

Washington University Global Studies Law Review

Volume 3 | Issue 1

January 2004

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Recommended Citation

Arianne Stein, *Should HIV Be Jailed? HIV Criminal Exposure Statutes and Their Effects in the United States and South Africa*, 3 WASH. U. GLOBAL STUD. L. REV. 177 (2004),
https://openscholarship.wustl.edu/law_globalstudies/vol3/iss1/7

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SHOULD HIV BE JAILED? HIV CRIMINAL EXPOSURE STATUTES AND THEIR EFFECTS IN THE UNITED STATES AND SOUTH AFRICA

INTRODUCTION

Epidemics are endemic to the human experience. From the Black Death to leprosy to syphilis to Acquired Immune Deficiency Syndrome (AIDS), medical epidemics cause fear and panic. Such fear and panic yield inevitable discrimination against groups of individuals who become scapegoats for a biological micro-organism that causes the illness.¹ Human Immune Deficiency Syndrome (HIV) criminal exposure statutes often target groups of HIV positive individuals. Those afflicted with the disease are sacrificed to quell the public's fear and panic. These statutes are more the product of a moral campaign against an alleged public vice, than a true attempt to halt the spread of the disease.

AIDS is a worldwide epidemic and remains a serious dilemma in the United States and South Africa. There are 36.1 million people infected with HIV worldwide.² Approximately 26 million people in Africa are infected with HIV.³ One in four South African adults is HIV-positive.⁴

1. In the Fourteenth century Christians alleged that the Jews caused the Black Death by poisoning the drinking water. Thus, the Jews were treated as scapegoats and killed or driven out in large numbers. Spain's Jewish community was reduced to one quarter of its original size. AIDS Exhibition, *An Exhibition of material from the Monash University Library Rare Books Collection: Of Epidemics in General*, at <http://www.lib.monash.edu.au/exhibitions/aids/Xaidcat.html> (last visited Oct. 13, 2003). During the middle ages, lepers were not allowed in hospitals run by religious institutions because they were seen as "unclean." *Id.* In 1864, England passed The Contagious Diseases Act. *Id.* The Act allowed policeman to arrest prostitutes to perform compulsory checks for venereal disease. *Id.* The women with diseases were placed in an isolated hospital until cured. Many of the women who were seized were not prostitutes, but they still were forced to undergo a shameful and daunting medical examination. *Id.* Spartacus Educational, *Contagious Diseases Act*, Dec. 7, 2001, at <http://www.spartacus.schoolnet.co.uk/Wcontagious.htm> (last visited Oct. 4, 2003) [hereinafter *Contagious Diseases Act*]. *Id.*

2. Carol Clark, *Paying the price of AIDS: Human, Economic Toll Reverberates Globally*, CNN.com, at <http://www.cnn.com/SPECIALS/2001/aids/stories/social.cost.html> (last visited Oct. 4, 2003).

AIDS will have a long lasting impact on humanity.

AIDS is going to change the course of human evolution. There's no doubt about that. When you have a disease that affects so many people and some people have systems better able to respond to it, that's how evolution works. It is so enormous that even for someone like myself who's been involved in it for 17 years, it is impossible for me to truly conceive of the magnitude of the epidemic.

Id.

3. *Id.*

The epidemic has had a huge global impact, adversely affecting human health, economics,⁵ and local⁶ and international relations.

HIV is an infection by one of two viruses that destroys white blood cells, eventually leading to AIDS as well as other diseases.⁷ Progressive medications are now available which thwart the development of HIV and enable infected individuals to live with the virus for many years. However, there is no known cure for HIV or AIDS, and many individuals around the world do not have equal access to proper medications.

In the United States, many states have enacted HIV transmission legislation, which is intended to combat the spread of the virus and often include criminal sanctions. However, South Africa still has not enacted criminal sanctions for HIV-specific conduct. This Note will discuss this kind of state statute in the United States and the potential impact of such laws if adopted by South Africa. This Note concludes that such laws will not benefit South Africa because they do not provide an effective solution for the proliferation of HIV. Instead, this Note argues that the South African government should focus on health care policy and education as superior means of combating the spread of the virus.

HISTORY OF AIDS IN THE UNITED STATES

AIDS was initially discovered in the United States in the early 1980s and remains a serious problem even today.⁸ There are currently about

4. *Id.*

5. AIDS affects economics for several reasons. The majority of AIDS cases occur among people in their twenties through forties, the years when people are usually most productive. *Id.* Additionally, the other diseases and complications that accompany AIDS are costly to treat. *Id.*

6. Local relations amongst members of South African communities are affected because “whole generations” are being destroyed by the disease, causing disruptions in family life, tradition, and local economics. *Id.*

7. MERCK MANUAL OF MEDICAL INFORMATION; HOME EDITION § 17 (Robert Berkow, M.D. et al. eds., 1997), http://www.merckhomeedition.com/interactive/hd_data/globals/fram-es/frameset.htm (last visited Sept. 5, 2003) (on file with The Washington University Global Studies Law Review) [hereinafter MERCK MANUAL].

8. In the early 1980s, the prevalence of two medical conditions increased among American homosexual men. *Id.* One was kaposi’s sarcoma, which is a rare cancer. *Id.* The second condition was pneumocystis pneumonia, which is a form of pneumonia occurring in those with a deficient immune system. *Id.* The failure of the immune system that allowed for the increase of these conditions was called “AIDS.” *Id.* Compromised immune systems were also found in intravenous drug users, hemophiliacs, and recipients of blood transfusions, as well as in bisexual men. *Id.* AIDS was next found in heterosexuals who were not drug users, hemophiliacs, or recipients of blood transfusions. *Id.* It was soon discovered that a virus was causing AIDS. *Id.* There are two viruses that cause AIDS: HIV-1 and HIV-2. *Id.* HIV-1 is the primary strain in the Western Hemisphere, Europe, Asia, and in Central, South, and East Africa. HIV-2 is the primary strain in West Africa (although HIV-1 is also

800,000 to 900,000 people in the United States who are HIV-positive,⁹ and more than 300,000 people are living with AIDS.¹⁰ There are approximately 40,000 new infections each year, with a large percentage concentrated among African-Americans and Hispanics.¹¹ A decade ago, AIDS was a leading cause of death in the United States.¹² Panic over HIV erupted soon after the virus was publicly addressed.¹³ Although HIV and AIDS have been in the public forefront for nearly two decades, the disease continues to impose a significant stigma in society.¹⁴

LEGAL RESPONSE TO HIV IN THE UNITED STATES

In the late 1980s, AIDS activists lobbied for a national AIDS policy, with the intent of helping to prevent the spread of AIDS.¹⁵ However, often this legislation or AIDS policy appeared to be designed more to appease panicked constituents.¹⁶ Consequently, the White House created an HIV Commission, which suggested that state legislatures enact criminal laws to deal with HIV-positive individuals who endangered others by transmitting

found in West Africa). *Id.*

9. The Body: An AIDS and HIV Information Resource, *What is AIDS?* (Nov. 16, 2002), at <http://www.thebody.com/nmai/whatisaids.html> (last visited Oct. 4, 2003) [hereinafter *What is AIDS?*].

10. *Id.* Once infected with HIV, a person is 'HIV-positive' and carries the virus for the remainder of his life. *Id.* See also AIDS foundation of South Africa, *About HIV/AIDS*, at <http://www.aids.org.za> (last visited Oct. 4, 2003) [hereinafter AIDS Foundation Report]. WebMD Health, *CD4+ Counts in HIV Infection*, at <http://my.webmd.com/content/healthwise/202/64429> (last visited Oct. 5, 2003).

