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Issues - Criminalization

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Materials on the Criminalization of Wilful HIV Transmission

Office of HIV/AIDS Policy

July 9, 1999

A) Outline of Criminalization Issue and State Legislative Activity

B) Letter from Larry Gostin re: State Police Powers

C) HIV Prevention Act of 1999

D) Unfunded Criminalization Provision of Ryan White CARE Act

E) Violent Crime Control and Law Enforcement Act of 1994

ISSUE BRIEF

HEALTH POLICY TRACKING SERVICE

Subject: HIV/AIDS Title: Issue Brief: Criminal Transmission and Exposure	Date: 03/31/98

By: Lee Sanchez and Stephanie Wilson

CRIMINALIZATION OF HIV TRANSMISSION and EXPOSURE

In addition to preventative measures such as education, testing and counseling, states are attempting to control the spread of HIV through the criminalization of HIV transmission and exposure. So far, 28 states have laws stating that it is unlawful for anyone who knows they are infected with HIV to transmit or expose others to the virus without their knowledge and consent. Public support for such measures is high; 79 percent of Americans believe that those who knowingly infect another person with HIV should face criminal charges. Half of those surveyed said that people who knowingly transmit the virus should be charged with murder (1).

Recent and well-publicized cases of HIV-positive individuals who knowingly exposed or transmitted HIV to others may bring new interest to this issue in the 1998 legislative session. One recent case involved a man in rural New York who infected at least 10 of more than 40 young women with whom he had sex. An earlier case pertained to a man in St. Louis, Mo. who reportedly infected 30 of the more than 100 women and girls he had sex with since learning of his HIV infection in 1992 (2). A third case involved a man in Traverse City, Mi. who pleaded guilty this past January of failing to notify one of his sex partners about his HIV infection (third-degree criminal sexual conduct) and to being a habitual sex offender (2). Although none of the women with whom he had sex tested positive for HIV, the man recently was sentenced to 15 to 20 years in prison. The offense was the man's second; he previously served four years in prison for a sex offense involving a minor.

Federal Activity

Two federal bills contain language addressing the criminalization of HIV transmission. The more well known is the HIV Prevention Act (H.R. 1062/S. 503), sponsored by U.S. Representative Tom Coburn, M.D. (R-Okla.), which, in part, encourages states to make it a felony for someone to knowingly transmit HIV to another person. The bill's first version was introduced in 1996, but did not make it through committee. A second version, introduced in February 1997, also did not move, but was carried over to the 1998 legislative session. In a letter sent to his colleagues in March 1997 to explain the bill and garner support, Coburn wrote, "Those who are infected with any communicable disease have a responsibility to prevent transmitting the disease to others. Because no cure exists for HIV, transmitting the disease is the equivalent of delivering a death sentence."

Although it has not passed out of committee, the bill currently has 108 sponsors and has been endorsed by the American Medical Association, 11 state medical associations and more than 50 local medical societies. The bill also has its critics, The San Francisco AIDS Foundation recently issued talking points on the criminalization of HIV transmission, stating that there is no need for federal legislation to address this issue. The foundation argued that every state has existing criminal laws that allow for the criminal prosecution of such an act, including laws against assault with a deadly weapon or assault with intent to kill. In addition, the group argued that many states impose criminal or civil penalties on individuals who knowingly expose another to a sexually transmitted or communicable disease, and several states have either amended these laws to specifically include HIV/AIDS or have enacted separate HIV/AIDS-specific laws. The foundation concluded that, "There is no reason for the federal government to usurp the state's rights to enact and enforce whatever laws a particular state deems necessary to ensure the health and safety of its citizens."

The second federal bill, also introduced last February, is the Protection for Innocent Victims of AIDS Transmission Act (H.R. 518), sponsored by U.S. Representative Dan Burton (R-Ind.). The bill amends the federal criminal code to provide for imposition of the death penalty or life imprisonment for knowingly transferring HIV through sexual contact without that person's consent. The bill was referred to the House Subcommittee on Crime in March 1997, was carried over to the 1998 session and is still pending in that committee.

State Activity

Much more activity regarding the criminalization of HIV transmission has occurred at the state level than the federal level, in large part because criminal penalties generally are a function of state government, according to Frank Baran, managing editor of *AIDS Policy & Law*. At present, 28 states (see chart below) have HIV/AIDS-specific laws that impose criminal charges for exposing and/or transmitting HIV through such methods as sexual intercourse; selling or donating blood, body fluids, organs or tissues; sharing or re-using needles; engaging in prostitution; or soliciting a prostitute. Some of these measures amend existing laws by imposing

harsher penalties for knowingly exposing or transmitting HIV or by reclassifying HIV/AIDS as a sexually transmitted disease (STD).

