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HIV-Specific Crime Legislation: Targetting an Epidemic for Criminal Prosecution

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HIV-SPECIFIC CRIME LEGISLATION: TARGETING AN EPIDEMIC FOR CRIMINAL PROSECUTION

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I. INTRODUCTION

The AIDS¹ epidemic continues to plague our country increasing the number of individuals exposed to HIV² at a rapid rate.³ Without a known cure, the government endeavors to stop the spread of the deadly virus. To effectively diminish or contain the spread of HIV, we must reassess the procedures implemented to control the epidemic and advance the most successful method(s).

In 1987, an advisory commission, created by Executive Order,⁴ investigated the spread of HIV and AIDS in the United States. In efforts to protect the public from contracting HIV,⁵ the Commission recommended that states and local departments aggressively advocate the use of HIV testing and counseling.⁶ In doing so, the Commission emphasized the importance of ensuring and

¹AIDS stands for acquired immunodeficiency syndrome. AIDS is defined as "a disease characterized by opportunistic infections (e.g. *Pneumocystis carinii* pneumonia, candidiasis, isosporiasis, cryptococcosis, toxoplasmosis) and malignancies (e.g. Kaposi's sarcoma, non-Hodgkin's lymphoma) in immunocompromised persons; caused by the human immunodeficiency virus transmitted by exchange of body fluids (e.g. semen, blood, saliva) or transfused blood products; hallmark of the immunodeficiency is depletion of T4+ helper/inducer lymphocytes, primarily the result of selective tropism of the virus for these lymphocytes." *Stedman's Medical Dictionary* 37-38 (25th ed. 1990).

²HIV means human immunodeficiency virus. HIV is defined as "human T-cell lymphoma/-leukemia virus type III; human T-cell lymphotropic v. type III; lymphadenopathy-associated v.; AIDS-related v.; a cytopathic retrovirus (subfamily *oncovirinae*, family *retroviridae*) that is about 100 nm in diameter, has a lipid envelope, and has a characteristic dense, cylindrical nucleoid containing core proteins and genomic RNA; it is the etiologic agent of acquired immunodeficiency syndrome (AIDS)." *Id.* at 1720.

³DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, *LEGAL ASPECTS OF AIDS* 1 (1991 & Supp. 1994). "The World Health Organization (WHO) estimates that 8-10 million adults and 1 million children worldwide are infected with HIV. By the year 2000, the WHO projects that 40 million people may be infected with HIV . . ." *Id.*

⁴Exec. Order No. 12,601, 52 Fed. Reg. 24129 (1987).

⁵Exec. Order No. 12,601, 52 Fed. Reg. 31831 (1987).

⁶Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 75 (1988) [hereinafter *HIV REPORT*]. "State and local departments of health should aggressively advocate the use of HIV testing and counseling services through public health education campaigns. These should highlight the assurance of confidentiality in order to induce more individuals to use the public health system . . ." *Id.*

maintaining the confidentiality of the test results.⁷ The assurance of confidentiality aims to encourage more people to undergo the voluntary HIV test. At the same time, the Commission also recommended criminalizing HIV transmission by directing states to adopt HIV-specific crime statutes.⁸

The two objectives present an inherent conflict. They involve not only opposing, but incompatible interests. HIV-specific legislation aims to attack the spread of the epidemic in a public forum through the criminal justice system. Criminalizing the transmission of HIV requires access to the otherwise confidential records in order to prove that an individual knew of their HIV positive status. Since criminal prosecutions are public record,⁹ the criminalization of HIV transmission impinges on the health care providers ability to increase assurance of confidentiality. For example, a voluntary testing center might assure an individual confidentiality in the HIV test results, however, if that individual subsequently becomes the target of a criminal transmission prosecution, then the "confidential" HIV test results appear in a public prosecution. Arguably, initiating criminal prosecutions for transmitting HIV could operate to eliminate any meaningful assurance of confidentiality of HIV test results.

To date, HIV testing cites operate without any obligation or requirement to inform tested individuals about HIV-specific crime statutes. If individuals were aware that HIV crime statutes override the confidentiality of the test results, more individuals may decline the HIV test. Criminalizing HIV transmission could discourage testing and ultimately even prove to be counter-productive in containing the spread of HIV. Legislatures must analyze the impact and effectiveness of HIV-specific legislation before enacting and enforcing laws that will unavoidably destroy the guarantee of confidentiality in HIV test results.

A growing number of state legislatures have drafted HIV specific crime statutes which criminalize the intentional transmission of the HIV virus to

⁷*Id.* at 126. ("Rigorous maintenance of confidentiality is considered critical to the success of the public health endeavor to prevent the transmission and spread of HIV infection. Current public health strategies for fighting the spread of HIV infection are entirely dependent on voluntary cooperation.")

⁸*Id.* at 131. ("Adoption by the states of a criminal statute—directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV—clearly setting forth those specific behaviors subject to criminal sanctions. With regard to sexual transmission, the statute should impose on HIV-infected individuals who know of their status specific affirmative duties to disclose their condition to sexual partners, to obtain their partners' knowing consent, and to use precautions, punishing only for failure to comply with these affirmative duties.")

⁹ See *In re Application of Multimedia KSDK, Inc.*, 221 Ill. App. 3d 199 (1991) (holding that AIDS Confidentiality Act did not preclude the media from disclosing the defendant's identity since the defendant had been charged with criminal transmission of HIV. Defendant's identity was a matter of public record by virtue of the public charge.).

another.¹⁰ This discussion will focus on the impact of HIV-specific crime statutes on the following issues: confidentiality, the right to privacy, the decision to submit to HIV testing,¹¹ and how the statutes may or may not succeed in containing the spread of HIV.¹²

Before examining the central issues, there will be an overview of the evolution of the HIV-specific crime statutes and examples of HIV-specific crime statutes enacted by some states. The final section will discuss alternative methods for containing the spread of the HIV-virus.¹³

II. EVOLUTION OF HIV-SPECIFIC CRIME STATUTES

A. The Use of Traditional Criminal Statutes

A person who intends to infect another person with HIV poses a threat to society and should receive a penalty in proportion to their lethal actions. The initial efforts of the states to punish such egregious behavior required them to use traditional offenses. The available offenses for prosecution included homicide, attempted homicide, rape, criminal assault, reckless endangering, prostitution, and sexually transmitted disease statutes.¹⁴ Most of these offenses require the state to prove both the defendant's state of mind and a specific result.¹⁵

¹⁰This note discusses only some state statutes for purposes of examining and discussing HIV-specific crime statutes. Although other states have enacted HIV-specific crime legislation, those statutes will not necessarily be included within the scope of this note.

¹¹Most states which have enacted HIV-specific crime legislation provide voluntary confidential as well as anonymous testing sites. While confidential tests link the subjects identity to the test result, anonymous tests prohibit any linking of the subjects identities to the test results. In addition, unless the state expressly delineates exceptions, usually in cases of convicted sex offenders, mandatory testing remains unauthorized. See GA. CODE ANN. § 24-9-47(a)(2) (1994); MINN. STAT. § 611A.19 (1994); TENN. CODE ANN. § 39-13-521 (1994).

