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From Mother to Child . . . A Criminal Pregnancy: Should Criminalization of the Prenatal Transfer of AIDS/HIV be the Next Step in the Battle Against this Deadly Epidemic?

She wanted to cling to the new life growing inside her, to feel the baby grow and emerge crying from her body, squinting and helpless in the light. She wanted to spend days changing diapers, worrying about the croup, teaching the child to say 'mama.'

But she faced the specter that she would only see this baby struggle with life and slowly die Every night a vigil, every day a crisis.¹

I. Introduction

It has been more than ten years since the United States received its first official report of the mysterious disease discovered by health care providers in California, later defined as Acquired Immunodeficiency Syndrome or AIDS.² In the decade following that report, AIDS and AIDS related illness³ has surpassed heart disease, cancer, suicide and homicide as one of the leading causes of death in

1. Susan Peterson, *Pregnant Women with AIDS Faced with Moral Dilemma*, HARRISBURG PATRIOT-NEWS, Sept. 29, 1991, at A8.

2. Center for Disease Control, *The HIV/AIDS Epidemic: The First Ten Years*, 40 MORBIDITY & MORTALITY WKLY REP. 357 (June 7, 1991) [hereinafter CDC, June 7, 1991] (citing Center for Disease Control, *Pneumocystis Pneumonia — Los Angeles*, 30 MORBIDITY & MORTALITY WKLY REP. 250 (July 3, 1981)). For a chronology of the identification of AIDS, HIV, and related illnesses, see *Kozup v. Georgetown University*, 663 F. Supp. 1048 (D.D.C. 1987).

3. See generally United States Dept. of Health & Human Services, *FACTS ABOUT AIDS* (1987) [hereinafter *FACTS ABOUT AIDS*]. AIDS is caused by a virus that is referred to by several names: Human T-Lymphotropic Virus, type III (HTLV-III); Lymphadenopathy Associated Virus (LAV); AIDS-Related Retrovirus (ARV); and Human Immunodeficiency Virus (HIV). These viruses all attack the immune system of the human body. *Id.* at 3. The Presidential Commission on the Human Immunodeficiency Virus Epidemic concluded that the term HIV, or human immunodeficiency virus, more accurately defines the problem and recommended that the focus of any preventative measures should be on HIV infection rather than later stages of the disease referred to as AIDS or ARC (AIDS Related Complex). *REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC AT XVII* (1988) [hereinafter *THE REPORT*]. However, for purposes of this comment the terms AIDS, HIV, and AIDS/HIV will be used interchangeably because all of these terms are used by both legislatures and the Center for Disease Control.

the United States.⁴ What began with a report of a few isolated incidences, affecting only 189 adults in fifteen states, has grown to epidemic proportions threatening the lives of over 200,000 men, women, and children across the entire country.⁵

Recognizing the need to effectuate federal, state, and local efforts to protect the public from the spread of this deadly epidemic, President Ronald Reagan, in 1987, created The Presidential Commission on the Human Immunodeficiency Virus Epidemic (hereinafter, The Presidential Commission).⁶ After a year, and more than forty hearings,⁷ The Presidential Commission recommended that "HIV infected individuals who knowingly conduct themselves in ways that pose significant risk of transmission to others must be held accountable for their actions."⁸ In response to this call for action, at least twelve states have enacted legislation criminalizing the transfer of AIDS or the HIV infection through sexual contact or the transfer of infected body fluids, blood or tissue.⁹

Perhaps the most innocent and tragic of all of the victims of this disease are the children who are born HIV positive.¹⁰ These children are forced to endure extensive hospitalization and intermittent atten-

4. Center for Disease Control, *Mortality Attributable to HIV Infection/AIDS in the U.S., 1981-1990*, 40 MORBIDITY & MORTALITY WKLY REP. 1 (Jan. 25, 1991) [hereinafter CDC, Jan. 25, 1991].

5. Center for Disease Control, *The Second 100,000 Cases of A.I.D. Syndrome U.S. June 1981-Dec. 1991*, 41 MORBIDITY & MORTALITY WKLY REP. 28 (Jan. 17, 1992) [hereinafter CDC, Jan. 17, 1992]. In 1981, 76% of the cases reported were discovered in New York and California. CDC, June 7, 1991, *supra* note 2. By comparison, in 1990, 2/3 of the cases reported occurred outside of those two states. *Id.* See CDC, June 7, 1991, *supra* note 2 for a discussion of the statistics and demographics of the disease.

6. THE REPORT, *supra* note 3, at V.

7. *Id.* at XVII.

8. *Id.* at 130. In 1988, the Presidential Commission concluded that the epidemic "should be a concern to all Americans . . . as estimates suggest that almost 500,000 Americans will have died or progressed to later stages of the disease by 1992." *Id.* at XVII. The Presidential Commission cautioned that legislation should be carefully drafted to "be directed only toward behaviors scientifically established as a mode of transmission." *Id.* at 130.

9. See ARK. CODE ANN. § 5-14-123 (Michie 1991 Supp.); CAL. HEALTH & SAFETY CODE ANN. § 1621.5 (West 1990); FLA. STAT. ANN. § 384.24 (West 1992 Supp.) (effective 1988); IDAHO CODE § 39-608 (1992 Supp.); ILL. ANN. STAT. ch. 38 para. 12-16.2 (Smith-Hurd 1992) (effective 1989); IND. CODE ANN. § 35-42-1-7 (Burns 1992 Supp.); LA. REV. STAT. ANN. § 14:43.5 (West 1991 Supp.); MICH. STAT. ANN. § 14.15(5210) (Callaghan 1992-93 Supp.); OHIO REV. CODE ANN. § 2927.13 (Baldwin 1992); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 1993 Supp.); TEX. PENAL CODE ANN. § 22.012 (West 1992 Supp.); and VA. CODE ANN. § 32.1-289.2 (Michie 1992).

10. The Center for Disease Control estimates that between 1,500 and 2,000 HIV-infected children are born each year in the United States. *Pediatric HIV Infection on the Increase, HIV/AIDS PREVENTION* (Center for Disease Control, Atlanta, Ga., Special Report, July 1991) at 2 [hereinafter *Pediatric HIV Infection*]. Eighty-seven percent of children infected with the disease are born to women infected with or at risk of HIV infection. CDC, Jan. 17, 1992 *supra* note 5, at 29. See also *infra* note 31 and accompanying text.

tion from medical professionals, rather than the love and stimulation of a constant caregiver, often knowing only a hospital setting as "home" during their brief lives.¹¹ Although none of the states that have enacted AIDS/HIV transmission legislation have specifically criminalized the prenatal transfer of the disease, it has been suggested that some states have passed statutes sufficiently ambiguous that such prosecution could be possible.¹² This Comment will first discuss the impact of the AIDS/HIV epidemic and the possible remedies available to a prenatally infected child. Second, this Comment will explore the possibility that states could prosecute an HIV infected woman who transfers the disease to her unborn child in utero. Third, this Comment will examine the ultimate battle such prosecution would spark between the rights of the woman, the rights of the child, and the interest of the state in protecting its citizens from the spread of this epidemic. Finally, this Comment will address social policy and enforcement problems and discuss an alternative solution.

II. Background

A. *The AIDS/HIV Epidemic*

As of December 31, 1991, in the United States alone, 206,392 cases of AIDS had been reported to the Center for Disease Control.¹³ Tragically, of those 206,392 people, less than 36% remain alive today.¹⁴ The number of reported AIDS cases in the United States was expected to increase to 365,000 by 1993.¹⁵ Even more

11. THE REPORT, *supra* note 3, at 108.

12. Michael Closen & Scott H. Isaacman, *Criminally Pregnant: Are Aids-Transmission Laws Encouraging Abortion?*, 76 A.B.A. J. 76 (Dec. 1990). However, it is important to note that the authors state that OKLA. STAT. ANN. § 1192.1 does not consider intent to transmit the infection as a necessary element of the crime. A careful reading of § 1192.1, however, indicates that it is "unlawful for any person *knowing* that he or she has Acquired Immunodeficiency Syndrome . . . and *with intent* to infect another . . ." to engage in conduct that could transmit the virus. Moreover, the statute was amended in 1991 and now provides an exception for "in utero transmission of blood or bodily fluids . . ." OKLA. STAT. ANN. tit. 21 § 1192.1 (West 1993 Supp.) (emphasis added).

13. CDC, Jan. 17, 1992, *supra* note 5, at 29. The first 100,000 cases were reported by August of 1989; thus, between September 1989 and December 1991 there were over 100,000 additional new cases reported. *Id.* In 1991 alone there were 45,506 new cases reported to the Center for Disease Control, an increase of 5% from 1990. *Update: Acquired Immunodeficiency Syndrome in the U.S. 1991*, 41 MORBIDITY & MORTALITY WKLY REP. 463 (July 3, 1992). World wide it is estimated that between eight and ten million adults and one million children are infected with the human immunodeficiency virus. CDC, June 7 1991, *supra* note 2.

