many sex partners who were exposed to HIV.¹⁸⁴

A New York Assemblywoman made the connection between control of STDs such as syphilis and control of HIV by stating that by enacting this legislation "we will be able to contain this disease in the same way that we control syphilis and other communicable diseases."¹⁸⁵ This legislation would bring New York in accord with 30 other States which make it a crime to not warn a sexual partner of the presence of HIV.¹⁸⁶

In response to the Williams epidemic, a Health Department spokeswoman said, "This incident really points out how one individual — if they do not take steps to protect others — can infect many, many people."¹⁸⁷ The McGee epidemic demonstrates this as well. If the enactment of HIV specific laws can deter just one person from spreading HIV, that one person may have been, or may have become, a supertransmitter.

VII. CONSTITUTIONALITY

Public Health laws have constantly been challenged as an invasion of privacy.¹⁸⁸ However, the public policy of protecting public health clearly falls within the police powers of the States and therefore the States have the power to legislate to control infectious diseases.¹⁸⁹

¹⁸⁴ Kimberly Schaye, *Health Officials Used 'Imminent Danger' in Case*, DAILY NEWS, Oct. 4, 1997, at 20.

¹⁸⁵ Moritz, *supra* note 181, at 21.

¹⁸⁶ *Id.* Other States that have enacted similar laws are: ILL. ANN. STAT. Ch. 38, ¶ 12-16.2 (Smith-Hurd 1990); ARK. CODE ANN. § 5-14-123 (Michie 1991); IDAHO CODE § 39-608 (1991); LA. REV. STAT. ANN. §43.5 (West 1992); MD.HEALTH- GEN.CODE ANN. § 18-601.1 (1990); MICH.COMP.LAWS ANN. §333.5210 (West 1991); MO. ANN. STAT. § 191.677 (Vernon 1992); MONT. CODE ANN. § 50-18-112 (1989); N.D. CENT. CODE § 12.1-20-17 (1991); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 1992); TEX. PENAL CODE ANN. § 22.012 (West 1991); WASH. REV. CODE ANN. § 9A.36.021 (West 1990).

¹⁸⁷ Schaye, *supra* note 185, at 20.

¹⁸⁸ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); See also Roger Doughty, Comment, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the Aids Epidemic*, 82 CALIF. L. REV. 111, 121 (1994). See also KENNETH R. WING, *THE LAW AND THE PUBLIC'S HEALTH* 24-25 (4th ed., 1995).

¹⁸⁹ Doughty, *supra* note 189, at 120.

This authority of the States to enact laws to protect public health is found within the United States Constitution.¹⁹⁰ The United States Supreme Court upheld a State's police power in *Jacobson v. Massachusetts*¹⁹¹ (without defining the limits thereof) and noted that a State has the power to enact quarantine laws and "health laws of every description."¹⁹² The court also emphasized that a State not only has the authority, but also the duty to do so to protect society.¹⁹³ This broad discretion given to the States is sometimes limited by requiring that the State have a legitimate interest and be able to prove a rational relationship between that interest and the laws enacted.¹⁹⁴ However, this standard is not stringent and the State's discretion is extremely broad given the "court's recognition of the State's crucial public health role and judicial deference to the executive and legislative branches [in this area]."¹⁹⁵ Therefore, "a court is likely to strike down a public health measure only if it stems from an illegitimate motivation or is demonstrably irrational and unrelated to its public health rationales."¹⁹⁶ Every State has used its police power in some way to protect society from the spread of HIV.¹⁹⁷ Further, even though compulsory screening for HIV has been criticized by commentators as being unnecessarily intrusive,¹⁹⁸ in *Love v. Superior Court*¹⁹⁹ the Court

¹⁹⁰ U.S. CONST. amend. X, § 10. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

¹⁹¹ *Jacobson*, 197 U.S. 11.

¹⁹² *Id.* at 25 (upholding a law which mandated compulsory smallpox vaccinations).

¹⁹³ *Id.* at 29 (underscoring the duty of the States to protect the many healthy people against the few sick people).

