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DISCLOSURE BEFORE EXPOSURE: A REVIEW OF OHIO'S HIV CRIMINALIZATION STATUTES

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I. Introduction

Public health agencies have long used the law as a means of controlling disease transmission.¹ The Bible spoke of leper colonies,² and sanitariums have long housed those who suffer bodily or mental illnesses. The Army subjected soldiers acquiring sexually transmitted diseases (“STDs”) to court martial for misconduct, loss of rate and pay, imprisonment and extension of their enlistments.³

Federal courts began addressing the authority of the state to exercise its police powers to enforce public health regulations early in the 20th century. In *Wong Wai v. Williamson*,⁴ the court, using what today might be called a strict scrutiny analysis, struck a resolution promulgated by San Francisco’s Board of Health.⁵ The resolution prohibited Chinese residents from traveling outside of the city without proof that they had been inoculated against bubonic plague.⁶ The court recognized the city’s authority to regulate public health, but the court also found that there were limits to this exercise of police power.⁷

The United States Supreme Court addressed the police power issue in *Jacobson v. Massachusetts*.⁸ In *Jacobson*, the Court upheld a regulation adopted by the board of health of Cambridge, Massachusetts.⁹ This resolution required all city residents to be vaccinated against the smallpox virus.¹⁰ The Court recognized the authority of the state to enact “health laws of every description” meant to protect the public health and the public safety.¹¹

*84 HIV, the Human Immunodeficiency Virus, has emerged as the greatest challenge to health professionals in the past half-century. Today, over 30 million people are living with the HIV virus and more than 25 million people have died of AIDS since 1981.¹² In an effort to curb the spread of HIV, Ohio and twenty-three other states have enacted statutes that criminalize exposure or transmission of HIV.¹³ Fifteen other states have passed statutes that deal with acts that were already crimes but are punished more severely when the perpetrator knows that he or she has HIV.¹⁴

II. The “Perp”

SIV, the Simian Immunodeficiency Virus, which is closely related to the HIV virus, appears to have resided in primate hosts for thousands of years.¹⁵ Researchers now believe that AIDS-like viruses “jumped” from chimp to human more than once, creating different strains of the virus.¹⁶ Hunting, which exposes people to excessive amounts of blood, may also have allowed SIV/HIV to infect humans.¹⁷

Although the virus may have existed in Central Africa for thousands of years, the first known human HIV infection was isolated in 1959 from a man who resided in the Congo.¹⁸ The virus may have spread beyond this region as a result of (1) the increasing urbanization of Central Africa after World War II, (2) the social upheaval and commerce that spread the virus across the African continent, and (3) widespread vaccination campaigns that may have used contaminated needles.¹⁹ Some scientists speculate that the influx of *85 western journalists and spectators to the Ali-Foreman championship fight in Zaire in 1974 led to the globalization of the virus.²⁰ Once outside its endemic area, where local residents enjoyed some innate immunity, the virus spread like wildfire.

The earliest case in the United States was identified in 1968 in St. Louis, Missouri.²¹ A fifteen-year-old boy presented to the hospital with symptoms now known to be consistent with advanced AIDS.²² Even today this case is puzzling, because the boy had never traveled beyond the Midwest.²³ Some researchers speculate that the boy was a prostitute.²⁴

In the early 1980's the disease appeared to be confined to Haitians, Africans, and North Americans.²⁵ Some reports questioned whether the disease could have spread from Africa to North America via Haiti.²⁶ Simply being Haitian was considered to be a risk factor at that time.²⁷ Today researchers believe that North Americans carried the virus to Haiti, because at that time Haiti was a favorite vacation spot for gay Americans.²⁸

Starting in June 1981, emergency rooms in San Francisco and New York reported otherwise healthy young men presenting with flu-like symptoms, fevers, and infections with *Pneumocystis carinii*,²⁹ an organism that causes infections almost exclusively in debilitated or immunosuppressed individuals.³⁰ About a year later, the Centers for Disease Control linked the illness to blood and coined the term "AIDS," which is shorthand for Acquired Immune Deficiency Syndrome.³¹ "In that first year, over 1600 cases [were] diagnosed with close to 700 deaths."³²