14. CDC, Jan. 17, 1992, *supra* note 5, at 29. As of December 1991 over 133,232 deaths (64.5%) had been reported. *Id.* at 29. Of these deaths, 31,196 were reported to the Center for Disease Control in 1990 alone. CDC, Jan. 25, 1991, *supra* note 4.

15. William L. Heyward & James W. Curren, *The Epidemiology of AIDS in the U.S.*, 259 SCI. AM. 72 (Oct. 1988).

alarming is the realization that these figures represent only the reported cases, and may not be reflective of the true severity of this epidemic.¹⁶

The viruses responsible for AIDS¹⁷ are usually transmitted through sexual contact, exposure to infected blood or blood products, sharing contaminated needles, and from mother to child during the prenatal period or during breast feeding.¹⁸ After initial exposure to one of the viruses that leads to AIDS, there is an incubation period which lasts from six months to seven years, although not everyone exposed to the disease will develop a "full blown case of it."¹⁹ The public demand for information about AIDS/HIV remains high,²⁰ while concerns over the possibility of transmission in the work place²¹ and health care facilities²² continues to increase.

From the first reported case of pediatric AIDS in 1982 until May, 1991, there were 3,089 cases of children infected with AIDS/HIV reported to the Center for Disease Control, and it is estimated that between 1,500-2,000 HIV-infected children are born every year.²³ Transmission from mother to child during the prenatal period is the most common route of transmission, accounting for 87% of the cases reported in 1990.²⁴ Sadly, AIDS/HIV has become the ninth leading cause of death among children between the ages of one and four.²⁵ More dishearteningly, these innocent victims will die within only three to nine years of birth, and will be forced to endure

16. The Presidential Commission estimated that between 1-1.5 million people are infected with this virus but are not yet ill enough to realize it. THE REPORT, *supra* note 3, at XVII.

17. See *supra* note 3 for a list of the viruses responsible for AIDS.

18. Heyward & Curren, *supra* note 15, at 72. See also FACTS ABOUT AIDS, *supra* note 3, at 4.

19. FACTS ABOUT AIDS, *supra* note 3, at 4.

20. *Delivering HIV/AIDS Information: CDC's National AIDS Hotlines and National AIDS Information Clearinghouse*, HIV/AIDS PREVENTION (Center for Disease Control, Atlanta, Ga., Special Report on Evaluation, February 1991) at 16. The Center for Disease Control reports that the "[d]emand for HIV/AIDS information has been, and continues to be, greater than that for any other health problem." *Id.* Calls to the AIDS Hotline average 3,500 a day, and more than 60,000 reference requests a year. *Id.* The AIDS Hotline number is 1-800-342-2437.

21. See *Raytheon Co. v. Cal. Fair Emp. & Hous. Comm'n*, 261 Cal. Rptr. 197 (Ct. App. 1989) (holding that an employer may not discharge an employee solely because he has tested positive for AIDS.). See generally Walter B. Connolly, Jr., *An Employer's Guide to AIDS in the Workplace*, 9 ST. LOUIS UNIV. PUB. L. REV. 561 (1990).

22. See generally Scott H. Isaacman, *The Other Side of the Coin: HIV Infected Health Care Workers*, 9 ST. LOUIS UNIV. PUB. L. REV. 439 (1990); David Zinman, *Health Care Workers Struggle with Dilemma as Congress Takes a Look at Mandatory Testing*, NEWS-DAY, Sept. 24, 1991, at 69.

23. *Pediatric HIV Infection*, *supra* note 10, at 2.

24. *Id.*

25. *Id.*

extensive hospitalization during their brief lives.²⁶ These children will never have a chance to grow up, and many never experience the pleasures of childhood before they must face the harsh realities of life and ultimately, death.

B. *The Rights of the Unborn Child*

1. *Remedies in Tort Law.*—What relief is available for these children? Recently, courts and commentators have increasingly recognized the rights of the unborn child, limiting the liberty of the mother in order to safeguard the health of the child she carries.²⁷ The New Jersey Supreme Court went so far as to declare that “justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.”²⁸

In support of the right to be born healthy, it has been suggested that a child deprived of that right and born infected with AIDS/HIV may find an appropriate remedy in the area of tort law.²⁹ Pro-

26. THE REPORT *supra* note 3, at 12.

27. See *In re A.C.*, 533 A.2d 611 (D.C. 1987) (finding that the state's interest in protecting an unborn child may override the mother's interest in bodily integrity); *Jefferson v. Griffen Spalding County Hosp.*, 274 S.E.2d 457 (Ga. 1981) (weighing the mother's right to practice her religion and refuse medical treatment against the child's right to live, the court held that the child was entitled to the protection of the court); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (1985) (appointing a doctor as guardian of an unborn, eighteen week old fetus, and ordering him to do all that was necessary to save the child's life, including performing a blood transfusion against the mother's objections). *But see* *Taft v. Taft*, 446 N.E.2d 395 (Mass. 1983) (denying an order that would require the mother to have an operation to prevent a miscarriage, finding the circumstances insufficiently compelling to justify violating the mother's rights). See generally Deborah Mathieu, *Respecting Liberty and Preventing Harm: Limits of State Intervention on Prenatal Choice*, 8 HARV. J. OF L. & PUB. POL'Y 19 (1985) (“[T]here may be circumstances under which a pregnant woman's liberty may be justifiably limited to prevent harm to her future child.”); Jeffrey A. Parness, *The Legal Status of the Unborn After Webster*, 95 DICK. L. REV. 1 (1990).

28. *Smith v. Brennan*, 157 A.2d 497, 503 (1960).

29. Martha M. Curley, Note, *Establishing Relief for the Most Innocent of all AIDS Victims: Liability for Perinatal Transmission of AIDS*, 28 J. FAM. L. 271 (1989-90). See also *Kozup v. Georgetown University*, 663 F. Supp. 1048 (D.D.C. 1987) (granting summary judgment to the defendant hospital and blood bank, in an action brought by the parents of an infant who received AIDS from a blood transfusion at birth, because there was no reason at the time of the blood transfusion for the defendant's to know that blood transfusions created a risk of AIDS/HIV transmission, so they acted within the standard of the community). *Cf.* *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982) (declaring that the term “minor child” includes an unborn viable child; and therefore, IDAHO CODE § 5-310, which provides that parents may maintain an action for injury to a minor child, could apply to an unborn viable child); *Eich v. Town of Gulf Shores*, 300 So.2d 354 (Ala. 1974) (holding that the parents of an eight and one-half month old stillborn fetus are entitled to commence an action for the wrongful death of the child under ALA. CODE § 6-5-391). See generally *C.A.U. v. R.L.*, 438 N.W.2d 441 (Minn. App. 1989) (concluding that although Minnesota courts have held that a person can be liable for transmission of a dangerous, communicable disease, the defendant in this case had no legal duty to warn his sexual partner that he might be infected with AIDS because it was not reasonably foreseeable at the time of their relationship that such was the case); David P. Brigham, Comment, *You Never Told Me . . . You Never Asked: Tort Liability for the Sex-*

posing a cause of action for battery or infliction of emotional distress, one commentator reasoned that the doctrine of parent-child immunity could be defeated by establishing that the act was intentional because the mother knew with substantial certainty that her conduct would transfer the antibodies to her child.³⁰ However, this theory fails to recognize that although the antibodies of the mother are always passively transferred to the child during pregnancy, not all children who are born to HIV-positive mothers will continue to carry the antibody eighteen months after birth. In fact, more than half of these children will not be HIV-positive within two years after birth.³¹ Consequently, while the mother may know with substantial certainty that she will pass the AIDS antibody to her unborn child during pregnancy, she does not necessarily know with substantial certainty that the child will remain independently HIV positive. Rather, the odds are in favor of the child growing up healthy.

Nonetheless, it is arguable that the exposure to the virus and the risk that the child will become infected constitutes the injury. But there remains an additional barrier to a successful cause of action for battery. Because of the long incubation period of the disease,³² it may be difficult to establish the requisite intent.³³ The mother may not have knowledge of her HIV infection during her pregnancy or at the time of transmission. While a woman who knows she has AIDS/HIV may have a difficult time convincing a jury that she did not realize the contagious nature of the disease, a woman who did not even know she was infected with the virus would have no reason to know, with substantial certainty, that she was transferring the disease to her unborn child.³⁴

A better remedy, therefore, may be found in an action for negligence.³⁵ If a woman engages in conduct known to transmit AIDS/HIV, then she arguably should know that she is at risk of being infected with the disease. Such a woman may arguably have a duty to ascertain whether she is infected before engaging in behavior

ual Transmission of AIDS, 91 DICK. L. REV. 529 (1986).