¹⁹⁴ Doughty, *supra* note 189, at 122 (noting that the State's discretionary authority is still wide).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Kenney, *supra* note 7, at 262. For example, by 1989 every State had enacted AIDS legislation dealing with education, reporting or testing. *Id.* at 260. N.Y. EDUC. LAW § 6505-b and N.Y. PUB. HEALTH LAW § 239 provide that dentists, nurses, podiatrists, optometrists, and physicians must be educated on preventing the transmission of HIV in the course of professional practice. N.Y. PUB. HEALTH LAW § 2781 provides for consent to HIV testing and rules for release and reporting of confidential HIV related information.

¹⁹⁸ Kenney, *supra* note 7, at 262 (noting that HIV screening was criticized

of Appeals of California upheld a mandatory statute requiring testing for HIV.²⁰⁰ The statute was challenged by Love on the basis that it violated the U.S. Constitution's right to due process, equal protection, and protection against unreasonable search and seizures.²⁰¹ The Love Court relied on *Jacobson*²⁰² and allowed the legislature a great deal of leeway to adopt legislation to control disease.²⁰³ *Jacobson* held that controlling the spread of disease is "a compelling State interest."²⁰⁴ *Jacobson* found that mandatory smallpox vaccinations were valid and stated that the Supreme Court "has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description'; indeed, all laws that . . . will protect the public health and the public safety."²⁰⁵ Although *Jacobson* has been criticized for not complying with contemporary theories of equal protection, due process, right to privacy, and medical reasonableness, the *Jacobson* standard remains and allows legislators to control disease through coercive measures which include criminalization.²⁰⁶ *Jacobson* recognized that the State public health departments usually deal with protecting the public health of the people by enacting regulation pursuant to the State's law, however the court clearly stated:

according to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. It is equally true that the State may invest local bodies called into existence for purposes of local administration

because it is ineffective for the most part and also hampers participation in voluntary testing as well as educational programs).

¹⁹⁹ Love v. Superior Court, 276 Cal. Rptr. 660 (1990).

²⁰⁰ *Id.* (upholding compulsory testing of convicted prostitutes for HIV). The statute provided that all convicted prostitutes must be tested for HIV and counseled. *Id.*

²⁰¹ Love, 276 Cal. Rptr. 660.

²⁰² 197 U.S. 11 (1905).

²⁰³ Love, 276 Cal. Rptr. 660 (allowing leeway by giving deference to the legislature's determinations).

²⁰⁴ 197 U.S. 11, 12 (1905).

²⁰⁵ *Id.* at 26-27.

²⁰⁶ Kenney, *supra* note 7, at 263.

with the authority in some appropriate way to safeguard the public health and public safety.²⁰⁷

Although decided in 1905, *Jacobson* may be interpreted today as indicating that specific HIV laws are the preferred constitutional way to criminalize the intentional sexual transmission of HIV/AIDS.²⁰⁸ Since public health laws targeted at HIV transmission would criminalize even casual contact that poses no threat of infection, they would fail the “*Jacobson* reasonableness standard for government restrictions on personal autonomy” because they would infringe on constitutionally protected privacy interests by being over broad.²⁰⁹ This exemplifies that grouping curable venereal disease with incurable HIV/AIDS is inappropriate and not constitutional; therefore, indicating the need for specific HIV statutes criminalizing the intentional sexual transmission of HIV/AIDS.²¹⁰

VIII. CONCLUSION

It will be difficult to overcome the many obstacles encountered by attempting to apply traditional criminal law statutes and public health statutes to the intentional sexual transmission of HIV.²¹¹ Therefore, the solution lies in the enactment of specific HIV transmission statutes criminalizing the intentional sexual transmission of HIV. However, statutes alone are not enough to control the spread of HIV.²¹² The statute should be looked at as one measure in the fight to control the spread of HIV; it should educate society on the acts most likely to transmit HIV; and it should do this by criminalizing only the most risky contact so the public does not irrationally fear casual contact while encouraging people

²⁰⁷ 197 U.S. at 25.

²⁰⁸ Kenney, *supra* note 7, at 266.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 267.

²¹² *Id.* at 272.

to be tested and treated for HIV.²¹³

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²¹³ *Id.*