¹²Several states recognize competing and important societal interests concerning the disclosure of HIV positive information. The criminalization of HIV transmission publicly divulges an HIV carrier's infected status. Some states have required courts to weigh the importance and necessity for disclosing the test results against the privacy interests of the test subject and the public interest of maintaining confidentiality in efforts to avoid deterring future testing. See IND. CODE ANN. § 35-42-1-7 (Burns 1994).

¹³This article examines the development and impact of HIV specific crime statutes. At times, examples of actual statutes are used to illustrate how the various states penalize HIV transmission. The state legislation used is not an exhaustive nor an in-depth comparison of how all the states in the country handle HIV transmission, but instead merely intends to provide an overview of how the different approaches actually work in practice.

¹⁴DAVID ROBINSON, JR., *Criminal Sanctions and Quarantine*, in AIDS AND THE LAW 243-57 (Wiley Law Publications, 2d ed. 1991 & Supp. 1995).

¹⁵MODEL PENAL CODE § 210.3, 4 (Proposed Official Draft 1962) [hereinafter MPC].

Some commentators argue that the prosecutions for intentional transmission of the HIV virus, under these non-HIV specific statutes, are fraught with imperfections.¹⁶ The two essential difficulties revolve around proving the intent (*mens rea*) and causation elements of the traditional criminal laws.¹⁷

1. Intent (Mens Rea) Issues

Several of the above mentioned traditional crimes will require the prosecution to prove that the defendant knew that he/she had the HIV virus. For specific-intent¹⁸ crimes, like murder, the prosecution has the additional burden of proving that the HIV carrier not only intended to transmit the virus but also intended to kill the victim.

Depending on the crime charged, the prosecution will either have to prove that the defendant acted knowingly¹⁹ or recklessly.²⁰ To prove that the defendant acted knowingly the prosecution will have to access confidential HIV test results. To prove that the defendant acted recklessly the prosecution will have to prove that the defendant should have known that he/she was HIV positive.

¹⁶E.g., BARRY SULLIVAN ET AL., AIDS AND THE LEGAL ISSUES 23-24 (1988).

¹⁷*Id.*

¹⁸The definition of specific intent is "[t]he mental purpose to accomplish a specific act prohibited by law. The most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but in addition it must be shown that there was an "intent to steal" the property. . . . The subjective desire or knowledge that the prohibited result will occur. BLACK'S LAW DICTIONARY 973 (Abridged 6th ed. 1991).

¹⁹The MPC defines knowingly as follows:

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

MPC, *supra* note 15, at § 2.02.

²⁰The MPC defines recklessly as follows:

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

Id.

2. Causation Issues

Several traditional crimes involve a second element that the state must prove: that the alleged perpetrator infected the victim with HIV. In order to establish that the defendant infected the victim, the state will have to eliminate other potential causes (i.e. other persons with whom the victim may have engaged in risk behavior). This extends the prosecution to determining the HIV status of additional third parties who have also engaged in "risk" behavior with the victim.

Other causation problems develop when punishing intentional HIV transmission through traditional criminal laws. For example, homicide requires a dead body. Due to the slow progression of HIV, the infected victim will most often outlive the alleged perpetrator.²¹

Different traditional criminal laws such as assault, reckless endangerment, and sexually transmitted disease statutes, do not require proof that the defendant's conduct actually harmed the victim.²² Although these laws present less difficulty for the state regarding causation issues and in establishing a case, prosecuting HIV transmission under these laws also has drawbacks. For example, the penalties under these statutes are minimal in comparison to the possible harm done: transmission of a fatal virus.²³

3. Disclosure Required

In order to establish both intent and causation, the prosecution must obtain confidential records from the health care providers. This creates an exception to the confidential status of the records. Currently, many health care providers simply alert tested individuals that confidentiality of the HIV results extends within the limits of the law.²⁴

As stated above, confidential HIV test result records, disclosed pursuant to law, become public through the criminal prosecution.²⁵ In addition, if the prosecution or defense involves potential third party HIV sources the confidentiality and privacy issues extend even further²⁶ since eliminating other sources could require the disclosure of any HIV test records of those individuals.

²¹Cf. MPC the year and the day rule.

²²AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE at VI-4-5 (Paul Albert et. al. eds., 2d ed. 1988) [hereinafter PRACTICE MANUAL].

²³SULLIVAN, *supra* note 16, at 27 (reckless endangerment is treated as a misdemeanor under the MPC).

²⁴See text and accompanying footnotes pp.18-19.

²⁵*Supra*, note 9.

²⁶For a discussion on right to privacy and voluntary HIV test results *see infra* pp. 11-15.

4. HIV Reports

Arguably, the HIV prosecutions fail given the voluntariness of HIV testing. An individual who declines to undergo testing avoids the reach of the statutes. Without records, the prosecution will have difficulty proving that the defendant knew he/she carried HIV. Ironically, most of the statutes effectively penalize only those who were responsible enough to get tested in the first place.²⁷ Those who engage in high risk behavior and disregard the threat of transmission escape penalty.

B. Traditional Statutes Applied

1. Georgia's Approach

Although several states have attempted to eradicate proof problems by enacting HIV-specific crime legislation, Georgia continues to utilize traditional criminal law to prosecute intentional transmission of HIV. Georgia recognizes a grave threat to health and safety posed by HIV.²⁸ The General Assembly has manifested an intent to use police powers in order to deal with AIDS and HIV infection in Georgia.²⁹ Georgia maintains an extensive statute on limiting the disclosure of AIDS confidential information³⁰ known as the AIDS disclosure statute. The statute authorizes disclosure of AIDS confidential information to the prosecutor or district attorney for criminal prosecutions.³¹

In a criminal prosecution for aggravated assault with intent to murder, a Georgia court determined that the AIDS disclosure statute never intended to act as a shield for individuals engaging in conduct with the intent to transmit HIV.³² The court authorized disclosure of AIDS confidential information in order to establish intent of the defendant to transmit HIV by biting a police officer.³³

Like Georgia, several other states have prosecuted HIV transmission with traditional criminal law. The most frequent charges include assault, attempted murder, and reckless endangerment. The behavior subject to prosecution has ranged from biting and spitting to sexual intercourse.³⁴

²⁷The availability of anonymous testing centers further complicates the ability to track down HIV records to prove an HIV carrier defendant's knowledge and intent.

²⁸See GA. ANN. CODE § 15-11-35.1 (1994) Editor's Note citing Ga. L. 1988, p. 1799, § 1.

²⁹*Id.*

³⁰GA. CODE ANN. § 24-9-47 (1994).

³¹GA. CODE ANN. § 24-9-47(t)(1)(A) (authorizes disclosure to a prosecutor in connection with a prosecution for the alleged commission of reckless conduct).

³²*Scroggins v. State*, 198 Ga. App. 29 (Ga. Ct. App. 1991).

³³*Id.*

³⁴HERMANN, *supra* note 3, at § 9:05 (synopsis of cases prosecuted in various states which used traditional criminal law to criminalize behavior "likely" to transmit HIV.)

