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## AIDS AND THE CRIMINAL LAW: NEEDED REFORM

Shortly before his death, Geatan Dugas, the Canadian flight attendant believed to be one of the principal introducers of the AIDS virus into the United States, met with Selma Dritz, a San Fransisco public health official, who urged him to stop spreading the disease. Dugas, who has been linked by the Center for Disease Control to more than 200 AIDS cases, refused, saying "Its my right to do what I want with my body."  
1/

Lost in the recent furor about AIDS testing is the question of the obligation of individuals who test positive to protect others from this life-taking disease. Until now, most experts have assured us that the education and counseling of victims will be enough to prevent dangerous behavior. Yet, there is deeply troubling evidence that a small minority of AIDS victims either are intent on infecting others--or simply do not care enough to change their sexual practices.

While most studies document a tremendous reduction in risky sexual behavior by homosexual men, at the same time, most also show that knowledge of positive test results does not affect the sexual behavior of a small core of AIDS victims--they do not reduce the number of their sex partners or the number of times that they engage in unprotected anal intercourse. In a Johns Hopkins study of 1,000 gay men, two years after being tested for AIDS, more than 15 percent still did not want to know the result. (Initially, more than 30 percent had not wanted to know.) 2/ In a Miami study, 16 of 28 AIDS patients continued to have unprotected sex for one to three years; 13 of their steady partners later tested positive. 3/ Studies in London and Paris show similarly disturbing behavior. 4/

None of these studies involved a random sample of AIDS victims, but their message is clear: Positive test results do not prevent a small number of infected persons from recklessly exposing others to this dread disease.

Pfc. Adrian Morris, 27, of Fort Huachuca, Arizona, was apparently the first person prosecuted for exposing others to AIDS through sexual

contact. In May, he was charged under the Uniform Code of Military Justice with aggravated assault based on allegations that he had sexual relations with three other soldiers (one man and two women, one of whom was his fiancée) without informing them that he carried the AIDS virus and without using a condom. 5/ Although none of Morris' partners has yet tested positive for AIDS, he could serve 11 1/2 years in prison, if convicted on all counts. Morris was told by Army medical personnel that he carried the AIDS virus, but according to an Army spokeswoman, "He did not follow the counseling that was provided. . . He was told to abstain from sexual conduct or use a condom and heavy emphasis was placed on notifying his partners of his exposure to AIDS." 6/

As is well known, Rock Hudson's estate has been sued by a man claiming that he is Hudson's former homosexual lover and that Hudson continued having sexual relations with him after knowing that he had AIDS. Marc Christian filed the suit in Los Angeles on November 12, 1985. Although he had not tested positive for AIDS when he filed suit, he brought two claims, one for \$10 million and one for \$14 million, alleging that Hudson, two of his doctors, and two close associates of Hudson, conspired to hide the fact that the actor was infected with AIDS. 7/

Some might say that people assume the risk of contracting AIDS when they have unprotected sex with members of high risk groups, such as gays and drug users. But consider this: In a recent study conducted by Adelphi University researchers, 80 percent of the wives of bisexual men did not know of their husband's homosexual activity. 8/ This is a dangerous lack of information. In a study of 45 married couples with one spouse carrying the disease and the other having no other known risk factor, 26 spouses became infected. 9/

Some of these cases end up court. In Minnesota last year, a woman sued her former fiancée for \$50,000 claiming that he had negligently exposed her to AIDS Related Complex (ARC) through sexual contact, and that circumstances were such that the defendant knew, or should have known, that he was infected with the virus. 10/

Moreover, there is evidence that some confirmed AIDS carriers become even more reckless toward others. "The drug addicts who test seropositively really go wild, with lots of increased drug use and sexual acting-out behavior," according to Edith Springer, a New York City health counselor. And then, of course, there was the widely reported case of Joseph Edward Markowski, charged on June 29 in Los Angeles with attempted murder for selling his AIDS-contaminated blood and with assault with the intent to commit great bodily injury for acts of prostitution. 11/

### Deliberate Attempts to Infect

Sometimes, there is a deliberate attempt to infect others. Many of these are a variant of "man bites policeman." On June 24, a Minneapolis jury convicted prison inmate James Moore, 44, an AIDS

carrier, of two counts of using his teeth and mouth as a deadly weapon. He bit two guards during a scuffle, and now faces up to 20 years in jail. 12/

