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THE CRIMINAL TRANSMISSION OF AIDS: A CRITICAL EXAMINATION OF MISSOURI'S HIV-SPECIFIC STATUTE

I. INTRODUCTION

In an extraordinary criminal trial, a St. Charles County jury found Brian T. Stewart guilty of injecting his infant son with HIV-tainted blood.¹ Now suffering from full-blown AIDS, the boy struggles daily to combat the effects of the virus.² The child is fed mostly a liquid diet through a plastic tube leading directly to his stomach, and he is almost completely deaf as a result of the ten different disease-fighting medications he takes everyday.³ Physicians do not expect him to live a “normal life span.”⁴

According to authorities, Stewart injected his son with the deadly virus simply to avoid making child-support payments.⁵ To achieve a conviction, the prosecutor presented a case based substantially on circumstantial evidence.⁶ The state argued that the defendant, a hospital phlebotomist, had easy access to HIV-contaminated blood and possessed the motive to commit the crime.⁷ During the trial, the evidence demonstrated that Stewart often brought home

1. *State v. Stewart*, 18 S.W.3d 75 (Mo. Ct. App. 2000). See also William C. Lhotka, *Judges Deny Retrial of Man Who Infected Son with HIV*, ST. LOUIS POST-DISPATCH, Mar. 29, 2000, at B2; Michele Munz, *Father is Found Guilty of Giving His Son an HIV-Tainted Injection*, ST. LOUIS POST-DISPATCH, Dec. 6, 1998, at A1 [hereinafter *Father is Found Guilty*].

2. See Frank Gluck, *Mom Describes Son's Fight with AIDS*, ST. CHARLES J., Dec. 6, 1998, at 2A; Michele Munz, *Trial Hears Iffy Prognosis for Boy with AIDS*, ST. LOUIS POST-DISPATCH, Dec. 5, 1998, at 5 [hereinafter *Trial Hears Iffy Prognosis*].

3. Gluck, *supra* note 2, at 2A.

4. *Id.*

5. *Stewart*, 18 S.W.3d at 83. See also Michele Munz, *Stewart Jury is Set for Opening Statements*, ST. LOUIS POST-DISPATCH, Dec. 2, 1998, at B1 [hereinafter *Stewart Jury is Set for Opening Statements*].

6. *Father is Found Guilty*, *supra* note 1, at A1. St. Charles County Assistant Prosecuting Attorney Ross Buehler noted this case could only be argued with circumstantial evidence because of the defendant's diabolical nature. *Id.* Buehler stated that “circumstantial evidence is like a number of strings that weave together and make a rope,” and that “it's a very strong rope that bears the weight of a conviction.” *Id.* See also *Stewart Jury is Set for Opening Statements*, *supra* note 5, at B1.

7. *Stewart*, 18 S.W.3d at 81-82. Defendant worked as a phlebotomist at Barnes-Jewish Hospital in St. Louis. *Id.* “His duties there were to collect blood from patients.” *Id.*

tourniquets, needles and syringes in his lab coat.⁸ He also denied being the boy's father, argued that he had no financial responsibility and made comments about the boy not living very long.⁹ Family members reported finding several vials of blood in the freezer when Stewart was living with them,¹⁰ and other witnesses testified that Stewart made threatening statements such as: "I could inject them with something and they would never know what hit them."¹¹

The defendant allegedly infected his son with the virus when the child was hospitalized for an unrelated respiratory problem.¹² While wearing his lab coat, which had deep pockets for carrying supplies, Stewart paid his son an unexpected visit at the hospital.¹³ After entering his son's room, he placed his lab coat on a rocking chair.¹⁴ Referring to stitches that were on the boy's face at the time, Stewart mentioned that the boy was going to be scarred for life and that he "was not worth having."¹⁵ When the boy's mother returned from the cafeteria, she found her son on the defendant's lap crying hysterically.¹⁶ Defendant's lab coat had been suspiciously moved from the chair while the mother was out of the room.¹⁷ The boy's health declined immediately after Stewart's private visit.¹⁸

Physicians could not understand the dramatic change in the child's health. He exhibited difficulty breathing, a fever and a fast heart rate.¹⁹ These

8. *Id.* See also Michele Munz, *Stewart Threatened Their Son, Boy's Mother Testifies Man Injected Child with HIV-Tainted Blood, Prosecutors Say*, ST. LOUIS POST-DISPATCH, Dec. 3, 1998, at A1 [hereinafter *Stewart Threatened Their Son*].

9. *Stewart*, 18 S.W.3d at 83. The court noted:

Defendant said, "[Y]ou won't need to look me up for child support anyway because your child is not going to live that long." Mother asked what Defendant meant by that and he replied, "[D]on't worry about it. I just know that he is not going to live to see the age of five." Defendant said that if Mother tried to find him he could have her taken care of and that nobody would be able to trace it back to him.

Id. See also *Stewart Threatened Their Son*, *supra* note 8, at A1.

10. See *Stewart*, 18 S.W.3d at 81; *Stewart Threatened Their Son*, *supra* note 8, at A1.

11. See *Father Is Found Guilty*, *supra* note 1, at A1. See also *Stewart*, 18 S.W.3d at 83; *Trial Hears Iffy Prognosis*, *supra* note 2, at 5.

12. *Stewart*, 18 S.W.3d at 82. "On Feb. 2, 1992, Mother brought [her son], who was eleven months old, to St. Joseph's Hospital West in St. Charles County because [the child's] asthma had worsened." *Id.*

13. *Id.* See also Michele Munz, *Determined Detective Tracked Boy's HIV Two-Year Investigation Ended with Charges Against Father*, ST. LOUIS POST-DISPATCH, Dec. 4, 1998, at A1 [hereinafter *Determined Detective*].

14. *Stewart*, 18 S.W.3d at 82.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* See also *Determined Detective*, *supra* note 13, at A1.

19. *Stewart*, 18 S.W.3d at 82.

symptoms, and the sudden change in the boy's condition, were consistent with those of receiving incompatible blood.²⁰ Instead of being sent home, the boy had to be transported to a pediatrics hospital for further treatment.²¹ Defendant never again visited his son in the hospital.²² The child was diagnosed with AIDS four years later.²³ After the virus was finally discovered, physicians stated the boy was in the final stages of AIDS and characterized his prognosis as "very dismal."²⁴

The state of Missouri and St. Louis health departments tested people with whom the child had contact and could not determine how the child contracted the disease.²⁵ All twenty-six people tested negative for the antibodies to HIV.²⁶ A two-year criminal investigation, however, implicated Stewart in the crime.²⁷ He had access to HIV-tainted blood, he threatened that the boy would not live past the age of five and he had the motive and opportunity to commit the crime.²⁸ Moreover, a witness testified that Stewart knew his son had AIDS before the defendant was ever officially notified.²⁹ Based on the evidence, the jury convicted Stewart,³⁰ and the court sentenced him to the maximum

20. *Id.* "No reason for the victim's sudden change of condition was discerned at that time. The trial testimony of Dr. Linda Steele-Greene, the victim's physician, established that the victim's symptoms were consistent with a hemolytic reaction." *Id.* at 83 n.3.

21. *Id.* The victim was transferred to Cardinal Glennon Children's Hospital in St. Louis.

22. *Id.*

23. *Id.* at 83.

24. Gluck, *supra* note 2, at 2A.

25. *Father is Found Guilty, supra* note 1, at A1.

26. *Id.*

27. *Determined Detective, supra* note 13, at A1.

28. *Father is Found Guilty, supra* note 1, at A1. While the state did not have direct evidence in this case, Buehler, summarizing the case, argued that:

- Stewart had access. His job gave him the opportunity to draw blood from patients with AIDS. He easily could have left the hospital with vials of blood, syringes and needles.
- He had a motive. Stewart would not admit he was the boy's father and had to be ordered to pay child support. He moved from one girlfriend to the next, and never wanted to leave any ties behind.
- He had the opportunity. On Feb. 6, 1992, the boy was being treated at Lake St. Louis hospital for respiratory problems. The child was scheduled to be released that day but took a turn for the worst after a private visit by Stewart. The symptoms he showed could have been from receiving incompatible blood, a blood specialist testified.
- He had made threats. Stewart told the boy's mother not to bother seeking child support because the boy wouldn't live past the age of 5. Others testified he made statements, such as "I have the power to destroy the world" and "I would inject them with something and they would never know what hit them."

Id.

29. *Id.* See also *Trial Hears Iffy Prognosis, supra* note 2, at 5.

30. *Stewart*, 18 S.W.3d at 83. "[Stewart] was charged by information with assault in the first degree for attempting to kill or cause serious physical injury . . . to his biological son . . . by injecting him with Human Immunodeficiency Virus." *Id.* at 81.

punishment of life in prison.³¹ Under Missouri law, however, he will be eligible for parole in fifteen years.³²

This highly publicized trial³³ demonstrated the potential of using AIDS as a deadly weapon. Like many states, Missouri has a statute that makes it a criminal offense to intentionally expose a person to HIV.³⁴ But this statute was inapplicable in the *Stewart* case because the statute affects only persons knowingly infected with the disease.³⁵ Unlike defendants in most previous criminal HIV-transmission cases, Stewart was not infected with HIV. He simply used the virus as a tool to carry out his assault. As a result, the state could not charge him for violating this particular law. Moreover, the statute of limitations under the law had expired by the time the child was diagnosed with the virus.³⁶ These are just two of the reasons why Stewart could not be charged under Missouri's current law.³⁷

While many recent law journal articles have addressed HIV-specific statutes,³⁸ this Comment will particularly explore Missouri's law. This

31. *Id.* See also *Father is Found Guilty*, *supra* note 1, at A1 (stating that the jury recommended life imprisonment).

32. Michele Munz, *Stewart Gets Life Term and Verbal Pounding*, ST. LOUIS POST-DISPATCH, Jan. 9, 1999, at A1. During the sentencing hearing, St. Charles County Circuit Judge Ellsworth Cundiff called the life sentence far too lenient for the crime. *Id.* The judge told Stewart, "I cannot image anything worse. You've reached new heights. You're in a class by yourself." Cundiff, verbally reprimanding Stewart, stated, "I believe when God finally calls you, you are going to burn in hell from here to eternity. Maybe that is the only justice in this case." *Id.*

33. See William C. Lhotka, *Vile Nature of Alleged AIDS Crime Attracts National Media Attention Assault Case Against Father is Getting Gavel-to-Gavel TV Coverage*, ST. LOUIS POST-DISPATCH, Dec. 6, 1998, at A1. The nature of the crime was so vile and unusual that national media descended on the St. Charles County courthouse. *Id.* The national networks picked up the local feed from area television stations. In addition, "Court TV has interrupted coverage of impeachment hearings at the nation's Capitol to give Stewart's trial gavel-to-gavel coverage; CNN had its own crew in town last week for stories on the case." *Id.* See also Michele Munz, *Trial for Man Accused of Infecting Son with AIDS Begins Today, Case Draws International Attention*, ST. LOUIS POST-DISPATCH, Nov. 30, 1998, at A1.

34. See MO. REV. STAT. § 191.677 (1996 & Supp. 2001).

35. *Id.* § 191.677(1).

36. See *infra* note 261 and accompanying text.

37. For more information on the *Stewart* case, see *The Needle and the Damage Done*, ST. LOUIS MAG., June 2000, at 24-40.

38. See Michael L. Closten, *The Arkansas Criminal HIV Exposure Law: Statutory Issues, Public Policy Concerns, and Constitutional Objections*, 1993 ARK. L. NOTES 47 (1993); Lori A. David, *The Legal Ramifications in Criminal Law of Knowingly Transmitting AIDS*, 19 LAW & PSYCHOL. REV. 259 (1995); Amy M. Decker, *Criminalizing the Intentional or Reckless Exposure to HIV: A Wake-Up Call to Kansas*, 46 U. KAN. L. REV. 333 (1998); Jody B. Gabel, *Liability for 'Knowing' Transmission of HIV: The Evolution of a Duty to Disclose*, 21 FLA. ST. U. L. REV. 981 (1994); Jennifer Grishkin, *Knowingly Exposing Another to HIV*, 106 YALE L.J. 1617 (1997); Kimberly A. Harris, *Death at First Bite: A Mens Rea Approach in Determining Criminal Liability*

Comment will briefly discuss the history of AIDS in the United States, outline the U.S. government's response to the epidemic, characterize the use of criminal statutes to prevent the spread of the disease, examine the history and enforcement of Missouri's HIV-related statutes and point out several criticisms and controversies associated with the current law. In addition, it will compare the statutory approach of Illinois and will suggest recommendations to the Missouri legislature on how it can improve the law. The goal of this Comment is to encourage legislators to amend the existing law so that prosecutors can more readily convict people who recklessly expose others to the deadly virus.