11. *What is AIDS?*, *supra* note 9. African-Americans comprise approximately thirteen percent of the population in the United States. However, they represent fifty-four percent of the new HIV infections. *Id.* Hispanics make up approximately twelve percent of the population and account for nineteen percent of the new infections. *Id.*

Low levels of education, high levels of multiple sexual partnering, high rates of homosexuality/bisexuality and high rates of injecting drug use account for the relatively high rate of new infections among blacks and Hispanics in the United States. Clark, *supra* note 2.

12. *What is AIDS?*, *supra* note 9 (noting that in the mid-1990s AIDS was a prevalent factor of death rates in the United States).

13. Patricia Nell Warren, *The Criminalization of HIV*, ART & UNDERSTANDING (Dec. 1999), http://www.aumag.org/viewfinder/article.cfm?a_id=460 (on file with The Washington University Global Studies Law Review).

14. Certain "minorities" have commonly been associated with the disease, particularly gay men, drug users, and workers in the commercial sex industry, even though the virus affects people of all walks of life. Lawrence Gostin, *Discrimination and Disability Law*, HIV/AIDS Resource Center / The Journal of American Medical Association (1996), <http://www.ama.assn.org/special/hiv/policy/discrim.htm> (on file with The Washington University Global Studies Law Review). Additionally, despite educational efforts, many people still do not understand the ramifications of the disease or how it is transmitted. *Id.*

15. *Id.* (noting that the criminalization of HIV began in Washington in 1988).

16. *Id.* (noting that the media was also responsible for escalating the public's alarm).

HIV.¹⁷ Several states also passed legislation requiring mandatory reporting of all individuals who tested positive for HIV and AIDS.¹⁸

Specific HIV-related criminal cases paved the way for public support to adopt HIV-specific statutes. One incident concerned Darnell “Bossman” McGee, whose sexual behavior prompted Missouri legislators to toughen the state’s law.¹⁹ Knowing he was HIV-positive, McGee had unprotected sex with more than 100 women.²⁰ Although it was already a felony in Missouri to *intentionally* expose someone to HIV, the Darnell McGee case led the state legislature to expand its law to include *reckless* behavior.²¹ In a similar case Nushawn Williams had unprotected sex with approximately 50 females in the state of New York knowing that he was HIV-positive.²² These and other highly publicized, outrageous cases caused a public uproar.²³

The purported goal of HIV-specific criminal statutes is halting the spread of the virus, yet every state has general criminal laws that can be

17. *Id.* Specifically, President George Bush Sr. asked the states to adopt laws for those who “knowingly, recklessly” exposed others. *Id.*

18. AIDS AND THE LAW 11 (David W. Webber ed., 3d ed. 1997). Prior to 1991, there was no standardized reporting system for HIV infections amongst the states. *Id.* The Center for Disease Control (CDC) has helped states to implement surveillance programs. Despite these surveillance measures, it is important to be wary of HIV data. *Id.* Surveillance reports do not represent all individuals who are HIV-positive for two main reasons: many people carrying the virus are not infected, and testing centers and educational programs often target certain groups of individuals for testing purposes. *Id.*

19. Jeff Flock, *Missouri Toughens Law on “Super-Transmitters,”* at <http://www.cnn.com/CNN/bureaus/chicago/stories/9711/aidskillerfolo/index4.htm> (last visited Mar. 16, 2003).

20. Darnell McGee was subsequently shot to death in an apparent revenge homicide. *Id.*

21. *Id.* The Missouri statute now reads as follows:

It shall be unlawful for any individual knowingly infected with HIV to: Act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV. Evidence that a person has acted recklessly . . . shall include (a) The HIV infected person knew of such infection before engaging in sexual activity with another person (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 corroborate devidence of sexual contact with the HIV infected person after a diagnosis of an HIV status.

MO. REV. STAT § 191.677(2) (2002). Illinois’ murder statutes also reflect an expansion to include reckless behavior. *See* 720 ILL. COMP. STAT. ANN. 5/9-1 (2003). Although the statutory language does not refer specifically to AIDS, it can be interpreted to include such behavior. *See id.*

22. John J. Goldman, *From Drug Arrest to AIDS Nightmare Health: The Many Contacts of Nushawn Williams, Accused of Spreading HIV, are Slowly Being Traced*, L.A. TIMES, Nov. 4, 1997, <http://www.aegis.com/news/H/1997/H971101.html> (last visited Sept. 5, 2003). *See also* Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV 847, 879 n.1 (1999) (discussing several cases of reckless HIV-exposure that prompted legislative action in response to public distress).

23. *See* Jeff Stryker, *Crime and Punishment and HIV*, HIV InSite, at <http://hivinstie.ucsf.edu/InSite.jsp?doc=2098.3bb5> (last visited Mar. 16, 2003) (discussing the case of Brian Stewart who allegedly injected his eleven month old son with HIV-positive blood).

applied to those who expose others to HIV, such as murder and attempted murder statutes.²⁴ According to the Model Penal Code, three elements must be present for a murder conviction: conduct, state of mind, and causation.²⁵ State of mind and causation are more difficult to prove than conduct, especially in HIV related cases.²⁶ In response, states have attempted to overcome the difficulties associated with applying traditional criminal law to HIV-related crimes by introducing HIV-specific laws.

HIV-specific legislation began in Washington in 1988.²⁷ Legislators designed these laws to punish and deter HIV-positive individuals from engaging in reckless sexual conduct. Typically the three primary objectives of any criminal law are incapacitation, promotion of normative behavior, and deterrence.²⁸ Incapacitation prevents those who have acted criminally in the past from acting in a similar manner by removing them from the community.²⁹ Promoting normative behavior encourages individuals to act within the confines of the law because they believe it is the right thing to do.³⁰ Deterrence attempts to discourage individuals from engaging in criminal activity by enforcing grave consequences for such behavior.³¹

In order to achieve these objectives, twenty-four states enacted

24. See, e.g., MO. REV. STAT. § 565.020 (2002) (stating that “A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.”). See also MO. REV. STAT. § 565.021 (2002).

A person commits the crime of murder in the second degree if he: Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from . . . such felony, another person is killed . . .

Id.

25. See MODEL PENAL CODE § 210.1(1)-(2) (2001). This discussion uses the Model Penal Code because of the variation found in state codes and common law.

26. To prove first-degree murder through HIV exposure, the defendant must have the intent to kill specifically by exposing the victim to HIV. Additionally, in HIV transmission cases, it may be difficult in certain situations to prove that a defendant’s behavior was the cause in fact of another’s exposure to the virus. For example, if an individual shares drug needles with many other individuals, several of whom may be HIV positive, it may be impossible to prove that any single individual was responsible for the transmission. Markus, *supra* note 22, at 853.

27. Warren, *supra* note 15.

28. Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETH. 239, 249-50 (2002).

29. *Id.* at 249. The “value [of incapacitation] to HIV prevention depends on the extent that the law can identify people who will infect others. The more people whose infection is prevented, the greater the benefit from any single prosecution.” *Id.*

30. *Id.*

31. The probability of being caught and the gravity of the ensuing punishment dictate an individual’s actions. *Id.* at 250.

legislation that criminalizes transmission of HIV either generally or through some form of specific behavior, including spitting, donating blood, or sexual intercourse.³² Fifteen states passed statutes concerning acts that are already crimes, such as prostitution, rape, and assaulting a peace officer, which punish the perpetrator separately or more severely when the perpetrator knows he is HIV-positive.³³

Generally, the State must show three elements to convict a defendant under an HIV criminal exposure statute. The first element is knowledge—an individual must know that he has HIV.³⁴ The second element is participation by the individual in prohibited conduct.³⁵ The third element is the lack of a defense, such as disclosure of HIV status to the sexual partner.