In 1997 alone, at least six states enacted tougher criminal penalties against HIV-infected people who expose others to the virus. **New Jersey** SB 1297 amended an existing state law that addressed intentional transmission of HIV and STDs, by making it a crime of the third degree--rather than a petty disorderly persons offense--to knowingly expose HIV through an act of sexual penetration without the informed consent of the other person. **Missouri** SB 347 also amended an existing law, that stated that a person is guilty of a class D felony if he or she deliberately creates a grave and unjustifiable risk of infecting another with HIV through sexual or other contact. The law replaced the existing language of "deliberately create a grave and unjustifiable risk" with the more encompassing "act in a reckless manner" and added that violation of such provisions with a person under age 17 is a class C felony if the offender is over age 21.

With regard to HIV exposure or transmission in detention facilities, two laws were enacted last year and one law has already been enacted this year. **Colorado** HB 1186 charges inmates with second degree assault for exposing an employee of a detention facility to bodily fluids or hazardous materials (i.e., causing an employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic material by any means, including, but not limited to, throwing, tossing, or expelling such fluid or materia). Also last year, **Maryland** enacted HB 1178, which appoints a task force to study HIV exposure in state correctional facilities. This year, **Pennsylvania** passed SB 635, introduced last year, which imposes a penalty of murder of the second degree for the same offense addressed by Colorado's law. The law adds that, at the time of the offense, the person must have known, had reason to know, or should have known that such fluid or material was infected by a communicable disease, including, but not limited, to HIV or Hepatitis B.

As indicated in the accompanying chart, some states have outlawed the knowing exposure or transmission of HIV by one method, but not another. Baran explains that some of these statutes were probably responses to specific cases and that, until those specific situations arose, states relied on their general criminal laws or on broad HIV/AIDS laws that do not specify methods of exposure.

HIV/AIDS-specific laws came about "partly in frustration with the difficulty in obtaining convictions under the general criminal law," wrote Larry Gostin, J.D., in his paper, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*. He explained that general criminal laws require a high burden of proof, such as proving that the defendant *knew* he/she was HIV positive, *knew* his/her conduct--such as biting or spitting--was a method of viral transmission and *intended* to kill an individual. "Reckless behavior," while not as difficult to prove, also is problematic because "crimes involving recklessness or negligence cast a very wide net," Gostin wrote. "They could include not only persons who test positive for HIV, but also people in high risk groups. The criminal law could therefore impact a very large population engaging in sexual activity." Specific statutes, he wrote, make it "easier to convict in cases in which the individual is engaging in truly dangerous behavior and give clearer notice to persons about the behavioral norms to which society expects them to conform."

Pros and Cons

Advocates of HIV/AIDS criminal penalty laws argue that such laws are necessary because they deter HIV-positive people from engaging in high-risk behaviors in the future and punish those who have deliberately endangered others in the past. According to Missouri State Senator J.B. "Jet" Banks, sponsor of a 1997 criminal penalty law, people who have AIDS or are HIV-positive should be punished if they knowingly expose others to the disease without their knowledge and consent. Some of the women and girls who had sex with Darnell "Boss Man" McGee, the St. Louis man previously mentioned, contracted HIV, AIDS or had HIV-infected children, Banks said.

According to California State Senator Richard Rainey, who sponsored HIV/AIDS criminal penalty legislation last year (that failed to become law), "Most people living with this tragic disease are very responsible and careful about their situation. A few individuals, however, choose to behave in a way that is not only irresponsible, but deadly. Those individuals who expose others to the AIDS virus with the intent to infect are committing a crime and should be held criminally accountable."

Opponents of such laws argue that criminal laws may very well exacerbate the AIDS epidemic. In his paper, Gostin wrote that coercive powers may cause a loss of trust and confidence by vulnerable populations who will not cooperate with essential public health programs of education, counseling and treatment. Prostitutes who want to avoid criminal charges based on their knowledge of their HIV status may not get tested. "It will very much be in the interests of risk group members not to know if they have the virus and not to discuss their sexual or needle sharing contacts with counselors or physicians," Gostin wrote. "The last thing that public health officials want is a population that is frightened of punitive solutions to their health problems."