In 1985 the Pasteur Institute isolated the HIV virus, and about a year later scientists confirmed that the HIV virus caused AIDS.³³ A test for HIV was ***86** approved later that year, and medications have been developed to combat the virus and the secondary infections that occur when AIDS damages the immune system.³⁴ By December 1987, over 71,000 cases of AIDS had been reported to the World Health Organization.³⁵ The greatest number of cases reported was from the United States.³⁶

III. The Victim

As its name suggests, the Human Immunodeficiency Virus attacks the human immune system.³⁷ The immune system is a complex series of defense mechanisms meant to protect us from exposure to bacteria, fungi, viruses and parasites. The immune response includes such interconnected systems as the initial barriers (intact skin, mucus, and bile), the innate responses (macrophages, complement, and neutrophils) and antigen-specific immune responses (antibodies and T-cells).³⁸

The elements of the immune system interact by direct cell-to-cell contact and via soluble molecules called cytokines. A common progenitor cell, called a stem cell, gives rise to all other blood cells. Stem cells mature into the two primary cells that modulate the immune system, the B-cells and the T-cells. B-cells mature in the Peyer's Patches, as well as the fetal liver and the fetal spleen.³⁹ B-cells develop into either plasma cells, which produce antibodies, or memory cells, which circulate until activated by a specific antigen, and then produce an elevated, or a secondary immune response.

T-cells, which mature in the thymus, make up 60-80% of peripheral blood lymphocytes. All T-cells express an antigen-binding T-cell receptor. T-cells have two major functions: (1) to directly kill virus-infected cells, foreign cells, ***87** (such as tissue grafts) and tumors, and (2) to activate, suppress or otherwise control immune and inflammatory responses by releasing cytokines.⁴⁰

The HIV virus attacks human T-cells by attaching at the specific CD-4 receptor site. Active infection markedly reduces the number of CD-4 T-cells⁴¹ in the peripheral blood, suppressing the helper and delayed-type hypersensitive responses in the host, resulting in HIV-induced immunosuppression (AIDS).⁴²

IV. The Process: The Stages of Infection

A. Acquisition of Infection

HIV is transmitted if bodily fluids such as blood, vaginal fluids, semen and breast milk from one person get into the bloodstream of another person.⁴³ The virus also exists in saliva, but normally in insufficient amounts to

cause infection.⁴⁴ HIV can be transmitted through sexual contact (anal, vaginal, and oral), through the use of unsterilized needles, through infected blood or blood products, and through vertical transmission from an HIV positive mother during pregnancy (across the placental barrier, during delivery, or through breast-feeding).⁴⁵ The count of CD-4 T-cells in the peripheral blood serves as one of the best indicators of the stage of the disease in infected individuals.⁴⁶

B. Primary HIV Infection

Initial infection with HIV is subclinical and a majority of infected persons remain asymptomatic.⁴⁷ A small percentage of infected persons develop rash, fever and lymphadenopathy.⁴⁸ Other symptoms are pharyngitis, arthralgia, *88 myalgia, retro-orbital headaches, malaise, diarrhea and vomiting.⁴⁹ Individuals with these symptoms show normal CD-4 T-cell counts.⁵⁰ Infected individuals generally show a positive test for HIV antibodies within 3-6 months after infection.⁵¹

C. Asymptomatic HIV Disease

Most patients in this stage maintain normal health and are unaware that they have the disease.⁵² This phase can last several years, the median time being 10 years.⁵³ CD-4 T-cell count in these individuals is usually above 500 cells per cubic millimeter.⁵⁴

D. Early Symptomatic HIV Disease

Patients in this stage show symptoms including fever, weight loss, recurring diarrhea, fatigue and headache.⁵⁵ Skin infections such as seborrheic dermatitis, folliculitis and recurrent Herpes Simplex infections may also occur.⁵⁶ Antiviral therapy is usually initiated at this stage.⁵⁷ The CD-4 T-cell count gradually decreases with time during this stage.⁵⁸

E. Late Symptomatic HIV Disease

During this stage, the risk of developing AIDS-related opportunistic infections or malignancy is very high.⁵⁹ Included are Kaposi's Sarcoma, lymphoma, Toxoplasma encephalitis, Pneumocystis carinii pneumonia ("PCP"), esophageal candidiasis, and systemic Mycobacterium avium complex ("MAC").⁶⁰ In this stage, the CD-4 T-cell count usually falls below 200 cells per cubic millimeter.⁶¹