State statutes vary in their requirements for proof of these three elements. For example, the Arkansas statute defines “knowing” as the individual knowing that he tested positive for HIV on a blood test.³⁶ In contrast, a similar Illinois statute is more vague as to the meaning of “knowledge.”³⁷ The California statute defines “intent,” narrowly³⁸ while

32. HIV Criminal Law and Policy Project, HIV-Specific Criminal Transmission Laws, at <http://www.hivcrimallaw.org/laws/hivspec.cfm> (last visited Oct. 13, 2003). These states are Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Washington. *Id.*

33. *Id.* These states are California, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, South Carolina, Tennessee, Utah, and Wisconsin. *Id.*

34. Markus, *supra* note 22, at 863-64.

35. *Id.*

36. See ARK. CODE ANN. § 5-14-123(b) (Michie 2001) (“a person commits the offense of exposing another to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus”). See also CAL. HEALTH & SAFETY CODE § 1621.5 (Deering 2001).

[i]t is a felony . . . for any person to donate blood, body organs or other tissue . . . who knows that he or she has acquired immune deficiency syndrome, as diagnosed by a physician and surgeon, or who knows that he or she has tested reactive to the etiologic agent of AIDS or to the antibodies to that agent.

Id.

37. The Illinois HIV transmission statute does not explain whether knowledge means actual or constructive knowledge. “A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV [engages in specified conduct].” 720 ILL. COMP. STAT. ANN. 5/12-16.2(e) (West 2002). See also Michael L. Closen & Jeffrey S. Deutschman, *A Proposal to Repeal the Illinois HIV Transmission Statute*, 78 ILL. B.J. 592, 594 (1990). The Idaho statute also fails to define “knowledge.” *Id.* “Any person who exposes another in any manner with the intent to infect or, knowing that he or she is or has been afflicted with acquired immunodeficiency syndrome (AIDS), AIDS related complexes (ARC), or other manifestations of human immunodeficiency virus . . . is guilty of a felony.” IDAHO CODE § 39-608 (Michie 2003).

38. See, e.g., CAL. HEALTH & SAFETY CODE § 120291(a) (Deering 2001) (addressing only “specific intent to infect the other person with HIV”).

the Louisiana statute completely fails to define “intent.”³⁹ States also classify the offense with different degrees of severity.⁴⁰

Throughout the last decade, states have not hesitated to enact HIV-specific legislation. However, the true intent of the legislators is often unclear. The question becomes whether the legislation was adopted in order to halt the spread of AIDS or merely to gain public favor against an identifiable minority and quell public fears?

HISTORY OF HIV IN SOUTH AFRICA

The AIDS epidemic has affected much more than the social and legal communities in the United States. It has greatly impacted all of Africa in the last two decades. Its effects have been so severe⁴¹ that global organizations such as the United Nations have taken it upon themselves to work on a solution.⁴² Shocking statistics indicate that the adult population in many African countries has been gravely impacted by AIDS.⁴³ United

39. See, e.g., LA. REV. STAT. ANN. § 14:43.5(A) (West 2002) (stating “[n]o person shall intentionally expose another to any acquired immunodeficiency syndrome,” but failing to define “intentionally.”).

40. Illinois classifies the criminal transmission of HIV as a class 2 felony. 720 ILL COMP. STAT. ANN. 5/12-16.2(e), *supra* note 37. Florida, on the other hand, classifies the criminal transmission of HIV as a third degree felony. FLA. STAT. ANN. § 384.34(5) (West 2002).

41. Twenty-eight million people in Africa have HIV. Press Release, *Time to Turn Commitments into Action in Africa*, UNAIDS (Dec. 10, 2001), at http://www.unaids.org/whatsnew/press/eng/pressarc01/ICASA_101201.html (last visited Sept. 4, 2003). Those infected with HIV in Sub-Saharan Africa account for seventy percent of the total number of people infected worldwide. BARRY BOGIN, *THE GROWTH OF HUMANITY* 9 (Matt Cartmill & Kaye Brown eds. 2001). Interestingly, Sub-Saharan African accounts for only 10.3 percent of the world’s population. *Id.* Only thirty thousand infected Africans are on medications. Peter Piot, *Address at the 12th International Conference on AIDS and STDs in Africa* (Dec. 9, 2001), <http://www.unaids.org/whatsnew/speeches/eng/piot091201ouagadougou.html> (on file with The Washington University Global Studies Law Review).

42. Erica Haber, *The United Nations’ Response to HIV/AIDS in Africa*, 18 N.Y.L. SCH. J. HUM. RTS. 467, 468 (2002). The United Nations is a primary advocate of finding a response to HIV in Africa. *Id.* at 468

43. Emory Health Sciences Press Release, *Global AIDS Epidemic Dramatically Outpaces U.S., According to Emory AIDS Experts* (Mar. 10, 1999), at <http://www.emory.edu/WHSC/HSNEWS/releases/mar99/031099aids.html> (last visited Sept. 4, 2003) [hereinafter *Global AIDS Epidemic Dramatically Outpaces U.S.*]. Statistics for 2001 indicate that 44.9 percent of pregnant women in urban Botswana are infected. One third of the population of Zimbabwe is infected. Approximately two-thirds of deaths in the managerial sector of Zambia can be attributed to AIDS. Charles Cobb Jr., *Defying Predictions, HIV in Africa Has Not Yet Peaked* (July 2, 2002), at <http://allafrica.com/stories/200207020718.html>. AIDS has caused a significant decrease in the average life expectancy in Botswana, Zimbabwe, Zambia, Uganda, and Malawi. Bogin, *supra* note 41, at 17. For example, the average life expectancy of an adult living in Botswana in 1992 was 62 years of age. *Id.* In 2000, the average life expectancy was 51 years of age. *Id.* The impact of HIV and AIDS on the adult African communities has created a vast number of orphans. *Id.* Fifteen percent of children under the age of fifteen are orphans in several African cities. *Id.* at 18-19. These statistics have implications for

Nations Secretary-General Kofi Annan established a program to provide seven to ten billion dollars a year to help developing nations with the AIDS epidemic.⁴⁴

The AIDS epidemic began in South Africa at approximately the same time it appeared in the United States.⁴⁵ The findings of the 2001 South African Antenatal Survey reveal that AIDS still remains a significant health problem in South Africa.⁴⁶ Approximately 4.74 million South Africans are currently infected with HIV.⁴⁷ Even though the rapid growth of HIV in South Africa is decreasing, the spread of HIV remains a serious dilemma.⁴⁸

Several factors contributed to the spread of HIV in South Africa. South Africa maintains an efficient transportation infrastructure which allows for high mobility, and thus facilitates the rapid spread of HIV.⁴⁹ In addition, the current South African welfare system is overloaded and inadequate to

the future of countries with so many orphans. When these children become adults, they will need more health care services from the state because of their inadequate childhood nutrition.

44. Clark, *supra* note 2, at 2. As of November 2002, the United States' contribution to the global fund was approximately 275 million dollars. Dr. Peterson, The Diane Rehm Show, *Famine and HIV in Africa* (Nov. 27, 2002), at http://www.wamu.org/dr/shows/drarc_021125.html (last visited Sept. 4, 2003) [hereinafter *Famine and HIV in Africa*]. In January 2003, President George W. Bush vowed to provide 15 billion dollars in aid over the next five years to help prevent and treat AIDS in developing nations. The plan would start by providing two billion dollars in 2004. President George W. Bush, State of the Union Address, (Jan. 28, 2003), <http://www.cnn.com/2003/ALLPOLITICS/01/28/sotu.transcript.1/> (last visited Sept. 4, 2003) (transcript). "Bush said his comprehensive plan would prevent 7 million new AIDS infections, treat at least 2 million people with life-extending drugs, and provide humane care for millions of people suffering from AIDS." *Bush outlines global AIDS/HIV relief plan*, CNN.COM (Jan. 31, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/01/31/bush.aids/index.html>.