II. HISTORICAL PERSPECTIVE OF AIDS IN THE UNITED STATES

The United States witnessed its first reported cases of Acquired Immune Deficiency Syndrome ("AIDS")³⁹ in the spring of 1981.⁴⁰ The first victims of the disease were five young, previously healthy, homosexual men living in the Los Angeles area.⁴¹ The disease, referred to as the "gay cancer," was originally dismissed as a threat only to the homosexual community.⁴² This stereotype quickly faded, however, as the number of HIV-infected Americans grew and included heterosexual men and women as well. The disease received

for *Intentional HIV Transmission*, 35 ARIZ. L. REV. 237 (1993); Donald H. J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351 (1990); Jacob A. Heth, *Dangerous Liaisons: Criminalizing Conduct Related to HIV Transmission*, 29 WILLAMETTE L. REV. 843 (1993); Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV. 847 (1999); Erin M. O'Toole, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, 10 J.L. & HEALTH 183 (1996); J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435 (1994); Thomas W. Tierney, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT'L & COMP. L. REV. 475 (1992); Stephen V. Kenney, *Criminalizing HIV Transmission: Lessons From History and a Model for the Future*, 8 J. CONTEMP. HEALTH L. & POL'Y 245 (1992).

39. Acquired Immune Deficiency Syndrome has been defined as:

The final stage of a series of specific health conditions and problems as well as opportunistic infections (OI) caused by a virus, HIV. HIV can be passed from person to person . . . In a person who has developed AIDS, the body's natural immune system is suppressed and allows for the active presence of microorganisms that otherwise would be fought off by the immune system. The acronym AIDS was first used by the Centers for Disease Control (CDC) in late 1982 to name cases of illness that were first reported in 1981.

MARY ELLEN HOMBS, *AIDS CRISIS IN AMERICA* 58 (1992). See also MO. REV. STAT. § 191.650(5) (1996).

40. See SETH C. KALICHMAN, *UNDERSTANDING AIDS: ADVANCES IN RESEARCH AND TREATMENT* 10 (2d. ed. 1998); *AIDS AND THE LAW* 3 (David W. Webber ed., 3rd ed. 1997).

41. KALICHMAN, *supra* note 40, at 10.

42. MIRKO D. GRMEK, *HISTORY OF AIDS: EMERGENCE AND ORIGIN OF A MODERN PANDEMIC* 6-9 (Russell C. Maulitz & Jacalyn Duffin trans., 1990).

serious public attention when AIDS cases were recorded throughout the United States.⁴³

Since its initial discovery, AIDS has continued to spread rapidly throughout the United States and the world. It has been called "the most dramatic, pervasive and tragic pandemic in recent history."⁴⁴ Moreover, "AIDS [has] emerged as a global health threat faster than any previous disease in history."⁴⁵ According to federal estimates, an American becomes infected with the virus every thirteen minutes.⁴⁶ All fifty states, the District of Columbia and U.S. dependencies and territories report diagnosed cases of AIDS to the federally funded Centers for Disease Control ("CDC") in Atlanta.⁴⁷ At the end of 1999, the CDC had received a reported 733,374 cumulative cases of AIDS in the United States.⁴⁸ In addition to those who already have AIDS, an estimated 650,000 to 950,000 Americans are living with Human Immunodeficiency Virus ("HIV"), the retrovirus that causes AIDS, and approximately 40,000 new infections occur annually.⁴⁹

Clinical research has revealed valuable medical, scientific and public health information about HIV and AIDS.⁵⁰ When HIV enters the human body, it attacks and damages the immune system.⁵¹ Although the virus's damage of the immune system does not itself lead to death, the infection often leaves the victim vulnerable to other infections and malignancies.⁵² Many of these infections, often termed opportunistic infections, take advantage of the already weakened immune system.⁵³ Most individuals who have full-blown AIDS die as a result of the complications attributed to the disease.⁵⁴

43. See Virginia Shubert, *Introduction* to HOMBBS, *supra* note 39, at 2-3.

44. GERALD J. STINE, *ACQUIRED IMMUNE DEFICIENCY SYNDROME: BIOLOGICAL, MEDICAL, SOCIAL, AND LEGAL ISSUES* xxi (2d ed. 1993).

45. KALICHMAN, *supra* note 40, at 57.

46. Dee Wampler, *Felonious Assault by the HIV-AIDS Infected*, 54 J. MO. B. 31, 31 (1998).

47. AIDS AND THE LAW, *supra* note 40, at 13; CENTERS FOR DISEASE CONTROL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, 11 HIV/AIDS SURVEILLANCE REPORT 2, 41-44 (1999), available at <http://www.cdc.gov/hiv/stats/hasrlink.htm> (last visited Oct. 28, 2000) [hereinafter SURVEILLANCE REPORT].

48. SURVEILLANCE REPORT, *supra* note 47, at 5.

49. AIDS PROJECT LOS ANGELES, HIV/AIDS STATISTICS 8, available at <http://www.apla.org/apla/ed/HIVSTATS.HTM> (last visited Oct. 30, 2000).

50. CENTERS FOR DISEASE CONTROL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, HIV AND ITS TRANSMISSION 1, available at <http://www.cdc.gov/hiv/pubs/facts.htm> (last visited Oct. 28, 2000) [hereinafter HIV AND ITS TRANSMISSION].

51. MARK BLUMBERG, AIDS: THE IMPACT ON THE CRIMINAL JUSTICE SYSTEM 3 (1990).

52. *Id.*

53. *Id.*

54. *Id.*

The paths in which HIV can be transmitted have been clearly identified.⁵⁵ The virus is spread by sexual contact with an infected individual, by sharing needles and syringes with someone who is infected, and less commonly, through transfusions of infected blood or blood clotting factors.⁵⁶ In countries where blood is screened for HIV antibodies, cases of transfusions of infected blood are indeed rare.⁵⁷ “Babies born to HIV-infected women may become infected before or during birth or through breast-feeding after birth.”⁵⁸ Some people fear that HIV might be transmitted through other media, such as air, water or insects, but no scientific evidence has been discovered to support any of these fears.⁵⁹ Despite a national reporting system designed to detect such a discovery, no additional routes of transmission have been recorded.⁶⁰ “All reported cases suggesting new or potentially unknown routes of transmission are thoroughly investigated by state and local health departments with the assistance, guidance and laboratory support from [the] CDC.”⁶¹

One of the difficult aspects of AIDS for epidemiological study is the long incubation period of the disease—the period between infection and the appearance of symptoms.⁶² The HIV disease can be separated into three stages: (1) the early short-term or acute stage that may last weeks; (2) the middle or chronic/latent stage that may last many years; and (3) the crisis or AIDS stage.⁶³ The progression of HIV infection to full-blown AIDS varies according to the individual. While some experience the progression rather quickly, others may not be diagnosed for ten or more years.⁶⁴ The temporal difference in experiencing AIDS may be attributed to the strength of the human immune system and how successfully it can fight the virus.⁶⁵ Regardless of the length of the progression period, most HIV-infected individuals will eventually develop AIDS.⁶⁶

Many Americans still remain fearful of becoming infected with the virus. This fear is exacerbated by the deadly nature of AIDS and the social stigma

55. See AIDS AND THE LAW, *supra* note 40, at 14-15; AIDS LAW TODAY 23-29 (Scott Burris et al. eds., 1993); AIDS SOURCEBOOK 11-15 (Karen Bellenir ed., 1999); BLUMBERG, *supra* note 51, at 18-29; HIV AND ITS TRANSMISSION, *supra* note 50, at 1-4; GRMEK, *supra* note 42, at 87-90; KALICHMAN, *supra* note 40, at 23-31; Shubert, *Introduction* to HOMBS, *supra* note 39, at 6-8.

56. HIV AND ITS TRANSMISSION, *supra* note 50, at 1.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. HIV AND ITS TRANSMISSION, *supra* note 50, at 1.

62. STINE, *supra* note 44, at 97.

63. *Id.*

64. *Id.*

65. *Id.* at 2.

66. *Id.* at 99.

attached to victims of the disease. And since there is no vaccination⁶⁷ or cure to prevent HIV infection, it is unlikely that the incidence of the disease will diminish in the near future. AIDS has clearly made a significant impact on society, and “perhaps more than any other illness [it] has profoundly affected the way in which medical, legal, public health, and information services are provided.”⁶⁸ It was only a question of time before the government addressed the growing public concern about this disease.

III. THE U.S. GOVERNMENT’S RESPONSE TO AIDS

In response to the epidemic, the U.S. government has taken a reactive role in the fight to suppress the diffusion of AIDS. While there had been much study of AIDS, there had been little federal action.⁶⁹ It took Congress nearly a decade to pass legislation directed at providing care for persons with HIV and AIDS. In 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic investigated the disease and presented its findings in a comprehensive report.⁷⁰ In this report, the commission recommended a national strategy to combat the spread of HIV.⁷¹ This strategy included proposals and means to increase the country’s efforts to discover a cure. To protect the public from contracting the disease, the commission suggested that states and local governments advocate the use of HIV testing and counseling.⁷²

The report also endorsed the criminalization of acts that risk the transmission of HIV to another person.⁷³ The report pointed out that problems applying traditional criminal law to HIV transmission should lead to the adoption of criminal statutes specific to HIV infection.⁷⁴ These statutes would

67. BLUMBERG, *supra* note 51, at 3.

68. AIDS AND THE LAW, *supra* note 40, at 2.

69. Shubert, *Introduction to HOMBS*, *supra* note 39, at 13.

70. THE REPORT OF THE PRESIDENTIAL COMMISSION ON HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (June 1988) [hereinafter THE REPORT OF THE PRESIDENTIAL COMMISSION]. President Reagan appointed the Commission in May 1987.

71. *Id.* at 157-58.

72. *Id.* at 73-75.

The recommendations of the Commission seek to strike a proper balance between our obligation as a society toward those members of society who have HIV and those members who do not have the virus. To slow or stop the spread of the virus, to provide proper medical care for those who have contracted the virus, and to protect the rights of both infected and non-infected persons requires a careful balancing of interests in a highly complex society.

Id. at XVII.

73. *Id.* at 130.

74. *Id.* The Commission pointed out the problems of prosecution under traditional criminal law statutes and recommended the enactment of AIDS-specific statutes that prosecute individuals

provide clear and adequate notice of socially unacceptable behavior.⁷⁵ The report recommended that states review their criminal codes to determine the possible need for adopting an HIV-specific criminal statute.⁷⁶ Within a year of the commission's report, all fifty states had enacted some form of AIDS legislation addressing health educational programs, reporting and testing for the virus.⁷⁷ Some states even heeded the advice of the report and passed HIV-specific statutes.⁷⁸

Congress addressed the growing epidemic by passing The Ryan White Comprehensive AIDS Resources Emergency ("CARE") Act of 1990.⁷⁹ This Act was dedicated to the memory of the 70,000 persons who lost their lives to AIDS as of the date of the law's enactment and to the memory of Ryan White.⁸⁰ While the measure was initially authorized for only five years, it was amended and extended for another five years in 1996.⁸¹ The CARE Act provides emergency relief by funding prevention, health services and health

who "knowingly conduct themselves in ways that pose a significant risk of transmission to others . . ." *Id.* In its report, the Commission recommended:

Adoption by the states of a criminal statute—directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV—clearly setting forth those specific behaviors subject to criminal sanctions. With regard to sexual transmission, the statute should impose on HIV-infected individuals who know of their status specific affirmative duties to disclose their condition to sexual partners, to obtain their partner's knowing consent, and to use precautions, punishing only for failure to comply with these affirmative duties.

HIV criminal statutes should include strong, uniform confidentiality protection.

Id. at 131.

75. THE REPORT OF THE PRESIDENTIAL COMMISSION, *supra* note 70, at 130.

76. *Id.*

77. Kenney, *supra* note 38, at 260.

78. *See infra* note 140.

79. Ryan White CARE Act Amendments of 1996, Pub. L. No. 104-146, 110 Stat. 1346 (codified as amended in scattered sections of 42 U.S.C.). The purpose of the Act is to:

[P]rovide emergency assistance to localities that are disproportionately affected by the Human Immunodeficiency Virus epidemic and to make financial assistance available to States and other public or private nonprofit entities to provide for the development, organization, coordination and operation for more effective and cost efficient systems for the delivery of essential services to individuals and families with HIV disease.