Mike Shriver, deputy executive director of policy with the National Association of People with AIDS, stressed that HIV/AIDS criminal penalty laws send the message that the crime of intentional HIV transmission and exposure does not fall under the scope of the criminal assault and reckless endangerment laws already in existence in every state and that the crime is somehow a separate and distinct act. "States' existing criminal assault and reckless endangerment laws are adequate to cover this crime. The problem may be that people are not aware that they're

there," Shriver said. In addition to being unnecessary, he argued that HIV/AIDS-specific laws tend to generate hysteria about the ways that HIV can be transmitted and send a faulty message that HIV-positive individuals are more irresponsible and reckless than others.

Methods of Exposure

A. Broad statements not specifically identifying method of exposure
B. Knowingly through sexual transmission
C. Knowingly through selling or donating blood, body fluids, organs or tissues
D. Knowingly through sharing or re-using needles
E. Knowingly by engaging in prostitution
F. Knowingly through blood or body fluids while detained in correctional facility
G. Knowingly by person soliciting prostitute

STATES THAT HAVE LAWS ON KNOWING HIV EXPOSURE and TRANSMISSION

State	A Broad	B Sexual	C Sell/ Donate	D Needles	E Prostitution	F Correctional	G Soliciting
Alabama	--	X	--	--	--	--	--
Arkansas	--	X	--	X	--	--	--
California	X	--	--	--	--	--	--
Colorado	--	--	--	--	X	X	X
Florida	--	X	X	--	X	--	--
Georgia	--	X	X	X	X	--	--
Idaho	X	X	X	X	--	--	--
Illinois	--	X	X	X	--	--	--
Indiana	X	X	X	X	--	--	--
Kansas	--	X	X	X	--	--	--
Kentucky	--	--	X	--	X	--	X
Louisiana	X	X	--	--	--	X	--
Maryland	X	--	--	--	--	--	--
Michigan	--	X	--	--	--	--	--
Minnesota	X	X	X	X	--	--	--
Missouri	X	X	X	--	--	--	--
Montana	X	--	--	--	--	--	--
Nevada	X	--	--	--	X	--	--
New Jersey	--	X	--	--	--	--	--
North Dakota	--	X	X	X	--	--	--
Ohio	--	X	--	X	X	--	--
Oklahoma	X	X	X	--	X	--	--
Pennsylvania	--	--	--	--	--	X	--
South Carolina	--	X	X	X	X	--	--
Tennessee	--	X	X	X	X	--	--
Utah	--	--	--	--	X	--	X
Virginia	--	--	X	--	--	--	--
Wash.	X	--	--	--	--	--	--

Source: National Conference of State Legislatures, 1998.

Notes
(1) U.S. Representative Tom Coburn, M.D., "Dear Colleague" Letter, March 12, 1997.

(2) *AIDS Policy & Law*, December 26, 1997.

Home

B

GEORGETOWN UNIVERSITY LAW CENTER

Lawrence O. Gostin, J.D., LL.D. (Hon.)
Professor of Law
Co-Director
Georgetown/John Hopkins University
Program on Law and Public Health

November 3, 1997

Eric Goosby, M.D.
Director, Office of HIV/AIDS Policy
Department of Health and Human Services
Room 730E, Humphrey Bldg.
Washington, DC
20201

Dear Eric:

As you know, Deborah Von Zinkernagel, Senior Policy Analyst on your staff, and Dan Riedford, Office of the General Counsel at the CDC, have been discussing the legal and policy implications resulting from the cluster of HIV cases in Chautauqua County, New York. Dan asked me to send you a brief letter containing my opinion about various state and federal responses. I am pleased to do so.

I am asked to discuss two questions: 1) Is the knowing or intentional transmission of HIV primarily an issue of state or federal law; and 2) Do the states have sufficient police powers to deal with the issue?

The knowing or intentional transmission of HIV is primarily a matter for the states under our American system of federalism. Public health powers are a quintessential function of the states under the U.S. Constitution. The Supreme Court has emphasized on numerous occasions the primary responsibility of the state to exercise its police powers to protect the public health. Police powers to protect the health, safety, and morals of the community are reserved to the states under the Tenth Amendment to the Constitution.