45. Edwin Cameron, *AIDS Denial in South Africa*, 5 GREEN BAG 415 (2002) (revealing that the first South African AIDS cases were diagnosed in 1982). Additionally, the initial profile of South Africans with the disease matched the profile of those in the United States: "white, affluent, mobile gay men." *Id.*

46. See South Africa, Department of Health, *National HIV and Syphilis Sero-Prevalence Survey of Women Attending Public Antenatal Clinics in South Africa—2001* § 5, <http://www.gov.za/reports/2002/hivsurvey01.pdf> (last visited Sept. 4, 2003) [hereinafter *Antenatal Survey*].

47. See Linda Stannard, *The HIV Epidemic in South Africa*, Feb. 2001, at <http://web.uct.ac.za/depts/mmi/jmoodie/anc0.html> (last visited Sept. 4, 2003).

48. See also Makubalo L. Simelela et al., *Antenatal Survey Results: Little Room for Pessimism*, 90 SAMJ 1062, Nov. 2000 (discussing that even though there were no statistically significant increases in HIV levels from 2000 to 2001, the HIV epidemic in South Africa is still a major dilemma). Studies of infected pregnant women reveal the continued prevalence of the virus. Approximately 25 percent of pregnant women were infected with HIV by the end of 2001. Although there is no statistically significant growth of infected pregnant women from the previous year, this infection rate still poses a significant public health problem. See *Antenatal Survey*, *supra* note 46.

49. AIDS Foundation Report, *supra* note 10. "The epidemic in South Africa did not exist until shortly after Apartheid, when the country opened and migration began to occur." *Global AIDS Epidemic Dramatically Outpaces U.S.*, *supra* note 43.

deal with the high level of medical expenses.⁵⁰ There is also a lack of objective information and services for South African youth regarding the virus.⁵¹ It is this ignorance that perpetuates risky sexual behavior. Furthermore, the high prevalence of other sexually transmitted diseases lowers individuals' immunities, making people more susceptible to HIV exposure.⁵² South Africa has increased high poverty and low education levels, which lead to risk-taking behavior.⁵³ The high poverty rate also prevents those infected with HIV or AIDS from attaining proper medication.⁵⁴

Cultural norms make it difficult to halt the spread of the disease as well. For example, South Africans are reluctant to use contraception due to established cultural norms.⁵⁵ Increased sexual violence against children in South Africa has become common, due to cultural beliefs and poverty levels, which also increases the presence of HIV.⁵⁶ Children are targeted because of the belief that sex with a virgin can cure HIV.⁵⁷ Sexual

50. AIDS Foundation Report, *supra* note 10.

51. *Id.*

52. *Id.* Tuberculosis is the primary cause of AIDS-related mortalities around the world. *Famine and HIV in Africa*, *supra* note 44. Tuberculosis accelerates the spread of HIV in the body. American Lung Association, *Tuberculosis Hastens AIDS Virus Replication* (Mar. 20, 1997), at <http://www.lungusa.org/press/medical/medmrchtb.html> (last visited Sept. 4, 2003). The medications for AIDS are at odds with the medications for tuberculosis, thus "simultaneous treatment for both diseases is very difficult." *Id.* (quoting Michael Weiden, M.D.).

53. AIDS Foundation Report, *supra* note 10.

54. *Id.* *Global AIDS Epidemic Dramatically Outpaces U.S.*, *supra* note 43.

A country's economy, productivity, national security and education all are severely affected by HIV. Many countries must make hard economic decisions about whether to devote money to AIDS care or to education. The cost of treating one patient with HIV is generally about the same as the cost of educating 10 children. The widespread death of young adults to AIDS creates a shortage of workers and soldiers, leaving countries poor and defenseless.

Id. It is estimated that by 2010, South Africa's Gross Domestic Product will be seventeen percent lower because of the expenses associated with the AIDS epidemic. War on Want, *South Africa Profile* (1999), at <http://www.waronwant.org/?lid=99> (last visited Oct. 4, 2003).

55. AIDS Foundation Report, *supra* note 10. One reason for the opposition to condom use is the strong influence of the Catholic Church which has historically opposed dissemination of condoms. *Id.* More recently, South African condom advocates have launched a massive advertising campaign on the use of condoms. Mduduzi Dlamini, *Organization Embarks on Controversial Billboard Campaign* (May 12, 2002), at <http://www.cath4choice.org/nobandwidth/English/new/inthenews/0512CityPress.htm> (last visited Mar. 16, 2003).

56. "[R]ape in South Africa results from several factors, including the generally high incidence of violence, the cultural patriarchy, and the treatment of children as commodities. High levels of alcoholism also lead to sexual violence." Thalif Deen, *U.N. Troubled by Rise in Child Rapes in South Africa*, Inter Press Service, SA (Oct. 4, 2002), at <http://ww2.aegis.org/news/ips/2002/IP021006.html> (last visited Mar. 16, 2003).

57. *Id.* Poverty leads children to accept money for schooling in return for providing sexual favors. *Id.* "[T]he AIDS epidemic has left many children orphaned," responsible for caring for siblings. Girls may prostitute themselves to help pay to feed and clothe family members. *Id.*

predators also believe that younger individuals are less likely to have contracted the disease.⁵⁸ Women traditionally hold a low status in society, making it difficult for them to protect themselves in sexual relationships.⁵⁹ Changing cultural norms have caused individuals to have higher numbers of sexual partners,⁶⁰ which proportionally increases the risk that a person will eventually have relations with an HIV-positive individual.

Additionally, the denial of certain behaviors leads to the proliferation of HIV. For example, a generally strong denial of teenage sexual activity and homosexuality exists in the black community.⁶¹ The government perpetuates this denial by refusing to address problems within the teen and homosexual communities.⁶² In the end, what is not acknowledged will not be cured.

These problems of South African culture are cyclical. For example, starving family members, and women in particular, are too malnourished and ill to continue gathering food for the rest of the family.⁶³ Thus, the entire family unit suffers and becomes malnourished. The younger females in the family are forced to find a source of income and often turn to prostitution, which, in turn, yields to more HIV infections.

SOUTH AFRICA'S LEGAL RESPONSE TO AIDS

The South African government has established several commissions and advisory boards to combat the AIDS epidemic. The government appointed an AIDS Advisory Group in 1985, but did not create a structured AIDS Program until 1991.⁶⁴ In 1992, the government

58. *Id.*

59. AIDS Foundation Report, *supra* note 10. Because of more traditional roles that women take in South African society, "women often depend on men for money." *Id.* Therefore, a woman may not be inclined to reject a man's sexual advances or suggest condom usage for fear of losing income. Paralegal Advice, *HIV/AIDS and the Law*, at <http://www.paralegaladvice.org.za> (last visited Oct. 4, 2003). Only twenty-six percent of married women practice contraception in Sub-Saharan Africa. The number of women and men of reproductive age will increase by more than three hundred million in the next two decades, thus reproductive health services need to expand rapidly. Millennium Development Goals, *Combat HIV/AIDS, Malaria, and Other Diseases*, at http://www.developmentgoals.org/Hiv_Aids.htm (last visited Oct. 4, 2003) [hereinafter *Combat HIV/AIDS*]. These traditional views provide that both men and women in South Africa believe that a woman does not have the right to say no to her husband's advances. *Id.*

60. AIDS Foundation Report, *supra* note 10.

61. *Id.*

62. *Id.*

63. *Famine and HIV in Africa*, *supra* note 43.