30. Curley, *supra* note 29, at 274-77.

31. While all babies are born with their mother's antibodies, they later develop their own antibodies. A clinical study showed that 30% of babies born to women infected with HIV were also HIV positive 18-24 months after birth. Stephane Blanche, M.D., et al., *A Prospective Study of Infants Born to Women Seropositive for HIV Virus Type 1*, 320 N.E. J. MED. 1543, 1645-47 (1989).

32. See FACTS ABOUT AIDS, *supra* note 3, and text accompanying note 19.

33. See Brigham, *supra* note 29, at 542.

34. See Curley, *supra* note 29, at 272-76.

35. Curley, *supra* note 29, at 284-86. See generally Brigham, *supra* note 29.

which could result in pregnancy.³⁶ As one commentator suggests,

a mother has a moral duty not to infect her child with a disease. Although it is not immoral per se to become pregnant, a mother who knows or should know that she has AIDS, and knows or should know that if she becomes pregnant the virus will probably be transmitted to her child, has a moral duty not to become pregnant.³⁷

The question remains, however, whether a court should hold a woman accountable for breaching this moral duty.

2. *Legislative Protection of the Unborn.*—In addition to court imposed duties on pregnant women, legislatures have also attempted to protect the health and safety of the unborn child.³⁸ Two policy considerations provide support for laws that protect potential human life: 1) the human being unborn today will be alive tomorrow, and 2) the unborn child should have an opportunity to live an unimpaired life.³⁹

Perhaps the most publicized legislative measure was enacted in Missouri,⁴⁰ and upheld by the United States Supreme Court in *Web-*

36. Curley, *supra* note 29, at 286.

37. Curley, *supra* note 29, at 284.

38. See CAL. PENAL CODE § 187 (West 1988) (defining murder as the unlawful killing of a human being or a fetus); CAL. PENAL CODE § 270 (West 1988) (imposing a duty on both parents to provide remedial care for a child, and considering an unborn child to be an existing person for purposes of this section); ILL. ANN. STAT. ch. 38, para. 9-1.2 (Smith-Hurd 1992) (providing a criminal penalty for homicide of an unborn child); LA. REV. STAT. ANN. § 14:32.5 (West 1992) (providing three specific degrees of the crime of feticide); OKLA. STAT. ANN. tit. 10, § 1101(4) (West 1993 Supp.) (defining "deprived child" as one in need of special care because of a physical condition, including the condition of being born dependent on drugs). See also Volk v. Baldazo, 651 P.2d 11 (Idaho 1982) (declaring that the term "minor child" includes an unborn viable child; and therefore, IDAHO CODE § 5-310, which provides that parents may maintain an action for injury to a minor child, could apply to an unborn viable child); Eich v. Town of Gulf Shores, 300 So.2d 354 (Ala. 1974) (holding that the parents of an eight and one-half month old stillborn fetus are entitled to commence an action for the wrongful death of the child under tit. 7, § 119 of the 1940 Code of Alabama, currently ALA. CODE § 6-5-391). See generally Parness, *supra* note 27.

39. Parness, *supra* note 38, at 4.

40. MO. ANN. STAT. § 1.205.2 (Vernon's 1992 Supp.) provides that

1. The general assembly of this state finds that:
 - (1) The life of each human being begins at conception;
 - (2) Unborn children have protectable interest in life, health, and well being;
 - (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitutions of

ster v. Reproductive Health Services.⁴¹ The preamble to the Missouri Code declares that

the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court⁴²

Employees of Missouri health care services that offer abortion services challenged the statute on the ground that it could be used to regulate abortion.⁴³ The Court explained that the states cannot adopt one theory of when life begins in order to justify a regulation of abortion if such a regulation would be invalid under the Court's previous decision in *Roe v. Wade*.⁴⁴ Refusing to rule on the constitutionality of the Missouri Preamble until the Missouri State courts interpreted it, the Supreme Court noted that the section simply offers protection to unborn children in tort law and probate law, protections that are not invalid under *Roe*.⁴⁵ The Court's decision in *Webster* seems to imply that states can decide when life begins in order to protect the rights of the unborn child, but they cannot pro-

this state.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child [sic] or children or the offspring of human beings from the moment of conception until birth and at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself by failing to follow any particular program of prenatal care.

41. 492 U.S. 490 (1989).

42. MO. ANN. STAT. § 1.205.2. See *supra* note 40.

43. *Webster*, 492 U.S. at 491.

44. *Id.* at 492. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court found the right of privacy broad enough to include the right to choose whether to terminate a pregnancy, without government regulation, as long as such a decision was made within the first trimester of the pregnancy. *Id.* at 163-64. After the first trimester, but prior to viability, a state may regulate abortion procedures to safeguard the health of the mother. *Id.* at 164. After viability, however, the Court found that a state may promote its interest in potential human life by prohibiting all abortions, except when necessary to protect the mother's life. *Id.* However, in *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791 (1992), a plurality of the Supreme Court affirmed the "essential holding" of *Roe*, but rejected the trimester framework for determining at what point a state has a valid interest in regulating abortion. Instead, the plurality opinion suggested an undue burden standard, "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. [Such a regulation would be invalid] . . . because the means chosen by the state to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* at 2820.

45. *Webster*, 492 U.S. at 492.

hibit an abortion permissible under *Roe*.⁴⁶ Therefore, legislatures may be in a better position to protect the health and safety of unborn children.

III. Legislative Attempts to Battle the Spread of this Epidemic

A. *The Need for Criminal Legislation—The Police Power of the State*

The Presidential Commission specifically appealed to state legislatures to join the battle to stop the AIDS/HIV epidemic, urging them to hold individuals who engage in risky behavior accountable for their actions.⁴⁷ Commentators have also urged state legislatures to recognize that “[t]he personal responsibility not to engage in behaviors likely to inflict others imposed on infected persons is not disproportionate to the harm those behaviors would otherwise impose on others.”⁴⁸ Traditional criminal laws may prove to be an ineffective and inappropriate means of deterring the type of culpable conduct responsible for transmission of the AIDS virus.⁴⁹ Yet, the aims and goals of HIV transmission legislation are arguably the same as the aims and goals of the more traditional criminal laws: to punish individuals who engage in prohibited behavior; deter or prevent dangerous and risky behaviors; and provide a social means of education regarding the norms of acceptable social behavior.⁵⁰

The Supreme Court has “frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concerns.”⁵¹ The holding of *Lochner v. New York*,⁵² in which the Court declared that the state regulation of a baker’s work hours was beyond the scope of the police power,⁵³ has

46. See *supra* note 44.

47. THE REPORT, *supra* note 3, at 130. Risky behaviors are those that are known to be responsible for the transmission of the virus.

48. Donald H. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 356 (1990). See also David Robinson, Jr., *Aids and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91 (1985); Sallyanne K. Sullivan & Max C. Feldman, *Imposing Criminal Liability on Those who Knowingly Transmit the AIDS Virus: A Recommendation for Legislative Action*, 13 U. DAYTON L. REV. 489 (1988).

49. Hermann, *supra* note 48, at 352. See also *State v. Sherouse*, 536 So.2d 1194 (Fla. App. 1989) (granting defendant’s motion to dismiss manslaughter charges after she offered to have sexual intercourse in exchange for money, knowing she was infected with HIV and failing to inform the man of her condition, because there was no evidence establishing a criminal intent to kill).

50. Hermann, *supra* note 48, at 352.

51. *Whalen v. Roe*, 429 U.S. 589, 597 (1977).

52. 198 U.S. 45 (1905).

53. *Id.* at 57. The Court stated:

been rejected many times.⁵⁴ The police power of the state has been upheld to protect children from exploitation,⁵⁵ and to protect the public health from the threat of tuberculosis⁵⁶ and venereal diseases.⁵⁷

Public policy demands that the rights of individuals must bend to the greater concerns of the general public when a deadly and costly disease threatens society.⁵⁸ In addition to the great financial burden created by the AIDS/HIV epidemic, the economy of the United States is being crippled by the decrease in the productivity of many people during their prime earning years.⁵⁹ Additionally, when a child is born to a mother and father who will not be alive to provide the necessary care and support,⁶⁰ the child will become the financial responsibility of the taxpaying public.⁶¹ As one commentator suggested, while lawmakers are limited in what they are able to do to halt the spread of this disease, the seriousness of its consequences compels them to do what they can.⁶² "If the threat of criminal liabil-

There is no reasonable ground for interfering with the liberty of person [sic] or the right of free contract, by determining the hours of labor in the occupation of a baker [W]e think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.

Id.