Federal activity in this area is normally limited to specific activities surrounding its enumerated powers under the Constitution such as the commerce clause power and the spending power. In this context Congress could, if it wished, encourage (but not require) states to take firm action to prevent HIV transmission by attaching conditions to various federal spending programs. This occurred, for example, in the Kimberly Bergalis bill. Beyond this limited role, there is a strong consensus in constitutional law that public health powers and criminal law are principally matters for state governments.

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States have ample powers under the Constitution and state law to deal with threats to the public health. Police powers under the Constitution provide near plenary authority to the states to implement strong measures to protect the public health, including coercive powers. Moreover, virtually all states have public health and HIV-specific laws dealing with these issues. These laws, *inter alia*, permit states to issue orders to cease and desist risk behaviors, and to bring criminal prosecutions for the intentional or knowing transmission of HIV or other sexually transmitted diseases. There have been several cases in which states have successfully brought prosecutions for risking transmission of HIV. See the AIDS Litigation Report, originally supported by the Public Health Service.

Existing state laws in this area are, to be sure, highly variable, and not always ideal. Some state laws are overly protective of civil liberties and privacy and some are overly punitive and contrary to most public health opinion. Yet, finding the right balance is a matter traditionally left to the states. Unless the federal government had a very clear and thoughtful method of proceeding that had a strong consensus in the public health community, it ought to allow individual states to deal with these questions. If such a uniform approach could be devised, it could be implemented only by encouraging states to act by conditioning federal funding.

I hope this brief review is helpful. If I can be of any further assistance, I would be delighted.

Yours Sincerely, with best wishes,

Larry

Lawrence O. Gostin, J.D., LL.D (Hon.)
Professor of Law and Co-Director,
The Georgetown/Johns Hopkins Program on
Law and Public Health

C

DISCUSSION DRAFT

JUNE 10, 1999

4:00 p.m.

106TH CONGRESS
1ST SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. COBURN introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Public Health Service Act with respect to preventing the transmission of the human immunodeficiency virus (commonly known as HIV), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"(B) in the case of any other first responder, any public health officer whose geographical jurisdiction includes the scene of the emergency to which the first responder responded.".

SEC. 5. SENSE OF CONGRESS REGARDING WILLFUL EXPOSURE TO HIV.

It is the sense of the Congress that the States should have in effect laws providing that it is a felony for an individual who has HIV disease to willfully expose another to HIV, whether through sexual activities or otherwise, without first obtaining the consent of the other individual to the exposure.

SEC. 6. SENSE OF CONGRESS REGARDING CONFIDENTIALITY.

It is the sense of the Congress that strict confidentiality should be maintained in carrying out the provisions of section 2616A of the Public Health Service Act (as added by section 3(a) of this Act).

D

105TH CONGRESS
1st Session

COMMITTEE PRINT

COMMITTEE PRINT 105–K

COMPILATION OF SELECTED ACTS WITHIN THE JURISDICTION OF THE COMMITTEE ON COMMERCE

HEALTH LAW

As Amended Through December 31, 1996

INCLUDING

PUBLIC HEALTH SERVICE ACT
DEVELOPMENTAL DISABILITIES ASSISTANCE AND BILL OF RIGHTS ACT
MENTAL HEALTH SYSTEMS ACT
CONSUMER-PATIENT RADIATION HEALTH AND SAFETY ACT OF 1981
DRUG ABUSE PREVENTION, TREATMENT, AND REHABILITATION ACT
PROTECTION AND ADVOCACY FOR MENTALLY ILL INDIVIDUALS ACT OF 1986
HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986
ALZHEIMER'S DISEASE AND RELATED DEMENTIAS RESEARCH ACT OF 1992
ABANDONED INFANTS ASSISTANCE ACT OF 1988
MISCELLANEOUS PROVISIONS

PREPARED FOR THE USE OF THE

COMMITTEE ON COMMERCE
U.S. HOUSE OF REPRESENTATIVES

MARCH 1997

(3) by inserting after subparagraph (C) the following new subparagraph:

"(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;".

42 USC 14011. SEC. 40602. PAYMENT OF COST OF TESTING FOR SEXUALLY TRANSMITTED DISEASES.

(a) FOR VICTIMS IN SEX OFFENSE CASES.—Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)(7)) is amended by adding at the end the following: "The Attorney General shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault. A victim may waive anonymity and confidentiality of any tests paid for under this section.".