In Flint, Michigan, an AIDS victim was arrested after a traffic incident when he spat on the four officers present. He is quoted as saying that "he was going to die and would take them with him." 13/

News stories suggest that some AIDS victims deliberately seek to infect others through sexual relations. Although involving herpes, a 1986 California case is illustrative. A woman from Carmel alleged that she had suffered \$20 million in damages because the defendant intentionally infected her with genital herpes. The plaintiff was the defendant's mistress for several years before the suit was commenced, and she finally ended the affair in 1984 because the defendant would not leave his wife. In an earlier suit she received a "palimony" settlement from the defendant. According to the plaintiff, the defendant returned to her in 1985, slept with her, and then told her that he had infected her with herpes because he didn't want any one else to have her. 14/

Educating and counseling AIDS carriers should certainly be the first and most important steps in trying to prevent such dangerous behavior. But it is denying reality to suppose that such effects will be enough. Cases like those described above call out for criminal prosecution. Here's how New York Governor Mario Cuomo put it: "If you know you have AIDS and you deliberately pass it on to someone who is not aware, that should be regarded as a very serious offense. . . . I'm talking about a sin against the community, a crime." 15/

Picturing AIDS victims as emaciated and near death, many will say that criminal prosecution would be heartless--and useless. Remember the fellow who spat on the police because he thought that he was "going to die and would take them with him." But most people who test positive are still healthy and may lead normal lives for years. For them, the prospect of criminal prosecution would not be an empty threat.

The San Antonio health department last year sent letters to 14 AIDS victims warning that further sexual activity would lead to felony charges under the state's Communicable Disease Prevention and Treatment Act. 16/

Unlike Texas, however, most states do not have laws that adequately cover the deliberate or reckless exposure of others to AIDS. Although many states have laws making the transmission of communicable diseases a crime, most of these laws are limited to specified diseases, such as syphilis, gonorrhea, and even tuberculosis, but not AIDS.

Even when state penal laws do cover all communicable diseases, including AIDS, they usually require an actual "transmission" of the disease. Rarely can this be proven in AIDS cases. Despite some early concern about a high rate of false positive results, the test is now considered very reliable, at least in regard to high risk groups. A more serious legal problem is that the AIDS test only determines the presence of AIDS antibodies, that is, it only shows that someone has

been exposed to the virus. It does not prove that someone has AIDS or AIDS Related complex (ARC). Nor are medical experts sure how many of those who test positive can spread the disease or how many will actually come down with the disease. (Most estimates range from 20 to 50 percent, but some go as high as 100 percent; no one really knows.)

Furthermore, proving the presence of antibodies can be problematic. There is a long incubation period before the AIDS test can detect their presence. In one California bite/assault case, sentencing was postponed for up to a year to see whether the bitten police officer would later test positive. Then the question would be whether the antibodies came from the bite or from some other incident.

Many states are now considering legislation to fill these gaps in their penal laws. Most proposals, unfortunately, are designed to meet special problems--or the most recent news story. Thus, a California bill would make donating blood after testing positive a felony punishable by six years in jail. Nevada--which has long had legalized prostitution--has passed a law providing 20 year jail sentences for prostitutes who continue to ply their trade after learning that they test positive. Such piecemeal legislation obscures the central issue. More generalized criminal legislation is needed.

For example, states could make it a felony to expose others deliberately or recklessly to the AIDS virus--whether or not the disease is transmitted, and whether or not the victim tests positive for AIDS antibodies. Although exposing someone to the AIDS virus does not always result in an infection, doing so is analogous to speeding on a busy street or shooting into a crowded room. Whether or not someone is hurt, the act demonstrates a criminal disregard for the safety of others. Many venereal disease control statutes have long been structured this way. Florida and Idaho recently made it a crime to willfully or knowingly expose anyone to the AIDS virus.

Alan Nudelman, the Santa Clara County Supervising District Attorney, would go further. He has proposed that persons convicted of sexual assaults that can be proven to have transmitted AIDS to their victims should have at least five years added to their sentence. 17/ (A recent California ruling permits the addition of five years to a sexual assault conviction if the defendant has transmitted venereal disease to his victim.) 18/

Nudelman also proposed that, if the victim dies from AIDS within three years from the time of the assault, the defendant should be charged with murder.

