Criminal Law and HIV/AIDS: Strategic Considerations

A Discussion Paper

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1. Background

Since the emergence of the HIV/AIDS pandemic, there have been calls for coercive measures to be used against those with the disease, and those identified with the disease in the public consciousness, to prevent the spread of HIV. In numerous jurisdictions, criminal sanctions have been invoked against HIV-positive people for conduct that transmits, or risks transmitting, the virus.

The use of criminal sanctions in some situations of HIV transmission or exposure may not raise particularly difficult legal, ethical, or policy concerns (eg, prohibiting a person with a known bloodborne disease from donating blood, or criminal liability for those who negligently operate blood banks). However, applications of the criminal law to other conduct that risks spreading HIV are more contentious, particularly when it comes to people with HIV engaging in sexual activity or sharing drug injection equipment. In such cases, the rhetoric of calls for criminalization or other coercive state measures has often appealed to prejudices and fears, which should in itself be cause for concern. Generally absent is any critical reflection as to the appropriate role of such policies in responding to HIV/AIDS. Often, the result is not only criminalization, but an ill-considered overreaction that unjustifiably overextends the criminal law. In some cases, criminal prosecutions have been used against HIV-positive people even when their conduct posed no appreciable risk of transmission (eg, biting or spitting). In others, people have been detained under public health legislation without convincing evidence that they posed any significant risk of transmitting HIV to others.

To date, actual prosecutions for HIV transmission or exposure have been reported primarily in developed countries,[1] and to lesser extent elsewhere.[2] In recent years, however, the issue of criminalization of HIV transmission/exposure has begun to receive increased attention in a number of developing countries and countries in transition.[3] This discussion has focused primarily

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[1] For a description of some such developments see: R Elliott. *Criminal Law and HIV/AIDS: Final Report*. Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997; DL McGolgin, ET Hey. "Criminal Law" in: DW Webber, ed. *AIDS and the Law* (3d ed). New York: John Wiley & Sons Inc, 1997, at 259-345 (and supplement); and regular updates in the following publications: *Canadian HIV/AIDS Policy & Law Newsletter*, *AIDS Policy & Law* (US), *HIV/AIDS Legal Link* (Australia), and *Impact* (UK).

[2] Eg, see reference to Bolivian case in AM Linares. Legislative Approaches to AIDS in Latin America. *Journal of International Law & Politics* 1991; 23(4): 1012 at 1024, also citing Resolución Bi-Ministerial 1415/89, Art 53, at 1018-1019; HIV-Positive Woman Jailed for Spreading AIDS Virus. *Russia Today*, 17 January 2000 (www.russiatoday.com); R Wockner. Hungarian arrested for HIV transmission. *International News* #255, 15 March 1999.

[3] For example, see: South African Law Commission. The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour (Discussion Paper 80, Project 85), October 1998; South African Law Commission. Consultative meeting with Experts, 3 February 2000: Report of Proceedings; AIDS Law Project South Africa (H Axam et al.) Response Paper to the SA Law Commission's Discussion Paper, 1999 (http://www.hri.ca/partners/alp); S Kanyangarara. Proposed Use of the Criminal Law to Deal with HIV Transmission in Zimbabwe. *Canadian HIV/AIDS Policy & Law Newsletter*

on physical assault that is seen as risking transmission (eg, rape and other sexual assault, biting, splashing of body fluids), and sexual activity with apparently consenting partners by HIV-positive individuals who conceal or do not disclose their status. Certainly these are the cases that have received the attention of criminal prosecutors and courts. (To a lesser extent, there has been some discussion of the application of criminal law to HIV-positive health-care workers who undertake certain medical procedures, to the sharing of drug injection equipment, and to breastfeeding of infants by HIV-positive women.[4])

1999; 4(2/3): 98-101; D Buchanan. The law and HIV transmission: help or hindrance? *Venereology* 1999; 12(2): 57-66 [regarding Indian criminal law]; D Buchanan. Public health, criminal law and the rights of the individual. African Network on Ethics Law and HIV: Proceedings of the Intercountry Consultation (Dakar, Senegal, 27 June – 1 July 1994). Dakar: UNDP, 1995; R Tenthani. Malawi seeks to prosecute reckless HIV transmitters. *PanAfrican News Agency*, 11 August 1999, via Africa News Online <www.africanews.org>; Kenya National AIDS/STDs Control Programme (NASCOP). AIDS in Kenya: Sessional Paper No. 4 of 1997 – Policy on AIDS (www.arcc.or.ke/nascop); Criminal Code needs more attention at NA session: Chairman. *Vietnam News*, 18 May 1999; R Stern. Criminal Penalties Proposed for People with AIDS in Costa Rica. News from Triangulo Rosa, 19 June 1997; W Gibbings. Trinidad & Tobago: Legal Minds Say No to More Laws on AIDS. *InterPress Service*, 13 May 1999 (www.aegis.com/news/ips/1999/IP990502.html).

[4] See: R Elliott. *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status*. Montréal: Canadian HIV/AIDS Legal Network, 1999, at 38-43; ML Closen, SH Isaacman. Criminally Pregnant: Are AIDS Transmission Laws Encouraging Abortion? *American Bar Association Journal* 1990; 76: 76-78; SH Isaacman. Are we outlawing motherhood for HIV-infected women? *Loyola University of Chicago Law Journal* 1991; 22: 478-496; H Sprintz. The criminalization of perinatal AIDS transmission. *Health Matrix* 1993; 3: 495-537; D Wanamaker. From Mother to Child...A Criminal Pregnancy: Should Criminalization of the Prenatal Transfer of AIDS/HIV be the Next Step in the Battle Against this Deadly Epidemic? *Dickinson Law Review* 1993; 97: 383; MA Field. Pregnancy and AIDS. *Maryland Law Review* 1993; 52: 402; S Sangree. Control of childbearing by HIV-positive women: some responses to emerging legal policies. *Buffalo Law Review* 1993; 41: 309; K Boockvar. Beyond survival: the procreative rights of women with HIV. *Boston College Third World Law Journal* 1994; 14: 1-42.

(1) Scope and Purpose of This Paper

This conference – Putting Third First: Critical Legal Issues and HIV/AIDS – provides an opportunity for participants from both developing and developed countries to discuss in depth a number of concrete legal issues relating to HIV/AIDS. The focus is on legal strategies to advance the human rights of those most vulnerable to HIV/AIDS and to discrimination: people in the developing world and people who, although they live in the developed world, suffer from poverty and marginalization and are at high risk of contracting HIV. One of those issues is the criminalization, or proposed criminalization, of HIV in many jurisdictions. This paper attempts to provide an overview of the factors that should be taken into account by policymakers, activists, lawyers and other advocates, and people with HIV/AIDS. and to present some recommendations and resources that will equip people to respond to this issue.

Given the constraints of time and space, it is not possible here to provide a detailed catalogue of various countries' actual or proposed legislation or specific cases of prosecution (many of which details can be found by referring to the resources listed at the end). Nor is an attempt made to provide a definitive answer as to which conduct that causes or risks HIV transmission is justifiably criminalized and which is not. Some such conduct (eg, sexual assault) is clearly criminal, not *because* of the HIV status of the assailant, but regardless of that status. And in some cases there is no justification for criminal prosecutions (eg, the HIV-positive person whose partner freely consents to risk activity while fully aware of the person's status).

But there is much room for reasonable disagreement between these two extremes. Should deliberately deceiving a sexual partner about one's HIV-positive status, or even merely not disclosing that fact, give rise to criminal liability? Does the degree of risk of transmission involved in the activity make a difference? What if precautions to reduce the risk (eg, condoms) are used? There is no easy answer to these questions, and each requires (and has been the subject of) extensive discussion.

In keeping with the objectives of this conference, this paper must remain at a more general level in considering how best to analyze and respond to the legal issue of criminalizing HIV transmission/exposure. The paper:

- sets out five guiding principles for the discussion;
- briefly outlines the rationales for criminalization and a number of other policy considerations;
- identifies three specific strategic questions regarding criminal law and HIV/AIDS;
- offers a number of draft recommendations for discussion; and
- provides a list of essential resources on the issue.

The ultimate goal is to ensure sound public policy in this area, so as to prevent the misuse of such coercive measures; minimize the harm to people with HIV/AIDS and vulnerable communities; and minimize the negative effects on HIV prevention efforts and access to care, treatment, and support for people with HIV/AIDS.

2. Guiding Principles

It is suggested that a number of principles should guide state policy regarding the use of criminal sanctions or coercive measures under public health legislation. They should also inform a discussion of strategies for ensuring that such public policy is sound.

(1) Respect and Promote Human Rights

Any legal or policy responses to HIV/AIDS, particularly the coercive use of state power, should not only be pragmatic in the overall pursuit of public health but must also conform to international human rights norms. In 1998, as requested by the UN Commission on Human Rights, the UN High Commissioner for Human Rights and the Joint UN Programme on HIV/AIDS issued *HIV/AIDS and Human Rights: International Guidelines*, "to assist States in translating international human rights norms into practical observance in the context of HIV/AIDS.... Several years of experience in addressing the HIV/AIDS epidemic have confirmed that the promotion and protection of human rights constitute an essential component in preventing transmission of HIV and reducing the impact of HIV/AIDS."[5] Two of those guidelines directly address this issue:

> Guideline 3: States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.
>
> Guideline 4: States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.

(2) HIV Prevention Must Be the Primary Objective

If resort is to be had to the criminal law as a social policy response to the HIV/AIDS pandemic, then the single most important objective in doing so must be preventing the spread of HIV. This does not mean that the objective of HIV prevention justifies any or all use of the criminal law, or that infringements on human rights can necessarily be justified in the name of HIV prevention (see

[5] Office of the United Nations High Commissioner for Human Rights & the Joint United Nations Programme on HIV/AIDS. *HIV/AIDS and Human Rights: International Guidelines*. New York & Geneva: United Nations, 1998: paras 10 & 72.

the first principle articulated above). Nor does this mean that all other potential arguments in favour of a criminal law response are automatically irrelevant because they do not relate to preventing HIV transmission. The point is simply that any objectives of invoking the criminal law other than preventing the spread of HIV must be secondary. Criminal law policy should not sacrifice HIV prevention in pursuit of other criminal law goals (such as retribution). Whether the criminal law will be effective in achieving this HIV-prevention objective, and how the pursuit of this objective must respect other legal policy objectives (eg, protecting the human rights of people with HIV/AIDS), are separate questions (and are touched upon below).