(b) LIMITED TESTING OF DEFENDANTS.—

(1) COURT ORDER.—The victim of an offense of the type referred to in subsection (a) may obtain an order in the district court of the United States for the district in which charges are brought against the defendant charged with the offense, after notice to the defendant and an opportunity to be heard, requiring that the defendant be tested for the presence of the etiologic agent for acquired immune deficiency syndrome, and that the results of the test be communicated to the victim and the defendant. Any test result of the defendant given to the victim or the defendant must be accompanied by appropriate counseling.

(2) SHOWING REQUIRED.—To obtain an order under paragraph (1), the victim must demonstrate that—

(A) the defendant has been charged with the offense in a State or Federal court, and if the defendant has been arrested without a warrant, a probable cause determination has been made;

(B) the test for the etiologic agent for acquired immune deficiency syndrome is requested by the victim after appropriate counseling; and

(C) the test would provide information necessary for the health of the victim of the alleged offense and the court determines that the alleged conduct of the defendant created a risk of transmission, as determined by the Centers for Disease Control, of the etiologic agent for acquired immune deficiency syndrome to the victim.

(3) FOLLOW-UP TESTING.—The court may order follow-up tests and counseling under paragraph (b)(1) if the initial test was negative. Such follow-up tests and counseling shall be performed at the request of the victim on dates that occur six months and twelve months following the initial test.

(4) TERMINATION OF TESTING REQUIREMENTS.—An order for follow-up testing under paragraph (3) shall be terminated if the person obtains an acquittal on, or dismissal of, all charges of the type referred to in subsection (a).

(5) CONFIDENTIALITY OF TEST.—The results of any test ordered under this subsection shall be disclosed only to the victim or, where the court deems appropriate, to the parent or legal guardian of the victim, and to the person tested. The victim may disclose the test results only to any medical professional, counselor, family member or sexual partner(s) the victim may have had since the attack. Any such individual to whom the test results are disclosed by the victim shall maintain the confidentiality of such information.

(6) DISCLOSURE OF TEST RESULTS.—The court shall issue an order to prohibit the disclosure by the victim of the results of any test performed under this subsection to anyone other than those mentioned in paragraph (5). The contents of the court proceedings and test results pursuant to this section shall be sealed. The results of such test performed on the defendant under this section shall not be used as evidence in any criminal trial.

(7) CONTEMPT FOR DISCLOSURE.—Any person who discloses the results of a test in violation of this subsection may be held in contempt of court.

(c) PENALTIES FOR INTENTIONAL TRANSMISSION OF HIV.—Not later than 6 months after the date of enactment of this Act, the United States Sentencing Commission shall conduct a study and prepare and submit to the committees on the Judiciary of the Senate and the House of Representatives a report concerning recommendations for the revision of sentencing guidelines that relate to offenses in which an HIV infected individual engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV. Reports.

SEC. 40604. EXTENSION AND STRENGTHENING OF RESTITUTION.

Section 3663(b) of title 18, United States Code, is amended—

(1) in paragraph (2) by inserting "including an offense under chapter 109A or chapter 110" after "an offense resulting in bodily injury to a victim";

(2) by striking "and" at the end of paragraph (3);

(3) by redesignating paragraph (4) as paragraph (5); and

(4) by inserting after paragraph (3) the following new paragraph:

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and".

SEC. 40605. ENFORCEMENT OF RESTITUTION ORDERS THROUGH SUSPENSION OF FEDERAL BENEFITS.

Section 3663 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(i)(1) A Federal agency shall immediately suspend all Federal benefits provided by the agency to the defendant, and shall terminate the defendant's eligibility for Federal benefits administered by that agency, upon receipt of a certified copy of a written judicial finding that the defendant is delinquent in making restitution in accordance with any schedule of payments or any requirement of immediate payment imposed under this section.

"(2) Any written finding of delinquency described in paragraph (1) shall be made by a court, after a hearing, upon motion of

CDC

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JUL 20 1998

The Honorable Tom A. Coburn, M.D.
House of Representatives
Washington, D.C. 20515

Dear Dr. Coburn:

Thank you for your letter regarding implementation of the provisions of the Ryan White CARE Act Amendments of 1996 that relate to funding prohibitions for States that do not have criminal laws sufficient to prosecute any HIV-infected person who intentionally exposes another to HIV. I apologize for the delay in responding.