2. United States Military Prosecutions

The United States Military Courts have progressed through a series of cases involving HIV transmission utilizing traditional offenses.³⁵ Since October of 1985, the military has tested all military recruits for HIV antibodies.³⁶ This mandatory testing eliminates problems with proving an individual's knowledge concerning his/her HIV status. However, the military must still address similar issues faced by the states such as whether consent operates as a defense.

In the military the consent issue has required at least two determinations. First, whether consent is negated if the HIV carrier failed to disclose his/her infected status. Second, whether a person can ever consent to serious physical harm (i.e. HIV infection). A related issue revolves around whether using protection during sexual intercourse shelters an HIV carrier from criminal liability.

The military cases have focused on two major issues vis-a-vis the criminal prosecution of HIV transmission under traditional criminal offenses: consent and protective measures used during sexual encounters. When a defendant attempted to assert the confidentiality privilege over his HIV positive medical records, the United States Army Court of Military Review allowed the disclosure of a defendant's positive HIV tests. The court reasoned that the limited confidentiality privilege pertained to criminal conduct preceding the HIV test, but not to activity engaged in after receiving the HIV positive test results.³⁷ The court considered and noted two societal interests in making their decision: deterring HIV carriers from engaging in reckless behavior and stopping the spread of deadly disease.³⁸

In another military case, *United States v. Johnson*,³⁹ the court acknowledged the proposition that the military has a legitimate interest in prosecuting unprotected sexual intercourse which risks transmission of the HIV virus. The court left open the question of whether protection alone could remove the defendant's conduct from criminal prosecution. This question was answered by the military court in a subsequent case.⁴⁰

In *United States v. Joseph*, the United States Court of Military Appeals faced the issue of whether an aggravated assault with a dangerous weapon conviction could be sustained where the deadly weapon was the HIV virus and the defendant and the victim had protected sexual intercourse. The defendant

³⁵See generally *United States v. Joseph* 37 M.J. 392 (1993); *United States v. Morris*, 30 M.J. 1221 (1990); *United States v. Johnson*, 30 M.J. 53 (1990); *United States v. Woods*, 27 M.J. 749 (1989).

³⁶PRACTICE MANUAL, *supra* note 22, at app. II-4 (1988).

³⁷*Morris*, 30 M.J. at 1226.

³⁸*Id.*

³⁹*Johnson*, 30 M.J. at 57.

⁴⁰*United States v. Joseph*, 37 M.J. 392, 393-94.

HIV carrier failed to disclose his HIV status to the victim. The defendant argued that since they had used protection the state could not prove the elements of criminal assault.⁴¹ The court held that by failing to divulge his HIV status, the defendant negated any defense of informed consent.⁴²

In sustaining the conviction, the court reasoned that the sexual encounter sufficed for intentional touching and the assault was consummated "when a knowingly HIV-infected person has sexual intercourse, without first informing his partner—regardless whether protective measures are utilized."⁴³

In another military case, *United States v. Woods*,⁴⁴ the court upheld defendant's conviction for wanton disregard for human life even though the victim consented to sexual intercourse and was aware of defendant's HIV status. The court refused to allow consent to operate as a defense when the defendant engaged in unprotected sexual intercourse knowing the inherent danger.

III. EXAMPLE HIV-SPECIFIC CRIME LEGISLATION

The persisting difficulties in defining the scope and parameters of the prohibited conduct, in part, prompted the proposals for HIV specific offense legislation.⁴⁵ States which have made exposing a person to HIV through sexual activity a criminal offense include, but are not limited to, Florida, Illinois, Michigan, Idaho, Louisiana, Missouri, Nevada, Oklahoma, and Washington.

Although numerous states have opted to enact HIV-specific legislation, the statutes vary in regard to setting forth and defining the specific behavior subject to criminal prosecution. In 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic, specifically urged the states to only use the HIV-specific crime legislation as a last resort. The Commission recommended utilizing public health intervention prior to instituting charges against HIV infected individuals.⁴⁶

A. The Scope of the HIV-Specific Crime Statutes

The Presidential Commission acknowledged that in drafting HIV-specific crime statutes, state legislatures must set forth specific behaviors subject to

⁴¹*Id.* at 393-94.

⁴²*Id.* at 397.

⁴³*Id.* at 395.

⁴⁴*Woods*, 27 M.J. 749.

⁴⁵HIV REPORT, *supra* note 6, at 130.

⁴⁶*Id.* at 131. ("Prior to instituting a case against an accused individual, prosecuting officials should consult with local public health officials to determine whether to prosecute the individual for an HIV transmission criminal offense or whether public health intervention would be more appropriate")

criminal sanctions.⁴⁷ In response, many of the states have meticulously and effectively defined exactly what behavior is encompassed by the terms used in their HIV-specific crime statutes. For example, Idaho specifically defines exactly what "bodily fluid" and "transfer" means for violation of the HIV-specific crime statute.⁴⁸ The statute provides that "'transfer' means engaging in sexual activity by genital-genital contact, oral-genital contact, anal-genital contact; or permitting the use of a hypodermic syringe, needle, or similar device without sterilization; or giving, whether or not for value, blood, semen, body tissue, or organs to a person, blood bank, hospital, or other medical care facility for purposes of transfer to another person."⁴⁹

Other states have left the terms of a HIV-specific crime statute open to judicial construction. For example, the Illinois legislature merely prohibits "intimate contact" which "means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in transmission of HIV."⁵⁰ The Illinois courts are left to interpret what constitutes "a manner that could result in transmission of HIV."⁵¹

B. Role of Confidentiality

The Presidential Commission stressed that "HIV criminal statutes should include strong, uniform confidentiality protection."⁵² Despite the emphasis on confidentiality, the disclosure of AIDS information statutes largely disregard an accused individual's right to confidentiality in their HIV test results when involved in criminal prosecutions.⁵³

States, such as Florida, seem to have contemplated the issue of confidentiality in drafting their HIV-specific crime legislation.⁵⁴ The Florida legislature designed the HIV-specific statute to make HIV testing mandatory only after a person has been convicted, pled no contest, or pled guilty to a crime involving the transmission of body fluids from one person to another.⁵⁵ Florida expressly provides that mandatory test results will not be admissible in any criminal proceeding arising out of the alleged offense.⁵⁶ The statute mandates

⁴⁷HIV REPORT, *supra* note 6, at 131.

⁴⁸IDAHO CODE § 39-608 (2) (1994).

⁴⁹IDAHO CODE § 39-608 (2)(b) (1994).

⁵⁰ILL. ANN. STAT. ch. 720, para. 12-16.2 (Smith-Hurd 1994).

⁵¹*See also* TENN. CODE ANN. § 39-13-109 (1994).

⁵²HIV REPORT, *supra* note 6, at 131.

⁵³*E.g.*, IND. CODE ANN. § 35-38-1-10.5 (e) (1994) ("The privileged communication between . . . health care provider and the health care provider's patient is not a ground for excluding information . . ."); *But see*, ALASKA STAT. § 18.15.310 (1994).

⁵⁴FLA. STAT. ANN. § 775.0877 (1)(l) (West 1995).

⁵⁵*Id.*

⁵⁶*Id.*

that the test results be disclosed to the offender and reported to the appropriate health department as well as to the Department of Health and Rehabilitative Services.⁵⁷ Only if the offender, after receiving notice of his/her positive status, commits a second or subsequent offense will he/she be charged with criminal transmission of HIV.⁵⁸ The mandatory testing after one conviction and the recording of the results only to be used in subsequent convictions eliminates violations of confidentiality.