64. AIDS Foundation Report, *supra* note 10. The infrastructure consisted of a network of AIDS training, information, and counseling centers. *Id.*

established the National AIDS Coordinating Committee of South Africa (NACOSA) to develop a national AIDS strategy.⁶⁵ The South African government consolidated this strategy in the National AIDS Plan and officially adopted it in 1994.⁶⁶ The plan has remained essentially the same, but there have been additions such as the Beyond Awareness Campaign⁶⁷ and the Partnership Against AIDS.⁶⁸ Other measures included an Interministerial Committee on AIDS⁶⁹ and the creation of the National AIDS Council (NAC).⁷⁰ In 1998, the Treatment Action Campaign (TAC) was established to help universalize affordable treatment and increase the availability of educational resources for those needing treatment.⁷¹

Despite these national plans to help combat the epidemic, the prevalence of HIV denial has significantly hindered the government's pursuit of a solution. HIV denialists claim that HIV does not exist at all.⁷² Because denialists have positions of authority within the South African government, passing meaningful legislation to combat the spread of the virus is very difficult.⁷³ Additionally, because there are five million infected South Africans, it may be easier for the government to deny the

65. *Id.*

66. *Id.* The committee was comprised of concerned individuals, non-governmental organizations (NGOs), AIDS service organizations (ASOs), all levels of government, and the African National Congress (ANC) Health Secretariat, as well as representatives of business, unions and churches. *Id.*

67. The Beyond Awareness Campaign is a communications campaign that was run by the Directorate, who is in charge of controlling South Africa's response to AIDS. *Id.*

68. The Partnership Against AIDS, created on October 9, 1998, advocated all South Africans working together to help the AIDS epidemic. *Id.*

69. Parliament established the Interministerial Committee on HIV/AIDS in 1997. *Id.*

70. The Council (NAC) was created in February 2000. *Id.* It is comprised of representatives from government, business, civil society, and the medical sector. *Id.* Groups of teams were fashioned to advise the Council on policy issues. *Id.* The NAC is chaired by the Deputy President, currently Jacob Zuma. *Id.* Unfortunately there are grave resource constraints that have hindered the execution of the National AIDS Plan. *Id.*

71. AIDS AND THE LAW § 10.16 (David W. Webber ed., 3d ed., 2002 Cumulative Supplement).

72. HIV denial began in the Western United States by a small group who purported that HIV was "not viral, and not infectious" and that it "has never been isolated" in a scientific setting. Cameron, *supra* note 45, at 416. These dissidents blame lifestyle behaviors, such as taking drugs and "partying," for the breakdown of individuals' immune systems. *Id.* at 417. Since the lifestyles of South Africans who were dying was different from the lifestyles of infected Americans, South African denialists had to find new reasons to support their hypothesis. *Id.* They again blamed lifestyle for the deaths, but the lifestyle causing the immune deficiencies was now "extreme poverty." *Id.* Once individuals who were not living impoverished lifestyles started contracting HIV, denialists began blaming HIV medication, claiming that the drugs were toxic. *Id.* at 418. Dissidents posit that the drug industry, run by Western nations, is to blame for the epidemic. *Id.* They say that keeping Africans sick in order to make African nations purchase more medications will keep the drug industry booming. *Id.* Additionally, denialists also believe Western corporations are hoping to poison Africans because they are black. *Id.*

73. *Id.* at 419.

problem and forego burdensome medical costs.⁷⁴ However, not all South African authorities are denialists. The South African government has recently repudiated the denialist position.⁷⁵

In addition, there are HIV criminal statutes in South Africa. Such statutes differ from those enacted in the United States. The South African laws do not create new crimes, such as non-disclosure of HIV status to a sexual partner. Rather, they change the sentencing requirements for HIV-positive offenders. For example, the Criminal Procedure Second Amendment Act (CPSAA) denies bail to HIV-positive alleged rapists.⁷⁶ The Criminal Law Amendment Act (CLA) provides for higher sentences for first time rape offenders.⁷⁷ The South African government recently passed the Compulsory HIV Testing of Alleged Sexual Offenders Bill.⁷⁸ This law enables victims of sexual offenses to apply for the alleged perpetrator to be tested for HIV.⁷⁹ All of these laws were enacted as a response to the public's frustration over the high rate of HIV-related crime in South Africa.⁸⁰

However, the South African government has not singled out HIV victims by enacting legislation that makes distinctly HIV-related behavior criminal.⁸¹ Reasons for choosing not to criminalize HIV to a further extent include more than the resistance of the denialists. The primary objectives of South African criminal laws are the same as American laws: incapacitation, promotion of normative behavior, and deterrence.⁸² The

74. *Id.*

75. *Id.* On April 17, 2002, the government of South Africa promoted a program of obtaining medications for HIV-positive individuals and reducing drug prices. *Id.*

76. AIDS AND THE LAW, *supra* note 71, § 10.16 (citing Act 85 of 1997, effective Aug. 1, 1998). Additionally, the act allows bail for "exceptional circumstances." *Id.*

77. *Id.* (citing Act 105 of 1997). The relevant sections of 51-53 became effective May 1, 1998. *Id.*

78. Journ-Aids, *Cabinet approves HIV tests for sex crimes* (Oct. 23, 2002), at <http://www.journ-aids.org/reports/23102002a.htm> (last visited Mar. 16, 2003).

79. *Id.*

80. AIDS AND THE LAW, *supra* note 71.

81. Nevertheless, these laws are reminiscent of the mandatory syphilis testing for suspected prostitutes (and non-prostitutes) in nineteenth century England after the passage of the Contagious Diseases Act. *See supra* note 1 and accompanying text.

82. South Africa has hundreds of statutory crimes and approximately forty common-law crimes. J. R. DU PLESSIS, AN ELEMENTARY INTRODUCTION TO THE STUDY OF SOUTH AFRICAN LAW 110 (Juta & Com 1981). The crimes of murder and culpable homicide are common-law offenses. *Id.* at 116. English law had a profound influence on South African law, particularly the statutory and criminal areas. *Id.* at 19-20. However, within the past fifty years, South Africa has weeded out much of the English influence to return to Roman-Dutch law. *Id.* at 21. Nevertheless, the influence of English law is still apparent in South Africa. *Id.* at 20-23.

South African Law Commission did not believe that criminalizing of HIV-exposure-related activities would achieve these objectives. Instead, it reasoned that criminalization of HIV transmission would have an isolating effect, which would infringe on the individual rights of those affected.⁸³ The criminal law may have some part in protecting against the deliberate exposure of HIV, however, the South African Law Commission stated the criminal law is neither the best nor the only way to deal with the epidemic.⁸⁴

EFFECTIVENESS OF THE HIV EXPOSURE STATUTES IN THE UNITED STATES

Unlike South Africa, the United States chose to implement criminal HIV exposure laws. The effectiveness of these laws in the United States has been grounded on specific history and culture.⁸⁵ HIV exposure statutes in the United States are superfluous in function and fail to stop the spread of the disease.⁸⁶ Between 1986 and 2001, no prosecutions involving HIV exposure were brought under a general communicable disease or STD statute.⁸⁷ All prosecutions were brought under HIV-specific state statutes,⁸⁸ and a majority of the cases could have been prosecuted under non-HIV-specific statutes because the alleged behavior by the defendant was already illegal regardless of HIV exposure.⁸⁹ Furthermore, nearly twenty-five percent of these cases involved behavior with an extremely

83.

