

# CRIMINALIZING HIV TRANSMISSION: NEW JERSEY ASSEMBLY BILL 966

## *I. Introduction*

New Jersey currently ranks fourth in the nation with reported acquired immune deficiency syndrome (AIDS) cases,<sup>1</sup> yet it lacks extensive legislation for dealing with myriad problems associated with the condition. The statutes relating to AIDS that presently exist are part of the New Jersey Health Code and primarily create research and counselling facilities and public education programs.<sup>2</sup> Accordingly, these statutes are limited in scope and do not reach issues of criminal culpability attendant with the negligent or intentional transmission of the Human Immunodeficiency Virus (HIV), the causative agent of AIDS. This note will focus on the AIDS in relation to criminal culpability and the legislative response, New Jersey Assembly Bill 966, which proposes legislation criminalizing the purposeful or knowing transmission of the disease.<sup>3</sup>

## *II. The Nature of the Disease and the Need for Legislation Imposing Criminal Liability*

Acquired immune deficiency syndrome is a disease caused by the human immunodeficiency virus (HIV).<sup>4</sup> When introduced into the body HIV debilitates the human immune system by infecting and destroying T-helper lymphocytes which are essential to the body's disease fighting ability.<sup>5</sup> The destruction of the immune system caused by this virus does not in itself lead to death, rather it leaves the body vulnerable to a host of opportunistic infections against which the body is unable to defend itself.<sup>6</sup> HIV also manifests itself in AIDS-related complex (ARC), which is a nonfatal condition arising from infection, and is less severe than

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<sup>1</sup> See N.J. STAT. ANN. § 26:5C-2 (West 1987); see also U.S. DEP'T JUSTICE, NAT'L INST. JUSTICE, AIDS BULLETIN: THE CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS 3 (June 1987) [hereinafter CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS].

<sup>2</sup> N.J. STAT. ANN. §§ 26:5C-3, -4 (West 1987).

<sup>3</sup> 6A. 966, 1988 Sess. N.J.

<sup>4</sup> J. HENRY, *AIDS in the Workplace*, in AIDS AND THE LAW 33 (W. Dornette 1987).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS, *supra* note 1, at 1.

full-blown AIDS.<sup>7</sup> HIV infection in its most common and insidious form occurs without symptoms;<sup>8</sup> this condition is medically referred to as asymptomatic antibody seropositivity.<sup>9</sup> HIV may lay dormant in the carrier's system for over seven years<sup>10</sup> before manifesting itself in the form of ARC or full-blown AIDS.<sup>11</sup>

The most commonly available tests capable of detecting HIV infection are the Western Blot test and the ELISA (enzyme linked immunosorbent assay) test.<sup>12</sup> The ELISA test is available in commercially produced kits licensed by the Food and Drug Administration.<sup>13</sup> Although the ELISA test is 93% to 99% accurate, there is a possibility of "false-positive" or "false-negative" results.<sup>14</sup> The Western Blot test is more sensitive and is often used to confirm the ELISA test results.<sup>15</sup>

HIV may be transmitted by any individual carrying the virus,

<sup>7</sup> J. HENRY, *supra* note 4, at 34.

<sup>8</sup> *Id.* There are an estimated 1.5 million individuals in the United States who carry the virus and who are asymptomatic. *Id.*

From the standpoint of epidemiological concerns, persons who are carriers of the AIDS virus but have not developed AIDS are of far greater importance than persons with AIDS because (1) people in the former group are approximately fifty to one hundred times as numerous; (2) their blood tends to contain greater concentrations of virus; and (3), being asymptomatic, they are more likely to be unaware of their infections, and consequently pose a greater danger of unknowing transmission of the virus to others.

Robinson, *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91, 92-92 (1985).

<sup>9</sup> S. Rennert, J. Parry, R. Horowitz, AIDS AND PERSONS WITH DEVELOPMENTAL DISABILITIES: THE LEGAL PERSPECTIVE 93 (ABA 1989). Asymptomatic HIV Infection is defined as: "Without subjective or objective signs of illness. People who are infected with HIV, as evidenced by the presence of HIV antibodies, may show no symptoms of disease." *Id.*

<sup>10</sup> Cooper, *Justice Department Memorandum on the Application of Section 504 of the 1973 Rehabilitation Act to Persons with AIDS*, Individual Employment Rights Manual (BNA) No. 2, at 56 (Mar. 1987) [hereinafter *Justice Department Memorandum*].

<sup>11</sup> "The Public Health Service (PHS) estimates that by the end of 1992, there will have been 365,000 AIDS cases diagnosed and 263,000 cumulative deaths. During 1992 alone, according to PHS, there will be 80,000 new diagnoses and 65,000 people will die of AIDS in the United States." HAMMETT, U.S. DEP'T JUSTICE, NAT'L INST. JUSTICE, ISSUES AND PRACTICES, 1988 UPDATE: AIDS IN CORRECTIONAL FACILITIES 7 (June 1989) [hereinafter AIDS IN CORRECTIONAL FACILITIES].

<sup>12</sup> Selwyn, *AIDS: What is Now Known, II Epidemiology*, 21 HOSP. PRAC. 143-44 (June 15, 1986).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 143.

<sup>15</sup> *Id.* at 144.

regardless of the disease's manifestations.<sup>16</sup> There are four recognized modes of transmission of the AIDS virus<sup>17</sup>: infection through intimate homosexual or heterosexual contact; infection through the sharing of contaminated intravenous needles; infection via contaminated blood and blood products; and infection via perinatal transmission from mother to unborn child.<sup>18</sup> As will be addressed in this article, which focuses on the intentional, reckless, or grossly negligent transmission of the AIDS virus, sexually transmitted AIDS and infection passed through intravenous needles gives rise to the greatest criminal culpability.<sup>19</sup>

Undoubtedly the vast majority of persons infected with the AIDS virus act responsibly and conform their behavior so as not to transmit the virus to other individuals.<sup>20</sup> However, there are those individuals in society who, at the expense of the safety and well-being of others, engage in sexual intercourse without informing their partners of their HIV status.<sup>21</sup> Also, situations may arise where an individual acting with malice may try to intentionally transmit the virus to another individual.<sup>22</sup> Because HIV is such a dangerous biological agent capable of causing profound pain and loss, there is a need for legislation imposing criminal sanctions on those individuals who would intentionally, recklessly or with gross negligence inflict HIV infection.<sup>23</sup>

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<sup>16</sup> AIDS IN CORRECTIONAL FACILITIES, *supra* note 11, at 5. "[T]here is continued uncertainty as to the relative infectiousness of symptomatic persons and those without symptoms. [Citation omitted]. Of course, asymptotically infected persons are still infectious." *Id.*

<sup>17</sup> AIDS: THE LEGAL PERSPECTIVE, *supra* note 9, at 9.