42 U.S.C. § 300ff (1994).

80. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 1990 U.S.C.C.A.N. (104 Stat.) 862, 862-63. Ryan White helped bring AIDS awareness to the public eye by winning a court battle to attend school in Indiana. He died in 1990 at age eighteen.

81. Ryan White CARE Act Amendments of 1996, Pub. L. No. 104-146, 110 Stat. 1346 (codified as amended in scattered sections of 42 U.S.C.).

care to the communities hardest hit by the AIDS epidemic.⁸² It also conditions the granting of emergency AIDS relief to states that demonstrate the capability of effectively prosecuting HIV-infected individuals who intentionally or knowingly expose others to the virus through sexual contact, blood or tissue donations or sharing hypodermic needles.⁸³

The law had its desired effect on state legislatures. Passage of the CARE Act prompted many states to enact laws to criminally punish individuals who knowingly transmit or expose others to the virus.⁸⁴ These criminal laws provide a means to educate and reinforce the norms of society. States had three basic alternatives to satisfy the CARE Act's prosecution requirement: (1) a state could modify existing public health statutes that criminalize the transmission and exposure of specified communicable diseases to include HIV; (2) a state could rely on traditional criminal statutes to combat the transmission of the virus; or (3) a state could enact an HIV-specific statute.⁸⁵ This Comment will look exclusively on the latter two alternatives.

A. *Traditional Criminal Laws*

States initially prosecuted defendants who knowingly transmitted HIV exclusively under traditional criminal offenses.⁸⁶ These traditional offenses were readily available to prosecutors and advanced the criminal law objective of deterrence. Many of these prosecutions involved HIV-positive individuals who knew of their infections and assaulted other persons, usually police officers or prison guards.⁸⁷ While states have charged alleged offenders with manslaughter, negligent homicide and reckless endangerment, they more

82. 42 U.S.C. §§ 300ff(11),(14) (1994 & Supp. IV 1998).

83. *Id.* § 300ff(47). The Act states:

The Secretary may not make a grant under section 300ff-41 of this Title 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) of this section, who—

- (1) makes a donation of blood, semen, or breast milk, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another to HIV 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.

Id.

84. *See* Heth, *supra* note 38, at 845; Kenney, *supra* note 38, at 247.

85. Heth, *supra* note 38, at 845.

86. Prosecutors most often charged attempted murder and assault. Strader, *supra* note 38, at 437.

87. AIDS LAW TODAY, *supra* note 55, at 245.

commonly prosecute under the traditional crimes of murder, attempted murder and aggravated assault.⁸⁸

Murder

Compared to other traditional criminal laws, murder is considered “the most serious criminal offense with which a person can be charged for transmitting HIV.”⁸⁹ Since criminal laws in the United States are primarily enacted and enforced on the state and local level, the definitions of murder vary according to jurisdictions.⁹⁰ Most states, however, have revised their criminal codes in recent years, guided by the Model Penal Code (“the Code”).⁹¹ To obtain a murder conviction in most jurisdictions, the state must prove four elements: (1) some conduct, whether an affirmative act or an omission to act where there is a duty to act, on the part of the defendant; (2) an accompanying “malicious” mental state; (3) defendant’s conduct “legally caused” the death of the victim; and (4) in some jurisdictions, the death must occur within a year and a day after the defendant’s conduct.⁹²

The state must first demonstrate that the defendant acted or failed to act in some way. In HIV-transmission cases, the infected defendant may have engaged in unprotected sexual intercourse, donated blood to the American Red Cross, shared a contaminated hypodermic needle or bit a prison guard. To satisfy the first element, the state need only prove that the defendant participated in such conduct. The state then has to demonstrate that the defendant had the requisite mental state. As distinguished from manslaughter, murder requires a higher culpable state of mind.⁹³ According to the Code, murder is the killing of another human being either purposely or knowingly or recklessly under circumstances manifesting “extreme indifference to the value of human life.”⁹⁴

88. *Id.*

89. Tierney, *supra* note 38, at 491.

90. AIDS AND THE LAW, *supra* note 40, at 266.

91. BLUMBERG, *supra* note 51, at 112.

92. WAYNE R. LAFAVE, CRIMINAL LAW 660 (3rd ed. 2000).

93. BLUMBERG, *supra* note 51, at 113.

94. MODEL PENAL CODE § 210.2 (Official Draft 1962) defines murder as:

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or
 (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or by threat of force, arson, burglary, kidnapping or felonious escape.

(2) Murder is a felony of the first degree [but a person convicted of murder may be

Each type of culpability has been defined accordingly. The Code defines “purposely” as wanting the prohibited result.⁹⁵ To prove purpose state of mind, the state must demonstrate that the defendant was aware of his HIV-positive status, that he believed that the virus could be transmitted by the activity and that he sought the death of the person by engaging in this behavior.⁹⁶ The term “knowing” is defined as being consciously aware that the result will occur.⁹⁷ To prove a knowing state of mind, the state must prove that the defendant was aware that he carried HIV and that he was practically certain that his activity would transmit the virus to another person.⁹⁸ The term “reckless” is defined as being consciously aware of a substantial and unjustifiable risk that the result will occur.⁹⁹ To prove a reckless state of mind, the state must establish that the defendant acted in conscious disregard of a substantial and unjustifiable risk that he was HIV infected, that he could transmit the virus and that transmission would cause the death of another person.¹⁰⁰ In addition, a reckless state of mind must be committed under conditions exhibiting extreme indifference to human life.¹⁰¹

The state must conclusively show that the defendant knew of his HIV status and that he purposely, knowingly or recklessly spread the virus to another person. In reality, however, an “AIDS transmitter is rarely certain that an act transmits AIDS, as knowing murder requires.”¹⁰² The intent element

sentenced to death, as provided in Section 210.6.].

95. *Id.* § 2.02(2)(a) defines purposely as:

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

96. See BLUMBERG, *supra* note 51, at 113; David, *supra* note 38, at 262.

97. MODEL PENAL CODE § 2.02(2)(b) defines knowingly as:

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

98. See BLUMBERG, *supra* note 51, at 113; David, *supra* note 38, at 263.

99. MODEL PENAL CODE § 2.02(2)(c) defines recklessly as:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material offense exists or will result from his conduct. The risk must be of a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

100. See BLUMBERG, *supra* note 51, at 113; David, *supra* note 38, at 263.

101. See MODEL PENAL CODE § 210.2(1)(b); David, *supra* note 38, at 263.

102. Harris, *supra* note 38, at 244.

may not be present in many prosecutions, as the goal of the defendant may not be the spread of the virus, but simply to have sexual relations. Even where the defendant did plan or hope to spread the virus, it is almost impossible to prove intent absent an admission of the defendant.¹⁰³

Even if the requisite state of mind element is satisfied, the state then has the burden of demonstrating the element of legal causation.¹⁰⁴ The state must show that the victim acquired the infection because of the acts or omissions of the defendant.¹⁰⁵ Establishing causation may be the most difficult challenge in proving charges for HIV-transmission. If the victim had many sexual partners, causation may be difficult to prove because it would be possible that more than one of these partners had HIV. If this were indeed the case, it would be virtually impossible to determine which sexual partner transmitted the disease to the victim.¹⁰⁶ In addition, the long period of time between exposure and detection exacerbates the problem. It could take years for a victim to demonstrate symptoms of HIV. Unless the victim undergoes an HIV test before this time, she will not know that she was exposed to the virus until long after the criminal act has taken place.

Finally, murder statutes require the death of the victim.¹⁰⁷ Since death may not occur for a considerable amount of time after transmission, the defendant may often die before the victim.¹⁰⁸ Under these circumstances, a charge of murder is moot. In addition, valuable evidence may be destroyed or lost between the time of transmission of the virus and the death of the victim. Another impediment involves the "year and a day" rule for homicide.¹⁰⁹ This "rule provides that death cannot be attributed to the defendant's wrongful conduct unless it occurs within a year and a day of the conduct."¹¹⁰ Since the victim's death may not come about for years after the transmission, the state would be prohibited from pursuing this cause of action under those circumstances.

In light of the many problems associated with proving murder, such as state of mind, causation, and the death of the victim, most murder prosecutions of persons accused of engaging in HIV-transmitting behavior will likely be ineffective. Nonetheless, prosecutors still have the discretion of using the murder statute to punish individuals who spread HIV. They simply have the challenging burden of satisfying all the necessary elements.

103. Decker, *supra* note 38, at 341.

104. Tierney, *supra* note 38, at 493.

105. *Id.*

106. Decker, *supra* note 38, at 340.

107. Tierney, *supra* note 38, at 492.

108. *Id.*

109. LAFAVE, *supra* note 92, at 660; David, *supra* note 38, at 263.

110. David, *supra* note 38, at 263.

Attempted Murder

Some prosecutors have charged those who intentionally transmit the virus with the crime of attempted murder.¹¹¹ In some ways, attempted murder is much easier to prove than murder. Unlike in murder cases, in an attempted murder trial the state is not required to meet the difficult burden of proving causation.¹¹² Attempted murder also does not require the state to prove the death of the victim, the cause of death or the actual transmission of the virus.¹¹³ The charge would apply not only when the victim has not yet died of AIDS, but even when the victim does not become infected with the disease at all.

Under the Code, the prosecution must prove that the defendant acted with the purpose of causing the death or with the belief that death would result.¹¹⁴ For the defendant to be found guilty, the state must show that he had either the goal of infecting another individual or the knowledge that the infection would in fact occur. As long as the defendant infected with AIDS “engaged in conduct that could transmit the virus and did so with the requisite state of mind,” he could be found guilty of attempted murder.¹¹⁵

The primary challenge with this offense, however, is proving the element of intent.¹¹⁶ The prosecution, attempting to demonstrate attempted murder, must establish that the defendant acted with the intent or purpose to cause the death of the victim.¹¹⁷ This is again a difficult task to accomplish. The intent to kill must be “more than a mere tenuous, theoretical, or speculative chance of transmitting the disease.”¹¹⁸ It is unlikely that the defendant will admit his intention to kill by infecting people with HIV.¹¹⁹ Many of the cases that have been successfully prosecuted under the attempted murder statute, however,

111. *Id.* at 264.

112. Tierney, *supra* note 38, at 496.

113. *Id.*

114. MODEL PENAL CODE § 5.01(1) defines attempt as:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

- (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
- (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
- (c) purposely does not omit to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

115. BLUMBERG, *supra* note 51, at 116.

116. *Id.*

117. *Id.*

118. Wampler, *supra* note 46, at 31 (quoting *State v. Haines*, 545 N.E.2d 834 (Ind. Ct. App. 1989)).

119. Decker, *supra* note 38, at 347.

have involved defendants who made their intentions known to someone before committing their crime.¹²⁰ Prosecutors often have to point to extrinsic evidence of the defendant's intent to kill. Sometimes this evidence simply does not exist.

Assault

Assault can also be used for prosecuting HIV-transmission offenses.¹²¹ Assault may seem a more appropriate tool for reaching AIDS transmission than murder or attempted murder.¹²² In assault cases, for instance, proof of death of the victim and actual transmission of the virus may not be required.¹²³ Assault may therefore be a more successful alternative for prosecuting HIV transmission.¹²⁴ On the other hand, as in murder cases, the state must prove in assault prosecutions the elements of intent and causation.¹²⁵

A person commits simple assault under the Code if he "attempts to cause or purposely, knowingly or recklessly causes bodily injury to another" or "negligently causes bodily injury to another with a deadly weapon."¹²⁶ A person commits aggravated assault if he "attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life" or "attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon."¹²⁷ The Code states that simple assault is a felony of the third-degree while an aggravated assault is a felony of the second degree.¹²⁸ While most state criminal codes have varying degrees of assault, prosecutors often apply the most serious one for cases involving a defendant

120. *Id.*

121. BLUMBERG, *supra* note 51, at 117.

122. David, *supra* note 38, at 266.

123. *Id.*

124. *Id.*

125. *Id.*

126. MODEL PENAL CODE § 211.1(1) defines simple assault as:

A person is guilty of assault if he:

- (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
- (b) negligently causes bodily injury to another with a deadly weapon; or
- (c) attempts by physical menace to put another in fear of imminent serious bodily injury.