After reviewing some current HIV-specific statutes and factors considered in drafting and enacting the legislation, various issues give rise to further discussion. Three issues, in particular, develop in relation to the HIV-specific crime statutes: Confidentiality, Equal Protection, and Counterproductive Effects of HIV-specific crime statutes.

IV. CONFIDENTIALITY

A. Conflicting Standards for Health Care Providers

The legal and medical implications of AIDS and HIV overlap and present conflicting ethical standards for practitioners in each profession. As the HIV-specific crime statutes continue to develop, individuals face restrictions on their right to privacy in the confidentiality of medical records. At the same time, health care providers must balance the assurance of maintaining confidentiality with court orders to disclose confidential HIV test results.

B. The Fundamental Right to Privacy

In the early part of the century, the United States Supreme Court grappled with whether citizens had a constitutionally protected fundamental right to privacy.⁵⁹ Although, the United States Constitution does not expressly provide for a "right to privacy", the Supreme Court held that the Bill of Rights created "zones of privacy" under several enumerated Amendments.⁶⁰ In *Griswold v. Connecticut*, the Supreme Court declared a privacy right in marriage and in using contraception.⁶¹ In a landmark case, *Roe v. Wade*,⁶² the Supreme Court extended the right to privacy to include a woman's right to have an abortion without undue interference by the government.

Since 1973, the Supreme Court has been reluctant to extend the right to privacy any further. In fact, in cases subsequent to *Roe*, the Supreme Court has

⁵⁷FLA. STAT. ANN. § 775.0877 (2) (West 1995).

⁵⁸FLA. STAT. ANN. § 775.0877 (3) (West 1995).

⁵⁹See generally *Pierce v. Society of Sisters*, 268 U.S. 10 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁶⁰*Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶¹*Id.*; cf., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (expanding privacy right to use contraception to unmarried couples).

⁶²410 U.S. 113 (1973).

qualified a woman's right to have an abortion by allowing a State to refuse to fund abortions in their government funded Medicaid program.⁶³ Although the Supreme Court has been reluctant to broaden the scope of the fundamentally protected right to privacy, the established privacy rights continue to possess a constitutionally protected status.

Under the Fourteenth Amendment,⁶⁴ citizens enjoy two kinds of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."⁶⁵ These individual interests can be outweighed by certain government interests. The right to privacy is not absolute.

C. Scope Of Privacy Interests

The law has recognized the importance of this right by affording legal remedies for the violation of privacy interests.⁶⁶ However, at some point, the interests of society outweigh an individual's right to privacy.⁶⁷ In the area of HIV legislation, the government must closely monitor the balance between societal interests and individual privacy interests. The balance remains tenuous and dependent on the proffered interests. For example, while society has an interest in containing the spread of HIV, courts have also held a public interest in having the confidentiality of medical records maintained.⁶⁸

But, if individual privacy rights are systematically sacrificed by the nonconsensual disclosure of medical records in efforts to curtail HIV transmission, more individuals may forego HIV testing to personally protect their own privacy. In contrast, flagrant disregard of one's HIV status by engaging in behavior which risks transmission, such as unprotected intercourse, endangers the health of the community. Society has a strong interest in sanctioning such deadly and unconscionable behavior. These competing societal interests are coupled with the legal and ethical

⁶³*Maier v. Roe*, 432 U.S. 464 (1977).

⁶⁴These rights are established through substantive due process. Substantive due process is defined in BLACK'S LAW DICTIONARY 997 (Abridged 6th ed. 1991).

⁶⁵*Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

⁶⁶WILLIAM H. ROACH, JR. ET. AL, MEDICAL RECORDS AND THE LAW 146 (1985) ("An invasion of an individual's right to privacy is a civil wrong that has been defined as an unwarranted appropriation or exploitation of that individual's personality, the publication of his or her private concerns in which the public has no legitimate interest, or a wrongful intrusion into his or her private activities."); See also SULLIVAN, *supra* note 16, at 112 ("the unauthorized disclosure of medical records can be punishable by a criminal penalty, under state or federal law.")

⁶⁷ROACH, *supra* note 66 at 149 ("An individual's actions or situation may become of such public interest that publication alone of personal information about him or her is no longer an invasion of privacy.")

⁶⁸Johnson, *supra* 30 M.J. 53 at 57 (interest in preventing spread of HIV); HIV REPORT, *supra* note 6, at 131 (interest in maintaining confidentiality).

responsibilities of physicians to honor their duty of confidentiality to their patients. The law must provide guidance in balancing these interests with uniformity.⁶⁹

D. The Confidentiality Privilege

The HIV-specific crime statutes not only present further intrusion into the realm of one's right to privacy, but also require physicians and/or health care providers to disclose confidential medical records in conflict with the medical code of ethics.⁷⁰ The American Medical Association's Code of Ethics instructs physicians to inform patients seeking HIV testing about the limits of confidentiality.⁷¹ The Code further instructs doctors to encourage HIV testing.⁷²

The basis for physician-patient confidentiality stems from the Hippocratic oath.⁷³ According to the American Civil Liberties Union,⁷⁴ more than forty states have statutes protecting the physician-patient privilege.⁷⁵ These statutes qualify the privilege, and compel the physician to testify about a patient or reveal a patient's medical record under certain conditions. For example, Ohio enacted R.C. § 2317.02 which protects privileged communications. Subsection (B)(1) creates privileged communications between physicians and their patients. The section also provides exceptions to the confidentiality wherein a physician may be compelled to testify concerning a patient. None of the expressed exceptions authorize disclosure of an HIV test, but the Ohio Revised Code devotes a specific statute to the confidentiality of HIV tests.⁷⁶

E. Confidentiality Privilege and HIV Test Results

Unlike the mandatory HIV testing conducted by the military, HIV testing remains voluntary in the states with only few statutorily defined exceptions for mandatory testing. As a result, individuals who obtain voluntary HIV

⁶⁹SULLIVAN, *supra* note 16, at 103.

⁷⁰AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS § 2.23, at 55-56 (1994) [hereinafter AMA CODE].

⁷¹*Id.* at 55. ("The confidentiality of the results of HIV testing must be maintained as much as possible and the limits of a patient's confidentiality should be known to the patient before consent is given.")

⁷²*Id.* at 55. ("In order to limit the public spread of HIV infection, physicians should encourage voluntary testing of patients at risk for infection.")

⁷³EVAN HENDRICKS ET. AL., YOUR RIGHT TO PRIVACY 155 (2d ed. 1990) (The Hippocratic oath states "All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with man which ought not to be spread abroad, I will keep secret and never reveal.")

⁷⁴Commonly referred to as the ACLU.

⁷⁵AMA CODE, *supra* note 70.

⁷⁶For the voluntary HIV testing options and regulations in Ohio *see infra* pp. 18-20.

testing remain the targets of the HIV-specific state statutes. Utilizing various traditional criminal laws to punish HIV-transmission conduct creates inconsistent results and confusion about exactly what behavior is prohibited.