<sup>18</sup> *Id.*

<sup>19</sup> For information regarding civil liability in connection with HIV transmission and test results disclosure, see K. KELLY, *Negligence and Intentional Torts*, in AIDS AND THE LAW 149-63 (W. Dornette 1987). It has been postulated that civil actions for the transmission of AIDS could be maintained under battery, fraud or deceit, or negligence theories. *Id.*

<sup>20</sup> "The growth in new cases of AIDS is slowing among gay populations in some parts of the country, as is incidence of HIV infection. This may be attributable to saturation or to behavior change or some combination of the two." AIDS IN CORRECTIONAL FACILITIES, *supra* note 11, at 7. *But see* Note, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L.REV 441, 450 (1988) ("Recent data suggest that many people have actually refused to change their lifestyles in response to the AIDS epidemic")(citations omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.,* United States v. Moore, 846 F.2d 1163 (8th Cir. 1988); *see also, infra* note 41.

<sup>23</sup> There is sufficient medical evidence to conclude that virtually all of those in-

To a large extent, the statutory bases for the theories of criminal culpability in regard to HIV transmission are already in existence. It has been postulated and advanced as a theory of criminal liability that an individual could be charged with either homicide or murder for the intentional or reckless transmission of HIV resulting in another person's death.<sup>24</sup> Similarly, other grounds for prosecution in connection with intentional, reckless or grossly negligent transmission of HIV lie in existing criminal assault statutes.<sup>25</sup> Such a prosecution could be maintained where the victim did consent to the physical contact, but did not knowingly consent to the contact giving rise to the infection.<sup>26</sup> A criminal assault prosecution would also have a particular efficacy in situations involving criminal sexual assault leading to HIV infection.<sup>27</sup>

Another logical basis for the criminalization of HIV transmission lies in preexisting communicable disease statutes.<sup>28</sup> Essentially communicable disease statutes afford criminal sanctions for those individuals who, knowing that they are infected with a sexually transmitted disease, engage in sexual acts with other individuals.<sup>29</sup> Communicable disease statutes, in furtherance of public health, may also provide for quarantine of infected individuals who refuse treatment or refuse to conform their behavior.<sup>30</sup> Other less direct statutory bases for criminal prosecution of HIV transmission may lie in extant sodomy statutes<sup>31</sup> and in statutes proscribing the unauthorized use and possession of hy-

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infected with HIV will develop full-blown AIDS and will eventually succumb to the disease. AIDS IN CORRECTIONAL FACILITIES, *supra* note 11, at 2.

<sup>24</sup> D. ROBINSON, *Criminal Sanctions and Quarantine*, in AIDS AND THE LAW 165-75 (W. Dornette 1987).

<sup>25</sup> *Id.* at 167.

<sup>26</sup> *Id.* See, e.g., *United States v. Moore*, 846 F.2d at 1168 (where the HIV infected defendant bit two corrections officers there was sufficient evidence to support assault conviction in that the defendant used his teeth and mouth as a deadly and dangerous weapon).

<sup>27</sup> See, N.J. STAT. ANN. § 2C:12-1.6(1) (West Supp. 1990).

<sup>28</sup> See, e.g., N.J. STAT. ANN. § 2C: 34-5 (West 1982).

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., N.J. STAT. ANN. § 26:4-36(a) (West 1987).

<sup>31</sup> D. ROBINSON, *supra* note 24, at 167-70. "The far greater prevalence of HIV in the male homosexual population together with increased risk of transmission associated with rectal, rather than vaginal, intercourse provide justification for selective applications of sex neutral sodomy statutes." *Id.* at 169.

podermic syringes.<sup>32</sup>

Though the grounds for criminal liability as set forth above already exist, there is a need for specific legislation criminalizing the intentional, reckless or grossly negligent transmission of the AIDS virus.<sup>33</sup> Primarily this need arises from the fact that AIDS has swept into the legal arena like a storm<sup>34</sup> and accordingly there has not been ample time for the development of the common law so as to unequivocally extend the existing statutes to encompass the AIDS problem.<sup>35</sup> Also, the need arises because of the virulent nature of AIDS and the compelling state interest in specific deterrents to cause people to conform their behavior so as not to spread the virus.<sup>36</sup>

### III. *Assembly Bill 966 and Definition of Terms*

A number of states have acted to make transmission of HIV a criminal offense,<sup>37</sup> and other states have enacted legislation requiring compulsory testing of sexual offenders.<sup>38</sup> Within this trend, one legislative response in New Jersey has been Assembly Bill 966, which uses New Jersey's pre-existing communicable disease statute as a basis of criminal liability.<sup>39</sup> Interestingly, the bill does not merely include AIDS as one more disease within the statutory framework, even though AIDS, like other communicable diseases, has been described as "highly contagious."<sup>40</sup> But rather in addressing the seriousness of HIV infection, Assembly Bill 966 specifically creates a new class of criminal transmission offense and allows for a third degree criminal prosecution for the

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<sup>32</sup> *Id.* at 170.

<sup>33</sup> See discussion below at *supra* notes 23 to 32.

<sup>34</sup> AIDS was first identified as a disease in 1981. CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS, *supra* note 1, at 1.

<sup>35</sup> See Robinson, *supra* note 8, at 100. "Enforcement of traditional criminal statutes, while helpful, may not provide the sort of specific guidance needed by infected individuals and public officials." *Id.*

<sup>36</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 205 (1824); *Railroad Co. v. Husen*, 95 U.S. 465, 471 (1877) (the State is granted constitutional authority to enact legislation in order to prevent the spread of contagious diseases).

<sup>37</sup> See, e.g., ARK. STAT. ANN. § 5-14-123 (Supp. 1989); CAL. PENAL CODE § 12022.85 (West Supp. 1990); IDAHO CODE § 39-608 (Supp. 1989).