127. *Id.* § 211.1(2) defines aggravated assault as:

A person commits aggravated assault if he

- (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
- (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

128. *Id.* § 211.1.

who knowingly transmits HIV.¹²⁹ The prosecution in the *Stewart* case, for example, charged the defendant with assault in the first degree.¹³⁰

The Code also provides for consent as a defense to assault.¹³¹ Consent of the victim is relevant in assault cases involving HIV transmission. Under the common law, consent is a complete defense because it vitiates the element of offensiveness.¹³² In the Code, on the other hand, consent is a defense in some cases, but not in cases of serious bodily harm.¹³³ In the context of HIV transmission, only informed consent will suffice.¹³⁴ Consent to sexual activity does not constitute consent to contract AIDS. For consent to preclude a prosecution under aggravated assault, the victim must agree to sexual intercourse with the defendant knowing that he has AIDS or tested positive for HIV exposure.¹³⁵

B. AIDS Specific Statutes

In addition to the CARE Act's financial incentives,¹³⁶ the challenges of using traditional criminal laws have encouraged state legislators to enact HIV-specific statutes. These statutes are consistent with the Report of the Presidential Commission, which recognized the problems in applying traditional criminal laws to HIV transmission.¹³⁷ According to the report, "[j]ust as other individuals in society are held responsible for their actions outside the criminal law's established parameters of acceptable behavior, HIV-infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions."¹³⁸ An HIV-specific statute can provide clear notice of socially unacceptable standards of behavior and facilitate tailoring punishment to the specific crime of HIV-transmitting behavior.¹³⁹

The majority of states have enacted statutes criminalizing activity that exposes others to HIV or other communicable diseases.¹⁴⁰ These statutes were

129. AIDS AND THE LAW, *supra* note 40, at 273 (noting that "some states have aggravated sexual assault statutes which apply to sexual assaults in which the accused causes or attempts to cause serious bodily injury or death").

130. *See supra* note 30 and accompanying text.

131. Tierney, *supra* note 38, at 498.

132. Harris, *supra* note 38, at 247-48.

133. Tierney, *supra* note 38, at 498.

134. *Id.*

135. *Id.*

136. 42 U.S.C. § 300ff(47) (1994 & Supp. III 1997).

137. THE REPORT OF THE PRESIDENTIAL COMMISSION, *supra* note 70, at 130.

138. *Id.*

139. *Id.*

140. States that have enacted HIV-specific legislation include the following: Arkansas: Exposing another person to HIV is a class A felony. ARK. CODE ANN. § 5-14-123 (Michie 1997).

California: Donating blood, tissue or body organ after knowledge of HIV infection is a felony. CAL. HEALTH & SAFETY CODE § 1621.5 (West 1990 & Supp. 2000).

Colorado: Authorizing the department of health to restrict dangerous conduct by an HIV-positive person. COLO. REV. STAT. § 25-4-1406 (2000).

Delaware: Authorizing the department of health to restrict dangerous conduct by an HIV-positive person. DEL. CODE ANN. tit. 16, § 704 (1995).

Florida: Engaging in sexual intercourse after knowledge of HIV infection without informed consent is illegal. FLA. STAT. ANN. § 384.24(2) (West 1998). Criminal transmission of HIV is a felony of the third degree. *Id.* § 775.0877(3) (2000). Prostituting or offering to commit prostitution after knowledge of HIV infection is a felony of the third degree. *Id.* § 796.08(5) (2000).

Georgia: Prostituting, needle sharing, engaging in oral or anal sex or donating blood/blood products after knowledge of HIV infection and without disclosure is a felony and punishable by imprisonment of not more than ten years. GA. CODE ANN. § 16-5-60(c) (1999).

Idaho: Exposing another person to AIDS or HIV by transferring or attempting to transfer body fluid, blood or tissue is a felony and punishable by imprisonment of not more than fifteen years. IDAHO CODE § 39-608 (Michie 1998).

Illinois: Engaging in intimate contact, donating blood or transferring needles after knowledge of HIV infection and without disclosure and consent is a class 2 felony. 720 ILL. COMP. STAT. ANN. 5/12-16.2 (West 1993).

Indiana: Intentionally donating, selling or transferring blood or semen that contains HIV is a class C felony. It is a class A felony if the act results in the transmission of HIV to any other person than the defendant. IND. CODE ANN. § 35-42-1-7 (Michie 1998).

Kansas: Exposing another person to a life-threatening communicable disease is a level 7 felony. KAN. STAT. ANN. § 21-3435 (Supp. 1999).

Kentucky: Donating organs, skin or other tissue after knowledge of HIV infection is a class D felony. KY. REV. STAT. ANN. § 214.452(3)(d) (Michie 1998).

Louisiana: Intentionally exposing another person to HIV through sexual contact or any means without informed consent is a felony and punishable of imprisonment of no more than ten years. LA. REV. STAT. ANN. § 14:43.5 (West 1997).

Maryland: Exposing another person to an infectious disease is a misdemeanor. MD. CODE ANN., HEALTH-GEN. § 18-601 (2000).

Michigan: Transferring or attempting to transfer HIV sexually to another person after knowledge of HIV infection is a felony. MICH. STAT. ANN. § 14.15(5210) (Michie 1995).

Montana: Knowingly exposing another person to a sexually transmitted disease, including AIDS, is a misdemeanor. MONT. CODE ANN. §§ 50-18-112, 50-18-113 (1999).

Nevada: Intentionally or knowingly engaging in conduct intended to or likely to transmit HIV after knowledge of HIV infection is a class B felony. NEV. REV. STAT. 201.205 (1997).

New Jersey: Exposing another person to sexual penetration after knowledge of HIV infection without informed consent is a crime of the third degree. N.J. STAT. ANN. § 2C:34-5(b) (West 1997).

North Dakota: Willfully transferring bodily fluid after knowledge of HIV infection is a class A felony. N.D. CENT. CODE § 12.1-20-17 (1997).

Ohio: Failing to take reasonable measures to prevent others' exposure to a contagious disease is illegal. OHIO REV. CODE ANN. § 3701.81 (West 1998). Selling or donating HIV-infected blood is a felony of the fourth degree. *Id.* § 2927.13.

Oklahoma: Knowingly engaging in conduct reasonably likely to transfer HIV, without informed consent, is a felony and punishable by imprisonment of not more than five years. OKLA. STAT. ANN. tit. 21, § 1192.1 (West Supp. 2000).

drafted to circumvent the inadequacies of the traditional criminal laws. While the proposed and enacted HIV-specific statutes vary from state to state, all of these laws make it an offense for an HIV-infected person to knowingly engage in behavior likely to transmit the virus. In their broadest form, these statutes criminalize any knowingly conducted activity that poses a risk of HIV transmission.¹⁴¹ HIV-specific statutes are preferable in that they make prosecution easier and more successful, they offer better protection to society from individuals who transmit HIV and they are fairer to the criminal defendant.¹⁴² These statutes provide clearer warnings and notice regarding what constitutes a crime.¹⁴³

Many problems associated with the use of the general criminal laws are effectively avoided. A properly drafted statute avoids the problems of proving the state of mind of intent and the element of causation, which are required by most traditional criminal statutes.¹⁴⁴ Most HIV-specific statutes do not require the element of intent. The state does not need to demonstrate, for example, that the infected person intended to physically harm his victim.¹⁴⁵ This significantly benefits the prosecution, for it is unlikely that the HIV-infected individual engaged in some activity with the sole intent to do harm.¹⁴⁶ This element is often difficult to prove at trial. In addition, there is no need to prove that the victim contracted the virus from the defendant.¹⁴⁷ Two reasons exist for not requiring the causation element.¹⁴⁸ Since the chances of contracting the virus from a single act of unprotected sex with an HIV-infected person are small, it is unlikely that the defendant will actually transmit the virus. Moreover, if the victim does contract the virus, proving that it was contracted

South Carolina: Knowingly exposing another to HIV through sexual activity, blood donation or needle exchange without informed consent is a felony and punishable by imprisonment of not more than ten years. S.C. CODE ANN. § 44-29-145 (Law. Co-op. 1999).

Tennessee: Engaging in intimate contact, transferring blood/blood products or exchanging or transferring needles after knowledge of HIV infection is a class C felony. TENN. CODE ANN. § 39-13-109 (1997).

Utah: Willfully introducing a communicable disease into the community is a class A misdemeanor. UTAH CODE ANN. § 26-6-5 (1998).

Virginia: Donating or selling blood, organs, body fluids or tissue after knowledge of HIV infection is a class 6 felony. VA. CODE ANN. § 32.1-289.2 (Michie 1997).

West Virginia: Exposing another person to an infectious venereal disease is illegal. W. VA. CODE ANN. § 16-4-20 (Michie 1998).

141. Kenney, *supra* note 38, at 268.

142. Markus, *supra* note 38, at 871.

143. *Id.* at 872.

144. *Id.* at 871.

145. *Id.*

146. *Id.* at 872.

147. Markus, *supra* note 38, at 871.

148. *Id.*

from the defendant is problematic. To avoid these problems, most HIV-specific statutes do not require the state to prove causation.¹⁴⁹

There are two common kinds of HIV-specific statutes.¹⁵⁰ The first type imposes penalties on persons who donate blood, body fluids or body parts knowing that they are HIV-infected or that they tested positive for HIV antibodies.¹⁵¹ The second type imposes penalties on persons who engage in sexual intercourse or penetration of another person knowing that they are HIV-infected.¹⁵² Some states, like Missouri, incorporate the language of both kinds into one statute.¹⁵³ Regardless, these statutes are designed to set forth prohibited behavior and attempt to make it clear to offenders that risky conduct will not be tolerated.

In order for a state to prosecute an alleged offender with an HIV-specific statute, the person must have engaged in a sexual or other prohibited activity articulated by the law.¹⁵⁴ The state must also demonstrate that the defendant knew of his HIV-positive status at the time of the alleged misconduct.¹⁵⁵ There are two potential objections to this requirement. First, it may encourage individuals to forego testing in order to remain ignorant of their HIV status, thus never achieving the “knowing state of mind” requirement.¹⁵⁶ Second, it may be difficult to prove that the defendant had knowledge of his HIV status because he may have been tested anonymously or not tested at all.¹⁵⁷ These criticisms have been applied to Missouri’s current law and will be discussed more in this Comment.

IV. MISSOURI’S LEGAL APPROACH

The Missouri General Assembly enacted a law in 1988 that made it a crime for a person to create deliberately a “grave and unjustifiable risk” of infecting another with HIV through sexual or other contact.¹⁵⁸ This statute, however,

149. *Id.*

150. *Id.* at 863.

151. *Id.*

152. Markus, *supra* note 38, at 863.

153. *See* MO. REV. STAT. § 191.677.

154. Markus, *supra* note 38, at 863.

155. *Id.* at 863, 873.

156. *Id.* at 873.

157. *Id.*

158. MO. REV. STAT. § 191.677 (1996) states:

1. It shall be unlawful for any individual knowingly infected with HIV to:
 - (1) Be or attempt to be a blood, organ, sperm or tissue donor except as deemed necessary for medical research; or
 - (2) Deliberately create a grave and unjustifiable risk of infecting another with HIV through sexual or other contact when an individual knows that he is creating that risk.
2. Violation of the provisions of subsection 1 of this section is a class D felony.
3. The department of health may file a complaint with the prosecuting attorney of a court

proved ineffective at curbing the transmission of the virus. It is estimated that only sixteen people were ever charged in Missouri circuit courts under this law over an eight-year period.¹⁵⁹ One explanation for so few prosecutions was that the statute demanded that prosecutors satisfy the element of criminal intent.¹⁶⁰ Moreover, the statute authorized only the Missouri Department of Health (“DOH”) to file complaints of violations of this law to the county prosecutor.

In response to some high-profile HIV-transmission cases in the St. Louis metropolitan area, the legislature amended the existing law in 1997 to make it easier for prosecutors to bring offenders to justice.¹⁶¹ The new statute was designed to better assist the health and criminal justice communities in their fight to remove from the streets persons who knowingly transmit HIV. Like the previous statute, the new law applies only to individuals knowingly infected with HIV, specifically classifies the activities that are considered

of competent jurisdiction alleging that an individual has violated a provision of subsection 1 of this section. The department of health shall assist the prosecutor in preparing such case.

159. Kim Bell, *Law Aims to Curb AIDS Crimes: People Who Infect Others Face Easier Path to Prison*, ST. LOUIS POST-DISPATCH, July 2, 1997, at A1.