Most states offer various voluntary HIV testing options in the form of anonymous and confidential testing sites. One crucial difference between these two alternatives is the ability to link an identity to a test result. These options create a distinct equal protection problem in relation to the disclosure of HIV test results for HIV-specific criminal prosecutions. The statutes in effect target or at least apply almost exclusively to the class of people who undergo confidential HIV tests. Those who forego testing have no knowledge of their HIV status and fall outside the scope of most HIV-specific crime statutes. Those who submit to anonymous testing escape prosecution as their HIV results and identities remain unlinked. However, those who submit to confidential testing are linked to the results of the HIV test and are exposed to potential prosecution. For purposes of simplicity and illustration, this portion of the discussion will trace the interaction of confidentiality, disclosure and criminal statutes of one state, Ohio.

1. Voluntary Testing Options

A majority of states mandated the establishment of both anonymous and confidential HIV testing sites.⁷⁷ Recognizing the stigma attached to HIV, the states provide anonymous testing sites in hopes of encouraging more people be tested. The important societal interest in maintaining these anonymous testing sites revolves around public health issues as well as ensuring complete anonymity to those being tested.

The Ohio⁷⁸ legislature codified the duties of the Health Director regarding AIDS testing. This statute instructs the Health Director to administer testing programs for individuals at risk for HIV infection, including both anonymous and confidential testing procedures.⁷⁹ The statute again, more specifically, orders the Director to establish sites for both anonymous and confidential testing sites and to compile a list of anonymous testing sites.⁸⁰ The Ohio Revised Code expressly states that an individual has a right to have an anonymous test and upon his/her request, a health care provider or agency shall direct them to an anonymous testing site.⁸¹

For purposes of testing and medical records under Ohio law, anonymous test and confidential test have distinctly different definitions. The Ohio law

⁷⁷E.g., LA. REV. STAT. ANN. § 40:1300.13(E) (1993); OHIO REV. CODE ANN. § 3701.241 (Baldwin 1994); W. VA. CODE § 16-36-2 (1994).

⁷⁸This article examines, in depth, only Ohio's state statute on HIV testing for purposes of illustration.

⁷⁹OHIO REV. CODE § 3701.241 (A) (2) (Baldwin 1994).

⁸⁰OHIO REV. CODE § 3701.241 (B) (2) (Baldwin 1994).

⁸¹OHIO REV. CODE § 3701.242 (D) (Baldwin 1994).

provides the following definitions: "Anonymous test" means an HIV test administered so that the individual to be tested can give informed consent to the test and receive the results by means of a code system that does not link his identity to the request for the test results.⁸² "Confidential test" means an HIV test administered so that the identity of the individual tested is linked to the test but is held in confidence to the extent provided by sections 3701.24 to 3701.248 of the Revised Code.⁸³

2. Anonymous v. Confidential Testing

In light of the HIV specific criminal statutes that are developing throughout the country, the difference between an anonymous and confidential test, i.e. the ability to link the tested individual with the test result, becomes crucial to equal treatment, administration and application of the law. As discussed, Ohio provides both anonymous and confidential testing sites. To date, Ohio has only enacted one statute that criminalizes transmission of the HIV virus by knowingly or recklessly selling or donating infected blood.⁸⁴ By including "recklessly", the Ohio Legislature avoids equal protection problems in relation to the testing options. In Ohio, even if a person has never been tested the law still forbids them to donate blood if they recklessly sell or donate infected blood.⁸⁵

a. Scope of HIV Confidentiality

Ohio has regulated the confidentiality of information regarding the disclosure of information containing HIV test results. This legislation statutorily mandates the disclosure of confidential test results under enumerated circumstances. One of the exceptions to confidentiality of HIV results compels disclosure pursuant to a search warrant, in connection with criminal investigation or prosecution.

The statute sets forth the procedure and circumstances under which the government may seek an order to compel disclosure.⁸⁶ The test the court must utilize, in determining whether to issue an order to compel disclosure, involves a balancing test where the state must establish by clear and convincing evidence a compelling need for disclosure of the information that cannot be accommodated by other means. The compelling need must outweigh the individual's right to privacy and any disservice to the public interest that might

⁸²OHIO REV. CODE § 3701.24 (9) (Baldwin 1994).

⁸³OHIO REV. CODE § 3701.24 (10) (Baldwin 1994).

⁸⁴OHIO REV. CODE ANN. § 2927.13 (Baldwin 1994).

⁸⁵Unlike Ohio, other states only criminalize conduct likely to transmit HIV when the accused actually knew he/she carried the virus. *E.g.*, ILL. REV. STAT. ch. 720 para. 5/12-16.2 (Smith-Hurd 1994).

⁸⁶OHIO REV. CODE § 3701.243 (C) (1) (Baldwin 1994).

result from the disclosure, including any deterrence of others from being tested.⁸⁷

The statute allows introduction of evidence concerning an HIV test of a specific individual in a criminal proceeding.⁸⁸ HIV test subjects should be informed and counseled regarding the ramifications and responsibilities that result from testing positive. Prior to testing, Health care providers should obtain informed consent from all test subjects.

3. Informed Consent

Ohio makes informed consent a prerequisite to HIV testing, but allows consent to be given orally or in writing.⁸⁹ Informed consent includes, but is not limited to, the agency providing "[a]n oral or written explanation about behaviors known to pose risks for transmission of HIV infection."⁹⁰ Other states, as well as other commentators, have recognized the crucial element informed consent will play not only as a prerequisite to HIV testing, but also as an effective waiver of the confidentiality privilege under explicit conditions.⁹¹

The statutes regulating HIV testing vary from state to state with many states requiring the health care provider to obtain informed consent before initiating the testing procedures.⁹² These states include California, Delaware, Florida, Iowa, Massachusetts, New York, and Wisconsin. States such as Illinois require written informed consent. While still other state statutes generally regulate voluntary testing with exceptions providing for involuntary testing under certain circumstances.⁹³

a. Notification of HIV Crime Statutes

The HIV specific criminal statutes raise issues of confidentiality breaches. At least one court has encountered this issue.⁹⁴ This court implied that when an individual, who knowingly carries the HIV virus, engages in activity which exposes others to the transmission of the virus, the individual waives the confidentiality provisions of the HIV test.⁹⁵ This implication apparently

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹OHIO REV. CODE § 3701.242 (Baldwin 1994).

⁹⁰OHIO REV. CODE § 3701.242 (A) (3) (Baldwin 1994).

⁹¹*E.g.*, GA. CODE ANN. § 24-9-47 (1994); MICH. COMP. LAWS § 333.5131 (1993).

⁹²HERMANN, *supra* note 3, at § 2.13 (Discussion defining informed consent which details the parameters of informed consent).

⁹³HERMANN, *supra* note 3, at 20-21 (Supp. 1994).

⁹⁴*State v. J.E.*, 606 A.2d 1160 (N.J. Super. Ct. Law Div. 1992).