54. *Whalen*, 429 U.S. at 597. See, for example, *Roe v. Wade*, 410 U.S. 113, 117 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965).

55. *State v. Davis*, 768 P.2d 499 (Wash. App. 1989) (holding a state law prohibiting possession of child pornography to be a valid invasion of privacy).

56. *In re Halko*, 246 Cal. App.2d 553, 54 Cal. Rptr. 661 (1966) (allowing a quarantine for tuberculosis); *Moore v. Draper*, 57 So.2d 648 (Fla. 1952) (allowing quarantine in prison for tuberculosis).

57. *People v. Johnson*, 181 Cal. App.3d 1137, 225 Cal. Rptr. 251 (1986) (affirming an enhanced sentence for a convicted rapist who infected his victim with herpes); *In re Johnson*, 180 P. 644 (1919) (allowing a quarantine for venereal disease).

58. Sallyanne K. Sullivan & Max C. Feldman, *supra* note 48, at 498. The Presidential Commission predicted that nationwide medical costs for people with AIDS is projected to increase from \$1.1 billion in 1985 to \$8.5 billion by the end of 1991. THE REPORT, *supra* note 3, at 142. The total cost to the country for lost income, decreased compensation, insurance payouts, and personal care was expected to increase from \$8.7 billion in 1986 to \$66.5 billion by the end of 1991. *Id.*

59. THE REPORT, *supra* note 3, at 142.

60. The Center for Disease Control estimates that during the 1990's, mothers or both parents of more than 10 million children will die from HIV infection. CDC, June 7, 1991, *supra* note 2. The Presidential Commission discovered that urban hospitals report an increasing number of children who must remain in the hospital when no medical care is required because there is nobody to care for them. THE REPORT, *supra* note 3, at 108.

61. It is estimated that 20% of AIDS victims are uninsured, and 40% of AIDS victims rely on medicaid. THE REPORT, *supra* note 3, at 145. The Presidential Commission recommended that an elaborate and comprehensive system of foster care supervised by specially trained case workers be implemented to provide for these infected children. *Id.* at 109. Funding for these programs should be made available from the Department of Human Services and the Department of Housing and Urban Development. *Id.* at 109-110.

62. Sullivan & Feldman, *supra* note 48, at 506-07.

ity elevates the consciousness of those capable of harming others through transmission of the virus, so that they forego dangerous activity, then the law will have achieved its goal."⁶³

The Current Legislation—Could it be Used to Prosecute a Woman for Prenatal Transmission?

Many states have heeded the call for action by enacting criminal statutes prohibiting certain behaviors that transmit the AIDS virus, and providing criminal penalties for those who disobey the law.⁶⁴ While some states have provided criminal liability only for the donation or sale of blood or other bodily fluids,⁶⁵ others protect against transmission through sexual contact.⁶⁶ Texas and Oklahoma specifically provide an exception from criminal liability for in utero transmission.⁶⁷ However, at least four states have drafted legislation that is ambiguous enough that it could be used to prosecute an infected woman who transfers the disease to her child during the prenatal transfer of blood and blood products.⁶⁸

An Illinois statute⁶⁹ in particular, has received both praise and

63. *Id.* at 508-09.

64. See statutes cited *supra* note 9.

65. See CAL. HEALTH & SAFETY CODE ANN. § 1621.5 (West 1990); OHIO REV. CODE ANN. tit. 29, § 2927.13 (Baldwins 1992); VA. CODE ANN. § 32.1-289.2 (Michie 1992 Supp.).

66. FLA. STAT. ANN. § 384.24 (West 1992 Supp.); LA. REV. STAT. ANN. § 43.5 (West 1991 Supp.); MICH. STAT. ANN. § 14.15(5210) (Callaghan 1992-93 Supp.).

67. OKLA. STAT. ANN. tit. 21 § 1192.1 (Michie 1993 Supp.); TEXAS PENAL CODE ANN. § 22.012 (West 1992 Supp.).

68. ARK. CODE ANN. § 5-14-123 (Michie 1991 Supp.); IDAHO CODE § 39-608 (1992 Supp.) (enacted in 1988); ILL. ANN. STAT. ch. 38, § 12-16.2 (Smith-Hurd 1992 Supp.) (effective Sept. 11, 1989); IND. CODE ANN. § 35-42-1-7 (Burns 1992 Supp.) (enacted 1988).

69. ILL. ANN. STAT. ch. 38, para. 12-16.2 (Smith-Hurd 1992 Supp.) provides:

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 the 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.

criticism.⁷⁰ Opponents seeking the repeal of this statute claim that a woman in Illinois who knows she is infected and becomes pregnant could be prosecuted under this section.⁷¹ Indeed, the language of the statute does encompass the intimate contact and transfer of bodily fluids between mother and child that occurs during pregnancy. Under the statute, "[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 . . . [or] provides his or her blood, . . . or other potentially infectious bodily fluids for . . . administration to another."⁷² The definition of intimate contact, "the exposure of the body of one person to the bodily fluid of another person in a manner that could result in the transmission of HIV,"⁷³ arguably applies to the prenatal transfer of fluids from mother to child. Moreover, the statute does not require that actual infection occur.⁷⁴ Even if the child is one of the 70% who do not test positive for the AIDS antibody eighteen months after birth,⁷⁵ the woman could still be prosecuted for the transmission that occurred during the prenatal period.

Similarly, an Indiana statute⁷⁶ provides that a woman who

(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.

(emphasis added).

70. See Michael Closen & Jeffrey Deutschman, *Proposal to Repeal the Illinois HIV Transmission Statute*, 78 ILL. B.J. 592 (1990) (criticizing the statute as overly broad, vague, and unconstitutional). *But see* Hermann, *supra* note 48 (calling the Illinois statute a "model HIV specific crime offense"). In April, 1991, a prostitute in Madison County, Illinois was charged with attempted criminal transmission of HIV, under this section, when she solicited an undercover policeman, knowing that she was infected with the virus. *Prostitute with AIDS Will Stay in Custody*, CHICAGO TRIBUNE, April 26, 1991, at C12.

71. Closen & Deutschman, *supra* note 70, at 592-93. Interestingly, the authors of this article also suggest that a person who cries in a swimming pool or shakes sweaty hands with another person could also be prosecuted, despite the fact that those situations may not involve any real threat of transmission. *Id.*

72. ILL. ANN. STAT. ch. 38, para. 12-16.2(a)(1)-(2). See *supra* note 69.

73. ILL. ANN. STAT. ch. 38, para. 12-16.2(b). See *supra* note 69.

74. ILL. ANN. STAT. ch. 38, para. 12-16.2(c). See *supra* note 69.

75. See *supra* note 31.

76. IND. CODE ANN. § 35-42-1-7 (Burns 1992 Supp.) provides:

Transferring contaminated body fluids.—(a) As used in this section, "component" means plasma, platelets, or serum of a human being.

(b) A person who recklessly, knowingly, or intentionally donates, sells, or transfers blood, blood component, or semen for artificial insemination (as defined in IC 16-8-7.5) that contains the human immunodeficiency virus (HIV) commits transferring contaminated body fluids, a Class C felony.

(c) However, the offense is a Class A felony if it results in the transmission of the human immunodeficiency virus (HIV) to any person other than the defendant.

CRIMINAL PREGNANCY

“knowingly, or intentionally . . . transfers blood . . . that contains the human immunodeficiency virus (HIV) commits transferring contaminated body fluids, a Class C felony.”⁷⁷ Even if the child does not test positive for HIV infection after birth, the woman who knows she is HIV positive and becomes pregnant could nonetheless be guilty of transferring contaminated body fluids. Furthermore, if the child does test positive for HIV infection, the woman could be guilty of a Class A felony.⁷⁸ It is questionable, however, whether a woman “intentionally . . . transfers blood” to her child during pregnancy if she did not intend to become pregnant. Moreover, the threat of this type of prosecution could force the woman to terminate her pregnancy to avoid knowingly transferring contaminated blood or body fluid.⁷⁹ If the woman does not discover that she is HIV positive until after her pregnancy has progressed beyond the time in which abortion is legal or safe, she may be left with no option but to violate the law or risk her own safety.

In comparison, a person in Arkansas who has AIDS or who has tested positive for HIV infection and practices certain behaviors is considered a “danger to the public.”⁸⁰ Accordingly, under the Arkansas statute, a person who “knows he or she has tested positive for

(d) This section does not apply to:

(1) A person who, for reasons of privacy, donates, sells or transfers blood or blood component at a blood center (as defined in IC 16-8-7-1) after the person has notified the blood center that the blood or blood component must be disposed of and may not be used for any purpose; or

(2) A person who transfers blood, a blood component, semen, or another body fluid that contains the human immunodeficiency virus (HIV) for research purposes.