160. *Id.*

161. MO. REV. STAT. § 191.677 (1996 & Supp. 2001). This amended statute states:

1. It shall be unlawful for any individual knowingly infected with HIV to:
 - (1) Be or attempt to be a blood, blood products, organ, sperm or tissue donor except as deemed necessary for medical research; or
 - (2) Act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV, through contact with blood, semen or vaginal fluid in the course of oral, anal or vaginal sexual intercourse, or by the sharing of needles. Evidence that a person has acted recklessly in creating a risk of infecting another individual with HIV shall include, but is not limited to, the following:
 - (a) The HIV infected person knew of such infection before engaging in sexual activity with another person, and such other person is unaware of the HIV infected person’s condition or does not consent to contact with blood, semen or vaginal fluid in the course of sexual activity, or by the sharing of needles;
 - (b) The HIV infected person has subsequently been infected with and tested positive to primary and secondary syphilis, or gonorrhea, or chlamydia; or
 - (c) Another person provides corroborated evidence of sexual contact with the HIV infected person after a diagnosis of an HIV status.
2. Violation of the provisions of subsection 1 of this section is a class D felony.
3. Violation of the provisions of subsection 1 of this section with a person under the age of seventeen is a class C felony if the actor is over the age of twenty-one.
4. The department of health or local law enforcement agency, victim or others may file a complaint with the prosecuting attorney of a court of competent jurisdiction alleging that an individual has violated a provision of subsection 1 of this section. The department of health shall assist the prosecutor in preparing such case.

unlawful, provides punishments for statutory violations and outlines who may file a complaint with the prosecutor.¹⁶²

The amended HIV-exposure law, however, can be distinguished from the previous law in several respects.¹⁶³ First, the required mental element of culpability for the crime has been lessened from intentional or knowing to reckless.¹⁶⁴ Prosecutors are no longer required to prove that a person “deliberately and knowingly created a risk of HIV infection through sexual or other contact. Instead, an individual who knows that he is HIV positive need only to have acted recklessly in creating a risk of HIV infection.”¹⁶⁵ This revision abates the burden that the state must ordinarily prove. Second, the new law specifies acts that are considered evidence of reckless acts that risk transmitting HIV.¹⁶⁶ The most notable of these specified acts is proof of infection of one of three sexually transmitted diseases after testing HIV positive.¹⁶⁷ This is clear evidence of reckless acts risking HIV infection and alerts health officials.

Third, a person’s informed consent to be exposed to HIV now appears to be an affirmative defense.¹⁶⁸ The old law does not appear to provide an affirmative defense of informed consent for the crime. This change affords defendants who informed their partners the opportunity to defend themselves against accusations. Fourth, “the new law substantially expands the group that can file complaints of violations of the law with the [prosecutor]. While the previous law required [only the DOH to] file such a complaint, the new law permits a victim, a local law enforcement agency or others to do so.”¹⁶⁹ Finally, the new law increases the punishment for a convicted offender over the age of twenty-one, if his victim is under the age of seventeen.¹⁷⁰ Under

162. *See generally id.*

163. For a comparison of the original and amended statute, see Amy E. Marchant, The “Boss Man” McGee Story and Missouri’s New HIV Exposure Law (1998) (unpublished law review article, Washington University School of Law) (on file with author).

164. MO. REV. STAT. § 191.677.1(2).

165. Marchant, *supra* note 163, at 3 (emphasis omitted).

166. MO. REV. STAT. § 191.677.1(2).

167. *Id.* § 191.677.1(2)(b) (noting “[t]he HIV infected person has subsequently been infected with and tested positive to primary and secondary syphilis, or gonorrhea, or chlamydia”).

168. *Id.* (noting that “[i]t shall be unlawful . . . to [a]ct in a reckless manner . . . without the knowledge and consent of that person to be exposed to HIV”). *But see Survey: Many with HIV Do Not Tell Sex Partners*, ST. LOUIS POST-DISPATCH, Feb. 9, 1998, at A5. *See also* Marchant, *supra* note 163, at 3.

169. Marchant, *supra* note 163, at 3; MO. REV. STAT. § 191.677.4 (noting that “[t]he department of health or local law enforcement agency, victim or others may file a complaint with the prosecuting attorney of a court of competent jurisdiction alleging that an individual has violated a provision of subsection 1 of this section”).

170. *Id.* § 191.677.3.

these circumstances, this violation enhances the punishment from a class D to a class C felony.¹⁷¹

The change in the law was reportedly prompted by a case in St. Louis regarding the activities of Darnell “Boss Man” McGee.¹⁷² Health officials had discovered that McGee, who was HIV positive, had sexual intercourse with more than 100 women and girls, some as young as twelve years of age.¹⁷³ It is alleged that he infected at least thirty people with the virus, and at least one of his victims delivered an HIV-infected baby.¹⁷⁴ Missouri and Illinois health officials claimed that McGee preyed mostly on poor teenage girls from across the metropolitan area, especially from St. Louis and East St. Louis.¹⁷⁵ But before he could be brought to trial on charges of infecting these girls with HIV, McGee was murdered in alleged retaliation.¹⁷⁶

Health officials report that dozens of sexual predators like McGee lurk in the St. Louis area and elsewhere in the country, recklessly willing to expose their sexual partners to the virus that causes AIDS.¹⁷⁷ This case, and another one bearing similar characteristics,¹⁷⁸ apparently acted as a catalyst in causing the statute to be amended. Although the statute was introduced before the McGee story was exposed, the passage of new HIV-exposure law was attributed to the media exposure concerning the case. State officials and legislators indicated that the new amendments were a legislative response to McGee’s actions.¹⁷⁹

Advocates of the new law argued that Missouri’s old law relied too heavily on the testimony of victims and was virtually unenforceable for nine years.¹⁸⁰ According to the state’s Bureau of HIV Prevention, by the time the case would be up for prosecution, the victim would often be dead or too sick to testify as a result of AIDS.¹⁸¹ In addition, many victims would refuse to testify because

171. *Id.*

172. Bell, *supra* note 159, at A1. Senator J.B. “Jet” Banks of St. Louis sponsored the measure to crack down on people like McGee. *Id.*

173. *Id.* See also Kristina Sauerwein, *A Sweet-Talking Guy Who Left a Trail of Tears and AIDS*, ST. LOUIS POST-DISPATCH, Dec. 21, 1997, at B1.

174. Kristina Sauerwein & Bill Bryan, *Boss Man’s Sex Partners Now Grow to Over 100*, ST. LOUIS POST-DISPATCH, Apr. 24, 1997, at 1A.

175. Kristina Sauerwein, *Some HIV Carriers Don’t Care Who They Have Sex with*, ST. LOUIS POST-DISPATCH, Nov. 23, 1997, at B1 [hereinafter *Some HIV Carriers Don’t Care*].

176. See Tim Bryan, *St. Louisan Could Get 30 Years for Killing Man Who Spread HIV*, ST. LOUIS POST-DISPATCH, Feb. 3, 1999. It was later determined that McGee was killed in a robbery unrelated to his alleged HIV crimes.

177. *Some HIV Carriers Don’t Care*, *supra* note 175, at B1.

178. See William C. Lhotka, *HIV Carrier Infected 3 Women, Police Say*, ST. LOUIS POST-DISPATCH, Apr. 9, 1995, at 3D.

179. Bell, *supra* note 159, at A1.

180. *Id.*

181. *Id.*

they were afraid of the defendant or possible retribution.¹⁸² For example, two of McGee's victims wanted to testify at first, but then changed their minds out of fear of going public.¹⁸³ To resolve this problem, legislators drafted the new law so that a victim's testimony would not be so crucial.¹⁸⁴ If a defendant knew that he had HIV, and subsequently tested positive for syphilis or gonorrhea, then that is enough to show that he is recklessly having sex and placing others at risk.¹⁸⁵ A defendant's reckless actions are much easier to prove than the old standard of deliberateness. Health officials and others, however, stress that the victim is still a necessary part of the state's case because it would be virtually impossible to prove that the victim did not consent without her testimony.¹⁸⁶

Enforcement

The DOH has the primary responsibility of testing individuals for HIV, educating these people about the current criminal law against transmitting the virus and reporting violations to the respective county prosecutor. Since the legislature passed the original HIV-transmission statute, the state has developed an innovative method of counseling infected persons and enforcing the law. In the early 1990s, the DOH enacted a program designed to handle complaints lodged against individuals with HIV who may have engaged in reckless sexual behavior.¹⁸⁷ This program, entitled Level II Intervention, provides the needed step between routine post-test consultation, termed Level I Intervention, and prosecution under Missouri law, termed Level III Intervention.¹⁸⁸ According to health officials, this program represents an effort to balance the responsibility of the state to protect the public health with the need to protect individual liberties.¹⁸⁹

The Level II Intervention program identifies probable violators through disease surveillance, receives and investigates complaints against individuals and follows up with potential violators.¹⁹⁰ To carry out these responsibilities, the state and local health departments employ health specialists who perform a variety of functions. They assess the potential violator's understanding of HIV infection, they counsel on prevention methods and they refer people to case management, peer support groups, substance abuse treatment, and medical and

182. *Id.*

183. *Id.*

184. Bell, *supra* note 159, at A1.

185. *Id.*

186. *Id.*

187. Todd F. Baumgartner & William Huber, *Level II Intervention for Persons Infected with Human Immunodeficiency Virus (HIV)*, MO. EPIDEMIOLOGIST, Mar.-Apr. 1991, at 1.

188. *Id.*

189. *Id.*

190. *Id.*

behavior modification therapy.¹⁹¹ Moreover, these health specialists provide in-depth discussions of the HIV-transmission statute and explain the ramifications of violating it.¹⁹²

The DOH will initiate a Level II Intervention on confirmed HIV-infected persons who are believed to be continuing to practice behavior consistent with the known means of transmission of HIV.¹⁹³ This Level II Intervention can be initiated several different ways. For example, a person who feels that an infected sexual partner has exposed her to HIV may file a personal complaint directly with the DOH.¹⁹⁴ Complaints will be accepted only from the exposed person—no third party complaint will be investigated.¹⁹⁵ The DOH will accept a personal complaint only if the following information is obtained: name and locating information of the person filing the complaint; name and locating information of the person the complaint is being filed against; and an actual complaint with specific details of the incident. Complaints may be made by phone if the above information is ascertained.¹⁹⁶

A private health care provider can also initiate a Level II Intervention. A physician, nurse or social worker who learns of persistent high-risk behavior by a client may report this directly to the DOH.¹⁹⁷ Other actions that may commence a Level II Intervention include: when a confirmed HIV-positive person returns to an STD clinic for treatment for a sexually transmitted disease; when a person attempts to donate blood or other tissue knowing that he is HIV infected; or when a health care coordinator, or case manager, identifies persistent high-risk behavior.¹⁹⁸

Level II Interventions are conducted exclusively by trained health specialists, who discuss many different issues with the HIV-positive individual. These specialists, for instance, explain the paths of HIV transmission and assess the client's knowledge of these modes.¹⁹⁹ They suggest proper use of condoms and appropriate medical care. These specialists also emphasize the need to notify future sex or needle-sharing partners of HIV status, the need to abstain from donating or selling blood, plasma, body organs, tissue or sperm, the need to avoid pregnancy and the need to enroll in a family planning program.²⁰⁰

191. *Id.*

192. Baumgartner & Huber, *supra* note 187, at 1.

193. *Id.* at 1-2.

194. *Id.* at 2.

195. *Id.*

196. *Id.*

197. Baumgartner & Huber, *supra* note 187, at 2.

198. *Id.*

199. *Id.*

200. *Id.*

They also take considerable time to discuss the consequences of failing to modify behavior, thereby exposing another person and creating the potential for prosecution.²⁰¹ To better explain the law, the HIV-positive client is given a handout that summarizes the statute referring to non-compliant behavior.²⁰² This handout outlines the implications and penalties for failure to comply with the law. Afterwards, the client is asked to sign a verification form acknowledging his HIV status.²⁰³ In this document, the client admits all of the following: being advised, orally and in writing, of the necessary precautions to prevent the transmission of the virus to others; receiving a copy of the criminal transmission statute; and understanding the consequences of violating the law.²⁰⁴

According to a health official, there is no maximum number of times that a client can be subjected to a Level II Intervention.²⁰⁵ The ultimate goal of this step is behavior modification.²⁰⁶ If it appears that the client is failing to change his behavior, the case is sent to a review board to consider the need for criminal prosecution.²⁰⁷ This is a Level III Intervention. The DOH will document all evidence of a client's failure to modify his behavior as outlined in the Level II Intervention process. This evidence is examined on a case-by-case basis by the DOH epidemiological and legal staff, and it is shared with representatives of the local health department, each of whom will make recommendations regarding the filing of the complaint and working with the prosecutor.²⁰⁸

The complaint may be filed jointly by the DOH and the local health jurisdiction.²⁰⁹ Alternatively, with the change in the law, a law enforcement agency, victim or other person or group may file a complaint directly with the prosecutor. In this situation, per Missouri statute, the DOH is now required to assist the prosecutor in developing and preparing the case.²¹⁰ The DOH has to turn over all documented evidence of the alleged crime to assist the prosecution's case.