(3) Base Decisions on the Best Available Evidence

The best available scientific evidence regarding modes of HIV transmission and levels of risk must be the basis for any rational thinking about if, and when, conduct should attract criminal liability. This principle is particularly important in the light of too many cases in which court decisions or legislation are over-broad and excessive in criminalizing conduct that carries little or no risk of transmission. Such irrational uses of the law are not only unjust, exacting inexcusable human suffering; they also endanger the public health by communicating misinformation about HIV and its transmission. In the words of Justice Kirby of the High Court of Australia:

> As in any area of the law, it is essential to base legal responses – if they are to be effective – upon a good empirical understanding of the target to which it is hoped the law will attach.... AIDS laws must not be based upon ignorance, fear, political expediency and pandering to the demand of the citizenry for "tough" measures.... Good laws, like good ethics, will be founded in good data.[6]

(4) Coercive Measures Are of Limited Utility

Justice Kirby has also warned us that "laws and public policies on HIV/AIDS will have only a minor part to play in the reduction of the spread of the virus. Do not put too much faith in coercive laws as a means of stopping the spread."[7] As is outlined below, the relevance of criminal sanctions (or other quasi-criminal, coercive measures) as a response to the HIV/AIDS pandemic is limited. Criminalizing HIV transmission and/or exposure might be presented by some as "getting tough" in the fight against AIDS. But such measures will be inapplicable or ineffective with respect to most instances of HIV transmission or exposure, and so will do little overall to stem the spread of HIV.

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[6] Kirby. HIV and Law – A Paradoxical Relationship of Mutual Interest. Paper presented at IUVDT World STD/AIDS Congress, Singapore, 22 March 1995 (www.fl.asn.au/resources/kirby/ papers/199950322_singa.html).

[7] M Kirby. The Ten Commandments. [Australian] *National AIDS Bulletin* March 1991: 30-31.

Coercive approaches may also be of detriment to public health on a macro level, by diverting resources and attention away from, and by undermining the strength of, policies and initiatives such as: HIV/AIDS education; access to the means of protecting against infection; access to testing, treatment, and support services; and remedies for the root causes of vulnerability to HIV infection (eg, poverty, violence, discrimination, and substance use). As the UN's *International Guidelines* note:

> One aspect of the interdependence of human rights and public health is demonstrated by studies showing that HIV prevention and care programmes with coercive or punitive features result in reduced participation and increased alienation of those at risk of infection. In particular, people will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality or other negative consequences.... [C]oercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and health support.[8]

(5) Principle of "Least Intrusive, Most Effective"

Coercive measures should be used sparingly and as a last resort: "The challenge ... is to use the available measures sufficiently to restrict the spread of AIDS [sic: read HIV], without going so far as to stifle individual freedoms."[9] State action to prevent the transmission of disease should operate on the principle that the "least intrusive" measures possible to achieve the demonstrably justified objective is always to be preferred, so as to minimally impair valuable rights and interests.[10]

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[8] *International Guidelines*, *supra* at para 74; see also: J Dwyer. "Legislating AIDS Away: The Limited Role of Legal Persuasion in Minimizing the Spread of HIV." *Journal of Contemporary Health Law and Policy* 1993; 9: 167.

[9] R Friedman. The Application of Canadian Public Health Law to AIDS. *Health Law in Canada* 1988-89; 9: 49 at 49.

[10] *International Guidelines*, *supra* at para 82.

3. Criminalization: Pros and Cons

To determine the justifiable parameters of the criminal law with respect to HIV transmission or exposure, consideration must be given to both the rationales for criminalization and a number of other policy considerations in favour of a restrained application of the criminal law.

(1) Functions of Criminal Law

There are four primary arguments for invoking criminal law as a response to conduct considered objectionable.

(a) Incapacitation

Some argue that incarceration prevents prisoners, for the term of their imprisonment, from harming others. This argument is weak in the context of HIV transmission. Rather than preventing an accused from engaging in further activity that may transmit HIV, incarceration places that person in a setting where evidence indicates high-risk behaviour is common and even likely. Furthermore, risk activities within prisons contribute to further transmission outside; prisoners receive conjugal visits and most will eventually be released into the community.

(i) Rehabilitation

Enabling individuals to take measures to reduce the risk of HIV transmission is ultimately the most important goal. But given the nature of sexual activity and drug use – which account for most cases of HIV transmission – the argument that criminalization serves the goal of rehabilitation is highly dubious. It must be questioned whether criminal prosecutions and penalties serve any significant rehabilitative function for any significant portion of offenders. There is a vast literature in the fields of criminology, psychology, and social sciences on this point, and there are few clear-cut answers to this question. For purposes of this paper, suffice to say that common sense suggests the rehabilitative value of criminal prosecutions and penalties, if any, will at the very least depend upon the individual offender, the makeup and approach of the courts and correctional systems, and a host of other variable factors that affect the relationship between them. Rehabilitation is a complicated matter, and it simply cannot be accepted without question that criminalizing risky sex or needle-sharing practices by HIV-positive people will bring about "rehabilitation" in the sense of preventing such behaviour in future. It seems far more likely that other interventions – such as counseling and support, addressing underlying causes of risk behaviour such as drug use, poverty, etc – will encourage long-term changes in risk-taking behaviour such as risky sex or sharing drug injection equipment, thereby preventing further HIV transmission. Such interventions can occur without the involvement of the criminal law.

(ii) Retribution

One justification for criminalizing certain conduct is that it deserves punishment because it is morally blameworthy (eg, it unjustifiably causes or risks harming others), and therefore society is justified in imposing penalties on those who engage in such conduct. However, this retributivist argument can only justify criminal sanctions in those cases where the conduct is clearly morally blameworthy and thus deserving of punishment. Therefore, it is necessary to consider the state of the mind of the accused person: it is the "guilty mind" directing the prohibited conduct that is the legitimate subject of punishment. Criminalizing conduct where there is no "guilty mind" – and hence no moral culpability – cannot be justified on the basis that punishment is morally deserved. For example, it would be unjustifiable (indeed immoral) to criminally prosecute a person for transmitting HIV when they were unaware of their own infection. At best, the objective of punishment sustains a limited application of the criminal law to conduct that is morally wrong, and even then, not every morally wrong act should also be defined as a crime.

Reasonable people may disagree as to whether conduct is morally wrong, and as to which moral wrongs should also be legal wrongs carrying criminal liability. For example, intentionally infecting someone with HIV would universally be considered morally wrong conduct that should carry penal sanctions. But is mere silence about one's HIV-positive status before penetrative sex the kind of immoral conduct that deserves criminal punishment? Does it matter whether a condom is used? Does it matter whether the HIV-positive person is insertive or receptive? Disagreements about the moral character of these acts (and others than can be imagined) are not easily resolved, and such resolution is not attempted here. Rather, the point is that a retributivist justification for invoking criminal law must always rest upon the premise that the conduct is so morally wrong that it deserves punishment by the state through the use of criminal penalties, its harshest measure.

(iii) Deterrence

The most common argument for criminalization is that it will serve to deter people from conduct that transmits, or risks transmitting, HIV. Unlike a retributivist rationale, deterrence is clearly motivated by public health concerns, because it claims that invoking the criminal law will prevent HIV transmission. This rationale for criminalizing risky conduct may hold some attraction on a theoretical level, but its practical significance is questionable.

> We cannot be very sanguine about the use of criminal law to compel changes in human sexual behaviour. Realistically, criminal law is likely to be of minimal significance in influencing conduct: other factors, such as fear of infection, are likely to be of greater effect in influencing sexual practices.[11]

> The behaviors sought to be controlled or punished are highly ingrained, intimate, and deeply human activities. Coercive state action is a particularly crude tool to

[11] W Holland. HIV/AIDS and the Criminal Law. *Criminal Law Quarterly* 1994; 36(3): 279 at 316.

> compel change in these behaviors.... Probably the most important goal of the criminal law in the context of a disease epidemic is deterrence. The best that can be hoped for is that the threat of criminal sanctions will prevent people from taking unreasonable risks that could transmit the virus. The criminal law is not a likely vehicle for deterring such behavior. In most cases where the criminal law has been used against [people with HIV] there was no motive or advance planning. Spontaneous behavior driven by human anguish, despair, or passion is difficult to prevent.[12]

This is not to say that, because it may be effective in only some cases, the criminal law should never prohibit conduct that causes or risks harm to others. It is merely to say that the argument based on deterrence offers a limited justification for a criminal law response to HIV transmission or exposure. The law can only be said to have any appreciable benefit in preventing HIV transmission through this deterrent effect in those cases where a person knows they are HIV-positive, considers the potential for criminal penalties, and modifies their conduct accordingly by avoiding or reducing activities that risk transmission or by disclosing their status to a sexual or needle-sharing partner.

The deterrent effects of criminal prohibitions are a complicated matter, and vary based on the individual's social and economic position (eg, poverty, vulnerability to abuse, ability to avoid liability), personality and psychological state (eg, knowledge of the law, mistaken factual beliefs, moral consciousness, political opinions, fear of punishment, impaired capacity), and circumstance (eg, opportunity to avoid detection, fear of violence), as well as the legal and political context (eg, ineffective criminal justice system, impunity for the rich and powerful). For example, in the extreme case of the person who feels no moral responsibility at all to avoid causing or risking harm to another, a legal prohibition would only be of any additional deterrent effect to the extent that the person feels the risk to them of criminal penalties. Or consider those cases where reasoned judgment is outweighed by other, less rational considerations (such as desire, fear, or addiction): "adding further reflective considerations such as laws or moral maxims is singularly unsuccessful. The fact that reason has already failed suggests that further reason will not fare any better."[13]

The simple claim that criminalizing conduct that causes or risks HIV transmission will deter that conduct, and thereby advance the goal of HIV prevention, requires careful and critical scrutiny. There may be some deterrent effect for some individuals under some circumstances. But it would be dangerous to the public health to overestimate the deterrent value of criminal prohibitions on

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[12] L Gostin. The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties. *Ohio State Law Journal* 1989; 49: 1017 at 1019, 1056.

[13] G Gillett. AIDS: The Individual and Society. In: *Legal Implications of AIDS*. Auckland: Legal Research Foundation, 1989, at 107.

such complicated human behaviour as sex or drug use. This is particularly true in circumstances where risk behaviour may be widespread because:

- many people's ability to disclose their HIV-positive status or to avoid or reduce risk in their sexual conduct or drug use is impaired (eg, by stigma and discrimination, possibility of violence, poverty, addiction, etc); and/or

- social, economic, and legal realities undermine any deterrent effect of criminal prohibitions (eg, already widespread impunity for men who harm women or children, or place them at risk of harm).

In such circumstances, relying to any great extent on the criminal law as a method of preventing HIV transmission would be misguided and irresponsible social policy. More effective measures that address the complicated socioeconomic factors underlying risk activities would represent a better use of scarce resources in preventing HIV transmission, and should be the priority.

(b) Other Policy Considerations Favouring Restraint

There are also five primary policy considerations suggesting that the application of criminal law to HIV/AIDS should be restricted in the interests of not damaging a number of valuable interests or objectives.

(i) Difficulties with proof

The burden is (and should be) on the prosecution to prove a crime – both the prohibited conduct (*actus reus*) and the requisite mental culpability (*mens rea*). To have any other rule would offend the presumption of innocence.[14] But if criminal prosecution is of any use, this will be hindered by the difficulty of proving these elements in order to obtain a conviction.