The isolation of recalcitrant individuals might . . . not have more than a minimal effect on any attempt by the authorities to combat the spread of HIV. The extremely slight advantage which isolation may hold for public health is thus disproportionate to the infringement of individual rights which isolation, even if based on behavior, may entail. The Commission is of the opinion that no case can be made out for generally applicable administrative measures that provide for the isolation of HIV infected persons.

SOUTH AFRICAN LAW COMMISSION, ASPECTS OF THE LAW RELATING TO AIDS (Working Paper No. 58, Project 85, ¶¶ 4.40-4.10, 1995).

84. "Notwithstanding the difficulty of accommodating the sexual behaviour of persons with HIV infection within the framework of the above-mentioned existing offences, the Commission is not in favour of the creation of a specific offence aimed at AIDS related behaviour." *Id.* ¶ 4.43. The behavior is already covered under general criminal laws. *Id.*

85. Lazzarini, *supra* note 28, at 239-41.

86. More than seventy percent of those charged with HIV-related crimes "committed their HIV-related illegal act in the course of a sex crime, an assault, or an act of prostitution." Lazzarini, *supra* note 28, at 247. Each of these activities is already criminal behavior and can be dealt with under general criminal laws, rendering HIV-specific statutes superfluous.

87. *Id.* at 244.

88. *Id.*

89. *Id.* at 240. Seventy percent of cases involved behavior that was already illegal, such as prostitution, nonconsensual sex, or a form of assault. *Id.*

low risk of exposure, such as biting, spitting, and scratching.⁹⁰

These statutes also fail to achieve their purported objectives. In terms of incapacitation, the law is rarely effective. Darnell McGee and Nushawn Williams are the type of individuals at who incapacitation is aimed.⁹¹ However, these extreme examples are not frequent occurrences warranting such legislative attention.⁹² Most HIV transmission cases deal with consensual sex or needle-sharing.⁹³ It is not easy to draw bright lines in these circumstances.⁹⁴

HIV criminal law in the United States has not promoted normative standards in any meaningful sense. In order for an individual to believe he should follow the law because the law treats him fairly, he must be aware of the law.⁹⁵ The laws concerning HIV transmission are not well known.⁹⁶ Moreover, these laws have been used “almost exclusively against minorities, sex workers, and prisoners.”⁹⁷ Just as women were the target of the Contagious Diseases Act,⁹⁸ these marginalized groups are the targets of HIV criminal exposure statutes.⁹⁹ These groups are the very ones most likely to mistrust the government and its laws.¹⁰⁰ Complying with the

90. *Id.* at 244.

91. See Flock, *supra* note 1919; Markus, *supra* note 22.

92. Lazzarini, *supra* note 28, at 251.

93. *Id.*

94. Many people consider sex to be consensual, even if a partner did not disclose his HIV status. Non-disclosure of HIV status when sharing needles may not be considered as grave an action as purposely having sex with as many people as possible in order to spread a deadly virus. When sharing needles, the intent is to take drugs and there may be no malicious purpose in trying to infect others, particularly if an individual is physically addicted to the drug. Rather, the infection is an adverse consequence. Drug use affects the judgment of drug addicts and it is less likely that they have the culpable state of mind to intentionally spread the virus. Further, if someone is intentionally trying to spread the virus, it is more likely that he will use sex, not intravenous drug sharing.

95. Lazzarini, *supra* note 28, at 249.

People generally are not terribly well-informed of the laws that regulate them, and the laws governing HIV exposure are often sufficiently opaque that even lawyers would argue about exactly what they require or prohibit . . .

[P]rosecutions are covered by the media, but the average number of articles is rather low and our reading of them found that they rarely provide clear information about the laws being applied.

Id.

96. *Id.*

97. Catherine Hassins, director of the AIDS Project at Lambda Legal Defense, at <http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.3483> (last visited Mar. 16, 2003).

98. See generally *Contagious Diseases Act*, *supra* note 1.

99. For example, some states require arrested prostitutes to submit to an HIV-test. See e.g. COLO. REV. STAT. § 18-7-201.5 (2003). Because prostitutes must be tested under these statutes, their results will become known to the prosecutor who is then able to bring charges for a separate crime, such as attempted murder, if the prostitute tests positive for HIV. See, e.g., FLA. STAT. CH. 796.08 (2003).

100. Lazzarini, *supra* note 28, at 250. Minorities often feel as though they are on the fringe of society. *Id.* Thus, they are often less likely to appreciate governmental policies and are less likely to

norm may not be a priority for such persons. Moreover, “[t]he behavior most widely accepted as wrong—deliberately using HIV as a tool to harm or terrorize another—is too rare to influence the epidemic, whereas the behavior most responsible for spreading the virus—voluntary sex and needle-sharing—is difficult and controversial to prohibit.”¹⁰¹

The HIV transmission statutes are not highly effective deterrents because relatively few people attempt to purposely infect others.¹⁰² Deterrence is ineffective if offenders run little risk of being caught.¹⁰³ Additionally, proving this behavior may be difficult under the law.¹⁰⁴

Some might say that the disadvantages outweigh the benefits of American HIV exposure criminal laws. The vagueness and breadth of several of these statutes arouse constitutional concerns.¹⁰⁵ Under some HIV exposure statutes, a mother could be charged with transferring HIV to her baby in utero.¹⁰⁶ The statutes can also discourage voluntary HIV testing; if “knowledge” is a requirement for conviction, a defendant can claim a lack of knowledge if he has not been tested.¹⁰⁷ Further,

put their trust in government decisions. *Id.*

101. *Id.* at 251. The extreme transmission cases are predominantly considered wrong and criminal. *Id.* However, more mundane activities, such as disclosing HIV status to sexual partners or condom usage are less cut and dry situations, thus, normative views are not as prevalent. *Id.* at 249.

102. *Id.* at 250.

103. *Id.*

104. *Id.*

105. A statute is unconstitutional for vagueness when it fails to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Illinois transmission statute, for example, is vague for failing to define “knowledge.” See 720 ILL. COMP. STAT. ANN. 5/12-16.2 (West 2002). Additionally, the Illinois law uses the phrase “could result in the transmission of HIV,” as opposed to using only medically proven methods of transmission. *Id.* Criminalizing the transfer of “potentially infectious bodily fluids,” even when such fluids may have no risk of transmission, renders the statute overbroad. *Id.* The broad definition in the New Jersey statute “encompasses conduct that presents no risk of HIV transmission. Christina M. Shriver, *State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications*, 21 N. ILL. U. L. REV. 319, 342 (2001). See also N.J. Stat. Ann. §2C:14-1 (West 2002). By including penetration with a hand, finger, or object in the definition, the law is susceptible to constitutional challenges for overbreadth. *Id.* It appears to criminalize activities that could not result in transmission of HIV or any sexually transmitted disease.” *Id.*

106. Lazzarini, *supra* note 28, at 246. Although no women have been prosecuted for in utero exposure, women have been prosecuted for exposing their fetuses to drugs. *Id.* In both cases, it is likely that a woman does not intend to transfer HIV or drugs to her unborn child. *Id.* Nevertheless, if a woman can be prosecuted for delivering drugs to her fetus, the same logic could apply to exposing her fetus to HIV. *Id.*

107. Markus, *supra* note 22, at 850. Moreover, the burden to prove that an individual knew he was HIV-positive at the time of the alleged transmission is on the prosecution. Richard Elliott, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, UNAIDS, 6-7 (2002). Testing a person for HIV on the basis of a criminal accusation poses such human rights concerns as violation of

confidentiality of medical records may be compromised if they are subject to subpoena in HIV transmission cases.¹⁰⁸