77. IND. CODE ANN. § 35-42-1-7(b). *See supra* note 76.

78. IND. CODE ANN. § 35-42-1-7(c). *See supra* note 76.

79. *See* Arlene Zarembka & Katherine M. Franke, *Women in the AIDS epidemic: A Portrait of Unmet Needs*, 9 ST. LOUIS U. PUB. L. REV. 519, 524 (1990); *see also* Closen & Issacman, *supra* note 12, at 77.

80. ARK. CODE ANN. § 5-14-123 (Michie 1991 Supp.) provides:

(a) A person with Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of human immunodeficiency virus (HIV) antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral transfer of blood and blood products and under these circumstances is a danger to the public.

(b) A person commits the offense of exposing another to HIV if the person knows he or she has tested positive for HIV and exposes another person to such viral infection through the parenteral transfer of blood or blood products or engages in sexual penetration with another person without first having informed the other person of the presence of HIV.

(c) As used in this section, “sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however, slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.

(d) Exposing another to HIV is a Class A felony.

HIV and exposes another person to such viral infection through the parenteral transfer of blood or blood products . . ." has committed a felony.⁸¹ Because the section does not further explain the scope of "parenteral transfer of blood," it is possible that the prenatal transfer from mother to child could satisfy this definition.⁸²

The term "parenteral" refers to the entrance of a substance into the body "by some other means than through the gastrointestinal tract; referring particularly to the introduction of substances into an organism by intravenous, subcutaneous, intramuscular, or intramedullary injection."⁸³ Because the mother's body provides nourishment to the child through the placenta, an "organ of metabolic interchange between the fetus and mother . . . [permitting] the absorption of nutritive materials, oxygen, and some harmful substances, like viruses, into the fetal blood . . ." ⁸⁴ this process is arguably a parenteral transfer.

On the other hand, because it may be difficult to determine the route by which the virus entered the child's body, the transfer may not be considered parenteral.⁸⁵ Specifically, if the child became infected during the trauma of birth, then depending upon whether the infection entered the child's body through an abrasion to the skin (subcutaneous) or through the mouth (digestive tract), the transfer may or may not be a parenteral one.⁸⁶

Finally, prosecution could be possible under an Idaho statute⁸⁷

81. ARK. CODE ANN. § 5-14-123(b). See *supra* note 80.

82. Closen & Isaacman, *supra* note 12, at 77.

83. STEDMAN'S MEDICAL DICTIONARY 1139-40 (Williams & Wilkins, 25th ed. 1990). "Intravenous" is defined as through the veins, "intramuscular" as through the muscles, and "intramedullary" as within bone marrow or the spinal cord. *Id.* at 796. "Subcutaneous" is defined as under the skin. *Id.* at 1493. "Gastrointestinal" is defined as "referring to the stomach and intestines." *Id.* at 636.

84. *Id.* at 1205. The definition of placenta provides that ". . . no direct mixing of fetal and maternal blood occurs, but the intervening tissue (the placental membrane) is sufficiently thin to permit the absorption of nutritive materials, oxygen, and some harmful substances, like viruses, into the fetal blood . . ." *Id.*

85. Telephone interview with Blake L. Powell, M.D., J.D., Emergency Medicine Physician at Harrisburg Hospital, Harrisburg, PA, certified by the American Board of Emergency Medicine (A.B.E.M.), and an adjunct instructor at The Dickinson School of Law, Carlisle, PA, (Nov. 17, 1991).

86. *Id.* Dr. Powell pointed out that if the child were to become infected during the trauma of birth it would be necessary to determine the manner in which the infection entered the child's body before concluding whether the transfer was a parenteral one. If the infection entered under the skin (subcutaneous), as the result of an injury during birth, then this could be considered within the definition of parenteral. However, if the child swallowed infected blood and the blood traveled from the mouth into the digestive tract of the child, this transfer would be outside the definition of parenteral. *Id.*

87. IDAHO CODE § 39-608 (1992 Supp.) provides:

(1) Any person who exposes another in any manner with the intent or, knowing that he or she is or has been afflicted with acquired immunodeficiency syndrome

which provides that a woman who knows she is infected with HIV and "transfers . . . her body fluid . . . to another person is guilty of a felony . . ." ⁸⁸ Idaho does provide an exception for a person who transfers such fluids after being advised by a physician that he or she is noninfectious. ⁸⁹ This exception may not protect a woman who discovers she is infected after she has begun her pregnancy.

IV. Analysis

A. Constitutional Challenges

1. *The Right to Privacy and The Right to Procreate.*—Any law that criminalizes the transfer of a disease through the prenatal transfer of blood, thereby burdening the choice of whether to conceive a child, will undoubtedly be met with cries of constitutional violation. Indeed, the Supreme Court has repeatedly recognized that the right to choose whether to bear a child is a fundamental right. ⁹⁰ As the

(AIDS), AIDS related complexes (ARC), or other manifestations of human immunodeficiency virus (HIV) infection, transfers or attempts to transfer any of his or her body fluid, body tissue or organs to another person is guilty of a felony and shall be punished by imprisonment in the state prison for a period not to exceed fifteen (15) years, by fine not in excess of five thousand dollars (\$5,000), or by both such imprisonment and fine.

(2) Definitions. As used in this section:

(a) "Body fluid" means semen (irrespective of the presence of spermatozoa), blood, saliva, vaginal secretin, breast milk, and urine.

(b) "Transfer" means engaging in sexual activity by genital-genital contact, oral-genital contact, anal-genital contact; or permitting the use of a hypodermic syringe, needle, or similar device without sterilization; or giving, whether or not for value, blood, semen, body tissue, or organs to a person, blood bank, hospital, or other medical care facility for purposes of transfer to another person.

(3) Defenses:

(a) Consent. It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity.

(b) Medical Advice. It is an affirmative defense that the transfer of body fluid, body tissue, or organs occurred after advice from a licensed physician that the accused was noninfectious."

88. IDAHO CODE § 39-608(1). See *supra* note 87.

89. IDAHO CODE § 39-608(1).

90. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 687 (1977) (declaring a law that restricted availability of hazardous as well as nonhazardous contraceptives unconstitutionally broad); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that unmarried persons could not be restricted from access to contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a couple's right to choose whether or not to use birth control falls "within the zone of privacy protected by several fundamental constitutional guarantees"); and, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that a statute providing for the sterilization of "habitual criminals" violated the equal protection clause of the Fourteenth Amendment, the court noted that "[w]e 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.").

Court declared in *Eisenstadt v. Baird*,⁹¹ "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."⁹²

However, a regulation that restricts or burdens a fundamental right is not necessarily unconstitutional. In *Roe v. Wade*,⁹³ the Court held that the right of privacy with respect to one's body was broad enough to cover the right to choose whether to terminate a pregnancy.⁹⁴ However, the Court qualified the privacy right involved as one that is not absolute, and one that in the past, the Court refused to recognize as unlimited.⁹⁵

As recognized in *Roe*, when a fundamental right is involved, a two-pronged, strict scrutiny test must be employed to determine the validity of the law in question.⁹⁶ If a state began prosecuting HIV infected women who transfer their infection to their children through the prenatal transfer of blood and blood products, the state would have to demonstrate that: 1) its regulation is justified by a sufficiently compelling state interest; and 2) the regulation is narrow enough in scope so as not to extend beyond the boundaries of that legitimate interest.⁹⁷

Under strict scrutiny, a regulation criminalizing the transfer of AIDS/HIV through prenatal transmission would probably meet the first prong of the test. As the Court cautioned in *Carey v. Population Services International*,⁹⁸ "even a burdensome regulation may be

91. 405 U.S. 438 (1972).

92. *Id.* at 453.

93. 410 U.S. 113 (1973).

94. *Id.* at 154.

95. *Id.* at 154. The Court cited with approval, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) in which compulsory vaccination to control an epidemic was upheld; and *Buck v. Bell*, 274 U.S. 200 (1927) in which the Court permitted the sterilization of institutionalized mental incompetents.

96. 410 U.S. at 155. For a discussion of the different levels of scrutiny that the Supreme Court has applied, see generally *The Supreme Court, 84 Term*, 99 HARV. L. REV. 4, 161 (1985). Under a strict scrutiny test, the state must prove a compelling interest in regulating a particular behavior. Under intermediate level scrutiny, however, the state must only show an important interest, while under a minimum level scrutiny tests, the state need only demonstrate a rational basis between the regulation and a legitimate state interest. *Id.* at 161, n.1.

97. *Roe*, 410 U.S. at 155. See also *Carey*, 431 U.S. at 686-88, and *Griswold*, 381 U.S. at 485. It has been suggested that any effort to regulate or control the transmission of AIDS/HIV may consequently infringe on the rights of those who are infected or who are members of a high risk group. Thus, when such measures are challenged on constitutional grounds, the regulation should be evaluated in terms of the state's purpose or objective, and the relationship between that purpose and the means employed to achieve it. *The Constitutional Rights of Aids Carriers*, 99 HARV. L. REV. 1274 (1986).