Risk activities will generally occur in private without third party witnesses. It will be difficult in some cases to conclusively prove that an HIV-positive person knew their status, or knew how HIV is transmitted. (This raises additional questions regarding the issue of what needs to be proven. What degree of mental culpability should be required in order to justify applying the criminal law? It would be unjust to prosecute and imprison the person who did not even know they were HIV-positive. Should the prosecution also be required to prove that the person knew their conduct posed a risk of transmission to another if they are to be held criminally liable? And

[14] *Universal Declaration of Human Rights*, Article 11; *International Covenant on Civil and Political Rights*, Article 14(2).

will it be a defence to criminal liability if someone mistakenly believed that their conduct posed no risk, or no appreciable or significant risk, of transmission to the other person?)
It will also be difficult to prove what was done or said (or not done or said) regarding taking precautions to reduce the risk of transmission and to disclose their infection. Legally, the burden of proof is on the prosecution. But decisions by courts, and particularly by juries, do not necessarily observe such legal niceties. In practical terms, people with HIV will still be required to defend themselves against an allegation of having sex without disclosing their status. If accused, how could one prove that they disclosed their status to a sexual or needle-sharing partner and/or took precautions to prevent transmission? The criminal law casts a shadow over all people with HIV/AIDS, including those who act responsibly.

(ii) Detrimental effect on public health initiatives

There a number of ways in which criminalization as a policy response – particularly if overextended and misused – could adversely affect important public health initiatives.

Stigma: The introduction of HIV-specific criminal legislation, or individual criminal prosecutions against people with HIV for risky conduct, is usually accompanied by inflammatory and ill-informed media coverage. This inevitably contributes to the stigma surrounding HIV disease and people with HIV/AIDS as "potential criminals." As one US court stated in 1985: "AIDS is the modern day equivalent of leprosy."[15] Sadly, the stigma surrounding HIV/AIDS – and the discrimination it engenders – remain very real today.

Deterring HIV testing: In addition, any effect the criminal law has in deterring risk activity could ultimately be outweighed by the harm it does to public health in deterring HIV testing. If knowing your HIV-positive status means that you immediately become subject to a legal obligation to disclose to a sexual partner, and that not disclosing means possible criminal prosecution, is this is an additional reason to avoid getting tested? The significance of this potential effect is unknown. However, the available evidence indicates that fear of negative consequences – such as loss of confidentiality, discrimination, and violence – remain barriers to seeking HIV testing; hence steps have been taken in many jurisdictions to address such barriers through initiatives such as access to anonymous testing, and strengthening laws to protect confidentiality and prevent and remedy discrimination. The threat of criminal prosecution for risky conduct upon learning of HIV infection is a similar negative consequence that should be factored into policymaking, although the extent of this effect may be hard to determine.

Undermining access to support: What is the impact of criminalizing risky conduct by people with HIV/AIDS on their access to support systems such as counselors? Implementing changes in risk behaviour – particularly in circumstances of addiction, poverty, or the threat of violence from a sexual partner or needle-sharing partner – is difficult. If continued risky behaviour is discussed with a physician or counselor, what use can be made of that information? Will the confidentiality

[15] *South Florida Blood Service Inc* v *Rasmussen*, 467 So.2d 798 at 802 (Fla Dist Ct App 1985).

of counseling sessions be sacrificed by prosecutors seizing counselors' notes in a search for evidence of criminal activity that can be used against the HIV-positive person? Could this ultimately do more harm to both people with HIV/AIDS and the public health than any potential benefit to be gained from criminalization?

False security: Creating a category of "other" people who are the sole focus of criminal sanctions may create a false sense of security among people who are (or think they are) HIV-negative, encouraging risky behaviour on their part:

> These statutes may create a false expectation that the existence of a criminal law has eliminated any danger from engaging in unprotected sex. To the extent public health policy states everyone should assume their partners are infected and should take measures accordingly, that policy is undermined by the false belief that criminal statutes have helped reduce the risk.[16]

Misinformation: The over-extension of the criminal law also risks spreading misinformation about how HIV is transmitted. Serious criminal charges have been laid in Canada and the US against HIV-positive people for biting and spitting, despite the evidence that the risk of HIV transmission in this fashion is infinitesimal at most. In one particularly egregious case, an HIV-positive prisoner in Texas was convicted of attempted murder for spitting at a prison guard. Four different courts of appeal upheld his conviction. Sentenced to 99 years in prison, he subsequently died in jail.[17] In Canada, an HIV-positive transgendered prostitute was sentenced to two years in prison for "aggravated assault" for biting a police officer's hand as he arrested her, because the judge accepted the argument that her bite had "endangered the life" of the officer. An appeal court refused to hear evidence showing there was no significant risk of transmission from the bite.[18] Sensational headlines reporting such cases undermine crucial efforts to educate the public about HIV and how it is, and is not, transmitted.

(iii) Selective prosecution

Given the stigma surrounding HIV, there is also concern that criminal sanctions, as is often the case, will be directed disproportionately at those who are socially and/or economically marginal and are associated in the public mind as the "guilty" people with HIV/AIDS, such as: the urban

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[16] JF Hernandez, in ML Closen et al. Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws. *Arkansas Law Review* 1994; 46: 921 at 971.

[17] *Weeks* v *State of Texas*, 834 SW.2d 559 (Tex CA, 1992), affirmed in *Weeks* v *Texas* (Texas Court of Criminal Appeals, No 92-1154), noted in *AIDS Policy & Law* 1992; 7(19): 3.

[18] *R* v *Thissen*, unreported decision, 16 May 1996, Ontario Court (Prov Div), Toronto, Cadsby J, affirmed [1998] OJ No 1982 (Court of Appeal) (QuickLaw). See: R Elliott. Sex Trade Worker Sentenced to Two Years for Biting. *Canadian HIV/AIDS Policy & Law* 1996; 3(1): 20; R. Elliott. Criminal Law and HIV/AIDS New Developments. *Canadian HIV/AIDS Policy & Law Newsletter* 1999; 4(2/3): 45-51 at 46.

poor, prostitutes, injection drug users, gay/bisexual men and other men who have sex with men, immigrants, ethnic or racial minorities in a country, etc. For example, "HIV positive sex workers occupy a central place in the discourse on people who pose a risk to the public health. This discourse is constructed through the media and a moralistic language associated with prostitution."[19]

Similarly, while the law in some jurisdictions has been written or interpreted as also applying to conduct that risks transmitting diseases other than HIV,[20] in many instances the law has been expressly and specifically targeted at people with HIV, and certainly the predominant focus of attention in all jurisdictions has generally been HIV as opposed to other transmissible diseases.

> Indeed, the intensity of the demand for criminalisation of HIV transmission may itself be a reflection of the prejudices surrounding the HIV epidemic, because no comparable demand has arisen in response to transmission of other sexually transmitted diseases which, although less serious in their medical consequences, are in fact more easily transmitted than HIV and nonetheless result in physical and emotional harm to the person infected.[21]

Such singling out of HIV and people with HIV for criminalization contributes to the stigma still attached to HIV and to the "background noise" of social exclusion and disapproval that is commonly experienced, in myriad ways and on a regular basis, by people with HIV/AIDS.

(iv) Gender inequality

Gender inequality must also be considered in any discussion regarding criminalization of HIV transmission or exposure. Social, economic, political, legal, and cultural inequality hinders the ability of many women to freely negotiate their sexual lives, including avoiding or reducing the risk of HIV infection; too often, attempts to do so may result in violence. The desire to impose criminal prohibitions on risky behaviour with a view to protecting women against HIV infection by their male partners is understandable. However, a gender-cognizant analysis of this issue must also consider the effect of invoking the criminal law on women, in particular women with HIV/AIDS.

As one participant at the workshop pointed out, women exposed to HIV or infected by their partners may not necessarily benefit from the prosecution and incarceration of their partner if this

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[19] S Gibson. 'Knowingly and recklessly': The policy and practice of managing people who place others at risk of HIV infection. *HIV/AIDS Legal Link* 1997; 8(3): 6-9 at 7.

[20] Eg, see *R* v *Cuerrier*, [1998] 2 SCR 371 (Supreme Court of Canada).

[21] AIDS Law Project South Africa (H Axam et al.) Response Paper to the SA Law Commission's Discussion Paper, *supra* at note 72.

means a loss of economic support for them or their children. Criminalization may be "tainted by gender bias" if it fails to account for differing levels of risk – all else being equal, the risk of female-to-male transmission is lower than male-to-female transmission,[22] although this difference may not be great enough that a court would consider it legally significant. Furthermore, imposing criminal sanctions for conduct that transmits HIV or risks transmission would be unjust in circumstances where an HIV-positive person's options to avoid that harm or risk of harm – by disclosing to a partner and/or by taking precautions to reduce the risk of transmission – are limited. Indeed, it is precisely the same factors of inequality that increase many women's vulnerability to HIV infection that will also hinder her ability to safely avoid or reduce the risk of transmission to husband or other male partner.[23]

> In most societies, the lower social and economic status of women reduces their ability to insist upon male sexual fidelity and to negotiate safe sex.... In some instances, a wife's mere suggestion that her husband use a condom can provoke physical abuse.... What is the purpose of handing out condoms to women if they have no power within a sexual relationship to negotiate for the use of the condom?[24]

The epidemic of violence against women is already well documented. In addition, research has shown disturbing levels of physical violence against people with HIV/AIDS following disclosure,[25] including for HIV-positive women at the hands of partners following disclosure.[26] For women and men whose ability to disclose their HIV status and/or to take precautions to reduce the risk of transmission is limited, invoking the criminal law as a response to HIV may not, ultimately, serve to protect. It certainly does not provide any solution to the underlying reasons

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[22] MA Bobinski. Women and HIV: A Gender-Based Analysis of A Disease and its Legal Regulation. *Texas Journal of Women & the Law* 1994; 3: 7.

[23] UNAIDS. *Gender and HIV/AIDS: Taking stock of research and programmes*. Geneva: UNAIDS, 1999 (UNAIDS/99.16E), available online at www.unaids.org (and note various studies cited therein).

[24] M Dhaliwal. Creation of an Enabling and Gender Just Legal Environment as a Prevention Strategy for HIV/AIDS amongst Women in India. *Canadian HIV/AIDS Policy & Law Newsletter* 1999; 4(2/3): 86-89 (www.aidslaw.ca); also available at website of the Lawyers Collective HIV/AIDS Unit (ww.hri.ca/partners/lc/unit/women-hiv.shtml). See also: UNAIDS. *Gender and HIV/AIDS: Taking stock of research and programmes*, *supra*.

[25] S Zierler et al. Violence victimization after HIV infection in a US probability sample of adult patients in primary care. *American Journal of Public Health* 2000; 90: 208-215.