HIV transmission statutes apply to already criminalized behavior,¹⁰⁹ and the total number of prosecutions is low.¹¹⁰ Therefore, it seems that the statutes serve mainly to stigmatize certain minorities in an attempt to crusade against alleged public vices.¹¹¹ Similarly, because there is prosecutorial discretion in all criminal cases, there is a risk that prosecutors may “arbitrarily or prejudicially” prosecute only certain HIV-positive individuals who have exposed others.¹¹²

an individual’s privacy. *Id.* at 7. Additionally, HIV testing after the alleged incident is not a conclusive determination of that individual’s status at the time of the incident. *Id.* Policymakers must decide whether the limited deterrent effect of a criminalization statute outweighs the harm the statute imposes on public health because individuals will choose not to be tested. *Id.*

108. Markus, *supra* note 22, at 850. Evidentiary burdens have implications for the privacy of others as well. An individual’s history of past sexual partners may also be brought into the courtroom, exposing the status of non-parties to the litigation. *Id.* at 874. While many states have special confidentiality requirements for an individual’s HIV status, there are certain circumstances in which such information may be released to third parties. *Id.* The primary exceptions for the release of HIV status include disclosure to health care providers, sexual and needle-sharing partners, parties with court orders or subpoenas, blood and organ donors, school officials, HMOs, and insurance companies. *Id.* A Course Manual Content, *Ethics . . . Exploring Privacy and Confidentiality Gray Areas: Bioethics and HIV/AIDS Patients*, at <http://www.socialworkcredit.com/contentsPCsec6.html> (last visited Oct. 28, 2002).

109. Lazzarini, *supra* note 28, at 247.

110. *Id.* at 248. In a study conducted analyzing the statistics of prosecutions for HIV-related crimes, no evidence was found of “systematic enforcement of HIV exposure laws.” *Id.* at 247.

111. Homicide statutes are available in the criminal justice system. Thus, creating a new law that is specific to HIV-positive individuals does not further the goals of the criminal justice system, but instead isolates those affected with HIV. “Private biases may be outside the law, but the law cannot, directly or indirectly, give them effect.” *Palmore v. Sidoti*, 466 U.S. 429 (1984). By criminalizing activities of those with HIV-positive status, HIV-positive individuals are generally seen in a negative light by other community members. If few prosecutions take place under this criminalization, the objective of incapacitation is not fulfilled. The only outcome thus becomes the negative attitude toward these individuals.

112. Lazzarini, *supra* note 28, at 240. Prosecutors may single out certain minorities in order to appease local communities who maintain biases against such individuals. Thus, these laws can be used to further stigmatize politically controversial groups. *Id.* For instance, homosexual behavior comprises seventy-two percent of all HIV transmission cases in Missouri. Dee Wampler, *Felonious Assault by the HIV-AIDS Infected*, 54 J. MO. B. 31 (1998). As previously mentioned, these laws have been used primarily “against minorities, sex workers, and prisoners.” Hassins, *supra* note 97, at 2. David Salyer reasons: “These HIV criminalization laws are all about blame, revenge and retribution. They ignore the consensual element of sex and abolish a negative person’s personal responsibility. They don’t apply until after the fact, making them grossly ineffective as a prevention strategy.” David Salyer, *Along the Latex Highway: Crime and Punishment; A Rape Survivor Discusses the Criminalization of HIV Transmission*, SURVIVAL NEWS, Dec. 1999, at <http://www.thebody.com/asp/dec98/crime.html> (last visited Sept. 7, 2003).

EFFECTIVENESS OF HIV TRANSMISSION LAWS IN SOUTH AFRICA

Despite the use of HIV exposure statutes in the United States, many other nations do not favor the criminalization of HIV exposure.¹¹³ Both the United Nations and Amnesty International reject criminalization, and author and AIDS advocate Patricia Nell Warren states that “African countries where HIV is widespread . . . hesitate about rushing into the Orwellian anti-HIV laws now favored by the United States.”¹¹⁴

When considering the objectives of incapacitation, promotion of normative behavior, and deterrence, HIV transmission laws would not be successful in South Africa. In terms of incapacitation, the same considerations apply in South Africa as in America. There are very few individuals who maliciously and purposely try to infect others with HIV. It is arguable that because of cultural norms, such as the belief that sex with a virgin will cure HIV,¹¹⁵ incapacitation might be slightly more effective in South Africa. However, education from National AIDS policies is diminishing such archaic views.¹¹⁶ Moreover, imprisoning an HIV-positive individual may not prevent him from spreading the virus.¹¹⁷ Prison settings often promote high-risk behaviors, and access to condoms and clean drug-injection equipment is virtually non-existent.¹¹⁸

HIV criminal law is not likely to achieve the objective of promoting norms in South Africa. The current laws concerning HIV transmission might not be well known to South Africans. Because the South African government has previously eschewed the criminalization of HIV,¹¹⁹ the South African public likely would be unaware of a new law criminalizing HIV exposure. If the HIV criminal laws are used primarily against minorities, sex workers, and prisoners,¹²⁰ as they are in America, the laws will not effectively promote normative behavior. These targeted individuals are most likely to mistrust the laws,¹²¹ leaving them without an

113. Warren, *supra* note 15.

114. *Id.*

115. Deen, *supra* note 56.

116. The National AIDS policies are likely to educate the public about HIV issues and debunk such rumors. *See supra* notes 64-71 and accompanying text.

117. Elliott, *supra* note 107, at 20.

118. *Id.*

119. South African Law Commission, *supra* note 83.

120. Hassins, *supra* note 97.

121. *See supra* note 98 and accompanying text.

incentive to comply with norms. Again, it is important to remember that it is quite difficult to prohibit the behaviors, such as voluntary sex, that are most responsible for spreading the disease.¹²² HIV transmission statutes would not be effective deterrants in South Africa. Individuals rarely knowingly infect others. South African cultural beliefs are not going to disappear simply with the enactment of an HIV criminal exposure statute. Such beliefs would make it more difficult for deterrence to work in South Africa than in the United States because offenders claim lack of knowledge that such behavior would spread HIV. Offenders could even claim they were trying to eliminate the virus through their sexual conduct. Under these circumstances, proving purposeful or even negligent¹²³ behavior may be difficult under the law.¹²⁴

Additionally, because of the high crime rate in South Africa, including rapes, the South African legal system would be hard pressed to process all of the possible offenders.

The additional goal of rehabilitation is also difficult to achieve in HIV transmission cases. If the objective is to stop the spread of the disease, and not to punish those who are afflicted, rehabilitation is not a practical solution because most offenders are not intentionally trying to infect others. Rehabilitation should be designed to cure the infected, which is an impossibility under criminal law.¹²⁵

HIV carries such a stigma in South Africa that transmission statutes would only perpetuate the problem.¹²⁶ The prejudice accompanying stigmatization has further ramifications for isolated HIV-positive individuals. In some instances those individuals are denied job opportunities.¹²⁷ They are also turned away from proper health care

122. See *supra* note 99 and accompanying text.

123. South African common law includes the offense of culpable homicide, which is defined as the negligent killing of another. DUPLESSIS, *supra* note 82, at 110.

124. Elliott, *supra* note 107, at 6.

[I]f reasoned judgment is outweighed by less rational considerations (such as desire, fear or addiction), or if a moral concern for the welfare of others has not already prompted a change in behaviour, then it is unlikely that a legal prohibition will have much additional effect.