### Voluntary Sexual Contact

Possible transmission through voluntary sexual contact requires special legislation because of the twin problems of consent and assumption of risk. At common law, for example, one assumed the risk of contracting venereal disease when one consented to sexual

intercourse. The Restatement (Second) of Torts Section 496C (1965) states that one who "fully understands a risk of harm . . . and who voluntarily chooses to enter or remain . . . within that area of risk . . . is not entitled to recover for harm within that risk." Thus, many courts hold that, by engaging in sexual conduct, a person assumes the risk of becoming infected. But this need not be.

As mentioned above, many states have long had statutes that make transmitting venereal diseases a crime. And, over the years, there have been numerous convictions for the intentional transmission of a communicable disease through sexual contact. Moreover, courts have relaxed the doctrine of assumption of risk in cases of the sexual transmission of diseases to the extent that in many jurisdictions one is not held responsible for having assumed the risk of venereal disease infection unless they knew or should have known that their partner was infected. 19/

### Legal Precedent

As far back as 1917, for example, a Delaware husband was convicted of battery for infecting his wife with syphilis. Nine months after they were married, when she began to experience pain in her genital area, he said that she merely had ulcers. After a month of continued pain, she consulted a physician who told her that she had syphilis. At first, the defendant admitted that he had been diagnosed as having syphilis nine months before the wedding, but claimed he sought treatment and was cured before the wedding. At the trial, he admitted that he was again diagnosed as having syphilis after five months of marriage, but said he had ceased to have sexual relations with his wife. The court held that the intent to infect the wife would be inferred if the jury found that the defendant had had sexual intercourse with her knowing that he was infected. The court dismissed the defendant's claim that his wife consented to the sexual intercourse, and therefore to the possibility of infection, in these words: "A wife in confiding her person to her husband does not consent to cruel treatment, or to infection with a loathsome disease." 20/

One legislative approach to deal with the consent problem in non-marital situations, already passed in the New Jersey Assembly, makes it a felony for those who know that they have AIDS to "commit an act of sexual penetration." But such legislation is likely to raise strong opposition. In explaining his objections to similar legislation, Thomas B. Stoddard, the New York Civil Liberties Union's legislative director, says that he fears that "the AIDS crisis will be used to recriminalize consensual sodomy statutes." 21/

Nothing of this sort is being proposed. There are many possibilities for providing adequate protection for sexual partners that can be achieved without threatening civil liberties. For example, simply making it a felony not to tell a sex partner about a positive AIDS test.

Furthermore, serious consideration should be given to legislation creating a civil cause of action for the failure to warn a sex partner of a positive AIDS test.

Civil suits for the sexual transmission of infectious diseases also have a long history. In 1920, a North Carolina wife was awarded \$10,000 (when that was a lot of money) because her husband "by reason of his illicit relations with lewd and profligate women contracted venereal disease" infected her. 22/ The court found the defendant guilty of causing wanton and willful injury to his wife by engaging in intercourse with her when he knew that he was infected.

These days, liability can be much higher. Earlier this year, for example, the Texas Supreme Court sustained a jury award to a wife whose husband negligently infected her with chlamydia trachomatis (a serious venereal disease that attacks the ovaries) during their marriage. The amount? \$254,320. 23/

On December 30, 1986, the New York State Supreme Court's Appellate Division voted 5-0 that a spouse can sue for damages if his or her mate has a sexually transmitted disease and does not give a warning before engaging in sexual intercourse. The appellate court upheld the lower court's ruling requiring the defendant to undergo testing for venereal disease as part of the plaintiff's \$1.5 million claim. The plaintiff alleged that the defendant had become infected with herpes through engaging in adulterous sex with prostitutes and other women, and that he had then transmitted herpes to the plaintiff. The two parties to the suit had been married during the time that the alleged infection took place, and the claim was made as part of a divorce proceeding. 24/

Rather than force litigants to press for such judge made law, which is uncertain, time consuming, and expensive, states should adopt broad remedial legislation along the lines described above.

We can have a compassionate response to AIDS victims without countenancing a small minority's antisocial behavior. Criminal penalties for deliberately exposing others to the AIDS virus will not eradicate this frightening dread disease, but they will certainly be a step toward containing its spread.