[26] RL North & KH Rothenberg. Partner notification and the threat of domestic violence against women with HIV infection. *New England Journal of Medicine* 1993; 329: 1194-1996; KH Rothenberg et al. Domestic violence and partner notification: implications for treatment and counseling of women with HIV. *Journal of the American Medical Women's Association* 1995; 50: 87-93; KH Rothenberg & S Paskey. The risk of domestic violence and women with HIV infection: implications for partner notification, public policy, and the law. *American Journal of Public Health* 1995; 85: 1569-1576.

why they may be placed at risk of infection (eg, poverty, domestic violence, etc). Rather, it may impose an additional burden on those who are doubly disadvantaged by HIV infection (and its attendant social and economic costs) and by their vulnerability to violence or other abuse.

(v) Invasions of privacy

Finally, as Holland has put it, "one of the most compelling reasons for caution is the potential intrusion into sexual privacy."[27] In addition, the privacy of "confidential" records kept by health professionals or counselors could also be lost in the search for evidence (as noted above). Criminal prosecutions are public proceedings, and the HIV-positive status of the accused would become widely reported. Some might argue that this is necessary to achieve the deterrent effect of the criminal law (the significance of which has already been questioned). However, we should question whether this outweighs the harm of fuelling HIV/AIDS stigma, and whether such public attention is desirable or justifiable if other alternatives exist. Complainants would also need to provide testimony, and the likely loss of confidentiality will also need to be considered in assessing the value of criminal proceedings. Judicial orders suppressing reporting of the person's identity may be a partial solution, but cannot be considered a complete answer; placing limits on the scope of reporting by mass media may be helpful, but does not ultimately preserve the complainant's privacy.

(2) Weighing the Arguments

The retributivist and deterrent functions of criminal law offer the strongest arguments in favour of using the criminal law to address conduct that may transmit HIV. However, even these rationales support, at best, a limited use of the criminal law: "Each of the usual rationales for the criminal law – retribution, incapacitation, and deterrence – appear ill-suited to deal with a disease epidemic."[28]

At the same time, a number of public policy considerations suggest that invoking the criminal law should only be done with restraint. Criminal prosecutions are likely to be difficult; they are likely to contribute to the stigma and misinformation surrounding HIV; they may be disproportionately used to target particular groups or defendants; they may undermine HIV testing and access to support. Overall, we must consider whether criminalizing risky conduct will protect and promote public health. If criminalization "serves to undermine our overall public health response to the HIV epidemic, then we must seriously question whether the gains from criminalization are worth it."[29]

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[27] Holland, *supra* at 287.

[28] Gostin, *supra* at 1019, 1041, 1056.

[29] HL Dalton. "Criminal Law." In: S Burris et al. *AIDS Law Today: A New Guide for the Public*. New Haven: Yale University Press, 1993, at 255.

4. Questions for Discussion

Three strategic legal questions regarding the criminalization of HIV transmission/exposure are presented here for further discussion:

- the issue of criminal prosecutions versus public health interventions;
- the question of applying traditional offences or enacting new HIV-specific legislation; and
- ways to prevent the overextension and misuse of criminal law or public health powers.

(1) Criminal Prosecutions or Public Health Interventions?

Should the principal policy response to conduct that risks HIV transmission take the form of prosecutions for a criminal offence, or should it be dealt with instead by the exercise of public health authorities' powers to intervene?

"One reason people tend to accept uncritically criminalization of HIV is that they do not compare it to other possible methods of dealing with the problem."[30] Most jurisdictions have statutes that grant specified powers to certain public authorities to be exercised for the protection of public health, including provisions for dealing with communicable disease. While the form and content of these statutes vary, in general they are worded quite broadly. Public health authorities and workers (eg, physicians, nurses, counselors) may intervene in a variety of ways to address conduct that could transmit HIV. They provide education, counseling, and support for behaviour change, including assistance in addressing underlying reasons that an HIV-positive person may be engaging in risk activity (eg, poverty, domestic violence, addiction).

But more coercive measures may also be authorized by law: compelling a person to be examined if there are grounds to be believe they may be infected; issuing orders to infected persons to conduct themselves so as to avoid spreading disease; and detaining or isolating a person if this is justifiably necessary to prevent the spread of disease. Refusing to comply with public health authorities' orders is also sometimes defined as an offence that can attract penal sanctions such as fines or imprisonment. Thus, in their more coercive applications, public health laws can take on a "quasi-criminal" character (although not resulting in a criminal record and the accompanying consequences).

Are criminal prosecutions or interventions by public health authorities preferable? Public health interventions do not preclude the application of criminal sanctions where such are warranted. However, a number of factors suggest that the exercise of public health powers may be preferable

[30] MA Bobinski, in ML Closen et al. Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws. *Arkansas Law Review* 1999; 46: 921 at 969.

to criminal prosecutions as the principal means of addressing conduct that causes or risks HIV transmission. It is submitted that public health interventions

- offer greater flexibility, which may mean greater effectiveness;
- are more proactive, rather than solely reactive;
- preserve confidentiality better, avoiding further stigmatization associated with HIV; and
- achieve the most important goals as well as, or arguably better than, criminalization.

(a) Flexibility

One-on-one interventions by public health workers (or other support workers) can be tailored to an individual's specific circumstances, such as addressing drug use that may result in sharing used injection equipment, or the fear of domestic violence that may prevent an HIV-positive woman from disclosing to her partner or taking "safer sex" precautions. In contrast, the criminal law is a very blunt instrument for attempting to effect behaviour change.

(b) Proactive Measures

Interventions by public health officials – eg, counseling, support in addressing underlying causes of risk behaviours, orders to avoid risk behaviour – are specifically designed with the goal of preventing conduct that risks transmission in the first place. In contrast, criminal prosecutions necessarily arise after the fact, where exposure (and in some cases, transmission) has already occurred. Which state response is better linked to the most important objective of preventing the spread of HIV?

(c) Confidentiality

Public health officials are (or ought to be) subject to legal obligations to maintain the confidentiality of information obtained about individuals' health status, with justified breaches of that confidentiality the exception rather than the rule.[31] This means that one-on-one interventions by public health workers to address risk behaviour are relatively private, and even where confidentiality may be breached (eg, to safeguard a specific person at risk of infection), such cases would not be widely publicized in the same fashion as criminal proceedings in open court. (A few exceptional cases have been seen in which public health officials have released public statements to the entire community identifying a person as HIV-positive.) Ironically, the success of public health interventions may contribute to a general perception that they are ineffective. It is often only those cases in which interventions by public health or other interveners have failed that criminal charges may be laid, with the accompanying media publicity that contributes to public thinking about HIV/AIDS as a problem of criminality rather than as a public health issue.

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[31] *International Guidelines*, *supra* at paras 28(e)-(g), (j), 97, 99.

(d) Achieves Most Important Objectives

Finally, the objectives of invoking the state's powers in response to HIV-risking conduct should be considered. If, on balance, the use of public health powers can achieve the desired (and justifiable) goals of criminalization, while doing less damage to public health initiatives and other important interests such as equality and privacy, then this strongly suggests a preferable alternative to invoking the criminal law – at least in those cases where this holds true.

Because of their greater flexibility, their more proactive nature, and the preservation of confidentiality (thereby avoiding stigmatization of the person publicly identified as HIV-positive), public health interventions are better suited to achieving the goal of *rehabilitation* (in the sense of enabling individuals to avoid future conduct that risks HIV transmission and effecting that change in conduct).

In cases where more extreme measures of coercion are required, public health legislation offers interventions preferable to, and probably more effective than, criminalization in achieving the goal of *incapacitation*. If less intrusive measures fail, an individual who persists in conduct that unjustifiably places others at risk could be detained in a setting where less high-risk activity occurs than in a prison (if this is an option in the jurisdiction in question).

It is true that criminal law is certainly better suited for punishing and publicly denouncing objectionable conduct. These are neither appropriate functions, nor desired effects, of applying public health law. But can we afford to let the desire for *retribution* in individual cases determine our public policy, especially in the context of an epidemic whose spread has already been exacerbated by misguided moralizing and scapegoating of vulnerable populations?

Finally, as already noted, since HIV prevention is the most important goal of invoking the criminal law, the role of the law in *deterring* conduct that causes or risks HIV transmission is the key consideration. But we can only speculate as to whether criminal sanctions or the use of public health interventions will have a greater deterrent effect. Public health orders may have some deterrent effect on the specific individuals to whom they apply, and can be directed at prohibiting certain conduct while preserving the person's liberty in other respects. If these orders are already enforceable by the courts and by police, it is unclear whether the threat of an additional prosecution for another, separate criminal offence will have any significant additional effect in modifying behaviour. While the public nature of criminal prosecutions may yield a greater deterrent effect for the public in general, experience suggests that the activities accounting for most HIV transmission (sex and injection drug use) are highly resistant to change and persist in the face of criminal prohibitions. With respect to the goal of deterring risky behaviour, interventions by public health officials that are tailored to the individual's life circumstances may ultimately be more effective.

There are, however, two other factors to consider in weighing the relative desirability of public health interventions versus criminal prosecutions: (i) due process protections for human rights, and (ii) the limits of public health law.

(e) Protecting Human Rights

As adverted to in the *International Guidelines*, "due process protection" in the application of public health or criminal laws to restrict the rights to liberty and security of the person is required.[32] This means the content of both public health legislation and the criminal law (codified or otherwise) in a given jurisdiction will be a significant consideration. What powers are available to public health authorities that are applicable to HIV/AIDS? What due process protections exist already (or could be implemented) in both areas of the law for those who will be subject to coercive measures?

As a preliminary matter, it must be noted that the coercive use of public health powers against someone based solely on their HIV-positive status is not only unsound public health practice; it is also unethical and a violation of internationally recognized human rights.[33] Rather, it is conduct that causes or risks harm to others that must be considered. As the *International Guidelines* point out: "In exceptional cases involving objective judgements concerning deliberate and dangerous behaviour, restrictions on liberty may be imposed. Such exceptional cases should be handled under ordinary provisions of public health, or criminal laws, with appropriate due process protection."[34]

Some have argued that the coercive use of state power against those whose conduct causes or risks HIV transmission is best done by invoking criminal sanctions, on the basis that this body of law offers (at least in some jurisdictions) greater procedural and substantive safeguards for those subject to such coercive measures (eg, the right to counsel, the entitlement to full disclosure of a prosecution's case and to cross-examine witnesses so as to make full answer and defence, the right to appeal a conviction or sentence). Naturally, the extent to which such rights are recognized and respected in domestic criminal law will vary across jurisdictions. There is a concern that domestic public health law may not always offer the same degree of (at least theoretical) protection against misuse.

There is the additional concern that public health interventions may be frequently directed at individuals from marginalized populations. For example, a recent survey of Australian public health departments showed that a large majority of those "case managed" for placing others at

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[32] *International Guidelines, supra* at para 112.

[33] *International Guidelines, supra* at para 110-113.