<sup>38</sup> See, e.g., CAL. PENAL CODE § 1524.1(b)(1) (West 1989); MICH. COMP. LAWS ANN. § 333.5129(3) (West Supp. 1989); OR. REV. STAT. § 135.139(2) (1989).

<sup>39</sup> G.A. 966, 1988 Sess. N.J.

<sup>40</sup> N.J. STAT. ANN. § 26:5C-2(b) (West 1987).

knowing transmission of HIV through the act of sexual penetration.<sup>41</sup> By creating a specific statutory offense, Assembly Bill 966 thus removes the ambiguities attendant with fitting AIDS related crimes into the purview of other broader offenses.<sup>42</sup>

Assembly Bill 966 was introduced by Assemblyman Kline and at this writing is in the Senate Judiciary Committee.<sup>43</sup> The bill would amend N.J. STAT. ANN. 2C:34-5 "Diseased Person Committing an Act of Sexual Penetration" to add the following:

1.b. Any person who, knowing that he or she is infected with human immunodeficiency virus [HIV], the causative agent for acquired immuno-deficiency syndrome, commits an act of sexual penetration as defined in N.J.S. 2C:14-1 is guilty of a crime of the third degree. It shall not be an offense under this subsection if the alleged victim consented to the act knowing that the person has human immunodeficiency virus (HIV).

2.a. Any person who knowingly transmits human immunodeficiency virus (HIV), the causative agent for acquired immunodeficiency syndrome, is guilty of a crime of the third degree.

b. It shall not be an offense under this section if the alleged victim consented to the contact which resulted in the transmittal of HIV knowing that the person has HIV.<sup>44</sup>

To better understand the implications of this bill it is necessary to set forth the definitions of some of the key provisions. To constitute an offense under the proposed legislation the actor must *know* that he or she is infected with HIV. A person acts knowingly "if he is aware that his conduct is of [a certain] nature, or that such circumstances exists, or he is aware of a high probability of their existence."<sup>45</sup> Based on the statutory definition of the word "know," or "knowingly," an actor will act knowing if he had tested positive for the presence of HIV or HIV antibodies in the blood, or has received other medical information sufficient to put him on notice prior to

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<sup>41</sup> The bill does not directly address other acts intended to transmit HIV, such as an intentional stabbing with a hypodermic syringe. For incidences involving such transmission of the disease, *see, e.g.*, N.Y. Daily News, Apr. 11, 1989, at 8; N.Y. Daily News, July 10, 1989, at 16.

<sup>42</sup> *See* discussion below at *supra* notes 33 to 36.

<sup>43</sup> Following its introduction on January 12, 1988, the bill was sent to the Assembly Judiciary Committee. On March 3, 1989, the bill passed the Assembly and on March 20, 1989 the bill was assigned to the Senate Judiciary Committee.

<sup>44</sup> G.A. 966, 1988 Sess. N.J.

<sup>45</sup> N.J. STAT. ANN. § 2C:2-2(b)(2) (West 1987).

the sexual penetration or conduct.<sup>46</sup> It is also possible that a person who has engaged in high risk behavior such as intravenous drug-use or male homosexual sex would be on notice that there was a high probability that he or she had HIV.<sup>47</sup> Under such a reading of the proposed statute, all intravenous drug users and male homosexuals could be criminally culpable should they transmit the virus. As HIV becomes more widespread in the heterosexual community, persons with multiple sexual partners would also be on notice in regard to the statute for engaging in high risk behavior and being possible HIV carriers.<sup>48</sup>

The bill also requires that the actor commit an act of "sexual penetration,"<sup>49</sup> however not every act of sexual penetration is a viable way of transmitting the virus.<sup>50</sup> The medical community has determined that HIV is transmitted by contact with blood, blood products, semen, or vaginal secretions.<sup>51</sup> However the definition of sexual penetration within existing New Jersey criminal statutes includes penetration of "objects" and sexual encounters that may not result in contact with blood or semen.<sup>52</sup> The statutory definition of "sexual penetration" as applied to transmission of HIV may thus be too broad.<sup>53</sup> If the bill is passed, specific definitions regarding viable modes of transmission should be included so as to remove ambiguities as to what kinds of contact are proscribed.<sup>54</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> The Centers for Disease Control (CDC) has found that homosexual males, bisexual males and intravenous drug users account for approximately 89 percent of all AIDS cases; thus the prevalence of AIDS within those groups is well documented. AIDS IN CORRECTIONAL FACILITIES, *supra* note 11, at 7-8.

<sup>48</sup> Currently, heterosexual transmission of HIV accounts for only 4 percent of AIDS cases in the United States. *Id.*

<sup>49</sup> G.A. 966, 1988 Sess. N.J., § 1b.

<sup>50</sup> Centers for Disease Control, *Summary: Recommendations for Preventing Transmission of Infection with Human T. Lymphotropic Virus Type III/Lymphadenopathy—Associated Virus in the Workplace*, MORBIDITY AND MORTALITY WEEKLY REPORT 681 (Nov. 15, 1985) [hereinafter *Recommendations for Preventing Transmission of HTLV-III*].

<sup>51</sup> *Id.* It is thus unlikely that insertion of a finger or an object would readily transmit the virus.

<sup>52</sup> N.J. STAT. ANN. § 2C:14-1(c) (West Supp. 1989).

<sup>53</sup> G.A. 966, 1988 Sess. N.J., § 1.b.

<sup>54</sup> For a comprehensive proposed statute which covers all known modes of transmission, see Robinson, *supra* note 8, at 101 ("Transfer includes engaging in sexual intercourse per anum, per os, per vagina; or permitting reuse of a hypodermic syringe, needle, or similar device without sterilization; or giving blood or semen to a person, blood bank, hospital, or other medical care facility for purposes of transfer to a person").