98. 431 U.S. 678 (1977).

validated by a sufficiently compelling state interest.”⁹⁹ It would be difficult to argue that a state does not have a compelling interest in protecting its citizens from the spread of this deadly epidemic.

As the Court recognized in *Roe*, “a pregnant woman cannot be isolated in her privacy” while she carries a developing human being in her uterus; and therefore the situation is inherently different from the issues of marital intimacy, procreative freedom, or the right to use contraception addressed in prior cases.¹⁰⁰ Because of this difference, the Court in *Roe* noted that it would be “reasonable and appropriate for a [s]tate to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.”¹⁰¹

In *Roe*, the critical point in time was at the end of the first trimester of pregnancy, when the risk to the mother during abortion was significantly increased, and the state’s interest in protecting the health of the mother became sufficiently compelling to justify regulation.¹⁰² In the present situation, the point in time when the state’s interest would arguably become compelling is at the moment the infected woman conceives and a potential life becomes involved. The Court has noted

that a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception . . . recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the [s]tate may assert interests beyond the protection of the pregnant woman alone.¹⁰³

The right to choose whether to bear a child cannot be free from governmental intrusion when such a choice affects the health and safety of the public as well as the right of a child to be born healthy.¹⁰⁴ Thus, the compelling interest requirement would be met and the analysis must move to an examination of the restrictiveness of the regulation.

This second prong of the strict scrutiny test may also be satisfied. In *Roe*, the Court determined that the Texas statute criminaliz-

99. *Id.* at 686.

100. 410 U.S. at 159. The Court distinguished *Roe* from *Eisenstadt*, *Griswald*, and *Skinner*.

101. *Id.*

102. *Id.* at 163.

103. *Roe*, 410 U.S. at 150 (emphasis original).

104. See *supra* notes 8, 13 & 27 and accompanying text.

ing abortion at any time during the pregnancy was overly broad because the interest of the State of Texas was not compelling until after the first trimester.¹⁰⁵ Similarly, the Court in *Carey* held that the New York Education Law, prohibiting anyone other than a licensed pharmacist from distributing contraceptives, was unconstitutional.¹⁰⁶ The Court reasoned that because the restriction of the non-hazardous contraceptives was not related to the state's interest in protecting health or potential life, the law which restricted both hazardous and non-hazardous contraceptives was overly broad.¹⁰⁷

The possible use of the criminal law examined in this Comment presents a situation distinguishable from *Roe* and *Carey*. The legitimate interest in this case is to prevent the spread of the AIDS epidemic by criminalizing the behaviors responsible for spreading the disease. Unlike the laws examined in *Roe* and *Carey*, this type of regulation would not extend beyond the boundaries of the legitimate state interest. Such a measure represents the least restrictive alternative available to the state. It is certainly better to place the responsibility on infected individuals to refrain from behavior that is responsible for transmitting the virus than to quarantine or isolate those individuals altogether.¹⁰⁸

Moreover, any argument that such a law would attempt to criminalize the status of being a victim of this illness, or being a member of a high risk group,¹⁰⁹ would fail for several reasons. First, unlike the statute invalidated in *Robinson v. California*,¹¹⁰ which made it a crime to *be* a heroin addict, a law criminalizing the transfer of the HIV infection through the prenatal transfer of blood and blood products would not punish a woman for being HIV infected. Rather, it would only punish infected individuals who engage in spe-

105. *Roe*, 410 U.S. at 163-64.

106. *Carey*, 431 U.S. at 689-91.

107. *Id.*

108. See *The Constitutional Rights of Aids Carriers*, *supra* note 97. The author suggests that quarantine of all AIDS carriers would be an overly oppressive measure and enforcement against only dangerous individuals might prove difficult.

Determinations would necessarily be based on predictions of future behavior that either could not be substantiated, or could not be made with sufficient certainty to meet the test of close fit and least restrictive means; an individual could face indefinite confinement simply because of assumptions about what he [she] might do in the future. . . . Under such a regulation, an individual who did not commit a crime could be involuntarily confined and permanently stigmatized without receiving the safeguards of a criminal trial.

Id. at 1283-84.

109. Those people considered members of a "high-risk group" are individuals who have engaged in the behaviors that are known to transmit the infection, regardless if they have tested positive yet. See Heyward & Curran, *supra* note 15.

110. 370 U.S. 660 (1962).

cifically prohibited conduct. A woman who suffers from AIDS would not be punished simply because she was ill; but rather, she would be prosecuted only when she engaged in the specific prohibited conduct of passing the disease to her unborn child through the prenatal transmission of blood and blood products.

Second, as Justice Douglas explained in his concurring opinion in *Robinson*, those who suffer from addictions or illnesses can be subject to punitive measures, but only when those measures are related to behaviors that transgress beyond acceptable standards.¹¹¹ A woman suffering from AIDS/HIV, or a woman who is knowingly a member of a high-risk group, would not be subjected to criminal prosecution unless she engages in behavior that transgresses beyond acceptable standards.

A woman who knows or has reason to know that she is HIV positive may arguably be considered to have engaged in behavior that transgresses beyond permissible or acceptable standards when she passes the infection to her unborn child in utero. But this argument fails to consider the problem presented when the woman claims to have unsuccessfully tried to prevent conception, and therefore she did not intend to become pregnant or engage in prohibited behavior. Of course, the need to prove intent could be eliminated by the imposition of strict liability.¹¹² However, an HIV infected woman who utilizes birth control might still be prosecuted for something over which she has no control because contraceptive measures do not always prevent pregnancy.¹¹³ Nonetheless, pregnancy results from the act of engaging in consensual sexual intercourse; conduct that is voluntary.¹¹⁴ Because the AIDS/HIV epidemic presents such a serious public threat, a state may be able to impose a duty on a woman to

111. *Id.* at 674 (Douglas, J., concurring).

112. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69-70 (1910) (holding that in prohibition of certain acts, in order to protect the public, a state may provide that "he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance"). See also *United States v. Balint*, 258 U.S. 250 (1922) "[W]here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require punishment of the negligent person though he may be ignorant of the noxious character of what he sells." *Id.* at 252.

113. See ELIZABETH R. ALLGEIER & ALBERT R. ALLGEIER, *SEXUAL INTERACTIONS* at 334-36 (D.C. Heath and Co. 1984). The effectiveness of contraceptive methods, designed to prevent conception and pregnancy, are measured by a theoretical and actual failure rate. The actual failure rate refers to the number of conceptions resulting from a combination of method failure and incorrect usage. The actual failure rate, out of 100 typical users, for birth control pills is 2%; for diaphragms (with spermicide) is 10%; and for condoms it is 10%. *Id.*

114. The author of this Comment recognizes that in instances of forced sexual intercourse, such as rape, the act is not voluntary.

ascertain whether she has or could have AIDS before engaging in an act that may result in pregnancy, and rightly subject her to strict liability for her failure to do so.¹¹⁵ It is therefore conceivable that a criminal law that restricts a woman's right to procreate, in order to safeguard the health and safety of the unborn child as well as the public, could pass the strict scrutiny test and withstand a constitutional challenge.

2. *Freedom of Religion.*—A second constitutional argument against such legislation is that it burdens an individual's right to freely practice religion.¹¹⁶ A woman whose religious beliefs do not permit the use of contraceptive measures to prevent pregnancy or prohibit abortion of an unwanted or unplanned pregnancy would essentially be forced to choose between engaging in sexual relations at the risk of breaking the law, refraining from sexual activity, or abandoning her religious values.¹¹⁷

For example, the use of contraceptive devices has been forbidden by the Catholic church "since earliest times."¹¹⁸ Pope Paul VI declared that "direct interruption of the generative process . . . is to be absolutely excluded . . . similarly excluded is every action . . . whether as an ends or a means, [that] render[s] procreation impossible."¹¹⁹ While prohibited from preventing pregnancy by the employment of contraceptive devices, an HIV positive Catholic could choose to abstain from marital sexual intercourse.¹²⁰ Moreover, an HIV-in-

115. See *Shevlin-Carpenter Co.*, 218 U.S. at 69-70, and *Balint*, 258 U.S. at 252-53.

116. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or the free exercise thereof . . ." U.S. CONST. amend. IV.

117. The use of birth control or contraceptive devices is not permitted by members of the Catholic Church. See JOHN HARDON, S.J., *MODERN CATHOLIC DICTIONARY* at 129 (Doubleday & Co., Inc. 1980). All forms of birth control are also forbidden by the Amish Community. See FRED L. ISREAL, *MEET THE AMISH* at 5 (Chelsea House Publishers 1986).