As you stated in your letter, 42 U.S.C. Section 300ff-47 provides that no State will receive Federal funding under Section 300ff-41 for HIV support services unless the State has implemented criminal laws as described above. The Congress did not appropriate funds for the Section 300ff-41 program, and it is not operational. Because no states are receiving Federal funds under this authority, The Department of Health and Human Services (HHS) has not initiated a system to track State provisions that would need to be in place if Federal funds were being awarded. If the section 300ff-41 program were to become operational, HHS would proceed to require States to certify that they have legislation concerning intentional transmission of HIV.

CDC has consulted with an expert in this area of law to obtain information. Based on the information provided, it is our understanding that virtually all States have public health laws dealing with this issue. The laws, *inter alia*, permit States to issue orders to cease and desist risk behaviors and to bring criminal prosecutions for the intentional or knowing transmission of HIV or other sexually transmitted diseases.

Should Congress appropriate funds for these provisions in the future, the Health Resources and Services Administration and CDC will coordinate, as appropriate, the implementation of Section 300ff-47.

I hope this information is helpful.

Sincerely,

Donna E. Shalala

E

VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

(3) by inserting after subparagraph (C) the following new subparagraph:

"(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;".

42 USC 14011.

SEC. 40503. PAYMENT OF COST OF TESTING FOR SEXUALLY TRANSMITTED DISEASES.

(a) FOR VICTIMS IN SEX OFFENSE CASES.—Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)(7)) is amended by adding at the end the following: "The Attorney General shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault. A victim may waive anonymity and confidentiality of any tests paid for under this section.".

(b) LIMITED TESTING OF DEFENDANTS.—

(1) COURT ORDER.—The victim of an offense of the type referred to in subsection (a) may obtain an order in the district court of the United States for the district in which charges are brought against the defendant charged with the offense, after notice to the defendant and an opportunity to be heard, requiring that the defendant be tested for the presence of the etiologic agent for acquired immune deficiency syndrome, and that the results of the test be communicated to the victim and the defendant. Any test result of the defendant given to the victim or the defendant must be accompanied by appropriate counseling.

(2) SHOWING REQUIRED.—To obtain an order under paragraph (1), the victim must demonstrate that—

(A) the defendant has been charged with the offense in a State or Federal court, and if the defendant has been arrested without a warrant, a probable cause determination has been made;

(B) the test for the etiologic agent for acquired immune deficiency syndrome is requested by the victim after appropriate counseling; and

(C) the test would provide information necessary for the health of the victim of the alleged offense and the court determines that the alleged conduct of the defendant created a risk of transmission, as determined by the Centers for Disease Control, of the etiologic agent for acquired immune deficiency syndrome to the victim.

(3) FOLLOW-UP TESTING.—The court may order follow-up tests and counseling under paragraph (b)(1) if the initial test was negative. Such follow-up tests and counseling shall be performed at the request of the victim on dates that occur six months and twelve months following the initial test.

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(7) CONTEMPT FOR DISCLOSURE.—Any person who discloses the results of a test in violation of this subsection may be held in contempt of court.

(c) PENALTIES FOR INTENTIONAL TRANSMISSION OF HIV.—Not later than 6 months after the date of enactment of this Act, the United States Sentencing Commission shall conduct a study and prepare and submit to the committees on the Judiciary of the Senate and the House of Representatives a report concerning recommendations for the revision of sentencing guidelines that relate to offenses in which an HIV infected individual engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV. Reports.

SEC. 40504. EXTENSION AND STRENGTHENING OF RESTITUTION.

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(1) in paragraph (2) by inserting "including an offense under chapter 109A or chapter 110" after "an offense resulting in bodily injury to a victim";

(2) by striking "and" at the end of paragraph (3);

(3) by redesignating paragraph (4) as paragraph (5); and

(4) by inserting after paragraph (3) the following new paragraph:

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and".

SEC. 40505. ENFORCEMENT OF RESTITUTION ORDERS THROUGH SUSPENSION OF FEDERAL BENEFITS.

Section 3663 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(i)(1) A Federal agency shall immediately suspend all Federal benefits provided by the agency to the defendant, and shall terminate the defendant's eligibility for Federal benefits administered by that agency, upon receipt of a certified copy of a written judicial finding that the defendant is delinquent in making restitution in accordance with any schedule of payments or any requirement of immediate payment imposed under this section.

"(2) Any written finding of delinquency described in paragraph (1) shall be made by a court, after a hearing, upon motion of

the determination of the officer, carry out a program of partner notification regarding cases of HIV disease.