#### NOTES

1. Shilts, Randy. And the Band Played On (St. Martins Press, NY: 1987)
2. Telephone conversation between author and Robin Fox, director of the Study to Help the AIDS Research Effort (SHARE) at the Johns Hopkins School of Hygiene and Public Health, July 28, 1987.
3. Leishman, K. (1987, February). Heterosexuals and AIDS. The Atlantic Monthly, pp. 39, 41.

4. See Henig, R. (1987, June 2). Testing for AIDS: Unanswered questions. The Washington Post, p. 7.
5. Gross, R.C. (1987, May 10). Army charges soldier hid AIDS status. The Washington Post, p. A3.
6. In West Germany, a former U.S. soldier has already been convicted and sentenced to "two years in prison 'for attempting to cause bodily harm' in two cases in which he had sex without using a condom, despite being aware that he carried the AIDS virus . . ." German AIDS Ruling Criticized. (1987, November 18). The Washington Post, p. A29.
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8. See Smilgis, M. (1987, February 16). The big chill: Fear of AIDS. Time, pp. 50-53.
9. AIDS spread to spouses shown. (1987, March 6). Facts on File, pp. 153-154.
10. C.A.U. v. R.L., No. 86-11C48025 (Ramsey County District Court, Minnesota, November 5, 1986). See Ex-fiance sued over HIV exposure. (1986, November 19). AIDS Policy and Law, 1, 4.
11. United Press International. (1987, September 4). Male prostitute with AIDS accused of attempted murder. The Washington Post, p. A22.
12. Beissert, W. (1987, June 25). Teeth ruled deadly weapon. U.S.A. Today, p. 3-H.
13. Galante, M.A. (1986, February 3). AIDS' expanding legal frontier. National Law Journal, pp. 3, 8.
14. United Press International. (1986, March 8). A lawsuit brought in U.S. District Court by a Carmel, Calif. woman, Shennan S. Este, asks \$20 million from Clinton H. Hendricks II, a Texas developer, who she says deliberately infected her with herpes. United Press International NewsWire. Dateline: San Jose, California.
15. Weisenhaus, D. (1987, July 20). AIDS criminal laws, cases rise. The National Law Journal, pp. 3, 32.
16. Tarr, A. (1985, November 25). The legal issues widen; AIDS. The National Law Journal, pp. 1, 28-29.
17. Associated Press. (1987, April 22). Sexual assault suspects should be tested for the AIDS virus so authorities can file additional

charges, possibly even murder, for those who test positive. Associated Press News Wire. Dateline: San Jose, California.

18. United Press International. (1986, April 18). Arapist must serve an extra five years behind bars because he transmitted incurable herpes to a woman he raped after forcing himself into her car at a stoplight, an appeal court rules. United Press International News Wire. Dateline: San Francisco. The defendant, Tony Johnson, was convicted of raping a 47 year-old woman at knife point after forcing his way into her car at a stoplight. A jury finding in California of great bodily harm in the commission of a violent crime allows a trial judge to add five years to a prison sentence. Hence, because defendant infected the victim with herpes during the rape, the trial court lengthened the defendant's prison sentence by five years. The California District Court of Appeals upheld the trial court's verdict that infection with genital herpes during rape constitutes great bodily harm.

19. See Note. (1984). Liability in tort for the sexual transmission of disease: genital herpes and the law. Cornell Law Review, 70, pp. 101-140.

20. State v. Lankford, 29 Del.(6 Boyce) 594, 102 A. 63, 64 (1917).

21. Supra note 16.

22. Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

23. Stafford v. Stafford, No. C-5220, Slip opinion (Supreme Court of Texas, February 18, 1987). See Taylor, G. (1987, March 16). Man liable for infecting his ex-wife. The National Law Journal, pp. 11, 19.

24. Jane Maharam v. Robert Maharam, 123 A.D.2d 165, 510 N.Y.S. 2d 104 (1st Dept. 1986); see Associated Press. (1986, December 31). A spouse can sue for damages if a partner has a sexually transmitted disease and doesn't give a warning before sex, according to appeals judges who ordered a man tested as part of his ex-wife's lawsuit. Associated Press News Wire. Dateline: New York.

### CREDENTIALS

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