⁹⁵*See* ROBINSON, *supra* note 14.

assumes that the individual knows the consequences of his/her behavior; otherwise the waiver of confidentiality would neither be knowing nor intentional. Such inferences, if followed by other courts, place a greater importance on informed consent to HIV tests.⁹⁶

b. Written Consent Forms

By requiring patients to sign an informed consent form, authorizing the disclosure of the medical record under HIV specific crime circumstances, health care providers obtain immunity from invasion of privacy claims when the results are disclosed to the authorities.⁹⁷ Some state statutes articulate the minimum requirements necessary to obtain informed consent from an HIV test subject. For example, West Virginia's statute⁹⁸ mandates that physicians shall provide the patient (HIV voluntary test subject) with certain information. This information includes, but is not limited to, "[a]n explanation of the test, including its purpose, potential uses, limitations, the meaning of its results . . . ,"⁹⁹ "[i]nformation about behaviors known to pose risks for transmission of HIV infection,"¹⁰⁰ and "that the consent for the test may be withdrawn at any time prior to drawing the sample for the test"¹⁰¹

c. AMA Standards

In accordance with AMA ethical standards concerning informed consent to HIV testing, a physician should disclose the exceptions to confidentiality and explain the right to an anonymous test.¹⁰² Anonymous testing operates through the use of a coded system and ensures that there will be no linking or individual identity to the HIV test request or results.¹⁰³ Such information might operate to make confidential testing obsolete since anonymous testing affords individuals more assurance of privacy than a confidential HIV test. But failure to provide such information would undermine the purpose of informed consent.

⁹⁶*Id.* at 150. (Discussion regarding importance of informed consent and confidentiality).

⁹⁷HERMANN, *supra* note 3, at § 2:14. (Example of model written consent for HIV antibody testing).

⁹⁸W. VA. CODE § 16-3C-2 (1994).

⁹⁹W. VA. CODE § 16-3C-2 (b) (1) (1995).

¹⁰⁰W. VA. CODE § 16-3C-2 (b) (6) (1995).

¹⁰¹W. VA. CODE § 16-3C-2 (4) (1995).

¹⁰²AMA CODE, *supra* note 70.

¹⁰³E.g., W. VA. CODE § 16-3C-2 (c) (1994).

V. HIV-SPECIFIC CRIMES AS DETERRENT TO VOLUNTARY TESTING

A. *Ability to Encourage Voluntary Testing*

In accordance with both public health and AMA ethical standards, voluntary testing must be encouraged. A decrease in privacy and confidentiality could defeat the purpose of voluntary HIV testing.¹⁰⁴ As police departments and criminal investigations mount into prosecutions for HIV specific offenses, the previous security in confidential testing will diminish.¹⁰⁵

In light of the developing HIV specific crime statutes, the ability of the physician to encourage testing becomes severely limited. Informed consent requires the physician and/or health care provider to advise the patients of the limits of confidentiality. The patient must be instructed that testing positive places regulations on their behavior. The patients should also be informed that if they test positive, anything construed as reckless behavior on their behalf (i.e. conduct likely to transmit HIV) could result in criminal charges being filed against them. The physician should alert the patient that the disclosure of test results would occur pursuant to any criminal investigation and could result directly in criminal charges. This means allegations that the individual engaged in conduct likely to transmit HIV are enough to suspend the duty of confidentiality.

Currently, many health care providers only state that confidentiality extends within the limits of the law. This overbroad statement fails to communicate to the patient exactly what the limits of the law are in that state. When testing positive transforms ordinarily legal conduct into illegal conduct, the individual must be put on notice. In effect, the HIV-crime specific statutes could operate to decrease voluntary HIV testing in individual efforts to avoid the potential criminal liability.¹⁰⁶

¹⁰⁴HENDRICKS, *supra* note 73, at 174. ("Most health officials, gay rights activists, and civil libertarians argue that if complete confidentiality is not guaranteed, then 'high risk' groups will shy away from AIDS testing, thus threatening to worsen the problem by failing to inform infected individuals of their condition.") *Id.* at 173-74.

¹⁰⁵*Id.* at 158. ("Police departments can gain access to medical records in the course of criminal investigations"). *Id.*

¹⁰⁶HERMANN, *supra* note 3, ch. 9 at 10 (Supp. 1994).

(One danger is that the use of the criminal law to stem HIV transmission may be counterproductive. To the extent that criminal statutes directed to prevent HIV transmission require that a person know that he or she is infected before being subject to a criminal charge for engaging in activity likely to spread the virus, these statutes may encourage individuals to avoid testing which would determine infection in order to avoid establishing a basis for subsequent criminal liability.)

*B. Attempts to Protect Voluntary Test Results***1. Conflicting Interests**

The efforts to contain the spread of HIV have produced conflicting societal interests. A person who intentionally engages in conduct with the intent to infect another person with HIV poses a grave danger to society. However, HIV-specific crime statutes which authorize disclosure of confidential voluntary HIV test results might serve to actually increase the public health risk by discouraging voluntary testing. In addition, those who may pose the most severe danger to society could remain insulated from HIV-specific crime penalties by refusing to submit to HIV testing. The law must reconcile the competing public interests.

2. Mandatory Testing

At present, most states have targeted individuals charged and/or convicted of specific crimes to undergo mandatory HIV tests. The primary purpose behind the mandatory testing of criminal defendants is to benefit the victim of a crime.¹⁰⁷ Although these statutes authorize HIV testing without the consent of the individual, they still maintain a certain degree of confidentiality.¹⁰⁸ California even attempts to avoid malicious prosecutions for sexual assault by finding anyone who files false sexual assault claims guilty of a misdemeanor for each separate disclosure of the accused's HIV test results.¹⁰⁹ In most instances, the statute prohibits the state from using the results of mandatory HIV tests in any criminal proceeding as evidence of either guilt or innocence.¹¹⁰ Florida, however, has taken the results of mandatory HIV test results a step further.

Florida subjects certain criminal offenders to mandatory HIV testing.¹¹¹ The statute precludes the state from using the results in the criminal proceedings of the offense which caused the offender to submit to the mandatory test.¹¹² However, the health officials maintain records of the test and the results. If the offender, after receiving notification of positive results, commits a second or subsequent offense, which exposes another to HIV, he/she commits criminal

¹⁰⁷CAL. PENAL CODE § 1524.1 (a) (Deering 1995).

¹⁰⁸E.g., CAL. PENAL CODE § 1524.1 (h) (Deering 1995). ("The local health officer and victim shall comply with all laws and policies relating to medical confidentiality subject to the disclosure . . .").

¹⁰⁹*Id.*

¹¹⁰E.g., CAL. PENAL CODE § 1524.1 (k) (Deering 1995).

¹¹¹See *supra* notes 53-56 and accompanying text.

¹¹²FLA. STAT. ANN. § 775.0877 (l) (West 1995).

transmission of HIV.¹¹³ Under Florida's approach, several societal health interests are protected.

By utilizing Florida's method, the mandatory tests identify individuals who are convicted, pled guilty or pled no contest to crimes which involve conduct likely to transmit HIV. Those individuals who test positive receive notification and counseling. The results remain confidential unless the individual refuses to modify their behavior and knowingly continues to engage in risk transmission behavior. This method effectively targets and punishes individuals who intentionally place others at risk of HIV infection. At the same time, the confidentiality of voluntary test results remains intact.