118. JOHN HARDON, S.J., *MODERN CATHOLIC DICTIONARY* at 129 (Doubleday & Co., Inc. 1980). The definition of contraception provides the "deliberate interference with marital intercourse The Catholic Church has forbidden it since earliest times." *Id.*

119. *Id.* at 129-30 (quoting Pope Paul VI, *HUMANAE VITAE* at 14 (1968) in which it is declared that "direct interruption of the generative process . . . is to be absolutely excluded Similarly excluded is every action, that, either in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, purposes, whether as an ends or as a means, to render procreation impossible.").

120. See Hardon, *supra* note 118, at 129. Although the Catholic Church defines continence as "chastity to be observed by the unmarried," it also may "refer to abstinence, in marriage, voluntarily agreed upon by both parties or forced by circumstances to abstain from marital intercourse." *Id.* See also Gerald D. Coleman, S.S., *Can A Person with AIDS Marry in the Catholic Church*, 49 *JURIST* 258 (1989), in which the author examined the theory that AIDS prevents a Catholic couple from physically consummating or validating their marriage, and pointed out that a marriage in which a decision is made to abstain from sexual intercourse can be a valid marriage. *Id.* at 262-63. Such a decision "is not an impediment to marriage

fect Catholic might be compelled to abstain from sexual relations or risk the threat of criminal prosecution. A law that provides criminal sanctions for the transmission of a disease during pregnancy would undoubtedly burden an individual's ability to freely engage in marital intercourse without the use of contraception.

The criminal prosecution of an individual for the transmission of a disease during pregnancy, however, would probably not be defeated by a freedom of religion objection.¹²¹ The first amendment provides two types of religious freedoms, the freedom to believe and the freedom to act.¹²² "The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."¹²³ When the exercise of religion involves behavior or conduct that endangers another person or presents a threat to society, that state has a responsibility to regulate such behavior.¹²⁴ As the Supreme Court has declared, "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death."¹²⁵ The interest of public health and safety in the prevention of infectious diseases has repeatedly been considered greater than the individual's right to exercise religious beliefs.¹²⁶ Upholding mandatory vaccination of school age children, regardless of religious objections, a court in Arkansas stated that a "person's right to exhibit religious freedom ceases where it overlaps or transgresses the rights of others."¹²⁷

since it is not impossible to do so, only irresponsible." *Id.* at 263.

121. The Supreme Court has upheld restrictions on the freedom to exercise religion when necessitated by greater social concerns. See *infra* note 126. See also *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1943) (holding a state law that prohibited minor children from selling or distributing newspapers or pamphlets in the streets as permissible and not a violation of the Jehovah Witnesses' right to practice their religion). But see *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding a state law that required a permit for solicitation of religious contributions, and allowed a government official to determine if the cause was indeed a religious one before issuing the permit, to be in violation of the constitution).

122. *Cantwell*, 310 U.S. at 303-04.

123. *Id.*

124. See cases cited *infra* note 126. See also *Childs v. Duckworth*, 705 F.2d 915 (7th Cir. 1983) (holding a prison inmate's first amendment right to exercise his religion was not violated when prison officials refused to supply candles, incense, and a crystal ball because of the valid security risk presented).

125. *Prince*, 321 U.S. at 166-67.

126. See *Cude v. State*, 377 S.W.2d 816 (Ark. 1964) (finding a law requiring school children to be vaccinated to be within the police power of the state, regardless of religious objections); *Brown v. Stone*, 378 So.2d 218 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980) (finding the public health concern in requiring vaccination of school age children greater than the right to exercise religious beliefs). See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (finding no violation of liberty in compulsory vaccination laws).

127. *Cude*, 377 S.W.2d at 819.

The power of the state to burden the right to freely exercise religion is not unlimited.¹²⁸ Again, strict scrutiny must be applied. The purpose of the regulation must be the result of a compelling state interest and it must not be so overly restrictive as to unduly infringe the protected right.¹²⁹ A regulation that would essentially force a woman to use birth control in order to prevent the prenatal transmission of a deadly epidemic, despite religious beliefs against such measures, would only burden a woman's right to act and not her right to believe.¹³⁰ Although burdensome to the individual, such a regulation would protect the child and society from a much greater danger than the threat to the individual's personal right.

Thus, a state law prescribing criminal sanctions for the transfer of AIDS/HIV during the prenatal transfer of blood and blood products could probably survive a constitutional attack. However, it would still face many public policy and enforcement concerns.

B. Problems and Concerns

The idea of using the criminal law to deter individuals infected with AIDS/HIV from engaging in conduct responsible for the transmission of the disease is plagued with many dangers and disadvantages.¹³¹ Any state that chooses to utilize HIV criminalization statutes to prosecute HIV infected women who transfer the disease during pregnancy must first address these problems and concerns.

1. *Public Policy—Forced Abortion and the Value of Human Life.*—The most alarming potential consequence of such a law is the possibility that a woman who tests HIV positive during her pregnancy may be encouraged, through coercive counseling, to abort the pregnancy.¹³² Two health care facilities in Rhode Island that treat

128. See *Cantwell*, 310 U.S. at 304.

129. *Id.* "The power to regulate must be exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.*

130. See *supra* note 122 and accompanying text.

131. See Hermann, *supra* note 48. Three main dangers or disadvantages are discussed: 1) decrease in the number of people seeking AIDS/HIV testing; 2) proof problems with causation and intent; and 3) selective enforcement. *Id.* at 356-57.

132. Arlene Zarembka & Katherine M. Franke, *Women in the AIDS Epidemic: A Portrait of Unmet Needs*, 9 ST. LOUIS UNIV. PUB. L. REV. 519, 524 (1990). The authors suggest that

when infants born with HIV antibodies are called "the innocent victims," the clear implication is that their mothers are in some way guilty or deserving of their infection It is safe to predict that women will experience overwhelming punitive consequences of a positive test such as coerced abortions, sterilizations, loss of custodial rights, and functual quarantine.

Id. at 524.

HIV positive women have already taken such a position.¹³³ If the act of transferring AIDS/HIV during pregnancy were criminalized, abortion would become the only alternative available to an HIV positive woman who becomes pregnant, despite the use of birth control, and does not want to risk criminal prosecution. Even if a woman infected with AIDS/HIV wanted to abort her pregnancy, she might experience difficulty finding a health care facility willing to perform the procedure.¹³⁴ In addition, many poor women who may not be able to afford an abortion will be left with no alternative to prosecution.

Some states have explicitly declared public policies that favor birth over abortion.¹³⁵ In those states, imposing strict liability for the transmission of AIDS/HIV during pregnancy would directly contradict public policy. Specifically, Illinois has declared that

the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the child's right to life Further, . . . if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.¹³⁶

133. *Id.* at 524, n.21 (citing Edward C. Maynard, M.D., *HIV Infection in Pregnant Women in Rhode Island*, 320 NEW ENG. J. MED. 1626 (1989)).

134. *See supra* note 113.

135. Zarembka & Franke, *supra* note 132, at 525, n.25.

136. *See* ILL. ANN. STAT. ch. 38, para. 81-21 (Smith-Hurd 1991 Supp.) which provides:

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in *reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception* and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitutions of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, *if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.*

It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, *to protect the valid and compelling state interest in the infant and unborn child*, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to

It is unlikely that Illinois will ever utilize its present HIV transmission statute to prosecute a woman who has AIDS/HIV and chooses to give birth rather than abort her pregnancy, because to do so would directly contradict this statement of legislative intent.¹³⁷ As the Illinois Supreme Court declared in its refusal to allow recovery for a claim of wrongful life, recognition of a fundamental right not to be born with a disease would undermine the legislatively expressed policy favoring birth over abortion.¹³⁸

Moreover, we must not forget that when a child is born to an infected mother the odds are in favor of the child being healthy.¹³⁹ Consequently, deterring women with AIDS/HIV from becoming pregnant or coercing them to seek abortions could be considered an extreme and unnecessary course of action.¹⁴⁰ Furthermore, a woman who is not infected with AIDS/HIV but who receives a false positive test result¹⁴¹ will be wrongly burdened in her right to choose whether to bear a child. Proponents of the rights and needs of HIV positive women have argued that the fact that so many women choose to take this 30% chance "reflects a much more complicated balancing of considerations than that applied by so-called experts who consider the issue as if HIV infection were the only factors in the equation."¹⁴²

Finally, a position that favors aborting a pregnancy in which there is a risk that the child will be HIV-positive suggests that the child will be irreparably harmed by being born HIV-positive, and consequently would have been better off not being born. Such an

gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, *that these rights and interest are not secure in the economic and social context in which abortion is presently performed.* (emphasis added).