(c) RULES OF CONSTRUCTION.—An agreement made under this section may not be construed—

(1) to require or prohibit any State from providing that identifying information concerning individuals with HIV disease is required to be submitted to the State; or

(2) to require any State to establish a requirement that entities other than the public health officer of the State are required to make the notifications referred to in subsection (b).

SEC. 2647. [300ff-47] REQUIREMENT OF STATE LAW PROTECTION AGAINST INTENTIONAL TRANSMISSION.

(a) IN GENERAL.—The Secretary may not make a grant under section 2641 to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual, subject to the condition described in subsection (b), who—

(1) makes a donation of blood, semen, or breast milk, if the individual knows that he or she is infected with HIV[1] and intends, through such donation, to expose another HIV[1] in the event that the donation is utilized;

(2) engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV; and

(3) injects himself or herself with a hypodermic needle and subsequently provides the needle to another person for purposes of hypodermic injection, if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to such etiologic agent in the event that the needle is utilized.

(b) CONSENT TO RISK OF TRANSMISSION.—The State laws described in subsection (a) need not apply to circumstances under which the conduct described in paragraphs (1) through (3) of subsection (a) if the individual who is subjected to the behavior involved knows that the other individual is infected and provides prior informed consent to the activity.

(c) STATE CERTIFICATION WITH RESPECT TO REQUIRED LAWS.—With respect to complying with subsection (a) as a condition of receiving a grant under section 2641, the Secretary may not require a State to enact any statute, or to issue any regulation, if the chief executive officer of the State certifies to the Secretary that the laws of the State are adequate. The existence of a criminal law of general application, which can be applied to the conduct described in paragraphs (1) through (3) of subsection (a), is sufficient for compliance with this section.

(d) TIME LIMITATIONS WITH RESPECT TO REQUIRED LAWS.—With respect to receiving a grant under section 2641, if a State is unable to certify compliance with subsection (a), the Secretary may make a grant to a State under such section if—

[1] Section 12(c)(4)(A) of Public Law 104–146 (110 Stat. 1373) provides that subsection (a)(1) is amended by inserting "to" before "HIV", but the amendment cannot be executed because the amendment does not specify to which instance of the use of the term "HIV" the amendment applies.

(1) for each of the fiscal years 1991 and 1992, the State provides assurances satisfactory to the Secretary that by not later than October 1, 1992, the State will have in place or will establish the prohibitions described in subsection (a); and

(2) for fiscal year 1993 and subsequent fiscal years, the State has established such prohibitions.

SEC. 2648. [300ff-48] TESTING AND OTHER EARLY INTERVENTION SERVICES FOR STATE PRISONERS.

(a) IN GENERAL.—In addition to grants under section 2641, the Secretary may make grants to States for the purpose of assisting the States in providing early intervention services to individuals sentenced by the State to a term of imprisonment. The Secretary may make such a grant only if the State involved requires, subject to subsection (d), that—

(1) the services be provided to such individuals; and

(2) each such individual be informed of the requirements of subsection (c) regarding testing and be informed of the results of such testing of the individual.

(b) REQUIREMENT OF MATCHING FUNDS.—

(1) IN GENERAL.—The Secretary may not make a grant under subsection (a) unless the State involved agrees that, with respect to the costs to be incurred by the State in carrying out the purpose described in such subsection, the State will make available (directly or through donations from public or private entities) non-Federal contributions toward such costs in an amount equal to—

(A) for the first fiscal year of payments under the grant, not less than $1 for each $2 of Federal funds provided in the grant; and

(B) for any subsequent fiscal year of such payments, not less than $1 for each $1 of Federal funds provided in the grant.

(2) DETERMINATION OF AMOUNT OF NON-FEDERAL CONTRIBUTION.—Non-Federal contributions required in paragraph (1) may be in cash or in kind, fairly evaluated, including plant, equipment, or services. Amounts provided by the Federal Government, and services (or portions of services) subsidized by the Federal Government, may not be included in determining the amount of such non-Federal contributions.