Florida's HIV-specific crime statute also avoids equal protection problems in applying the laws. In Florida, all people convicted of the enumerated crimes are subject to mandatory testing and repercussions of knowingly engaging in risk transmission behavior. Due to the hysteria and stigma attached to HIV and AIDS, some writers anticipate selective application of the HIV-specific crime statutes. They argue that HIV-specific crime statutes will plague already stigmatized groups (homosexual men, IV drug users, and prostitutes).¹¹⁴

VI. EQUAL PROTECTION

A. The Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution guarantees that no State shall "deny to any person within its jurisdiction equal protection of the laws."¹¹⁵ The Equal Protection Clause operates to protect similarly situated classes of people from being discriminated against or treated unequally. When the law or statute treats classes of similarly situated people differently, the state must present a government interest that meets the appropriate level of scrutiny: rational basis, intermediate, or strict scrutiny. If the state fails to meet the level of scrutiny, the statute will be held invalid.

Classifications not involving a suspect/quasi-suspect classification or fundamental right are subject to lower level scrutiny (the rational basis test). Most statutes survive the rational basis test which requires only that the classification be rationally related to a legitimate governmental interest.¹¹⁶ Classifications that involve "suspect" or "quasi-suspect" classifications invoke a higher level of scrutiny.

¹¹³FLA. STAT. ANN. § 775.0877 (3) (West 1995) (Criminal transmission of HIV is a separate crime from the underlying crime and an offender can be convicted and sentenced separately for each crime.)

¹¹⁴SULLIVAN, *supra* note 16, at 29. ("[M]orals laws may be selectively enforced to harass persons based on their sexual orientation, commentators have expressed concern that such statutes might be selectively applied . . .").

¹¹⁵U.S. Const. amend. XIV, § 1.

¹¹⁶*See generally* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Williamson v. Lee Optical, 348 U.S. 483 (1955).

Characteristics of a suspect classification include "discrete and insular minorities,"¹¹⁷ a history of discrimination against the group, stigmatization, and inability to control one's membership in the group (immutable trait). Both race and nationality receive the highest level of scrutiny as suspect classes.

To survive strict scrutiny, the state must have a compelling governmental interest in making the classification and the classification must be necessary (i.e. the only way) to accomplish the interest.¹¹⁸ Strict scrutiny is also invoked when the classification involves a fundamental right.¹¹⁹

A statute which involves a "quasi-suspect" classifications (i.e. gender and legitimacy) is subjected to intermediate level scrutiny. Under intermediate level scrutiny, the state must establish an important government interest and show that the statute is substantially related to accomplishing that purpose.¹²⁰

In order for a suspect classification to receive strict scrutiny, intentional discrimination must be established.¹²¹ Intentional discrimination can be established three ways: 1) if the law expressly discriminates on its face;¹²² 2) the law is neutral on its face but is administered in a discriminatory way;¹²³ and 3) the law is neutral on its face and administered appropriately but, was enacted with discrimination as its purpose.¹²⁴

B. Discrimination and the HIV-Specific Crime Statutes

Currently, many of the HIV-specific statutes only prosecute the "intentional" transmission of HIV to another.¹²⁵ These HIV-specific crime statutes make a classification between people who submit to voluntary testing and people who decline to submit to voluntary testing. Such HIV laws serve to punish only the HIV positive individuals who have voluntarily submitted to confidential HIV testing. While the same behavior, engaged in by a non-tested HIV positive individual, amounts to no penalty just because the individual did not bother to be tested.

In terms of equal protection, the classifications created by the HIV-specific crime statutes must first be analyzed to determine whether the class possesses characteristics of suspectness. First in order to obtain a level of heightened

¹¹⁷United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

¹¹⁸See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

¹¹⁹See generally *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

¹²⁰See generally *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981) (gender classification); *Levy v. Louisiana*, 391 U.S. 68 (1968) (legitimacy classification).

¹²¹*Washington v. Davis*, 426 U.S. 229 (1976).

¹²²E.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880).

¹²³E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹²⁴E.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹²⁵E.g., IDAHO CODE § 39-608 (1) (1994).

scrutiny, an argument must be made that HIV positive individuals, who submit to voluntary testing, exhibit characteristics of suspectness (i.e. stigmatization, political powerlessness, inability to control one's membership in the class, etc.). For the highest level of scrutiny a discriminatory intention must be established in addition to establishing suspect classification. The HIV-specific statutes requiring the accused to have knowledge of his/her HIV status is facially discriminatory. The statute only applies to individuals who have been tested. If the court determines that the classification fails to meet the qualifications of a suspect or quasi-suspect class, the statutes will only receive rational basis review.

In *Craig v. Boren*,¹²⁶ the United States Supreme Court invalidated an Oklahoma law which classified on the basis of gender (a quasi-suspect classification). The statute at issue forbade the sale of 3.2% beer to males under the age of twenty-one, but allowed females over the age of eighteen to purchase the product. The court utilized the intermediate level of scrutiny and held the state's interest (promoting traffic safety) insufficient. The court reasoned that the statute was not substantially related to achieving the purported governmental interest (promoting traffic safety).

Similarly, if the HIV-specific crime statutes create a quasi-suspect classification, the statutes under equal protection attack will receive intermediate level scrutiny. The government interest (preventing the spread of HIV) must be substantially related to the statute. As several commentators have suggested, the HIV-specific statutes may not only fail to prevent the spread of HIV, but also serve to increase danger to public health by discouraging individuals from submitting to voluntary testing.

Even if the courts refuse to find elements of suspectness in the classification created by the HIV-specific crime statutes, the statutes may not survive even rational basis scrutiny. In *City of Cleburne v. Cleburne Living Center*,¹²⁷ the Supreme Court of the United States declined to regard mental retardation as a quasi-suspect classification. The statute under attack in *Cleburne* involved a municipal zoning ordinance which only required special use permits for group homes for certain specified groups. In *Cleburne* the municipality denied a special use permit for the operation of a group home for the mentally retarded. The court applied rational basis scrutiny. Nonetheless, the court invalidated the ordinance. The court reasoned that requiring the permit rested on irrational prejudice against the mentally retarded.

Similarly, HIV-specific statutes could also reflect irrational prejudice against individuals who have tested positive for HIV. The question is whether it is rational to treat individuals who have voluntarily submitted to HIV testing differently than individuals who decline to determine their HIV status. In effect, the statutes serve to punish individuals who arguably have acted

¹²⁶429 U.S. 190 (1976).

¹²⁷473 U.S. 432 (1985).

responsibly in seeking voluntary testing, while rewarding those who may in fact pose a greater public health danger by not being tested.

Unless HIV testing becomes mandatory, HIV-specific crime statutes may present an arbitrary and counterproductive method of containing the spread of HIV. Before enacting and utilizing HIV-specific crime statutes, states should consider implementing public health laws as alternative methods to contain the spread of HIV.

VII. ALTERNATIVE METHODS OF CONTAINING THE SPREAD OF HIV

In light of the HIV-specific crime statutes, every instance of HIV infection constitutes a crime. That means that every defendant in criminal transmission prosecutions is also a victim of the same crime by nature of his/her infected status. The potential for criminal prosecutions becomes endless.