[34] *International Guidelines, supra* at para 112.

risk of HIV infection had one or more of drug dependence, intellectual disability, and/or mental illness:

> ... HIV positive people who are also "clients" of the mental health, criminal justice, disability and drug and alcohol systems are subject to increased governmental surveillance around their bodies and sexuality. This surveillance (which may be called "case management") facilitates the discovery of sexual behaviours that are believed to require correction and the person then becomes subject to additional surveillance under the public health system.[35]

However, it does not necessarily follow from these concerns that a criminal law response to risky conduct is preferable. "Case management" may be particularly appropriate as the response when addiction or impairment is present, precisely because it allows for interventions to address these underlying factors contributing to risk behaviour, rather than imposing criminal sanctions. And a concern for due process protections in the application of coercive public health measures suggests a need for reform in this area of the law, rather than resorting to criminalization in all cases. Regardless of whether the state acts by invoking public health laws or initiating a criminal prosecution, the same rights and interests are engaged, and substantially equivalent protections for human rights should be incorporated into that body of law.

(f) Limits of Public Health Law

Public health interventions require, of course, that public health authorities be aware of the individual and their conduct that risks HIV transmission. Indeed, encouraging access to HIV testing is a principal mechanism for engaging those infected, or at risk of infection, with the public health system; it opens the door to education, counseling, support, partner notification, and, if necessary, more serious measures to prevent further transmission. In some cases, however, a course of conduct that has transmitted HIV or exposed others to the risk of infection only comes to the attention of public health authorities after the fact. This does not preclude interventions at that time to prevent further exposures. Nonetheless, it remains the case that conduct that could give rise to a criminal prosecution may already have been committed. In such cases, should a complainant, police, and/or prosecutors decide to proceed with criminal charges, the mere fact that future conduct could be better addressed by public health interventions does not preclude the possibility of prosecution for conduct that has already occurred.

It should also be acknowledged that public health law may not be able to satisfactorily address all cases of ongoing risky conduct. However, this does not negate the value of a graduated approach that rests upon the principle of "least intrusive, most effective" in the use of state power. The limits of public health law will depend on the extent to which it incorporates the possibility of coercive measures for the most egregious of cases. As has been noted, quasi-criminal measures

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[35] S Gibson. "Knowingly and recklessly": The policy and practice of managing people who place others at risk of HIV infection. *HIV/AIDS Legal Link* 1997; 8(3): 6-9, at 7.

(such as penalties for breaching public health orders and the power to detain a person who continues to place others at significant risk of infection), are just as effective as a traditional criminal prosecution and sentence of incarceration, while at the same time offering benefits such as greater confidentiality and detention in a more appropriate facility (if available). If such measures are available under public health legislation, only the objective of imposing *retribution* remains (partially) unsatisfied by refraining from criminal prosecutions.

Finally, as a point of particular significance for developing countries, it should be noted that public health interventions of the order described above may not always be a realistic mechanism for responding to conduct that causes or risks HIV transmission. The resources needed to staff and sustain a public health system, and accompanying services to address issues such as drug addiction, domestic violence, intellectual disability, mental illness, or poverty may simply be unavailable in many developing countries (indeed, they are often stretched in wealthier countries). Furthermore, while it is a virtue of public health interventions that they may be tailored to address individuals' circumstances so as to address conduct that risks infecting others, the cost of doing so may be greater when the underlying reasons are less individualized, and instead represent deeply entrenched societal norms that are less subject to change by the individual (eg, subordination of women and denial of their sexual autonomy, women's lack of economic autonomy).

This does not mean that the public health system has nothing to offer in the way of preventive interventions such as providing condoms and education, treatment for other sexually transmitted diseases to reduce the risks of HIV transmission, counseling, anonymous partner notification, and assistance with disclosing to current sexual or needle-sharing partners. What it does mean is that public health interventions may not represent as viable or credible an alternative to criminalization if lack of resources undermines their feasibility.

But it does not necessarily follow that there must be a greater role for the criminal law in such circumstances. After all, the significance of the criminal law's retributive function remains the same. And the absence of a well-resourced and functional system of potential public health interventions does not somehow increase the potential deterrent effect of criminal prosecutions. Rather, such a situation further highlights the need, on a macro level, for responses that do not divert attention and resources toward social policy responses that will ultimately do little to check the HIV/AIDS pandemic and away from more effective measures to prevent HIV transmission, including eliminating the stigma and discrimination.

(2) Traditional Offences or HIV-Specific Laws?

If criminal prosecutions are to be pursued, should this take the form of applying traditional offences or should new criminal legislation specific to HIV be enacted?

The answer to this question will depend in part on upon the existing state of the law in a given jurisdiction. Broadly speaking, there are two possible approaches to invoking legal prohibitions against conduct that causes or risks HIV transmission: (i) applying existing offences, and (ii) enacting new laws.

(a) Apply Existing Offences

The first approach is to apply *existing criminal offences* to conduct that transmits HIV or risks transmission. The appropriate offence will depend upon what exists in domestic law that could be applicable given the conduct in question and the mental state of the accused. In some cases, existing statutes dealing with disease transmission may not be applicable, by virtue of their wording and the classification of HIV/AIDS under the legislation.

For the purposes of the present discussion, the term "criminal offences" is used to refer to any legal provisions that prohibit conduct and impose penal sanctions for that conduct – whether embodied in a statute clearly described as penal legislation (eg, Criminal Code, Penal Code, Crimes Act, Offences Act), or in a health statute (eg, Public Health Act), or in the common law definition of offences (eg, assault). It is difficult to always make a clear distinction between what are called "criminal offences" and what are called "public health offences" – often the two may overlap in a country's legal structure. In some jurisdictions, "offences against public health" may be incorporated into a penal code as criminal offences (eg, Honduras,[36] Mexico,[37] Argentina[38]). In other jurisdictions, public health legislation may set out what are in essence criminal offences, for which severe penal sanctions such as fines and imprisonment may be imposed (eg, Australia,[39] Zimbabwe[40]). Regardless of how characterized, when clearly applicable provisions already exist in the law of a jurisdiction (eg, an offence of knowingly spreading disease), there is no need for any HIV-specific legislation (although the existing legislation may possibly be subject to criticism in its drafting or application).

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[36] *Criminal Code of Honduras, 1983*, Book II, Title IV, Art 180, analyzed in: JO Ramos Soto. AIDS in the Scope of Honduran Criminal Law. In: H Fuenzalida-Puelma et al, eds. *Ethics and Law in the Study of AIDS*. Pan American Health Organization: Washington DC, 1992

[37] *Código Penal Federal*, Vol 2, Title 7, Chapter 2, Article 199bis.

[38] Código Penal de la República Argentina, Capítulo IV, Artículos 202 and 205.

[39] See: J Godwin, J Hamblin, D Patterson, & D Buchanan. *Australian HIV/AIDS Legal Guide (2d ed)*. Australian Federation of AIDS Organisations: The Federation Press, 1993: at 35-60; SH Bronitt. Criminal Liability for the Transmission of HIV/AIDS. *[Australian] Criminal Law Journal* 1992: 85; SH Bronitt. Speading Disease and the Criminal Law. *Criminal Law Review* 1994: 21-34.

[40] *The Public Health Bill, 1999*, s 60, introduced October 1999 (available online via: http://www.ecs.co.sz, under "Environmental Legislation" link).

(b) Enact HIV-Specific Legislation

However, in those circumstances where no such provisions exist, the contours of the criminal law's application to HIV transmission/exposure will be shaped by prosecutorial initiative and judicial interpretation of other traditional criminal offences (eg, assault), in response to specific complaints (as has been the experience in Canada,[41] the United Kingdom,[42] and Germany.[43]) And it is particularly in such circumstances that some have proposed the second, more direct approach to criminalization: *enact legislation* that prohibits and penalizes, as an offence under either criminal or public health statutes, certain conduct that transmits or may transmit HIV (as has been the predominant approach in the United States following the recommendation of a presidential commission[44]). This approach means that criminal (or quasi-criminal) prohibition is at the initiative of legislators (which may or may not be in response to particular cases and political pressure), and the contours of the law may be more directly defined.

If it were determined that the current state of the law in a jurisdiction were insufficient to properly address those egregious cases that warrant more coercive measures, it might be justifiable to implement legislation that would strike the best balance possible between the competing interests at stake. The question for the drafters – and necessarily for those concerned about ensuring sound public policy that facilitates HIV prevention efforts and access to care, treatment, and support – is whether HIV-specific legislative measures are desirable or required.

The primary argument advanced in favour of enacting HIV-specific criminal or public health statutes is that this offers an opportunity to more clearly define the prohibited conduct and punishment than would be the case if this task were left to the courts in their interpretation of whether and how traditional offences apply to HIV transmission/exposure. A carefully drafted statute could minimize the likelihood of judicial misdefinition of the criminal law, avoiding judicial waywardness resulting in the overextension and inappropriate application of the law (and the attendant harms already described). However, there is no guarantee that the vagaries of the highly politicized legislative process will necessarily result in a considered, measured approach to legal drafting and approval. Indeed, in many US jurisdictions, HIV-specific "criminal exposure" statutes have been criticized as over-broad (extending to conduct that does not carry any appreciable risk

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[41] See: R Elliott. *Criminal Law and HIV/AIDS: Final Report*. Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997. (www.aidslaw.ca); R Elliott. *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status*. Canadian HIV/AIDS Legal Network, 1999. (www.aidslaw.ca).

[42] Law Commission. Consent in the Criminal Law (Consultation Paper No. 139). London: HMSO, 1995; Law Commission. Violence: Reforming the *Offences Against the Person Act, 1861*. (Consultation Document). 1998.

[43] See: O Kratz. HIV/AIDS in Germany. *Canadian HIV/AIDS Policy & Law Newsletter* 2000; 5(4): forthcoming.

[44] *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic*. US Government Printing Office, 1988.

of transmission) and in some cases unconstitutionally discriminatory (against particular groups) or vague (not adequately distinguishing between criminal and non-criminal conduct).

Furthermore, even accepting that a directed process of implementing new legislation were to be preferred over the incremental development of the law, it does not necessarily follow that new legislation needs to be HIV-specific. Indeed, the *International Guidelines on HIV/AIDS and Human Rights* recommend that:

> Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.[45]

Many arguments against the implementation of HIV-specific statutes have been raised. First, as has been noted, such statutes will be unnecessary in many cases. Existing criminal or public health offences may be adequate in addressing that conduct that is legitimately subject to prohibition and sanction, without the need to single out HIV/AIDS for such treatment.

Second, creating a new offence could compound the problem of criminalization if a new criminal charge is treated by prosecutors as an addition to traditional criminal law charges. The benefit of a carefully and tightly drafted statute in preventing the misuse of the criminal law would be squandered unless such a statute also expressly ousts the applicability of other offences. Indeed, in the US, prosecutions have proceeded under both HIV-specific "criminal exposure" laws and under traditional criminal offences (eg, assault, attempted murder).[46]

Third, an HIV-specific statute would be unlikely to have any additional deterrent effect over and above the deterrent effect (such as it may be) of criminal prosecution under traditional criminal offences.