201. *Id.*

202. Baumgartner & Huber, *supra* note 187, at 2.

203. Missouri Dept. of Health, Second Level Intervention Program, Intervention Verification Form (on file with author).

204. *Id.*

205. Interview with Debbie Schindler, St. Louis City Health Department, in St. Louis, Mo. (Dec. 7, 1999).

206. *Id.*

207. *Id.*

208. Baumgartner & Huber, *supra* note 187, at 2.

209. Interview with Debbie Schindler, *supra* note 205.

210. MO. REV. STAT. § 191.677.4 (noting that “[t]he department of health shall assist the prosecutor in preparing such case”).

V. CRITICISMS OF MISSOURI'S STATUTE

While the revised Missouri statute makes the law more enforceable from a criminal justice perspective, it still contains some controversial aspects. Some of these criticisms are, for example, that the law dissuades individuals from getting tested for HIV, in direct contradiction to public policy, and that it disproportionately affects homosexual men and other minority groups. Other criticisms include: the law is facially overbroad and vague in violation of the First Amendment; its statute of limitation is not long enough to ascertain the requisite information to establish a probable cause; its statutory range of punishment is too lenient for the crime; and its disclosure requirement infringes upon a person's right to privacy.

A. *The Application of the Law*

Several criticisms of Missouri's HIV-specific statute involve its application to people accused of risky behavior. First, the statute requires a person to know of his HIV-positive status before the state can commence criminal charges against him.²¹¹ This prerequisite may encourage people to forego testing in order to remain ignorant of their HIV status.²¹² In essence, this avoids the "knowing state of mind" requirement. Since this is a required element of the offense, individuals could refuse to get tested for HIV simply to prevent being prosecuted. And since the state wants its citizens to get tested for HIV, this is at direct odds with public policy. This effect, however, may be reduced by continued efforts by the DOH to encourage testing by infected persons so they may have early access to available drug therapies and treatment.²¹³ HIV-positive individuals will not have available medical treatment if they refuse to get tested and remain unaware of their viral status.²¹⁴ In addition, there is no conclusive proof that fewer people are getting tested in Missouri. In St. Louis, for example, the percentage of persons eligible for HIV testing who actually get tested has remained relatively consistent.²¹⁵

Moreover, it may be difficult to prove that the defendant had knowledge of his HIV status because he may have been tested anonymously or not tested at all.²¹⁶ The prosecutor may have a difficult time discovering sufficient evidence to present to a jury. This criticism may be countered by the activities of the DOH and the Level II Intervention program. This program counsels known HIV-infected persons and informs them of the ramifications of their

211. MO. REV. STAT. § 191.677.1.

212. Markus, *supra* note 38, at 873.

213. Decker, *supra* note 38, at 359. *See also* Closen, *supra* note 38, at 48-49.

214. Markus, *supra* note 38, at 873.

215. *See, e.g.*, the statistics from the City of St. Louis reported over the last four years in the MISSOURI DEPARTMENT OF HEALTH, HIV-PARTNER NOTIFICATION REPORTS.

216. Heth, *supra* note 38, at 862.

actions. It also stresses behavior modification. The DOH records the names of HIV-infected persons and solicits the names of their sexual partners. More importantly, if a complaint is made by a victim, the DOH has the ability to cross-reference its lists and narrow down the suspected offenders.²¹⁷

Finally, Missouri's HIV-specific statute could be used discriminatorily against politically disfavored groups like gay men and other minorities.²¹⁸ This is especially true since homosexual sex acts account for seventy-two percent of all HIV transmission cases in Missouri.²¹⁹ There may be a real danger of selective enforcement of this law. But the possibility of arbitrary and abusive enforcement may be curtailed by the DOH. In light of the DOH's considerable involvement in applying this law, police departments and county prosecutors have less discretionary power to selectively enforce the statute. Moreover, since the law now provides the defense of informed consent, it should not be used disproportionately against homosexuals, especially if they inform their sexual partners of their HIV-status.²²⁰

B. *First Amendment Challenges*

Another criticism of the Missouri HIV-specific statute involves its constitutional validity. The original law has been judicially challenged on First Amendment grounds for allegedly being unconstitutionally overbroad and void for vagueness.²²¹ The overbreadth doctrine serves to invalidate a statute that is so sweeping that it restricts constitutionally protected rights of speech.²²² It requires that a law be invalidated if it is fairly capable of being applied to punish people for constitutionally protected speech or conduct.²²³ The test to determine if a law is facially overbroad is whether it specifically aims "at evils within the allowable area of government control" without sweeping "within its ambit other activities that constitute an exercise of protected expressive or associational rights."²²⁴ A challenge can be made to the statute only when the protected activity is a significant part of the law's target, and there exists no satisfactory way of severing the law's constitutional applications from those that are unconstitutional.²²⁵

217. Interview with Debbie Schindler, *supra* note 205.

218. Markus, *supra* note 38, at 873-84.

219. Wampler, *supra* note 46, at 31 (discussing the percentages of HIV transmission in Missouri: drug usage constitutes nine percent, a combination of homosexual sex and drug usage another nine percent, heterosexual six percent, blood transfusion 1.5% and prenatal only .5%).

220. *See supra* note 166 and accompanying text.

221. *State v. Mahan*, 971 S.W.2d 307 (Mo. 1998) (en banc). *See also* William C. Lhotka, *Lawyer Attacks Statute on HIV*, ST. LOUIS POST-DISPATCH, Apr. 16, 1995, at 1D.

222. BLACK'S LAW DICTIONARY 1103 (6th ed. 1990).

223. *Id.*

224. *Id.*

225. *Id.*

The void for vagueness doctrine requires that a statute give fair and adequate notice of prohibited conduct to an ordinary person.²²⁶ The U.S. Supreme Court noted that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to what the State commands or forbids.”²²⁷ The law must accordingly provide definite standards to protect against arbitrary and discriminatory enforcement—it cannot be applied on an ad hoc or subjective basis.²²⁸ The test to determine if a law is void for vagueness is whether the statutory language conveys to a person of average intelligence a sufficiently unambiguous warning when measured by common understanding and practice.²²⁹ A common person must have sufficient warning of the proscribed conduct.

The Missouri Supreme Court addressed both of these arguments in companion cases.²³⁰ In these cases, the defendants were previously diagnosed as HIV-positive and received Level II Intervention counseling.²³¹ Both defendants were made aware of the criminal statute against transmitting the virus, and both acknowledged their understanding of the law and the need to inform potential sexual partners of their HIV-status.²³² Irrespective of these warnings, the defendants had sexual intercourse without first notifying their partners of their HIV status.²³³

Defendants first raised a facial overbreadth challenge to the HIV-specific statute with which they were charged. They argued that the law was unconstitutionally overbroad because it criminalizes certain conduct that they claimed was constitutionally protected.²³⁴ The court easily rejected this argument because neither defendant raised a direct First Amendment claim in

226. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1337 (13th ed. 1997).

227. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

228. *LAFAVE*, *supra* note 92, at 101-02.

229. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. 1999) (en banc).

230. *See State v. Mahan*, 971 S.W.2d 307 (Mo. 1998) (en banc).

231. *Id.* at 309-10.

232. *Id.* at 310. Kevin Wells, a public health counselor with the Kansas City Health Department, conducted the Level II Intervention with defendant Sykes. Wells testified that Sykes “remember[ed] the modes of transmission from the first interview” and “knew that he needed to notify his sex partners” that he was HIV-positive. *Id.* at 309-10. Wells also testified that he read MO. REV. STAT. § 191.677 to Sykes and that he had Sykes repeat the law back to him. *Id.* at 310. Sykes signed a form in which he stated that he was aware of what the Missouri law entailed and that he would not violate the law. *Id.* Shirley Wells, an official with the Joplin City Health Department, conducted the Level II Intervention with defendant Mahan. Wells testified that Mahan also recalled the modes and transmission of HIV and was given a copy of the law. *Id.* at 310-11.

233. *Id.* at 310-11.

234. *Mahan*, 971 S.W.2d at 311.

his appeal.²³⁵ A First Amendment facial overbreadth challenge is concerned only with the rights of free speech and expression.²³⁶ Defendants even conceded that their actions did not fall into any constitutionally protected category.²³⁷ The court concluded that the defendants failed to demonstrate how the statute prohibits or chills any activity protected by the First Amendment.²³⁸ Therefore, the court concluded that neither defendant had standing to bring a defense under the overbreadth doctrine.²³⁹

One of the defendants also challenged the law as void for vagueness.²⁴⁰ The defendant argued that the phrase “grave and unjustifiable risk” does not provide fair notice of prohibited conduct, and it does not provide standards to law enforcement officers to prevent arbitrary and discriminatory enforcement.²⁴¹ Rejecting this argument, the court held that the statute was not unconstitutionally vague as applied to the facts of the case.²⁴² The defendant was placed on notice of what acts were prohibited.²⁴³ For example, the defendant lied to his partner about being HIV-positive and engaged in unprotected anal intercourse, after a health specialist explained to him that anal sex was one of the riskiest types of sexual behavior.²⁴⁴

Moreover, he underwent a lengthy Level II Intervention session.²⁴⁵ At the conclusion of the session, he signed a verification form acknowledging that he was HIV-positive and confirming his understanding of the law.²⁴⁶ He also recognized activities that would place others at risk for exposure.²⁴⁷ In sum, the court held that the facts left no doubt that the defendant subjected his partner to a “grave and unjustified risk” of behavior.²⁴⁸ In light of these cases, it appears that Missouri’s HIV-specific statute will survive a constitutional challenge based on First Amendment grounds.

C. *Statute of Limitation and Punishment*

A particularly valid criticism of Missouri’s HIV-specific statute involves the statutory period of limitation within which a prosecutor may charge a

235. *Id.* at 312.

236. *Id.*

237. *Id.* at 311.

238. *Id.* at 312.

239. *Mahan*, 971 S.W.2d at 312.

240. *Id.* Defendant Mahan challenged the constitutionality of Missouri’s HIV-specific statute.

241. *Id.*

242. *Id.*

243. *Id.* at 312.

244. *Mahan*, 971 S.W.2d at 312.

245. *Id.* at 310.

246. *Id.* at 311.

247. *Id.*

248. *Id.* at 312.

person for transmitting the virus. A statute of limitation sets forth a maximum time period within which a cause of action may be brought against a defendant.²⁴⁹ In criminal law, a statute of limitation is considered “an act of grace, a surrendering by the sovereign of its right to prosecute.”²⁵⁰ The U.S. Supreme Court recognized that statutes of limitations provide “the primary guarantee against bringing overly stale criminal charges.”²⁵¹ After the period of time set out in a statute of limitation has expired, the state cannot bring any legal action against the person for the alleged offense, irrespective of whether any claim ever existed.²⁵²

There are several public policy reasons regarding the government’s relinquishment of its right to prosecute. One reason involves the policy of not prosecuting persons who have served as law-abiding citizens for some years.²⁵³ Another reason is the diminished public response for retribution and accountability.²⁵⁴ But the foremost explanation stresses the desirability of requiring a prosecution be based on reasonably fresh evidence to reduce the possibility of erroneous conviction.²⁵⁵ Staleness of evidence is certainly a relevant issue; it is more difficult for a person to defend himself against charges when evidence has been obscured by the passage of time.²⁵⁶ Moreover, statutes of limitations encourage law enforcement to conduct prompt investigations of alleged criminal activity.²⁵⁷

When proscribing an appropriate statute of limitation, all jurisdictions make a distinction between minor and serious criminal offenses.²⁵⁸ More serious and violent crimes normally have a lengthier limitations period because persons who commit these crimes pose a greater danger to society and are less likely to reform their behavior.²⁵⁹ In addition, there is a greater and constant need for deterring these types of offenses.²⁶⁰ According to Missouri law, the statute of limitations for commencing most felony prosecutions is three years.²⁶¹ Therefore, a prosecutor has to initiate a criminal charge against the

249. BLACK’S LAW DICTIONARY, *supra* note 222, at 927.

250. *Id.*

251. U.S. v. Marion, 404 U.S. 307, 322 (1971) (quoting U.S. v. Ewell, 383 U.S. 116, 122 (1966)).

252. BLACK’S LAW DICTIONARY, *supra* note 222, at 927.

253. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 870 (3d ed. 2000).