The consequence of knowingly transmitting HIV is conviction of a crime in the third degree.<sup>55</sup> The penalty for a third degree offense is imprisonment for three to five years, a \$7,500 fine, and/or restitution not to exceed the victim's loss.<sup>56</sup> There are a number of problems with these types of penalties. Although imprisonment will remove the offender from the public, persons diagnosed with full-blown AIDS normally have a short life expectancy and would have a high probability of dying while serving such a prison sentence.<sup>57</sup> Thus, a prison term of several years, which would be mandated under the present sentencing guidelines, would effectively serve as a life-term.<sup>58</sup> Imprisoning HIV carriers may also increase the spread of the virus within the prison population.<sup>59</sup>

In reference to the monetary criminal penalties under the current statutory framework, there would be an inherent difficulty in imposing a restitution-type sanction against the offender.<sup>60</sup> This problem arises insofar as it would be difficult to financially quantify the victim's actual damages or future damages arising from his or her contact with the virus.<sup>61</sup>

The only statutory defense to the crime proposed by the bill is consent by the alleged victim who knows that the "offender" carries or probably carries HIV.<sup>62</sup> Thus, not only must the victim consent to the contact, sexual or otherwise, but he or she must consent with full knowledge that the would-be offender is infected with HIV.<sup>63</sup> Accordingly, the proposed legislation puts a burden of full-disclosure upon individuals who knowingly carry the virus and who en-

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<sup>55</sup> G.A. 966, 1988 Sess. N.J., § 2.a.

<sup>56</sup> N.J. STAT. ANN. § 2C:43-6(a)(3) (West Supp. 1989).

<sup>57</sup> CAUSE TRANSMISSION AND INCIDENCE OF AIDS, *supra* note 1, at 1. "There is presently no cure for AIDS. Most patients die within 2 years of being diagnosed with end-stage AIDS and very few live more than 3 years." *Id.*

<sup>58</sup> *Id.* N.J. STAT. ANN. § 2C:43-6(a)(3) (West Supp. 1989).

<sup>59</sup> *But see* AIDS IN CORRECTIONAL FACILITIES, *supra* note 11, at 17. "Transmission of HIV among prisoners remains an important and controversial issue, about which we still have relatively little data. Fragments of information from several correctional systems suggest low rates of transmission, but these are not conclusive." *Id.*

<sup>60</sup> N.J. STAT. ANN. § 2C:43-6(a)(3) (West Supp. 1989).

<sup>61</sup> On damages issues, see K. KELLY, *supra* note 19, at 156. "Although the case law in this area has arisen primarily in regard to toxic substances (e.g., asbestos, radiation, diethylstilbestrol), similar issues would arise in the delayed manifestation of development of AIDS." *Id.*

<sup>62</sup> G.A. 966, 1988 Sess. N.J., § 2.b.

<sup>63</sup> *Id.*



gage in sexual activities with other individuals.<sup>64</sup> The new offense of the knowing or intentional sexual transmission of HIV as proposed by the bill would therefore be effectively levied at sexual offenders, as well as those engaging in consensual sex without full disclosure.<sup>65</sup>

It is not clear from the bill whether HIV must actually be transmitted to constitute an offense. Section 1.a. states that a person who knows that he or she is infected with HIV will be guilty of a third degree crime for committing sexual penetration. Thus, whether the victim actually contracted HIV from the accused is irrelevant. Section 2.a., on the other hand, states that any person who knowingly *transmits* HIV is guilty of a third degree crime. This section is inconsistent not only in that it requires that the virus actually be transmitted, but that the virus may be transmitted in a way other than through sexual penetration. This inconsistency could lead to problems of statutory interpretation.

Another problem with prosecution under the statute arises not from the drafting of the proposed law, but rather from the inherent nature of the disease itself: establishing the causative nexus between the offender's undisclosed infectious sexual contact and the victim's HIV infection creates a pitfall.<sup>66</sup> If the victim routinely engaged in high-risk behavior, it would be virtually impossible to prove how he or she contracted the virus and whether the defendant was actually at fault.<sup>67</sup> The difficulty in obtaining a conviction would be circumvented if it were a criminal act for an infected person to engage in undisclosed sexual intercourse, because proof of transmission and causation would no longer be necessary.

Bill 966 is perhaps unnecessarily limited in scope; the bill does not reach modes of transmission other than sexual. Accordingly, intravenous drug users, knowing that they are infected with HIV, who freely share their hypodermic syringes would not be subject to prosecution under the statute.<sup>68</sup> Similarly, knowingly infected individuals who sell or donate their whole blood products would not be covered by the statute even though their actions may rise to gross

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> "Because of the long latency period between the exposure to the virus and the development of the disease, it may be difficult . . . to prove proximate cause of the injury." K. KELLY, *supra* note 19, at 158.

<sup>67</sup> See Robinson, *supra* note 7, at 96-97.

<sup>68</sup> G.A. 966, 1988 Sess. N.J.

negligence.<sup>69</sup> Also notably absent in the proposed statutory framework are provisions for mandatory testing of sexual offenders which, given the great anxiety of HIV infection suffered by sexual assault victims, may be warranted.<sup>70</sup>

Statistically, male homosexual and bisexual transmission accounts for 66% of all reported cases of AIDS.<sup>71</sup> As a result the legislation proposed by Assembly Bill 966 may have its greatest impact on those groups.

#### IV. HIV Transmission Laws in Other States

Criminalizing intentional, reckless or grossly negligent transmission of HIV is not a novel approach for dealing with the problem. Notably, the legislative response in the several states has in many areas been diverse. Several states have enacted legislation mandating criminal sanctions and/or provisions allowing for disclosure of the accused's HIV status to the victim. For example in California, any person who commits rape or sodomy, knowing that he or she has AIDS, will receive an additional three year sentence for each violation.<sup>72</sup> The California laws also provide that the victim may request and the court, satisfied that there is probable cause to believe that the accused committed the offense, may grant a search warrant to compel the accused to submit to HIV testing.<sup>73</sup>

Florida has enacted legislation creating a first degree misdemeanor for prostitutes who know they have HIV and who engage in sexual activity that could result in HIV transmission.<sup>74</sup> There is no provision for disclosure of the test results directly to the victim, however, the results are made available to the court.<sup>75</sup> Similar legislation is being considered in Pennsylvania<sup>76</sup> and Nevada.<sup>77</sup>

The Washington statute is more comprehensive than either the California or Florida laws, and may serve as a comprehensive

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<sup>69</sup> *Id. See, e.g.,* Robinson *supra* note 8, at 101.

<sup>70</sup> *Id.*

<sup>71</sup> CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS, *supra* note 1, at 3.