See also MO. STAT. ANN. § 1.205.2, *supra* note 40.

137. ILL. ANN. STAT. ch. 38, para. 81-21.

138. *Siemieniec v. Lutheran General Hospital*, 512 N.E.2d 691, 701 (Ill. 1987). The court reasoned that a finding that the child had an interest in avoiding his own birth would require possession of "the divine ability to determine what defects should prevent an embryo from being allowed life so that denial of the opportunity to terminate [the pregnancy] . . . supports a cause of action." *Id.* at 698.

139. See *supra* note 31 and accompanying text.

140. See Zarembka & Franke, *supra* note 132, at 525.

141. See Harvey V. Fineberg, *Screening for HIV Infection and Public Health Policy*, 18 LAW. MED. HEALTH CARE 29 (1990). "While under ideal conditions, a properly employed battery of antibody tests is extremely accurate in terms of a very low risk of false positive results, many laboratories do not attain such a level of quality." *Id.* at 31.

142. Zarembka & Franke, *supra* note 132, at 525. The authors disagree with a statement made by John Arras, a medical ethicist at Montefiore Hospital in Bronx, New York, that society's interest in avoiding the cost of caring for babies with AIDS outweighs the judgment of a woman that a 30% chance of having an HIV infected child is a risk worth taking. *Id.* at 525, n.24.

argument "suggests that there is a perspective apart from our life and world, from which one can stand and say that he finds non-existence preferable to existence."¹⁴³ Many courts, in refusing to allow wrongful life and wrongful birth actions,¹⁴⁴ have already demonstrated a reluctance to recognize as an injury the condition of being born alive with a congenital or genetic impairment.¹⁴⁵ As the Pennsylvania Supreme Court so aptly noted,

[b]ecause we have no way of knowing what opportunity will be available to this child or how the child will respond to life in general, we cannot say how the child's pain and suffering will compare to the benefits of its life, and thus, we cannot determine that its life constitutes an injury.¹⁴⁶

2. *Enforcement and Deterrence.*—Practicality of enforcement and the realistic probability of any deterrent effect must also be considered. Because "[e]very person convicted of a criminal offense has demonstrated a willingness to violate a legal proscription,"¹⁴⁷ it may not be effective to use the criminal law as a deterrent to transmission of AIDS/HIV. It is realistic to theorize that a person who is already facing a death sentence¹⁴⁸ will not be deterred by the threat of criminal prosecution from taking the 70% chance to beget a healthy child.¹⁴⁹ Furthermore, use of the criminal law may even be inequitable because it requires individuals to behave at the highest stages of moral development, and it has been suggested that many AIDS/HIV carriers may not have the ability or willingness to do so.¹⁵⁰

In addition, the threat of criminal sanctions may act as a disincentive to seeking early diagnosis and treatment.¹⁵¹ If knowledge of HIV infection is necessary to criminally transfer the disease, it is logical that the attitude "what I don't know can't hurt me" may

143. *Goldberg v. Ruskin*, 499 N.E.2d 406, 409 (Ill. 1986) (refusing to allow recovery for child born with tay-sachs disease under a theory of wrongful life).

144. *See Siemieniec v. Lutheran General Hospital*, 512 N.E.2d 691 (Ill. 1987). Wrongful birth actions are brought by the parents in their own behalf and wrongful life actions are brought on behalf of the child. *Id.*

145. *See Black v. Cruz*, 698 P.2d 315 (Idaho 1984) (congenital rubella); *Goldberg v. Ruskin*, 499 N.E.2d 406 (Ill. 1986) (tay-sachs disease); *Bruggeman v. Schimke*, 718 P.2d 635 (Kan. 1986) (down's syndrome).

146. *Ellis v. Sherman*, 515 A.2d 1327, 1329 (Pa. 1986) (holding that a child born with virulent form of neurofibromatosis did not have a cause of action for wrongful life).

147. *Hermann*, *supra* note 48, at 355.

148. *See Closen & Deutchmann*, *supra* note 71, at 593-94.

149. *See supra* note 31.

150. Larry Gostin, *The Politics of AIDS and Contemporary State Powers: Public Health and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1044 (1989).

151. *See Hermann*, *supra* note 48, at 356-57.

prevail. It is possible, however, that appreciation of the benefits of early treatment which directly results from early diagnosis might minimize this effect.¹⁵²

Finally, there is a possibility of selective enforcement since those individuals who must rely on government medical assistance will be brought to the attention of prosecuting authorities more easily than those who can afford to obtain private health care.¹⁵³

V. Conclusion and Recommendation

The seriousness of the AIDS/HIV epidemic is undisputed. It is a danger that threatens all Americans.¹⁵⁴ As Representative Jose E. Serrano reminded the House of Representatives shortly after the Persian Gulf War, "we must not forget that we have another kind of war right here in our own backyard . . . a war that is killing hundreds of people in their prime of life — even worse, those who may never have a chance — our children."¹⁵⁵ Responding to a recommendation from the Presidential Commission,¹⁵⁶ several state legislatures have employed the criminal law as the latest weapon in the battle against this deadly epidemic.¹⁵⁷ However, taking these criminal laws one step further and using them to prosecute women who transfer AIDS/HIV during the prenatal period would most likely prove to be an ineffective and overly burdensome measure.

Instead, a more effective means of preventing prenatal transmission may be appropriate contraceptive counseling and AIDS/HIV education. The basic premise of counseling and training services is "knowing your HIV serostatus and receiving appropriate counseling can lead to behavior changes which reduce transmission of HIV."¹⁵⁸ Such an approach offers promise. A recent survey of more than fifty studies showed that the counseling did lead to behavior changes in some people.¹⁵⁹

Currently, HIV counseling and screening services are the key

152. See Hermann, *supra* note 48, at 356-57.

153. *The Constitutional Rights of AIDS Carriers*, *supra* note 108, at 1284. See also Hermann, *supra* note 48, at 357.

154. THE REPORT, *supra* note 3, at XVII.

155. *Perspective: Children and AIDS*, HIV/AIDS PREVENTION (Center for Disease Control, Atlanta, GA, Special Report, July 1991) at 1. Representative Serrano introduced a resolution for a "Pediatric AIDS Awareness Week." *Id.*

156. See THE REPORT, *supra* note 3.

157. See statutes *supra* note 9.

158. *Counseling and Testing: Effective Prevention Services*, HIV/AIDS PREVENTION (Center for Disease Control, Atlanta, GA, February 1991) at 7.

159. *Id.* at 8.

elements of this country's HIV-preventional strategy.¹⁶⁰ There are at least ninety-eight community based organizations, in metropolitan areas most affected by AIDS, that are directly funded by the Center for Disease Control and encouraged to address the needs of reproductive age women.¹⁶¹ Many other counseling and education programs sponsored by the American Red Cross target women in high risk groups.¹⁶² The objectives of these preventative programs are: 1) identifying and removing barriers to effective use of contraception among women in high risk groups or already infected; 2) facilitating the use of family planning services; 3) evaluating psychosocial factors related to the use of contraception; and 4) encouraging behavior modification to reduce acquisition and transmission of AIDS/HIV.¹⁶³

The possibility of transferring AIDS/HIV to an unborn child is already a concern to many women who seek information from the Center for Disease Control.¹⁶⁴ In order to encourage these women to make responsible and informed decisions, efforts should be increased to facilitate contraceptive counseling and AIDS/HIV education. Despite the compelling and valid interest of the state in protecting the public from the spread of this deadly epidemic, and irrespective of the likelihood that such criminal prosecution could withstand a constitutional challenge, a woman should not be forced to choose between aborting a potentially healthy fetus or risking violation of a criminal law. Rather, a woman should be encouraged to make an informed and caring decision before she becomes pregnant and "cling[s] to the new life growing inside her"¹⁶⁵

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160. *Targeting Prevention Programs to Women via Community Based Organizations*, HIV/AIDS PREVENTION (Center for Disease Control, Atlanta, GA, Newsletter, April 1991) at 11.

161. *Id.*

162. *Activities and Outreach of the American Red Cross*, HIV/AIDS PREVENTION (Center for Disease Control, Atlanta, GA, Newsletter, April 1991) at 12.

163. *Perinatal HIV Preventative Projects Evaluate Strategies*, HIV/AIDS PREVENTION (Center for Disease Control, Atlanta, GA, February 1991) at 12.

164. *Women and AIDS: Resources and Services*, HIV/AIDS PREVENTION (Center for Disease Control, Atlanta, GA, Newsletter, April 1991) at 7. The Center for Disease Control reported that 43% of its one million calls in 1990 were from women and one of the most common questions was "I am thinking of becoming pregnant. Should I be tested for HIV?" *Id.*

165. Peterson, *supra* note 1.