Fourth, and most significantly, the process of enacting such legislation could be damaging. By specifically focusing on people with HIV/AIDS as potential criminals, the legislative process would contributing to the stigma associated with HIV/AIDS. This would (further) deter HIV testing, undermine education efforts, and impede access to counseling and support services that will assist changes in behaviour to reduce the risk of HIV infection.

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[45] *International Guidelines*, Guideline 4, para 29(a).

[46] See: DL McGolgin, ET Hey. "Criminal Law" in: DW Webber, ed. *AIDS and the Law* (3d ed). New York: John Wiley & Sons Inc, 1997, at 259-345 (and supplement)

(3) How to Prevent Misuse of Criminal Law or Public Health Powers?

How can the overextension and misuse of criminal law or public health powers be avoided or mitigated?

At one point or another, every jurisdiction will likely have to deal with a case or cases where an HIV-positive person, aware of their infection, engages in conduct that causes transmission or poses a significant risk of transmission. Public health authorities, police, prosecutors, the judiciary, and legislators will be confronted with the difficult questions raised by proposals for criminalizing such conduct. People with HIV/AIDS, community-based organizations and other service providers working with people with HIV/AIDS and people at risk, as well as advocates and human rights activists, will need to respond to this issue and the inevitable proposals for criminalization. Obviously, the exact nature and method(s) of addressing the issue will greatly depend upon the political landscape of the jurisdiction, the existing legislation that may be applicable or relevant, the manner in which the issue has been placed on the policy agenda, the state of development of a community-based HIV/AIDS movement, and its capacity to articulate important points that need to be heard in this debate.

Which strategies are necessary or likely to have any impact will need to be determined on a local level. However, knowledge of approaches adopted in other jurisdictions, and the legal/policy analysis undertaken elsewhere, may be informative and helpful in articulating a domestically relevant position on what is a politically charged issue. Identified here are four possible complementary means of working on the issue of criminal law and HIV/AIDS. Discussion of the benefits and difficulties of these strategies – and identification of other possible strategies – will be undertaken at the workshop.

(a) Proactive Educational Strategies

Unlike those situations where positive action is necessary and desirable in order to effect change, the issue of criminal law and HIV/AIDS is, generally speaking, not one to which a great deal of attention should be drawn. The issue of criminal law and HIV/AIDS, rather than providing an opportunity to invoke legal or ethical principles to improve the status quo, is generally best left alone unless and until a response is necessary, be it to an individual prosecution or a legislative proposal. The proactive educational strategies that best advance a sound public policy are not those that invite the debate on criminalization, but rather those that focus on eliminating the stigma and discrimination surrounding HIV/AIDS. If successful, such education may help reduce the degree to which eventual calls for criminalization will be grounded in, and appeal to, prejudice, misinformation, and fear about the disease and those vulnerable populations with whom it is associated in the public mind. Such an approach could include targeted educational initiatives that seek to educate the primary parties responsible for shaping and applying the law in this area: public health officials, police and prosecutors, the judiciary and legislators. The timing and content of such initiatives, however, will need to be carefully considered, so as to avoid encouraging what is likely to be an ill-advised and ill-informed interest in criminalization.

(b) Reacting to Legislative Proposals

It may well be the case that a government or individual legislator takes the initiative of drafting and introducing legislation targeting transmission of or exposure to HIV. This may or may not be framed in HIV-specific terms; it may be directed at creating an offence of "spreading disease" or "engaging in conduct likely to communicate a disease" or some similar variant thereof. Alternatively, it could be the case that a law commission or other advisory body is tasked with the responsibility of preparing recommendations or draft legislation on this issue. It is crucial that policy considerations be articulated from the perspectives of people with HIV/AIDS and of community-based organizations serving HIV-positive people, and that this analysis identify the connection between health, human rights, and sound public policy (including in the area of criminal law). Any submission will need to directly address the question of gender inequality and the role of the criminal or public health law. This gender-based analysis of the issue of criminalization of HIV transmission/exposure should include a discussion of the particular impact of coercive measures on HIV-positive women vis-à-vis male partners (or, more broadly, the situation of any HIV-positive person who may lack the power to negotiate safer sex with partners and/or to safely disclose their status). If evidence relevant to the jurisdiction in question is available regarding the potential impact of different proposed legal measures on public health initiatives, this will necessarily inform the analysis and the position articulated.

(c) Interventions in Legal Proceedings

It is likely that, in some fashion, prosecutions under criminal or public health laws will arise that involve many of the considerations articulated in this paper about the appropriate extent of, and manner of using, such coercive measures. If a matter has reached the stage of a formal legal proceeding, that proceeding may well establish or clarify the parameters of the criminal or quasi-criminal public health law as it applies to HIV transmission/exposure. The primary concern will be to influence the outcome of that proceeding to avoid an overextension or misuse of the law.

The manner in which this may be done will depend in part on the law of the jurisdiction. If possible, community-based organizations should make submissions to the court/tribunal on the policy considerations that should be considered in interpreting or establishing the application of a given aspect of criminal or public health law. Potential interveners must carefully assess whether the particular case before the courts is an appropriate one in which to intervene. In some cases, however, even if the facts of a case are not likely to engender public or judicial sympathy for the interveners' position, it may be that the intervener cannot afford to *not* make submissions. In fact, it may be particularly in such a case that an intervention is most important, because the risk of a damaging overreaction by the courts or legislators may be greatest.

Submissions from a number of different organizations may carry more weight than a single intervener – particularly if that grouping includes a diverse group of organizations, including non-HIV/AIDS organizations and women's groups. Interveners should consider whether a joint

submission or separate submissions would be more likely to be permitted and effective. As with any submission to a legislative committee or commission considering draft legislation, the analysis will need to address the gendered dimensions of criminalization, as well as available evidence regarding the impact of different legal rules on HIV prevention and care (eg, deterring access to testing, undermining supportive counseling relationships).

(d) Developing Guidelines

Regardless of how coercive state measures are embodied in the law, it will be important to take steps to prevent the misuse of such laws by those with the responsibility and the power to apply them. Community-based organizations that have the capacity may review existing "soft law" such as regulations, guidelines, policies, protocols, and practices governing public prosecutors and public health authorities, measuring them against the provisions of domestic, regional, and international human rights law, as well as the guiding principles identified at the outset and the *International Guidelines on HIV/AIDS and Human Rights*. A process of discussion with other community-based organizations, including people with HIV/AIDS, could yield widespread support for proposed improvements to such policies or for the creation of such policies where they do not already exist. Such proposals could also include recommended legislative changes, should these be deemed necessary to ensure proper due process protections for those HIV-positive people subject to coercive measures, or could elaborate a protocol to be followed by public health authorities or police in responding to cases where an HIV-positive person engages in conduct that transmits HIV or poses a significant risk of transmission, balancing the rights and interests involved. Once prepared, such proposals could be raised with the responsible governmental officials at the appropriate levels.

5. Conclusions and Recommendations

The following recommendations are offered for consideration by those needing to articulate a well-considered perspective on the ethical, legal, human rights, and public health dimensions of the criminalization of HIV transmission/exposure.

(11) Lobby for strong, accessible, and enforceable legislation protecting confidentiality and freedom from discrimination for people with HIV/AIDS and vulnerable groups, and promoting and protecting access to prevention information and materials, as well as care, treatment, and support. This should include affordable access to post-exposure prophylaxis, and the necessary information and support, for survivors of rape or other sexual assault posing any appreciable risk of HIV infection, and for workers who have any appreciable occupational exposure. National guidelines or a protocol on providing services and treatment to those exposed (including training of health-care workers, police, and prosecutors who will interact with sexual assault survivors) should be developed.

(12) Undertake educational campaigns on HIV/AIDS, including how it is and is not transmitted, that target both the general public and public health authorities, police, prosecutors, lawyers, the judiciary, and legislators and other policymakers. While acknowledging that police, prosecutors, and legislators are pressured to "do something," such educational approaches should reiterate the need for a reasoned approach, that the handful of cases that receive media attention do not represent the most common instances of transmission (which is by people unaware of their infection), and that responding to such cases should not be allowed to divert resources and support from proven strategies for fighting the epidemic.

(13) Prepare an analysis or position statement on the criminalization of conduct that causes or risks HIV transmission, through community discussion and consultation. In particular, consultations should include the perspectives of women with HIV/AIDS, as well as communities with heightened vulnerability to criminalization (eg, sex workers, gay/bisexual men, injection drug users), where feasible.

(14) Articulate that analysis, when necessary, to any relevant audiences, such as: government officials responsible for justice, health, and prison portfolios; legislative committees or law commissions examining the issue; community-based organizations and other service providers working with people with HIV/AIDS or vulnerable/at-risk communities; public health authorities and workers; lawyers and other advocates and human rights activists.

(15) Be prepared to respond to cases of criminal or public health prosecutions should they arise, both by addressing the general public through a media strategy and by making submissions (if possible) to courts or other judicial bodies before whom legal proceedings are brought, preferably through cooperation with other community-based organizations sharing similar policy concerns.

(16) Engage in dialogue with police, prosecutors, and public health in developing guidelines or protocols for handling cases in which an HIV-positive person may engage in conduct that risks transmission. Through this process, develop guidelines for the use of public health powers and a graduated approach to the use of coercive measures.

6. Key Resources and Documents

(1) Articles and Reports

The following is a list of some key reports and articles from law journals or legal texts on the issue of criminal law and HIV/AIDS. They represent a variety of opinions on some complicated questions. There is a geographical bias in the source and focus of the available materials; much more has been written about this issue in developed countries, coincident with the greater number of prosecutions and legislative initiatives in those countries. All the documents listed here are available from the resource centre of the Canadian HIV/AIDS Legal Network and, as indicated, some of them are also available on the Internet. (See the list of useful websites below.)

AIDS Law Project South Africa (H Axam et al). Response Paper to the SA Law Commission's Discussion Paper *Aspects of the Law Relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour*, 1999.

> This is one of the few detailed analyses of the topic from a developing country, prepared by a legal NGO engaged in human rights advocacy in response to proposals for criminal legislation on HIV exposure. The submission reviews the South African context of extremely high HIV prevalence, accompanied by tremendous stigma and low rates of HIV testing, and argues that the criminal justice system is ill-suited to recognize the realities of the epidemic and effectively reduce rates of HIV transmission while protecting individual rights. It argues that criminal prosecutions are warranted in rare circumstances already covered by the existing common law. ALP also submits that not only would an HIV-specific offence fail to advance the objectives of criminal law, but would also impede public health initiatives and divert scarce resources away from these programs. ALP also expresses its concern about the invasion of privacy rights and compounding stigma, and feels that criminalization "will reinforce rather than redress the patterns of gender inequality which underlie the increased vulnerability of women in the HIV epidemic." It therefore concludes that the "tremendous costs in terms of public health and individual rights far outweigh any questionable deterrent or retributive benefits that might accrue from adopting and enforcing an HIV-specific criminal offence." The document is available at the ALP website at www.hri.ca/partners/alp.