As the Presidential Commission suggested, HIV-specific crime statutes should only be implemented after other avenues of sanctioning irresponsible behavior have been exhausted.¹²⁸ Other writers have also emphasized the benefits of utilizing public health laws to monitor and control HIV positive individuals who persist in risk transmission conduct.¹²⁹ Mass education, encouraged voluntary testing, and extensive counseling reflect other means suggested to diminish the spread of HIV.¹³⁰

A. Public Health Quarantine

Some states, such as Florida and Tennessee, have incorporated the public health law procedure of quarantine into the HIV-specific statute.¹³¹ Although quarantine falls under public health law procedures and not under criminal law punishments, Florida permits the court to require an offender of the HIV-specific crime statute to serve a term of criminal quarantine community control. Despite the Presidential Commission's recommendation to forego criminal prosecutions where public health intervention is appropriate, Florida opts to provide this sanction *in addition* to criminal penalties.¹³²

In Florida, quarantine under this provision involves "intensive supervision with 24-hour-per-day electronic monitoring. Criminal quarantine community control status must include surveillance and may include other measures normally associated with community control, except that specific conditions necessary to monitor this population must be ordered."¹³³

¹²⁸HIV REPORT, *supra* note 6, at 131; Cf., HIV REPORT, *supra* note 6, at 78. ("Quarantine or isolation of HIV-infected individuals based only on status without consideration of an individuals's behavior is not appropriate and should not be adopted.").

¹²⁹E.g., HERMANN, *supra* note 3, at ch. 9:03. ("The public health law can provide the means to isolate individuals who persist in HIV-transmitting behavior").

¹³⁰SULLIVAN, *supra* note 16, at 21.

¹³¹FLA. STAT. ANN. § 775.0877(7) (West 1995); TENN. CODE ANN. § 39-13-108 (a) (1995).

¹³²FLA. STAT. ANN. § 775.0877 (7) (West 1995).

Tennessee required the department of health to promulgate rules regarding transmission of HIV and to include specific procedures for quarantine or isolation for individuals "who clearly and convincingly demonstrate[] willful and knowing disregard for the health and safety of others who pose[] a direct threat of significant risk to the health and safety of the public regarding transmission of HIV."¹³⁴ This statute requires interpretation as to what constitutes "willful and knowing disregard," "direct threat," and "significant risk." In order to avoid discrimination in the application of the HIV-specific laws, legislatures should clearly define the parameters of proscribed conduct.¹³⁵

B. Public Health Laws

State legislatures could create public health laws targeted at individuals who engage in HIV-transmission conduct. Some states already have public health laws in addition to HIV-specific crime statutes.¹³⁶ These states should follow the recommendation of the Presidential Commission on the Human Immunodeficiency Virus Epidemic and only resort to the criminal law when the public health measures fail.

An advantage of utilizing the public health laws instead of criminal sanctions is that an individual's quarantine or isolation will only last as long as that individual refuses to modify his/her behavior.¹³⁷ The scope of the states' public health powers is broad.¹³⁸ The states' public health powers include involuntary hospitalization of the mentally ill and the institutionalization of drug abusers.¹³⁹

As discussed, HIV-specific statutes may in effect exacerbate the HIV epidemic. By focusing on alternative methods to criminal penalties the states may actually achieve the goal of prevention more fully. As pointed out by one commentator, the implementation of HIV-specific crime laws may "divert legis-

¹³³FLA. STAT. ANN. § 948.01 n1 (14) (West 1996).

¹³⁴TENN. ANN. CODE § 39-13-108(a) (1995).

¹³⁵The potential for violations of Equal Protection and analysis of selective application of the HIV-specific statutes discussed in depth. See *supra* pp. 20-23.

¹³⁶E.g., Ill. Admin. Code tit 77, § 693.80 (b); ILL. ANN. STAT. ch. 720, para. 5/12-16.2 (Smith-Hurd 1994).

¹³⁷HERMANN, *supra* note 3, at 22.

¹³⁸See generally HERMANN, *supra* note 3, at ch. 8., 4 ("[powers] include exercise of state power to examine, treat, and quarantine in case of contagious disease.").

¹³⁹*Id.* at ch. 8, 5.

latures from implementing more effective measures"¹⁴⁰ (i.e. counseling and mass public education).

By implementing measures other than HIV-specific crime legislation, health care providers and test centers may have greater success encouraging testing and assuring confidentiality of test results. If the legislatures place the greater emphasis on public health law, community programs and mass education, and less emphasis on criminal prosecutions that suspend confidentiality of HIV results, more HIV carriers may undergo testing and receive crucial counseling and life preserving assistance.

VIII. CONCLUSION

The HIV epidemic clearly poses a public health crisis. State legislatures rightfully maintain an important, if not compelling, governmental interest in preventing the spread of HIV. However, legislatures must be careful not to lose sight of the goal. At some point overzealously attacking the crisis from every angle presents conflicting interests which serve to impede, or perhaps cancel, any effective progress.

Legislatures must carefully weigh the competing interests (interest in confidentiality, interest in maximizing voluntary testing, and interest in criminally sanctioning HIV-transmission conduct). After evaluating the importance of each interest, legislatures should concentrate on promoting that interest.

If HIV-specific crime legislation prove more beneficial in containing the spread of HIV, then confidentiality protections should be deemphasized. On the contrary, if HIV-specific crime legislation serves to diminish voluntary testing and increase the public health risk, then confidentiality laws and anonymous testing centers should be emphasized and complemented by alternative methods of HIV transmission control.

While the trend to enact HIV-specific crime statutes continues, the existing HIV-specific crime laws should be evaluated and used as a guide by states which intend to enact their own HIV-specific crime statutes. Of all the HIV-specific crime statutes, Florida's drafted HIV-specific crime legislation seems to maintain the best balance between individual constitutional rights and the government's interest in penalizing those who engage in behavior that endangers the community.

Current HIV-specific crime legislation should be monitored and evaluated in terms of efficiency and effectiveness of controlling the spread of the AIDS virus. Legislatures should aim to create HIV-specific statutes that can assure equal protection of the laws in terms of sanctioning risk transmission behavior. This could be accomplished by making HIV testing mandatory or by drafting HIV-specific crime statutes to sanction both knowingly and recklessly engaging in risk transmission behavior. If HIV-specific statutes incorporate the term "recklessly," those individuals who have not been tested but are HIV

¹⁴⁰SULLIVAN, *supra* note 16, at 28.

positive and engage in risk transmission behavior will not escape criminal liability.¹⁴¹ In the states that have enacted HIV-specific crime legislation, the courts will determine whether the statutes survive constitutional attack. Nonetheless, societal interests in confidentiality, equal protection, and efforts to contain the spread of HIV will continue to contend with the implementation of these new criminal laws.

ERIN M. O'TOOLE

¹⁴¹Individuals act recklessly by consciously disregarding a substantial and unjustifiable risk that a material element exists or will result from his conduct (i.e. failing to verify whether they are a carrier of HIV when they think, or have reason to believe, that they have been exposed to the virus and the individual continues to engage in risk transmission behavior). Incorporating recklessly into the HIV-specific crime legislation will result in other problems that will not be addressed in this note. For example, the HIV-positive individuals who have not been tested, also have not been counseled nor informed of what constitutes risk transmission behavior.