<sup>72</sup> CAL. PENAL CODE § 12022.85 (West Supp. 1990).

<sup>73</sup> *Id.* § 1524.1(b)(1) (West Supp. 1989).

<sup>74</sup> FLA. STAT. ANN. § 796.08(5) (West Supp. 1989).

<sup>75</sup> *Id.* § 796.08(3) (West Supp. 1989).

<sup>76</sup> G.A. 436 and 437, 1989 Sess. Penn.

<sup>77</sup> S. 73, 1989 Sess. Nev.

model to the New Jersey Legislature because it applies to types of transmission other than sexual contact, such as shared intravenous needles.<sup>78</sup> The Washington law states that a person is guilty of second degree assault if he or she exposes to or transmits HIV with the intent to inflict bodily harm.<sup>79</sup> The statute also provides that a person who had any significant contact with the accused may obtain the results of any HIV test.<sup>80</sup>

Idaho has also declared intentional transmission of HIV to be a criminal offense.<sup>81</sup> The Idaho law provides that any person who, knowing that he or she has HIV or any manifestation of the virus, intentionally acts in such a way as to infect, transfer or attempt to transfer bodily fluids or organs to another person is guilty of a felony and shall face up to 15 years imprisonment and/or a \$5,000 fine.<sup>82</sup> The result of any HIV test may be disclosed only for public health reasons, but in compelling circumstances may be disclosed to others as the authorities may deem necessary.<sup>83</sup>

The New York law requires that there be written informed consent prior to the performance of an HIV test,<sup>84</sup> but once a test has been performed, the results may be disclosed for the adjudication of a criminal or civil proceeding and to an individual whose life or health is at a significant risk as a result of contact with the accused.<sup>85</sup>

Other states such as Texas<sup>86</sup> and Colorado<sup>87</sup> have laws that allow the victim or the court to compel the accused to submit to a blood test to determine the accused's HIV status, but the results of the test may not be used against the accused in any future criminal proceedings.<sup>88</sup>

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<sup>78</sup> WASH. REV. CODE ANN. 9A.36.021 (West Supp. 1990).

<sup>79</sup> *Id.* § 9A.36.021 (West Supp. 1990).

<sup>80</sup> *Id.* § 70.24.340 (West Supp. 1990).

<sup>81</sup> IDAHO CODE § 39.608 (1989).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* § 39-609 (1989).

<sup>84</sup> N.Y. PUB. HEALTH LAW § 2781(1) (McKinney 1990).

<sup>85</sup> *Id.* § 2785(2) (McKinney 1990).

<sup>86</sup> TEX. CRIM. PROC. CODE ANN. § 21.31(b) (Vernon 1989). The victim or the court may request that the accused undergo a medical procedure or test to diagnose AIDS or the presence of HIV. *Id.* Should the accused refuse to comply, the court has the power to enforce compulsory testing. *Id.*

<sup>87</sup> COLO. REV. STAT. § 18-3-415 (1989).

<sup>88</sup> TEX. CRIM. PROC. CODE ANN. § 21.31(b) (Vernon 1989).

The more comprehensive statutes such as those in Washington<sup>89</sup> and Idaho<sup>90</sup> cover means of transmission of the virus other than sexual transmission. Considering that intravenous drug abusers account for 20% of all reported AIDS cases, with that percentage increasing every year, a more comprehensive statute would help prevent further spread of the virus.<sup>91</sup> Although sexual contact is the leading cause of transmission, the legislature should consider the other means as well. If the bill is amended to apply to all types of transmission, the facially discriminatory effect on homosexuals will be decreased and the bill will more fully meet the public health concerns.<sup>92</sup>

*V. Historical Perspective: Laws for Other Transmittable Diseases in New Jersey.*

AIDS, like other venereal diseases, is "infectious"<sup>93</sup> and is spread through intimate sexual contact.<sup>94</sup> Ostensibly due to the fact that HIV infection is essentially different and far more serious than other sexually transmitted diseases,<sup>95</sup> primarily in that HIV infection manifesting in AIDS is incurable and almost inevitably fatal,<sup>96</sup> the focus of the proposed legislation is to deal with the intentional or wreckless transmission of the virus with greater stringency.<sup>97</sup> The proposed legislation does not merely add HIV transmission as another offense under the presently existing

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<sup>89</sup> WASH. REV. CODE ANN. § 9A.36.021 (West Supp. 1990).

<sup>90</sup> IDAHO CODE § 39-608 (1989). Under the Idaho statute it is a felony punishable by imprisonment up to 15 years for a person to knowingly transfer his infectious bodily fluids, organs or tissue to another person. *Id.* By virtue of the broad wording of the statute, it is clear that the Legislature has manifested an intent that the statute include all modes of viral transmission. *Id.*

<sup>91</sup> AIDS IN CORRECTIONAL FACILITIES, *supra* note 23, at 8.

<sup>92</sup> For an excellent article highlighting the social and legal implications upon the gay community in reference to AIDS-related legislation see Note, *AIDS—A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L. 315 (1984).

<sup>93</sup> N.J. STAT. ANN. § 26:5C-2(b) (West 1987).

<sup>94</sup> *Recommendations for Preventing Transmission of HTLV-III*, *supra* note 50, at 681-82. See also S. RENNART, J. PARRY, R. HOROWITZ *supra* note 9, at 7-9.

<sup>95</sup> Chancroid, gonorrhea, syphilis, and herpes virus are sexually transmitted diseases listed under N.J. STAT. ANN. § 2C:34-5 (West 1982). Any person who, knowing that he is infected with any of the above diseases, and who engages in sexual penetration, commits a petty disorderly person offense. *Id.*

<sup>96</sup> See *supra* note 23.