254. *Id.* (noting that statutes of limitations also decrease the possibility of blackmailing a person).

255. *Id.*

256. *Id.*

257. *Id.*

258. LAFAVE, *supra* note 253, at 870.

259. *Id.*

260. *Id.*

261. MO. REV. STAT. § 556.036.2(1) (1999). The statute of limitation for any misdemeanor is one year. *Id.* § 556.036.2(2).

defendant within a three-year period after the act was committed. On the other hand, a murder indictment—a class A felony—may be commenced at any time.²⁶² The law does not subject prosecutors to any temporal restriction for these crimes. The legislature has selectively defined the serious and violent offenses that have no statute of limitation.²⁶³

To determine when the limitation period begins to run, the court inquires into when the offense was committed. Like most jurisdictions, Missouri law states that an offense is committed either when every prima facie element of the crime has taken place or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity terminates.²⁶⁴ Time starts to run on the day after the offense is committed.²⁶⁵ Missouri law also notes that a prosecution is commenced either when an indictment is found or an information is filed.²⁶⁶ It does not depend on when the defendant has his day in court.

The legislature has also enumerated circumstances when the statute of limitation does not run. These tolling exceptions include: (1) any time when the accused is absent from the state, but this time cannot extend the period of limitation otherwise applicable by more than three years; (2) any time when the accused is concealing himself from justice either inside or outside of Missouri; (3) any time when a prosecution against the defendant for the offense is pending in the state; or (4) any time when the defendant is deemed to lack the mental fitness to proceed pursuant to Missouri statute.²⁶⁷ In addition, Missouri makes an exception for prosecutions for sexual offenses involving persons eighteen years of age and under.²⁶⁸ Under this exception, the time period is greatly extended—prosecution for unlawful sexual offenses may be commenced within ten years after the victim reaches the age of eighteen.²⁶⁹

Missouri's HIV-specific statute has only a three-year statute of limitations. This period may be unreasonably restrictive in light of the complexity of establishing the prima facie elements of the crime of transmitting the virus.

262. *Id.* § 556.036.1.

263. Missouri law designates the following crimes as class A felonies: murder in the first degree, MO. REV. STAT. § 565.020 (1999); murder in the second degree, *id.* § 565.021 (1999); robbery in the first degree, *id.* § 569.020 (1999); assault in the first degree, *id.* § 565.050 (1999); kidnapping, *id.* § 565.110 (1999); treason, *id.* § 575.070 (1995); and trafficking drugs in the first degree, *id.* § 195.222 (1996 & Supp. 2001). The following crimes *could* be class A felonies: perjury, MO. REV. STAT. § 575.040 (1995); escape or attempted escape from custody, *id.* § 575.200 (1995); escape or attempted escape from confinement, *id.* § 575.210 (1995 & Supp. 2001) and arson in the first degree, *id.* § 569.040 (1999).

264. MO. REV. STAT. § 556.036.4.

265. *Id.*

266. *Id.* § 556.036.5.

267. *Id.* § 556.036.6.

268. *Id.* § 556.037 (1999).

269. MO. REV. STAT. § 556.037.

For example, the victim may not know that the defendant is indeed HIV-positive. The defendant may often deny to the victim that he has been infected with the virus. The only way in which the victim will discover the truth is if either the defendant later admits it or the victim is diagnosed with HIV. It could take several years simply to determine the HIV status of the defendant. If the victim becomes infected with HIV, the DOH will assist in ascertaining how the victim received the virus.²⁷⁰ This may also become a long and exhaustive process, especially if the victim had many sexual partners in the past. The DOH may have to interview and test dozens of people if none of the sexual partners listed by the victim is known by the DOH to be HIV-positive. Again, this investigation could take a significant amount of time to complete.

While a DOH investigation could take some time to determine if a victim's partners are HIV-positive, it may take even longer to determine if they are epidemiologically linked.²⁷¹ Given that HIV is more prevalent among high-risk groups, a partner's HIV-positive status alone would not necessarily mean that the defendant infected the partner. "Viral typing is the only way to establish this, and it could add considerable length to an investigation."²⁷² Viral typing involves examining the relationship between the DNA of the HIV viruses of the victim and defendant. It is often difficult to establish evidence of a direct transmission because a virus mutates or alters its DNA with the transmission of HIV from person to person.²⁷³

Moreover, the DOH's Level II Intervention program may serve as an impediment for prosecutors because the program is designed primarily to encourage behavior modification. It is not initiated to recommend immediate prosecution of a person suspected of risky sexual behavior. Unless the victim files a personal complaint, the DOH simply investigates whether known HIV-positive persons are obeying the law. It will take time for the DOH to track down their client's known sexual partners and determine whether the client violated Missouri's HIV-transmission statute. The most common way to ascertain a client's partners is simply by asking him, and the client may often refuse to provide names or may not be truthful.²⁷⁴ And even if the DOH receives factual information, it must locate the victim, ask about the victim's private and intimate sexual relationship with the client and then convince the victim to pursue criminal prosecution.²⁷⁵ This is a lengthy and bureaucratic process.

270. Interview with Debbie Schindler, *supra* note 205.

271. Interview with Richard Knaup, St. Louis County Department of Health, in St. Louis, Mo. (Nov. 6, 2000).

272. *Id.*

273. *See, e.g.*, State v. Schmidt, 771 So.2d 131, 144-45 (La. Ct. App. 2000).

274. Interview with Debbie Schindler, *supra* note 205.

275. *Id.*

In light of many of these challenges, a three-year statute of limitations may be too short a period of time to discover the necessary evidence to prosecute successfully. In the *Stewart* case, for example, it took four years for physicians even to diagnosis the boy with HIV and an additional two years for investigators to gather the evidence that would be used to convict the defendant.²⁷⁶ Moreover, the public policy of deterring serious crimes may not be advanced by the three-year statute of limitations. In the McGee example, the defendant had sexual relations with possibly over 100 women.²⁷⁷ He was clearly a serious threat to the community.

In addition, the punishment for violating Missouri's HIV-specific statute may be viewed as insufficient. Many theories have been advanced as to the purpose of punishing criminal behavior. For example, the aim of punishment is to prevent the criminal from committing future crimes, to restrain criminals from harming society, to rehabilitate convicted criminals so they can return to society as reformed citizens, to deter others from committing the crime, to educate the public as to what is acceptable behavior and to seek retribution for a wronged act.²⁷⁸

Under Missouri's criminal code, violating a class C felony is punishable by a term of years not to exceed seven years.²⁷⁹ For a class D felony, the term of years shall not exceed five years.²⁸⁰ Violating Missouri's HIV-specific statute is only a class D felony. But if the victim is under the age of seventeen and the defendant is over the age of twenty-one, the punishment is a class C felony. For many victims, especially those who have acquired HIV from their sexual partners, this term of imprisonment is entirely too lenient for the crime.²⁸¹ Many of these victims now face a life of frequent hospital visits, daily medications, personal embarrassment, social stigma and public misunderstanding. Recognizing that there is no known cure for the disease, the victims who are HIV-positive, in a sense, receive a death sentence.

Those defendants convicted under this statute face only a few years of jail time. Considering the rapidly overcrowding in prisons and the reputation of some lenient judges, some defendants could get sentenced to much less time and then be placed on probation. Victims point to other crimes that the Missouri legislature has designated as class D felonies, such as passing a bad check for over \$150 or drawing upon a closed or nonexistent account.²⁸² In their minds, this is equating risking the transmission of HIV to writing a bad

276. See *supra* notes 23 & 27 and accompanying text.

277. Bell, *supra* note 159, at A1.

278. LAFAVE, *supra* note 92, at 22-26.

279. MO. REV. STAT. § 558.011.1(3) (1999).

280. *Id.* § 558.011.4.

281. Interview with Debbie Schindler, *supra* note 205.

282. MO. REV. STAT. § 570.120 (1999).

check for a television. Not surprisingly, victims feel the punishment for violating the statute trivializes the crime and simply does not make sense.

D. Right to Privacy

A final and compelling criticism of Missouri's HIV-specific statute involves a person's right to privacy. This includes the right to be left alone, the right of an individual to be free from unwarranted publicity and the right to live without unwarranted interference by the public.²⁸³ First recognized by the U.S. Supreme Court in *Griswold v. Connecticut*,²⁸⁴ the right to personal privacy has "permeated American jurisprudence."²⁸⁵ While the right to privacy is not found in any specific guarantee of the Constitution, the Court found that the Bill of Rights inherently encompasses "zones of privacy."²⁸⁶ These zones protect people from unwarranted governmental intrusions.²⁸⁷ But since 1973, in cases subsequent to *Roe v. Wade*,²⁸⁸ the Court has struggled to define the parameters of the right to privacy and has been reluctant to extend it.²⁸⁹

The right to privacy encompasses various rights recognized to be inherent in the concept of ordered liberty, and such a right prevents governmental interference in intimate personal relationships or activities.²⁹⁰ Under the Fourteenth Amendment, citizens enjoy two types of privacy interests.²⁹¹ "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain important kinds of decisions."²⁹² The Court has noted that the right to privacy, however, is not absolute and exists only so far as it is consistent with law or public policy.²⁹³

Missouri's law may unnecessarily abridge a person's right to privacy because test results are revealed to prosecutors and ultimately, the public. Once criminal charges have been issued, the charges are a matter of public record, and the accused may discover that his HIV-positive status is widely known. Enforcement of the statute may impede efforts to preserve the confidentiality of medical records and may "undermine the assurances of

283. BLACK'S LAW DICTIONARY, *supra* note 222, at 1195.

284. 381 U.S. 479 (1965).

285. Kellie E. Lagitch, *Mandatory HIV Testing: An Orwellian Proposition*, 72 ST. JOHN'S L. REV. 103, 108 (1998).

286. *Griswold*, 381 U.S. at 484.

287. *Id.*

288. 410 U.S. 113 (1973).

289. Lagitch, *supra* note 285, at 108; O'Toole, *supra* note 38, at 193-94.

290. BLACK'S LAW DICTIONARY, *supra* note 222, at 1195.

291. O'Toole, *supra* note 38, at 194.

292. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). These rights are established through substantive due process. Substantive due process is defined in BLACK'S LAW DICTIONARY, *supra* note 222, at 997.

293. O'Toole, *supra* note 38, at 194.

public health officials that HIV test results will remain confidential.”²⁹⁴ In addition, if individual privacy rights are systematically disregarded by the nonconsensual disclosure of medical records in efforts to reduce HIV transmission, more people will avoid testing.

The report of the Presidential Commission stressed that “HIV criminal statutes should include strong, uniform confidentiality protection.”²⁹⁵ The DOH is placed in an uncomfortable position. On the one hand, it has an ethical obligation to keep its clients records confidential. It has to develop and nurture the trust of HIV-positive persons and make them comfortable in seeking medical assistance. The DOH cannot be viewed as extended branch of the criminal justice community. But on the other hand, it has an overriding obligation to protect the public against the spread of HIV.

To protect these records, the Missouri General Assembly enacted a statute protecting the confidentiality of reports and records.²⁹⁶ This law demands that information and records in any government agency, department or political subdivision concerning the HIV-status of a person be kept strictly confidential and shall not be disclosed.²⁹⁷ But this law may seem ineffective because of its exceptions. For example, the law states that no person is liable for violating any duty or right of confidentiality for disclosing the results of another’s HIV testing to the DOH or to health care personnel working with the infected person, unless the person acted in bad faith or conscious disregard.²⁹⁸ This may serve as a way of circumventing the right to privacy and the confidentiality of medical records. For once the DOH discovers a person’s HIV-positive status, that person could later be subjected to criminal prosecution.