American Civil Liberties Union Foundation (AIDS and Civil Liberties Project). Criminalizing Transmission of the Virus. New York, NY: ACLU (undated).

> This is a position statement presenting the "best arguments against criminalizing transmission" and includes some supporting documentation.

MA Bobinski. Women and HIV: a gender-based analysis of a disease and its legal regulation. *Texas Journal of Women and the Law* 1994; 3: 7.

This article argues that a gender-based analysis is useful in understanding and critiquing the legal system's response to HIV infection, including the construction of "women as vectors or victims." It analyzes both criminal law and tort law in relation to women's sexual autonomy and HIV transmission.

SH Bronitt. Spreading disease and the criminal law. *Criminal Law Review* 1994: 21-34.

Bronitt considers a number of difficult issues of legal principle and policy raised by applying the ordinary criminal law to conduct that transmits disease. He critically reviews proposals for reform in Australia, including the Law Commission's recommendation that the "causing injury" offences in the Criminal Code should be broad enough to cover conduct that causes another person to become infected with a disease.

D Buchanan. The law and HIV transmission: help or hindrance? *Venereology* 1999; 12(2): 57-66.

This paper explores the conflict between the law's role in building partnerships in fighting the AIDS epidemic and its role in punishing those who are morally culpable, as it occurs in relation to HIV transmission offences under Indian law. Buchanan is concerned about the legislative overreaction to the threat of HIV. He notes that comprehensive criminal law already exists, so there is no need for amendments to the \Penal Code. He argues that special HIV transmission offences are undesirable and can be dangerous, notes the difficulties of proof with regard to HIV prosecutions, and expresses concern about the breach of confidentiality of medical or counseling records. Buchanan grapples with (although cannot resolve) the difficult issue of consent and the position of many women whose vulnerability means they are not free to give true consent to risky activities. While asking whether it is "the role of the law to presume inequality," he also notes that if, in reality, women have little power to protect themselves by suddenly demanding that their male partners use condoms, "then there may well be an argument for appropriate application of the criminal law with a view to harmonising one of the classic roles of the criminal law – general deterrence – with the relevant goal of public health – reducing the incidence of disease."An earlier version of this paper, delivered at a workshop for judges in India, is available on the website of the Lawyers Collective HIV/AIDS Unit at www.hri.ca/partners/lc/unit/offeces.shtml.

J Dwyer. Legislating AIDS away: the limited role of the legal persuasion in minimizing the spread of the human immunodeficiency virus. *Journal of Contemporary Health Law & Policy* 1993; 9: 167-176.

This article criticizes "perhaps well-intentioned but heavy-handed and misguided attempts to legislate away an infectious disease," which compromise opportunities to test, find, and counsel HIV-positive individuals, thereby helping them and others. Dwyer argues that "there is a need for urgent intervention but that there are few legal manoeuvres that can

help." He rejects the proposition that AIDS should be treated "just like other diseases," given the fear, ignorance, stigma, and violence that still surrounds it. The role for lawyers and the law is to "establish and protect a supportive environment for people affected by the epidemic," including designing a legal and social environment that redress inequalities related to gender, race, wealth, and sexual orientation that lead to vulnerability to HIV.

ML Closen et al. Criminalization of an epidemic: HIV-AIDS and criminal exposure laws. *Arkansas Law Review* 1994; 46: 921-983.

This article is a transcription of a roundtable discussion between several US lawyers and legal academics on the issue of HIV "criminal exposure" statutes. The discussants touch on matters of criminal law doctrine and principles of statutory interpretation, political considerations regarding the motivation for such laws and their impact, and whether or not such laws help or harm the public health. The general sentiment of the discussants is that, while there is some role for the criminal law in limited (and disputed) circumstances, most of the HIV-specific statutes in the US are problematic as drafted, but that prosecutors and the courts have seriously overreacted in applying traditional criminal offences in a climate that is hostile to people with HIV/AIDS. This article is less academic in tone and content than many law journal articles, but still provides an introduction to the basic issues.

ML Closen, S Isaacman, M Wojcik. Criminalization of HIV Transmission in the USA. IXth International Conference on AIDS, Berlin, 6-11 June 1993: Abstract PO-D27-4188.

The paper describes the variety of statutes criminalizing HIV transmission that have been adopted in the US, presents arguments for and against the constitutionality of these statutes, and proposes a model statute on criminal transmission of HIV. It argues that reliance on traditional criminal and public health laws to deal with individuals who knowingly expose others to HIV would be better than enactment of a specific criminal offence. A table of selected US cases and a bibliography are attached.

HL Dalton. Criminal law. In: S Burris et al. *AIDS Law Today: A New Guide for the Public*. New Haven: Yale University Press, 1993, at 242-262.

The article provides an overview of the issues raised by criminalization of HIV transmission or endangerment. It discusses some of the cases decided in the US. After reviewing the traditional criminal law offences that have been used in some HIV-related cases, the article discusses HIV-specific penal statutes. It points out that, unlike traditional penal laws, HIV-specific statutes do not require proof of either "harm," "causation," or "state of mind." Rather, it is sufficient under these statutes that the accused engaged in the forbidden behaviour. According to the author, such statutes have several advantages over traditional laws because, eg, they provide much clearer warning of what constitutes a crime. However, she concludes that, when measured against the possible justifications for invoking the criminal law, "the case for criminalizing risky behaviour is highly dubious"

and may be counterproductive to advancing the public health. Finally, Dalton discusses the relevance of HIV as a factor in criminal proceedings.

R Elliott. *Criminal Law and HIV/AIDS: Final Report*. Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997.

This lengthy report provides a comprehensive review of Canadian criminal law relating to HIV (as of 1997) and provides an overview of cases and policy recommendations in some other common law jurisdictions. It also analyzes in detail the arguments for and against the use of criminal law in this area, as well as the possible alternative approach under public health laws. It analyzes the possible application and legal interpretation of existing offences in Canada's *Criminal Code*, and argues against any amendment to enact a new offence. Nonetheless, the first appendix makes specific recommendations regarding the various elements of, and defences to, any possible new offence. Other appendices provide a detailed summary of Canadian criminal cases related to HIV and the text of several HIV-specific criminal statutes from US jurisdictions. It is one of the most comprehensive documents on the subject, with extensive footnotes and bibliography. The full document, and a series of infosheets on the topic, are available online at the website of the Canadian HIV/AIDS Legal Network at www.aidslaw.ca.

R Elliott. *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status*. Canadian HIV/AIDS Legal Network, 1999.

This report provides the most detailed analysis of the 1998 decision of the Supreme Court of Canada in the *Cuerrier* case, which held that a person who knows they are HIV-positive may be convicted of aggravated assault if, without disclosing their status to a sexual partner, engage in activity that poses a "significant risk" of transmission. This case appears to be the first to reach a country's highest court and has been cited repeatedly in subsequent cases, law reform papers and submissions, and the legal literature. The paper explores the extent of a duty to disclose, whether a "safer sex" defence exists, and what the ruling may mean for transmission other than through sexual activity (eg, medical procedures, sharing injection equipment, mother-to-child transmission). It also considers the implications for public health policy and practice, and for the compelled disclosure of confidential information (such as counselors' records) for use in criminal prosecutions. The full report is available online at www.aidslaw.ca .

MA Field, KM Sullivan. AIDS and the criminal law. *Law, Medicine and Health Care* 1987; 15(1-2): 46-60.

The article explores whether the transmission of HIV should be treated as a crime and, if so, under what circumstances. It first describes ways that traditional criminal laws and public health offences might be found to cover transmission of HIV, and why those laws are ill suited to the context. It then describes what the most appropriate form of criminal

proscription would be if the criminal law were to intervene, but concludes that the criminal law should not intervene "The social costs of criminalizing AIDS transmission would far outweigh the benefits of deterrence such a law might have."

L Gostin. The politics of AIDS: compulsory state powers, public health, and civil liberties. *Ohio State Law Journal* 1989; 49: 1017-1058.

This early analysis remains just as relevant today. The author argues that the use of compulsory state powers has "little place in fighting a disease epidemic." Compulsion requires vigorous justification, one requirement of which is reliable epidemiological evidence regarding transmission, and community health is not an absolute overriding value, but must be weighed against the costs of such a policy (including infringement of human rights, cost, and practical burdens). Analysing proposals for the isolation of HIV-positive people and criminal prosecution for HIV transmission, Gostin demonstrates that "many compulsory powers have been, and will be, exercised in cases where they serve no overriding public purpose."

L Gostin, WJ Curran. The limits of compulsion in controlling AIDS. *Hastings Center Report* 1986 (December): 24-29.

The article examines control measures that directly impinge on individual liberty, including contact tracing, quarantine, and the use of the criminal law. With respect to the criminal law, it argues that sexual acts are not wholly consensual if the infected person fails to inform his partner of the substantial risk to health; nor is the behaviour wholly private because of "the public risk inherent in increasing the reservoir of infection." However, the authors place little reliance upon the criminal law as a mechanism for impeding the spread of HIV, and express reservations about the use of the criminal law in the private realm. They conclude that compulsory legal interventions will not provide a fair and effective means of interrupting the spread of HIV.

Intergovernmental Committee on AIDS (Legal Working Party). *Legislative Approaches to Public Health Control of HIV-Infection*. Canberra, Australia: Department of Community Services & Health, February 1991.

This discussion paper affirms that "each person must accept responsibility for preventing themselves from becoming infected ... and for preventing the further transmission of the virus." It argues that criminal sanctions "should be used judiciously in the HIV/AIDS area because of the risk of stigmatising already alienated groups." The working party argues that public health legislation and guidelines, reflecting due process protections, are preferable to applying the criminal law. It also recommends that specific, as opposed to existing general, criminal law sanctions be carefully considered.

R Jürgens, B Waring. *Legal and Ethical Issues Raised by HIV/AIDS: Literature Review and Annotated Bibliography* (2d ed). Montréal: Canadian HIV/AIDS Legal Network & UNAIDS, November 1998.

> This document contains both a short review of the literature on this topic and a partially annotated list of articles. It can be viewed online at www.aidslaw.ca. All articles listed in the bibliography are available from the resource centre of the Canadian HIV/AIDS Legal Network.

S Kenney. Criminalizing HIV transmission: lessons from history and a model for the future. *Journal of Contemporary Health Law and Policy* 1992; 8: 245-273.

> This article examines US case law empowering states to invoke laws to protect the public health, and the historical parallels of both coercive and non-coercive public health responses to syphilis and AIDS. It also analyzes a variety of laws used by US states to criminalize HIV transmission, and concludes that the success of public health programs in responding to the AIDS epidemic "is jeopardized by the states' use of traditional criminal law and public health statutes to prosecute individuals for activity risking HIV transmission. The author is more sympathetic to an AIDS-specific statute, but nevertheless identifies several problems with even this narrower approach that may be counterproductive and exacerbate the public health crisis. He concludes that the social and economic cost of this strategy outweighs any benefit likely to result from prosecuting the few individuals who intentionally injure others by transmitting HIV.