<sup>97</sup> G.A. 966, 1988 Sess. N.J.

communicable disease statutes,<sup>98</sup> but rather creates an entirely new offense allowing for felony criminal sanctions.<sup>99</sup>

However, the legislative response to other communicable diseases such as typhoid, tuberculosis and venereal diseases has been similar in many respects. A person with typhoid or paratyphoid fever is an infectious stage, acting in such a way as to expose the public to danger of infection could face criminal prosecution.<sup>100</sup> Persons with a venereal disease in the infectious stage can be quarantined<sup>101</sup> imprisoned, with or without hard labor,<sup>102</sup> or fined for failure to perform any statutory duty.<sup>103</sup> Quarantine has also been suggested for recalcitrant AIDS carriers to restrict the rapid spread of the disease.<sup>104</sup> Though many people infected with HIV act responsibly to prevent transmission of HIV, quarantine could be an effective public health measure to prevent infected individuals unwilling to conform their behavior from placing others at risk.<sup>105</sup>

The proposed legislation would have its most severe impact on the homosexual community,<sup>106</sup> but it is not directed solely at

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<sup>98</sup> N.J. STAT. ANN. § 2C:34-5 (West 1982).

<sup>99</sup> G.A. 966, 1988 Sess. N.J.

<sup>100</sup> N.J. STAT. ANN. § 26:4-52 (West 1987).

<sup>101</sup> N.J. STAT. ANN. § 26:4-36 (West 1987). "Quarantine for venereal disease has the purpose of preventing transmission of venereal diseases and shall mean and include, restriction of the actions, behavior and movements of a person or confinement to a defined place and area." *Id.*

<sup>102</sup> N.J. STAT. ANN. § 26:4-36 (West 1987). Such criminal sanctions may be imposed should the defendant be convicted twice within six months of such infectious behavior. *Id.*

<sup>103</sup> N.J. STAT. ANN. § 26:4-129 (West 1987).

<sup>104</sup> See Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L. REV. 441 (1987). Cf. N.J. STAT. ANN. § 26:4-36(a) (West 1987). Under present New Jersey law, "[a]ny person who has or who is believed upon reasonable grounds to have a venereal disease in its infectious stage, if he is likely to spread the disease to others by reason of this failure to refuse to submit to treatment or by reason of his habits. . ." may be subject to quarantine. *Id.* Because AIDS or HIV infection is not included within the definition of "venereal disease" under N.J. STAT. ANN. § 26:4-27 (West 1987), it is questionable whether a recalcitrant HIV carrier would be subject to quarantine at this time.

<sup>105</sup> Fallone, *supra* note 104, at 457-58; but see McGuigan, *The AIDS Dilemma: Public Health v. Criminal Law*, 4 LAW AND INEQUALITY 545, 573 (1986). "Indefinite quarantine, most likely enduring for the life of the victim, would undoubtedly implicate an unconstitutional deprivation of liberty. Consequently, a general quarantine of all virus carriers would be arbitrary and capricious, and the isolation of the individual victims would serve no purpose other than harassment." *Id.*

<sup>106</sup> See generally Note, *supra* note 92.

those engaging in homosexual relations. The bill is intended to prevent the intentional spread of the virus, whether it be through homosexual or heterosexual conduct.<sup>107</sup> Since the bill would criminalize all non-consensual sexual relations or contact, it does not appear that this is an attempt to reinstate the laws against sodomy or otherwise legislate homosexual activity.<sup>108</sup>

## V. *Constitutional Issues*

### A. *Privacy*

The bill will clearly affect the accused's fourth amendment privacy interests in maintaining the confidentiality of his or her medical condition.<sup>109</sup> Although the fourth amendment grants a right of privacy, it is not an unlimited right.<sup>110</sup> There are competing public interests that warrant intrusion into an individual's privacy, including an individual's health, where it could place others at risk.<sup>111</sup>

The accused would be required to submit to an HIV test for the purposes of a criminal prosecution and the results of that test would be used as evidence in the criminal trial,<sup>112</sup> just as blood alcohol tests and breathalyzer tests are used in driving-under-

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<sup>107</sup> As the bill is currently constructed, a person who is knowingly infected with the virus, and who commits an act of sexual penetration, is subject to criminal sanctions. The proposed legislation does not reach specific acts designated as homosexual behavior.

<sup>108</sup> New Jersey's sodomy statutes. N.J. STAT. ANN. §§ 2A:143-1, -2 were repealed by L. 1978 c.95, § 2C:98-2.

<sup>109</sup> U.S. CONST. amend IV. See *Whalen v. Roe*, 429 U.S. 589 (1977); *Woods v. National Life & Acc. Ins. Co.*, 347 F.2d 760 (3d Cir. 1965).

<sup>110</sup> U.S. CONST. amend IV. The fourth amendment is a guarantee only against unreasonable searches and seizures and is not a guarantee against all searches and seizures. See, e.g., *United States v. Sharpe*, 105 S. Ct. 1568 (1985).

<sup>111</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." [Citation omitted]. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

*Id.* at 337. Cf. N.J. STAT. ANN. § 26:4-31 (West 1987) (compelling persons suspected of carrying venereal disease to submit to examination and supply necessary blood samples).

<sup>112</sup> Cf. N.J. STAT. ANN. § 26:4-31 (West 1987).

the-influence cases.<sup>113</sup> Unless the medical records were sealed, once introduced into evidence, they become public record and may be publicly disseminated.<sup>114</sup>

The purpose of the statute is to promote public health and safety which falls within the police powers of the state.<sup>115</sup> In *Jacobson v. Massachusetts*,<sup>116</sup> the Supreme Court held that it is the state legislature's duty to protect the public health and safety even if such would result in a restraint on the constitutional rights of the individual. The courts will only review legislation protecting the public health "if it has no real or substantial relation to [that] object, or is, beyond all question a plain, palpable invasion of rights secured by the fundamental law. . . ."<sup>117</sup>

The state's right to ascertain an individual's HIV status may be justified by the victim's right to know of possible life threatening circumstances.<sup>118</sup> Medical records are confidential and well within the test subject's zone of privacy, but proper governmental interest can justify disclosure of the contents of those records.<sup>119</sup> In *United States v. Westinghouse*, the Third Circuit listed factors to consider to decide "whether an intrusion into an individual's privacy is justified," including the type of record requested, the potential for harm if there is nonconsensual disclosure, the degree of need for such access, public policy and public interests.<sup>120</sup> Thus, essentially it becomes a balancing test between the accused's right to main the confidentiality of the test results against the victim's right to know.

In *Hauge v. Williams*, the New Jersey Supreme Court held that

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<sup>113</sup> See *id.* § 39:4-50.1 (West 1973) (allowing for chemical analysis to determine percentage of alcohol in blood).

<sup>114</sup> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that the press is free to publish information found in official court records).