(c) TESTING.—The Secretary may not make a grant under subsection (a) unless—

(1) the State involved requires that, subject to subsection (d), any individual sentenced by the State to a term of imprisonment be tested for HIV disease—

(A) upon entering the State penal system; and

(B) during the 30-day period preceding the date on which the individual is released from such system;

(2) with respect to informing employees of the penal system of the results of such testing of the individual, the State—

(A) upon the request of any such employee, provides the results to the employee in any case in which the medical officer of the prison determines that there is a reasonable basis for believing that the employee has been exposed by the individual to such disease; and

Criminal Law Won't Stop AIDS

Harsh Measures Are an Overreaction, and Counterproductive

By LARRY GOSTIN

Fears that out-of-control AIDS patients are seeking vengeance by exposing others to their virus have fueled demands for criminal sanctions. Approximately 30 criminal cases—alleging intentional transmission by biting, spitting, donating infected blood or having sexual intercourse—have been filed across the country against AIDS patients. Florida and Idaho have amended their laws to make it an offense to willfully expose another to the AIDS virus. Fourteen states have similar bills pending.

True, malicious transmission of a potentially lethal virus is just as dangerous as other behavior that criminal law already prohibits. There is no reason why persons in high-risk groups who endanger the public should be exempt from ordinary criminal law because the intent is to protect them and others against the spread of AIDS.

But, first, I will argue that what we think we know to be a crime is not the same as proving it in a court of law. And, second, I will argue that to create a criminal law applicable solely to AIDS carriers would be counterproductive and unfair from a public-health perspective.

There is an understandable outrage when any citizen acts maliciously to place another's life in jeopardy. But we live under a legal system that respects constitutional rights, and it is necessary to prove beyond a reasonable doubt that the person intended to transmit the virus and did not inform his partner of his condition. It is nearly impossible to know what went on, and what was said, in the privacy of a sexual encounter that may have taken place years ago. Did the person know that he harbored the virus? Did he inform his sexual partner? Did he engage in "safer" sex? Has the partner had other sexual encounters or intravenous drug experiences with infected persons? These questions illustrate the difficulty of establishing guilt and innocence in a consenting sexual relationship.

Proving intent in cases of donation of infected blood is even more problematic. Is it possible, for example, in the case of a person who is destitute and gives blood for money to prove a specific intent to cause death? Joseph Edward Markowski, who is charged with attempted murder by the Los Angeles district attorney, said: "I was so hard up for money that I didn't give a damn." Should we not more aptly describe Markowski as a desperate man wanting to make a small sum of money for sustenance than a person who fully understood the consequences of his act, and intended to kill? Society may feel that he is evil and try to use draconian felony charges to seek revenge. But to what purpose? Markowski, it should be remembered, is dying from AIDS. The possibility of a long prison sentence would be an unlikely deterrence to his attempts to sell his blood.

If officials want to ensure that there are no future donations of AIDS-infected blood, there are other ways to achieve the objective. In most of the known cases of persistent donations, payments were involved. The practice of being paid for blood should be, as it is in much of Europe, abolished or severely regulated.

The cases in which criminal charges are brought against AIDS carriers are among the most vexing in law. But hard cases make bad law, and it would be counterproductive for states to follow the lead of Idaho and Florida by creating criminal statutes specifically applicable to AIDS. Widespread use of criminal law is a misdirected policy that will have no effect in curtailing the spread of AIDS. The overwhelming majority of cases of AIDS transmission are outside the reach of criminal law, and will go unnoticed. Those who do come to the attention of the police are likely to be the poorest and least articulate of those harboring the virus. This makes criminal law a lottery affecting primarily the most vulnerable.

History has shown that the use of criminal law has rarely had a positive public-health effect. Laws in nearly half the states making it a crime to intentionally transmit a venereal disease are widely regarded as a failure, and have fallen into disuse. The reason is that criminal law is ill suited to deal with a case in which there are sexual relations with a consenting adult who can and should take precautions to avoid transmission of the disease.

Transmission of a virus does not easily fit into the model of a guilty offender and an innocent victim.

Indeed, there is good reason to believe that widespread use of criminal law to prosecute AIDS carriers would make it more difficult to combat the disease. The argument that coercion will drive the epidemic underground is well rehearsed.

But it may be one thing to require a person to be tested, and quite another to make his or her sexual behavior a criminal offense carrying a stiff prison sentence. It will be very much in the interests of risk-group members not to know if they have the virus and not to discuss their sexual contacts with counselors or physicians. The last thing that public-health officials want is a population that is frightened of punitive solutions to their health problem.

Criminal court cases and statutes directed against AIDS carriers may appear to be getting tough with the disease. But in fact they divert our attention and resources from the policies that would make a real difference—focused education, testing, counseling and treatment for drug dependency.

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