Office of the United Nations High Commissioner for Human Rights & the Joint United Nations Programme on HIV/AIDS. *HIV/AIDS and Human Rights: International Guidelines*. New York & Geneva: United Nations, 1998, para 72.

> These Guidelines were jointly developed by UNAIDS and the UN Office of the High Commissioner for Human Rights through an international consultation with a varied group of experts. They emphasize the synergistic relationship between promoting public health and protecting human rights, and offer measures to protect both in relation to HIV/AIDS. The Guidelines assist governments in translating international human rights norms into real observance in their domestic laws and policies, and consist of two parts: "first, the human rights principles underlying a positive response to HIV/AIDS and second, action-oriented measures to be employed by Governments in the areas of law, administrative policy and practice that will protect human rights and achieve HIV-related public health goals." Although the generality of the Guidelines will often mean they must be supplemented by more detailed analysis of specific issues in order to inform domestic legislation that is appropriate to a particular national context, they are a key reference document and advocacy tool in the promotion and protection of both the human rights of people with HIV/AIDS and of sound public health policy.

KM Sullivan, MA Field. AIDS and the coercive power of the state. *Harvard Civil Rights–Civil Liberties Law Review* 1988; 23(1): 139-198.

> This article discusses the use of the coercive power of the state to prevent the spread of HIV, focusing on status-based quarantine, behaviour-based quarantine, traditional criminal laws, and HIV/AIDS-specific criminal statutes. The authors argue that the use of traditional criminal law offences carries with it the risk of inconsistent and unfair judgments, and that this risk could be reduced and the educative value of the criminal law could be enhanced by creating an HIV/AIDS-specific law "that clearly imposes affirmative duties on knowing AIDS carriers." According to the authors, such a law could specify disclosure and precautions as defences. However, the authors conclude that "any deterrence that criminal enactments might add to incentives that already exist is not worth the disadvantages of using the criminal law as a tool to contain the AIDS epidemic. Criminalization, like quarantine, would encourage some people to avoid voluntary testing..., would threaten the privacy of sexual relationships and encounters far beyond those that actually transmit AIDS ... and raises the risk of official harassment and abuse.... In short, it would be a mistake to enact either criminal measures or quarantine to deal with the problem of transmission of AIDS."

H Sprintz. The criminalization of perinatal AIDS transmission. *Health Matrix* 1993; 3: 495-537.

> This law journal article first discusses US law on the prosecution of pregnant women for harm to their fetuses, and criminal statutes penalizing HIV-positive individuals for infecting, or creating the risk of infecting, other individuals. It considers how these statutes could realistically be applied to prosecute women who transmit HIV during pregnancy. It then analyzes the constitutional arguments for and against punishing perinatal transmission, concluding that such prosecutions violate women's constitutional rights. It also notes other policy concerns such as how these laws affect all HIV-positive women, and the disproportionate effect on poor minorities. Sprintz argues that none of the four goals of criminal justice are satisfied by prosecuting perinatal transmission, and that these statutes need to be redrafted. Finally, she recommends a number of extra-legal measures to address the problem of perinatal transmission, including increasing women's access to testing and counseling, adequate prenatal care, education, and drug rehabilitation programs, as well as health-care coverage.

Terrence Higgins Trust. Response to [UK] Law Commission Consultation Paper No. 139: *Consent in the Criminal Law*. London, UK: The Trust, 1996.

> This paper by a working group of the largest AIDS service organization in the UK provides an excellent, clear, step-by-step response to proposals for criminalizing activity that transmits or risks transmitting HIV. The paper argues that there should be no criminal liability if a person's partner consents to the risk of infection. It then argues, based on both health-promotion grounds and for legal policy reasons, that neither misrepresentation nor

failure to disclose HIV status should of themselves give rise to criminal consequences, but that if the government were to criminalize either, then this should be done by way of a separate offence (rather than treating misrepresentation or non-disclosure as nullifying a partner's consent to sex).

TW Tierney. Criminalizing the sexual transmission of HIV: an international analysis. *Hastings International and Comparative Law Review* 1992; 15: 475.

The article explores some of the arguments for and against the use of the criminal law to limit the spread of HIV. It compares criminal laws relating to HIV/AIDS in the US, Great Britain, Australia, and New Zealand. It suggests that the traditional criminal law is inappropriate when dealing with conduct capable of transmitting HIV, and proposes elements for a special HIV-specific criminal statute that takes into account the unique characteristics of HIV. According to the author, a model statute should: require the state to prove that the accused knew that they were HIV-positive at the time of the conduct in question; require the state to establish that the accused purposely intended to infect another; be clear in the definition of behaviour that is to be controlled (offences should be narrow and clearly defined); only be enforced if a victim complains to law enforcement authorities. In addition, it should provide for several affirmative defences: consent of the partner after full disclosure; and the use of appropriate protection.

UNAIDS. *Handbook for Legislators on HIV/AIDS , Law and Human Rights*. UNAIDS/IPU. Geneva, 1999.

This handbook is intended to assist legislators in evaluating whether laws and policies regarding HIV/AIDS or affecting people with HIV/AIDS comply with international human rights norms, and covers many areas. With respect to coercive state powers, it reaffirms that measures such as the liberty of people with HIV should be restricted only in exceptional cases of illegal behaviour, and recommends "graded interventions"under public health laws. It also reiterates that due process protections are required, and identifies some such protections. The full handbook is available online at www.unaids.org.

(2) Newsletters and Journals

Canadian HIV/AIDS Policy & Law Newsletter
Provides regular updates and feature articles on significant cases and legislative developments in the area of criminal law and HIV/AIDS (and many other issues) in Canada and in numerous other jurisdictions. Published quarterly in English & French. For info, contact the Canadian HIV/AIDS Legal Network: 484 McGill St, Suite 400, Montréal, QC, Canada H2Y 2H2. Phone: +1-514-397-6828 ext 227; fax + 1 514-397-8570; email: info@aidslaw.ca. The *Newsletter* is available online at www.aidslaw.ca.

AIDS Law Project Policy Review and Update
A supplement to the annual report of the AIDS Law Project of South Africa, this annual publication addresses major changes in South African law and policy relating to HIV/AIDS. The report is not available online, but the ALP can be contacted at: AIDS Law Project, Centre for Applied Legal Studies, Private Bag 3, University of the Witwatersrand, Johannesburg 2050, South Africa. Phone +27-11-403-6918; fax +27-11-403-2341; email: 125fa2ra@solon.law.wits.ac.za.

AIDS Legal Quarterly
The primary focus of this publication of the AIDS Legal Network in South Africa is on HIV-related legal, policy, ethical, and human rights issues in South Africa. However, it also covers similar issues in sub-Saharan Africa and other regions of the world. It occasionally includes material regarding criminal law developments. This publication is not available online. Contact the AIDS Legal Network at PO Box 6358, Roggebaai 8012, Capetown, South Africa. Phone +27-21-423-9254; fax: +1-27-21-423-0891; email: aln@kingsley.co.za. The website is www.aidslegal.co.za.

HIV/AIDS Legal Link
This quarterly publication of the Legal Project of the Australian Federation of AIDS Organisations contains regular updates on criminal law developments in Australia and some other jurisdictions (particularly from the Asia/Pacific region). For information, contact the AFAO, Level 4, 74 Wentworth Avenue, Surry Hills NSW 1300, PO Box 876 Darlinghurst NSW 1300, Australia. Phone +61 2 9281 1999; fax + 61 2 9281 1044; email: asajben@afao.org.au. The newsletter is available online at www.afao.org.au.

Newsletter of the African Network on Ethics, Law and HIV
This occasional publication includes information on current legal, ethical, and human rights issues and news related to HIV/AIDS in Africa, including some country-specific reports. It occasionally includes articles addressing criminal law questions.

AIDS Policy & Law
A US biweekly newsletter on legislation, regulation, and litigation concerning AIDS. Contains short summaries of US developments, including lawsuits and legislative proposals. Tel: +1-215 784 0860. A for-profit publication not available online.

Lesbian/Gay Law Notes
A monthly publication of the Lesbian & Gay Law Association of Greater New York, this newsletter reports on lesbian/gay and AIDS legal developments in the US (with occasional notes regarding developments in other countries). It tracks significant new legislation, court decisions,

administrative rulings, and executive actions, and highlights new publications of interest. The newsletter is available online at http://qrd.diversity.org.uk/qrd/www/legal/lgln.

International Digest of Health Legislation
Published by the World Health Organization, this digest often reprints, in full or in summary form, legislation and other instruments regarding HIV/AIDS. Not available online, but see ordering information online at www.who.org/dsa/periodicals/dig.html.

(3) Websites with Information on HIV/AIDS and Criminal Law

Canadian HIV/AIDS Legal Network
www.aidslaw.ca
In addition to the *Canadian HIV/AIDS Policy & Law Newsletter* (see above), this website holds a series of eight info sheets, a lengthy report on Criminal Law and HIV/AIDS, and a full-length paper analyzing a Supreme Court of Canada decision on this topic.

AIDS Law Project, South Africa
www.hri.ca/partners/alp
Contains selected ALP publications, including the ALP's response to the South African Law Commission's discussion paper on the creation of a criminal offence aimed at "harmful HIV-related behaviour." The SALC's discussion paper is at www.law.wits.ac.za/salc/salc.html.

The Lawyers Collective HIV/AIDS Unit
www.hri.ca/partners/lc/unit
The website of this Indian advocacy NGO provides information about HIV/AIDS-related law and policy in India, including a paper on HIV transmission offences and information about proposed legislation that includes criminal penalties for activities that risk HIV transmission.

American Civil Liberties Union – AIDS Project
http://www.aclu.org
An annual update of US cases and legislation in which the ACLU's AIDS Project has been involved, including a section on criminal law.

HIVInSite ("Social Issues" section)
www.hivinsite.ucsf.edu
The "Social Issues" section of this website provides a lengthy report entitled "The AIDS Litigation Project: A Look at HIV/AIDS in the Courts of the 1990s," which includes a substantial section on "State Restrictions on Persons: Criminal Law" incorporating both a short overview of US criminal law and a synopsis of numerous US cases. The site is now outdated (not having been updated since July 1996) but is useful as a research tool.

Lambda Legal Defence & Education Fund
www.lambda.org
Regular updates regarding litigation and legislative developments in the US on a variety of issues, including HIV/AIDS, as well as a table of states' criminal and/or public health laws on HIV transmission/exposure.

AIDS Legal Bibliography ("Criminal Law and Corrections Issues")
http://qrd.rdrop.cm/browse/aids.legal.bibliography
A lengthy, but not exhaustive, compilation of articles and books (predominantly from the United States) concerning legal issues surrounding the AIDS epidemic (up to June 1998), compiled by Prof Art Leonard.