<sup>115</sup> See *A & P Tea Co. v. Cottrell*, 424 U.S. 366 (1976). "[U]nder our constitutional scheme the States retain 'broad power' to legislate protection for their citizens in matters of local concern such as public health. . . ." *Id.* at 371 [citation omitted].

<sup>116</sup> 25 S. Ct. 358, 362 (1905); see also *People ex rel. Baker v. Strautz*, 54 N.E.2d 441, 386 Ill. 360 (1944) (generally, where there is a conflict between an individual's constitutional right and the state's power to protect the health and welfare of its citizens, the constitutional right must yield to the state's duty to the public). *Id.* at 443.

<sup>117</sup> *Jacobson*, 25 S. Ct. at 363.

<sup>118</sup> Cf. CAL. PENAL CODE § 12022.85 (West Supp. 1990).

<sup>119</sup> *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).

<sup>120</sup> *Id.*

a patient's right against disclosure is limited, "subject to the exceptions prompted by the supervening interest of society."<sup>121</sup> Ordinarily there is a veil of confidentiality over the patient-physician relationship, but disclosure may be made without the patient's consent in the interest of public policy and "under compelling circumstances . . . to a person with a legitimate interest in the patient's health".<sup>122</sup> An alleged victim who has engaged in sexual relations with the offender would have a legitimate interest in knowing the offender's HIV status.

The law has created a "duty to warn" foreseeable victims. This duty applies to doctors,<sup>123</sup> therapists and physiologists,<sup>124</sup> landlords,<sup>125</sup> and others. In *McIntosh*, the court held that the duty to warn is dependent on the surrounding circumstances, the relationship of the parties, the risk and the public interest.<sup>126</sup> In that case, the court specifically held that "a physician has the duty to warn third persons against possible exposure to contagious or infectious diseases, e.g. tuberculosis, venereal disease."<sup>127</sup> It is evident that protection of the victim is of paramount concern, and in the case of a contagious and deadly virus such as HIV, the public health is also a stake.

Notifying the victim serves not only to protect his or her physical health, but the victim's mental health as well. In *People v. Thomas*,<sup>128</sup> the court held that the result of an AIDS test should be disclosed to the test subject, the defendant, and the victim

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<sup>121</sup> 37 N.J. 328, 336, 181 A.2d 345, 349 (1962).

<sup>122</sup> *Id.* See also *Stempler v. Speidell*, 100 N.J. 368, 375 495 A.2d 857, 863 (1985); *Kurdek v. West Orange Educ. Bd.*, 222 N.J. Super. 218 536 A.2d 332, 336 (Law Div. 1987). The patient-physician statutory privilege "is to be construed restrictively since its allowance obstructs the search for the truth." *Id.* at 225.

<sup>123</sup> See *McIntosh v. Milano*, 168 N.J. Super. 466 403 A.2d 500 (Law Div. 1979); see also *Tarasoff v. Regents of California*, 551 P.2d 334 131 Cal. Rptr. 14 (1976) (a physician has a duty to reveal a confidence, i.e., a patient's mental state and verbal remarks, when it is necessary to protect the welfare of an individual or community); *Gammill v. United States*, 727 F.2d 950 (10th Cir. 1984) (a physician's duty to warn extends to people likely to be exposed to the patient).

<sup>124</sup> See N.J. ADMIN. CODE tit. 13, § 13:42-4.1(a)(1)(xxiv)(1)(A)(1989).

<sup>125</sup> See *Earle v. Kuklo*, 26 N.J. Super. 471 (App. Div. 1953) (landlord was liable for damages for failing to inform tenants that he and his family were infected with tuberculosis when he knew or had reason to know that he and his family were infected).

<sup>126</sup> *McIntosh*, 168 N.J. Super. at 483.

<sup>127</sup> *Id.* at 484, 403 A.2d at 509.

<sup>128</sup> 529 N.Y.S.2d 429, 431 (Co. Ct. 1988).



who was raped and sodomized by the defendant. The court weighed the intrusion upon the attacker of the "routine drawing of a blood sample" against the "mental anguish suffered by the victim" and determined that "the victim has a right to know whether she may have been exposed to the AIDS virus."<sup>129</sup> The court placed a higher priority on the duty to warn a possible victim than on the attacker's right to privacy.<sup>130</sup> Although at the time New York did not have any laws regarding the transmission of HIV or AIDS, the court held that a positive HIV test could result in "prosecution for depraved indifference murder."<sup>131</sup>

HIV and AIDS pose significant health risks, but they also present other detrimental social ramifications as well. Disclosure to public health agencies has been upheld, even where "disclosure may reflect unfavorably on the character of the patient."<sup>132</sup> The Court held that this type of disclosure "does not automatically amount to an impermissible invasion of privacy."<sup>133</sup>

However, disclosure of medical information regarding HIV status may result in privacy and tort actions such as intentional infliction of emotional distress. In *Plowman v. Dep't of the Army*,<sup>134</sup> the court determined that an Army colonel who disclosed the results of plaintiff's HIV test to four other federal officers pursuant to an Army AIDS Policy did not violate the plaintiff's privacy rights. The court considered the privacy interests asserted in *Whalen v. Roe* and determined that a "privacy right in one's medical condition is not absolute. Compelling government interests may outweigh that right and justify its infringement."<sup>135</sup>

The court considered the social issues of AIDS and held:

That plaintiff tests positive for AIDS, rather than for another, less politically-charged disease, is not relevant to the constitutional analysis. AIDS is a fatal, infectious disease; it is not a political or constitutional status. AIDS does not, therefore, confer in its victims any greater constitutional rights than are possessed by victims of other infectious or fatal maladies, such as herpes, tuberculosis, or cancer. By the same token,

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Whalen v. Roe*, 97 S. Ct. 869, 878 (1977).

<sup>133</sup> *Id.*

<sup>134</sup> 698 F. Supp. 627 (D.C.E.D. Va. 1988).

<sup>135</sup> *Id.* at 634.

AIDS victims do not forfeit any constitutional rights by virtue of their AIDS status.