The Missouri Supreme Court has also addressed the issue of a right to privacy in HIV-transmission cases.²⁹⁹ In *State v. Mahan*, defendants alleged that the trial courts erred in permitting the prosecution to present evidence to the jury that they were HIV-positive.³⁰⁰ They argued that by subpoenaing and revealing their HIV test results to the jury, the prosecutors violated their medical privilege of confidentiality.³⁰¹ The court, however, held that the defendants overlooked other statutes that permitted the results of HIV tests to be disclosed to public employees outside the DOH, who need to know the

294. AIDS AND THE LAW, *supra* note 40, at 295.

295. THE REPORT OF THE PRESIDENTIAL COMMISSION, *supra* note 70, at 131.

296. MO. REV. STAT. § 191.656 (1996 & Supp. 2001). For another state’s privacy statutes, *see generally* N.Y. PUBLIC HEALTH LAW §§ 2781-82 (McKinney 1993 & Supp. 2001).

297. MO. REV. STAT. § 191.656.1.

298. *Id.* § 191.656.2.

299. *State v. Mahan*, 971 S.W.2d 307, 313 (Mo. 1998) (en banc).

300. *Id.*

301. *Id.*

individual's status in order to "perform their public duties."³⁰² In this case, the prosecutor needed to know the individual's HIV status to charge him for violating the statute.

Because infection with HIV is an element of the crime of risking infection with HIV, a prosecutor who is contemplating bringing charges against someone under this statute needs to know the HIV status of that person.³⁰³ Moreover, section four of the statute anticipates that the HIV test results of an individual may be shared with prosecutors and used in the preparation of the state's case against the individual.³⁰⁴ In enacting this language, the legislature acknowledged that one of the enumerated exceptions to the HIV confidentiality statute must apply to prosecutors, judges and jurors in defendants' cases.³⁰⁵ According to the court, the social interests in protecting a sexual partner from HIV infection must outweigh an individual's right to privacy.³⁰⁶

Legislators also recently enacted a law giving the Missouri State Attorney General's office and county prosecutors the power to obtain HIV-related medical records from the DOH if there is a compelling reason.³⁰⁷ To receive these documents, a court order is all that is required.³⁰⁸ The measure was drafted as an outgrowth of the *Stewart* case where the prosecutor encountered

302. *Id.*

303. *Id.*

304. *Mahan*, 971 S.W.2d at 313.

305. *Id.* at 314.

306. O'Toole, *supra* note 38, at 193.

307. MO. REV. STAT. § 191.657 (Supp. 2001). This statute notes that:

[A] court may grant an order for disclosure of confidential HIV related information to peace officers, the attorney general or any assistant attorneys general acting on his or her behalf, and prosecuting attorneys upon an application showing:

- (1) A compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding;
- (2) A clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the individual to whom the information pertains;
- (3) Upon application of a state, county or local health officer, a clear and imminent danger to the public health; or
- (4) That the applicant is lawfully entitled to the disclosure and the disclosure is consistent with the provisions of this section.

Id. § 191.657.2. The statute is fairly explicit about directing state courts to "weigh the need for disclosure against the privacy interest of the protected individual." Courts must cite specific medical and scientific findings in assessing compelling need, and persons receiving this information are not authorized to re-disclose it. The statute also provides that the court keep this information sealed and not made available to the public. *Id.* § 191.657.3. See also Bill Bryan, *Law Can't Help Victims Who Want to Know Their Attackers' HIV Status*, ST. LOUIS POST-DISPATCH, Oct. 18, 1999, at A1 [hereinafter *Law Can't Help Victims*].

308. MO. REV. STAT. § 191.657.

many obstacles trying to receive information from the DOH.³⁰⁹ These records, however, cannot be disclosed to the victim or anyone else. This law may serve as another example of the lessening right to privacy. On the other hand, those in the criminal justice system maintain that this is a necessary tool to effectively prosecute persons who recklessly expose others to HIV.

VI. ILLINOIS' HIV-SPECIFIC STATUTE

Illinois also has enacted an HIV-specific criminal statute,³¹⁰ which clearly sets out specific HIV-transmitting behaviors that are prohibited. This law places individuals on notice and resolves any void for vagueness challenge. For example, the transfer or donation of blood, tissue, semen or organs for almost any purpose is strictly prohibited.³¹¹ In addition, the statute disallows the delivery, exchange, transfer or sale of nonsterile intravenous or intramuscular drug paraphernalia.³¹² This paraphernalia is well defined as any equipment, product or material of any kind, which is peculiar to and marketed for use in injecting a substance into the human body.³¹³

Illinois' statute does not require the element of intent to harm others by infecting them with HIV. The Illinois legislature drafted around the knowing

309. *Law Can't Help Victims*, *supra* note 307, at A1.

310. Hermann, *supra* note 38, at 373. Illinois' HIV-specific statute, 720 ILL. COMP. STAT. 5/12-16.2 (1993), states:

(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 purpose of this Section:

"HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.

"Intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.

"Intravenous or intramuscular drug paraphernalia" means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.

(c) Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.

(d) It shall be an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.

(e) A person who commits criminal transmission of HIV commits a Class 2 felony.

311. 720 ILL. COMP. STAT. 5/12-16.2(a)(2).

312. *Id.* at 5/12-16.2(a)(3).

313. *Id.* at 5/12-16.2(b).

state of mind requirement inherent in traditional criminal offenses. The statute simply prohibits HIV-positive persons from engaging in intimate contact with another.³¹⁴ Prosecutions will be easier to achieve absent the intent provision, and convictions will be more likely under this statute, which will increase the effect of deterrence. It is only necessary to prove that a defendant knew of his HIV-positive status and engaged in intimate conduct.³¹⁵ The Illinois law also enumerates an affirmative defense of informed consent.³¹⁶ The statute declares that “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.”³¹⁷ In this provision, the statute recognizes the right to privacy between two consenting adults and their right to engage in personal, sexual acts absent the intrusion of government.

In addition, the statute maintains that infection need not occur in order for an individual to be charged with violating the statute. The law punishes only the risky behavior and not the consequences of such acts. This alleviates the causation problems that plague traditional criminal laws.³¹⁸ The prosecution does not need to prove that the defendant was the cause of the victim’s infection.³¹⁹ The Illinois statute is also limited in scope—it applies only to those who know of their HIV-positive status and continue to engage in risky behavior. This protects those individuals who are unknowingly HIV-infected and unwittingly pass on the virus.

Illinois’ statute contains some of the same weaknesses as the Missouri HIV-specific statute. The most significant criticism involves the definition of intimate contact and whether it violates the void for vagueness doctrine. Specifically, the statute defines intimate contact as “the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.”³²⁰ The question then rests on what could result in the transmission of the virus from one individual to another. Biting, spitting or throwing infected bodily fluids are all behaviors that do not seem to fall within the prohibited conduct of the law.³²¹ This definition may be overly broad and void for vagueness.³²² But if this definition is given judicial construction,

314. *Id.* at 5/12-16.2(a)(1).

315. Hermann, *supra* note 38, at 374.

316. 720 ILL. COMP. STAT. 5/12-16.2(d).

317. *Id.*

318. Hermann, *supra* note 38, at 374.

319. *Id.*

320. 720 ILL. COMP. STAT. 5/12-16.2(b).

321. Hermann, *supra* note 38, at 374.

322. *Id.*

which limits it to means of transmitting HIV recognized by the CDC, then it loses its vagueness and provides adequate notice of prohibited behavior.³²³

Moreover, a person who violates the Illinois statute is guilty of a class 2 felony. The maximum punishment authorized under a class 2 felony is only three to seven years imprisonment.³²⁴ In addition, like Missouri, the statute of limitation for this statute is three years.³²⁵ Therefore, the Illinois HIV-specific statute suffers the same criticisms as Missouri when regarding punishment and the statute of limitation.

VII. CONCLUSION

Although new disease-fighting medications are becoming available, AIDS continues to take the lives of thousands of Americans. Everyone who possesses the disease is in some way a hostage. These victims have to endure the fear, social discrimination and daily challenges of living with AIDS. At the same time, however, HIV-positive individuals have a unique responsibility to society—for they possess a deadly weapon in their blood stream. While public education should encourage HIV-testing, safe sex and clean needle exchanges, education alone is not the most effective method of preventing the disease. HIV-specific statutes clearly advance the objective of deterring risky sexual behavior.

The Missouri General Assembly did an admirable job at addressing this problem. The legislators crafted a criminal statute that prohibits people from reckless exposing others to the deadly virus. Since the original law was difficult to prosecute, they lessened the required mental element of culpability for the crime from intentional or knowing to reckless. The legislators also enumerated specific acts that are considered evidence of reckless behavior, and they expanded the groups of people who can file complaints with the prosecutor. This list notably includes victims and local law enforcement agencies. Finally, they enacted a statute that allows prosecutors to obtain medical records if the court finds a compelling reason. This is a much needed tool to better facilitate the prosecution of individuals suspected of transmitting HIV.

But even though the amended HIV-specific statute corrected many of the deficiencies of the original HIV-specific statute, additional revisions could be implemented. One recommendation, for example, advocated by health specialists, involves explicitly carving out an affirmative defense of informed consent, as in the Illinois statute. Missouri's law states that a person may be charged with exposing another to HIV "without the knowledge and consent of that person to be exposed to HIV." While it is assumed that Missouri's new

323. *Id.*

324. 730 ILL. COMP. STAT. 5/5-8-1(a)(5) (1993 & Supp. 2001).

325. 720 ILL. COMP. STAT. 5/3-5(b) (1993 & Supp. 2001).

statute creates the affirmative defense of informed consent, Illinois' approach is more direct and simpler to understand. During Level II Interventions, for instance, health specialists could point to the unambiguous sentence in the statute explaining the meaning of informed consent.

Another recommendation involves the DOH Level II Intervention program of enforcement. This successful program balances the privacy rights of an HIV-positive individual with the need to protect the public. While this program principally aims at behavior modification, there is simply no maximum number of times a person can be subjected to a Level II session before his name is suggested for criminal prosecution. Therefore, a potential offender may engage in risky behavior dozens of times before the DOH will recommend his name to the county prosecutor.

By serving as counselor to its clients and as liaison to prosecutors, the DOH is undoubtedly placed in an uncomfortable situation. It needs to develop trust and rapport with its clients without undermining its assurances that a client's medical records will remain confidential. Though recognizing this dilemma, the DOH should promulgate some stricter guidelines that would make the process more efficient and less bureaucratic. For example, it could implement a general policy as to the number of times an individual can undergo a Level II Intervention. By forwarding more swiftly to prosecutors the names of known violators, the number of convictions would increase, the deterrence effect would be heightened and the citizens of the state would be better protected.

Finally, Missouri's law needs a longer statute of limitation and a more appropriate punishment. A three-year statute of limitation is clearly not enough time for the DOH to thoroughly investigate the matter. It may take years to track down an individual's sexual partners and determine whether they are HIV-positive and epidemiologically linked. Moreover, a longer statutory period also advances the public policy underlying statutes of limitations. Freshness of evidence is not an overriding concern when an HIV-infected person is trying to track down who gave her the deadly disease. A person's HIV-positive status is something that will not change. The questions that need only be addressed include whether the person had sexual relations with the victim, knew his HIV status and adequately informed his partner. Moreover, as the McGee example amply demonstrates, individuals who risk transmitting the virus pose a significant risk to society. It is in the state's interest to lengthen the statute of limitation for this crime.

It also seems appropriate to increase the degree of punishment for violating this statute. The legislatures of Arkansas, Indiana and North Dakota, for example, classify their HIV-specific statutes as class A felonies.³²⁶ One suggestion may include an enhanced sentencing option if the victim acquired

326. *See supra* note 140.

HIV as a result of the encounter. If the victim did receive the virus, then a greater range of punishment should be available to the courts. Indiana specifically carves out a greater punishment if the virus is transferred to the victim.³²⁷ If Missouri were to follow this approach, then exposing another person would ordinarily be a class D felony with a three-year statute of limitation. Transferring the virus, on the other hand, would be a class A felony with no statute of limitation. This would effectively circumvent the problem in determining who actually infected the victim with HIV. The current punishment of five years simply does not appear to be a sufficient punishment for this crime. The judge in the *Stewart* case certainly did not think that a life sentence with possibility of parole in fifteen years was enough.

By taking into consideration the criticisms of the statute and the available remedies, the Missouri legislature should be able to make an informed decision as to how to ameliorate these problems by amending the existing law. Prosecutors should be able to successfully prosecute offenders under Missouri's HIV-specific statute in lieu of one of the traditional criminal statutes. The statutory deficiencies inherent in this law need to be addressed to protect innocent victims like the child in the *Stewart* case. The active enforcement of this statute is a fundamental step in the fight to stop the spread of this deadly disease.

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327. IND. CODE ANN. § 35-42-1-7.

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