125. Under criminal law, the only solution is to incarcerate offenders. True rehabilitation, however, would theoretically entail curing offenders of their HIV status. The criminal law is unable to achieve this objective.

126. Cameron, *supra* note 43. Overbroad use of criminal laws can spread misinformation about HIV transmission. Elliott, *supra* note 107, at 6. So many myths about the disease run rampant in South Africa that creating new laws would only perpetuate the problem.

127. Because of stigmatization, "HIV/AIDS can render talented individuals unemployable or uninsurable, and impair their ability to secure housing or receive health care or other services. Gostin, *supra* note 14.

services due to a lack of resources and medication.¹²⁸ Without any medical attention, victims' conditions worsen; those affected are unable to lead productive lives, are often confined to their homes, and cannot effectively integrate themselves into the rest of society.

The legislative debate focuses on both moral considerations and the assignment of responsibility for the promulgations of health care laws.¹²⁹ Legal sanctions are based on moral considerations, such as an infected person's affiliation with a certain group, while the rendering of public health services typically concentrates on the severity of the individual's illness. This debate makes it difficult to solve the AIDS epidemic, as well as other global health care issues.

ALTERNATIVES FOR SOUTH AFRICA

Criminalizing, sanctioning, or stigmatizing sufferers of HIV and AIDS will not solve the epidemic. Horrific HIV transmission reports, such as the cases of Darnell McGee and Nushawn Williams,¹³⁰ fuel a public outcry for retribution. However, policymakers must avoid creating laws that serve such purposes.¹³¹ An effective solution requires more than merely enacting criminal laws to enforce normative judgments. Instead, it is necessary to "combat the ways [the disease] is transmitted . . . without condemnation or shame or guilt."¹³² Policy should focus on education and increasing medical funding.¹³³

HIV prevention, care, treatment, and support will emanate from effective public health policy, not from criminal legislation. Public health policies can address underlying causes of vulnerability to HIV infection and risk activities, such as addiction and domestic violence.¹³⁴ Criminal laws fail to deal with these underlying circumstances. In terms of deterrence, "[p]ublic health interventions are more flexible, and can be better tailored to the individual's circumstances than the blunt tool of a

128. State of the Union Address, *supra* note 44.

129. The legislature is traditionally responsible for the creation of laws. Yet, in this Author's opinion health care professionals are arguably more familiar with the array and details of health care problems and may have more insight into the analysis of health care law.

130. Flock, *supra* note 19; Goldman *supra* note 22.

131. Elliott, *supra* note 107, at 8.

132. Cameron, *supra* note 45, at 3.

133. The criminal code that already exists can adequately deal with offenders such as Darnell McGee and NuShawn Williams.

134. Elliott, *supra* note 107, at 8, 29.

criminal prosecution.”¹³⁵ Every case has specific nuances, and criminal law is less likely to tailor itself to such circumstances. These laws can actually impede HIV prevention, care, treatment, and support. They should be repealed or at least amended.¹³⁶ Public health orders can successfully preserve an individual’s liberty and confidentiality while providing deterrent effects.¹³⁷ Concentrating on a cure, rather than a punishment, is the most effective means of halting the spread of HIV.

A primary educational objective of the South African government should be debunking some of the myths surrounding HIV and AIDS. Policymakers must protect against discrimination and protect privacy,¹³⁸ and ensure that vulnerable and stigmatized groups are no longer in positions of susceptibility.¹³⁹ As long as HIV and AIDS are associated only with certain groups, many individuals will not believe they are at risk.

Because women have long acted as the primary child caretaker in South Africa, death of women greatly affects family structure. Female teachers, health care workers, and farmers are among those killed by the disease;¹⁴⁰ schools, health care clinics, and food sources are threatened when so many women are affected. Deaths by parents in general have left more than 13 million AIDS orphans. That figure is expected to “more than double by 2010.”¹⁴¹

In addition to massive education efforts, sufficient funding for medical assistance is imperative for an effective AIDS prevention policy. Access to HIV testing, counseling, and support for risk reduction are required, as well as treatment for exposure.¹⁴² The global fund established by United

135. *Id.* at 29.

136. These laws impede the treatment of HIV because they stigmatize individual groups, making the community less willing to provide for these groups. Individuals in these groups are singled out for prosecution, but they are not cured of their HIV status and the HIV rate continues to rise in spite of the random prosecutions.

137. *Id.*

138. *Id.* at 38.

139. Lawrence Gostin, *The Politics of AIDS: Compulsory State Power, Public Health and Civil Liberties*, 49 OHIO ST L.J. 1017 (1989). “States . . . should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.” *International Guidelines on HIV/AIDS and Human Rights*, U.N. Commission on Human Rights, res. 1997/133, U.N. Doc. E/CN.4/1997/150 (1997), available at <http://www1.umn.edu/humanrts/instatee/+4igha.html>.

140. *Combat HIV/AIDS*, *supra* note 57.

141. *Id.*

142. Elliott, *supra* note 107, at 29.

Nations Secretary-General Kofi Annan¹⁴³ is a good starting point for ensuring access to these resources for affected victims. However, a global fund is only a “financing mechanism and not an implementing mechanism.”¹⁴⁴ Even if funds are available, the leaders establishing the funds must oversee the implementation of effective programs that properly utilize and distribute medical and educational resources.¹⁴⁵ In addition, effective public education will also allow South African women to break out of their traditional submissive roles; they can feel more assured when rejecting unwanted sexual advances by men and when insisting on condom usage.

CONCLUSION

The United States, South Africa and the world will continue to battle the spread of AIDS for many years. The enactment of criminal HIV exposure statutes in South Africa will not accomplish the objectives of criminal law in the context of AIDS. The statutes were not very successful in the United States and will likely be even less successful in South Africa. The moral panic, such as fear and prejudice, that accompanies the AIDS epidemic does not prevent disease. Instead, it merely impedes public health education and funding for cures. Syphilis was defeated by penicillin, not by the Contagious Diseases Act.¹⁴⁶ In a similar vein, AIDS

143. Clark, *supra* note 44 and accompanying text.

144. *Famine and HIV in Africa*, *supra* note 44. At a global level, AIDS and HIV advocates are beginning to question whether AIDS and HIV programs are effective. XIV International AIDS Conference, *UNGASS Will Make Governments Accountable*, (July 25, 2002), at http://www.aids2002.com/ViewArticle.asp?article=/T-CMS_Content/News/7252002023513PM.xml (last visited Sept. 5, 2003). “The reality that we need to face is that many of those who control the purse strings still ask this question, and see spending on AIDS as something that they are getting forced into by political pressure.” *Id.*

145. A new set of indicators has been established to measure national progress against the United Nations General Assembly Special Session on AIDS (UNGASS) commitments that 180 governments signed on to in 2000. *Id.* The indicators will analyze analysis of national and global AIDS funding and policies. The analyses will be distributed for broad publication and ensuing debate. *Id.* For example, the indicators will calculate the percentage of pregnant women with HIV who receive antiretroviral prophylaxis and measure the levels of HIV among young people and newborns. *Id.* Other indicators will record government commitment by surveying national funds that are spent on AIDS. At a global level, the indicators will note the levels of donor contributions on AIDS and whether international agencies have workplace policies and staff training programs to adequately combat AIDS. *Id.* These indicators and analyses will hopefully make policymakers more accountable and improve commitment to HIV/AIDS needs. *Id.*

146. Pat Califa, CounterPunch, *The Necessity of Excess*, (Oct. 19, 2002), at <http://www.counterpunch.org/califa1019.html> (last visited Oct. 4, 2003).

will be defeated by education and funding for medical treatment, not by establishing HIV criminal exposure statutes.

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