The Court is mindful, however, that AIDS may provoke heightened reactions among people. . . . This reaction could be a factor pertinent to the constitutional calculus where, as here, a right is not absolute and balancing is required.<sup>136</sup>

These three cases demonstrate that there is no impermissible infringement on an individual's privacy interests when the disclosure of medical information is made to those required by statute or those who are within a reasonably necessary scope. Disclosing an individual's HIV-status to a sexual partner or other person who has engaged in high-risk behavior with the accused is narrow in scope and enables the victim to seek medical care as soon as possible. The public interest in limiting the spread of the virus may be sufficient justification for the infringement of the accused's fourth amendment privacy interest.<sup>137</sup>

#### B. *Due Process: Self-incrimination*

The results of the HIV test eventually may be used against the accused in the criminal proceedings. This type of evidence could arguably be violative of the accused's fifth amendment right against self-incrimination. However, the use of blood tests, hair samples,<sup>138</sup> writing samples<sup>139</sup> and voice demonstrations<sup>140</sup> have been upheld repeatedly because they are physical evidence and do not come within the scope of the fifth amendment. Blood alcohol tests have long been upheld by the courts on charges of driving under the influence.<sup>141</sup>

Requiring a defendant to give blood for the purpose of

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<sup>136</sup> *Id.* at 632 n.20.

<sup>137</sup> See *supra* notes 8-11.

<sup>138</sup> *State v. Burke*, 172 N.J. Super. 555, 412 A.2d 1324 (App. Div. 1980) (the court allowed the taking of pubic hair, saliva, and blood from a person accused of rape for purposes of analysis and comparison).

<sup>139</sup> *In re Riccardi*, 337 F. Supp. 253 (D.N.J. 1972); see also *Matter of Special Federal Grand Jury*, 809 F.2d 1023 (3d Cir. 1987) (order requiring witness to provide normal handwriting exemplars was not testimonial communication protected by the fifth amendment).

<sup>140</sup> *State v. Cary*, 49 N.J. 343, 230 A.2d 384 (1967).

<sup>141</sup> *State v. Burns*, 159 N.J. Super. 539, 388 A.2d 987 (App. Div. 1978) (blood tests were admissible on a drunk driving charge regardless of whether the accused consented); *State v. Amaniera*, 132 N.J. Super. 597, 334 A.2d 398 (Law Div. 1974); *State v. Blair*, 45 N.J. 43, 211 A.2d 196 (1965).

chemical analysis does not violate his or her fifth amendment rights against self-incrimination because blood is not testimonial evidence.<sup>142</sup> However, the procedures for obtaining the blood sample must comply with the Fourth Amendment and the two-prong test set forth by the Supreme court in *Schmerber v. California*.<sup>143</sup>

The first requirement is that the purpose for taking a blood test is justifiable; second is that the method of procuring the blood sample must comport with fourth amendment criteria of reasonableness.<sup>144</sup> The Court upheld the taking of a blood sample in *Schmerber* because there was an emergency situation of sufficient urgency to waive the warrant requirement and because the taking of a blood sample by a physician in a hospital according to accepted medical procedures is virtually painless, without risk and minimally intrusive.<sup>145</sup>

To meet the first prong of the *Schmerber* test in the context of a blood test for HIV, there must be a reasonable belief that the virus has been transmitted. Biting, for example, is generally not a recognized means of transmission.<sup>146</sup> However, intimate sexual contact as provided in the bill is a reasonable means of transmission; therefore the victim of a sexual offense would be justified in requesting that the alleged offender submit to an HIV test.

Although the circumstances of HIV tests are different than alcohol blood level tests, they are no less crucial. The presence of HIV will not dissipate as the presence of alcohol in the blood will, but the earlier HIV is detected, the sooner the victim and the offender can get treatment and the spread of the virus can be stopped. As with blood alcohol tests, HIV tests are performed with minimal blood samples that are taken routinely in hospitals and medical labs. Therefore, the second prong of the *Schmerber* test would also be met.

New Jersey has determined that consent to a blood alcohol test is not necessary where the results are required to substanti-

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<sup>142</sup> *Burke*, 172 N.J. Super. at 557-58, 412 A.2d at 1325.

<sup>143</sup> *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 768 (1966)); see also *Egloff v. N.J. Air Nat'l Guard*, 684 F. Supp. 1275 (D.N.J. 1988).

<sup>144</sup> *Schmerber* 384 U.S. at 768.

<sup>145</sup> *Id.* at 770-71.

<sup>146</sup> See *United States v. Moore*, 846 F.2d 1163, 1168 (8th Cir. 1988).

ate the charge of operating under the influence.<sup>147</sup> A hospital may even run tests that were not consented to by the patient.<sup>148</sup> The ultimate purpose and use of the HIV test results would be the same as blood alcohol test results: criminal prosecution. Therefore, considering the case law construing the character of blood tests, it is clear that the accused cannot assert a valid fifth amendment right to prevent the results of an HIV test from being used as evidence in a criminal prosecution.

## VI. Conclusion

The legal and ethical problems presented by AIDS and HIV infection are numerous, but that cannot prevent the legislature from acting to limit the spread of the virus. Assembly Bill 966 is only one means of attacking the AIDS related problems facing our society. The legislature should continue to provide for voluntary testing programs and research facilities to fight the battle against AIDS.

The bill could be improved by setting forth provisions for counselling the victim and the accused. Counselling both parties is a vital tool in stopping the spread of the virus and should be provided for in any HIV testing legislation. The bill should also include definitions of terms in order to focus the scope and effect of the legislation. Also, the proposed law could be improved if its scope were broadened to include other modes of transmission.

Although there are no hard and fast statistics for intentional acts of HIV transmission, the problem does exist. In a society that consistently attempts to compensate the victim for the harm he or she has suffered, this type of bill provides additional rights for the individual and is aimed at protecting the public health from this deadly epidemic.

*Lisa Black*

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<sup>147</sup> State v. Tolbert, 100 N.J. Super. 350, 241 A.2d 865 (Crim. Div. 1968). N.J. STAT. ANN. § 39:4-50.2 "does not require a person's express consent to the taking of specimens of his bodily substances in order to determine the content of alcohol in his blood." *Id.* at 357, 241 A.2d at 869.

<sup>148</sup> State v. Dyal, 97 N.J. 229, 478 A.2d 390 (1984) (hospital performed a blood alcohol test on a blood sample that was given to determine defendant's blood type. The court held that the results of the blood alcohol test were admissible evidence, regardless of whether consent was given).