***89 F. Advanced HIV Disease**

The patients in this stage usually exhibit multiple malignancies and opportunistic infections.⁶² In the advanced stage, the patient's CD-4 T-cell count is usually less than 50 per cubic millimeter.⁶³

V. The Intent

Deliberate transmission occurs when involved individuals (both HIV+ and HIV-) use needles to intentionally infect others with HIV.⁶⁴ Because the virus is almost always transmitted to the victim, this category represents the most serious offense that can be committed.⁶⁵

Reckless transmission occurs when the HIV virus is passed by a careless rather than a deliberate act.⁶⁶ Reckless transmission occurs when the infected person actually transmits the virus, but the primary purpose is sexual gratification.⁶⁷ During one Ohio prosecution, the State's expert witness estimated that an HIV positive man will infect an HIV negative woman during intercourse two percent of the time.⁶⁸

Accidental transmission is by far the most common mode of passing the HIV virus.⁶⁹ Accidental transmission

occurs most often when (1) infected persons are undiagnosed or otherwise unaware that they carry the virus, or (2) infected persons know that they are infected and use appropriate protection, but the protection somehow fails.⁷⁰

VI. The Prosecution

In practice, it is difficult to prove whether an infected person has deliberately, recklessly or accidentally transmitted the virus.⁷¹ First, the prosecution must show that the defendant caused the victim's infection.⁷² Through a process known as phylogenetics, or evolutionary analysis, the DNA ^{*90} of the viruses isolated from the defendant and the victim are compared.⁷³ If viral DNA from the defendant is the same or very similar to the DNA from the infectee, the defendant likely infected the victim.⁷⁴ If they are different, the defendant was not the source of the victim's infection and the prosecution will fail.⁷⁵ Further, the HIV virus rapidly mutates and changes its structure once it enters another person's body, making comparisons difficult.⁷⁶

Second, even if the DNA from the victim's and the defendant's samples match, the prosecution must show that the defendant infected the victim and not vice versa.⁷⁷ This can be proven if prior HIV tests show that the victim was negative after the defendant tested positive.⁷⁸ Testing less than three months after exposure can lead to unclear results.⁷⁹ The time period between exposure to the virus and the development of antibodies is called the window period.⁸⁰ During the window period, the infected person can have large numbers of the viruses in their blood, semen or breast milk.⁸¹ The infection can be passed to another person even though the infected person exhibits a negative HIV-antibody test.⁸²

Last, in cases where intentional or deliberate transmission needs to be proven, the prosecution must show that the defendant actually intended to infect the victim.⁸³ Unless there is a "smoking gun," such as a syringe filled with HIV infected blood, the proof often boils down to one person's word ^{*91} against another's.⁸⁴ Since HIV is most often transmitted via sexual contact, generally there are no witnesses other than the defendant and the victim.⁸⁵ If deliberate infection cannot be proven, the lesser offense of reckless transmission can be pursued.⁸⁶

VII. The Ohio Cases

A search for Ohio cases prosecuted under these statutes yields very little. First, trial court cases are not generally published in Ohio unless there is an appeal, and many of the published appeals involve issues other than transmission of the virus. Second, proving intent and knowledge is difficult. Third, testimony is often limited to the defendant and the victim, making proof difficult. Finally, many cases that fall under the above-named statutes are plea-bargained to lesser-included offenses. A brief synopsis of the Ohio cases includes the following:

Felonious Assault, [Ohio Revised Code section 2903.11](#).⁸⁷ There are two types of fact patterns that emerge from suits brought under the Felonious Assault statute. One type involves individuals who attempt to use their HIV status as a "deadly weapon," usually through spitting or biting, brought under ^{*92} section (A) of the statute, and the other involves a person's failure to disclose his or her HIV status before engaging in sexual activities, brought under the 2000 addition to the Felonious Assault statute.⁸⁸

In 2000, *State v. Couturier*⁸⁹ analyzed the use of the defendant's HIV infection as a deadly weapon.⁹⁰ The court reversed the defendant's conviction in large part due to the addition in the Felonious Assault statute.⁹¹ In the court's opinion, the addition showed that the Ohio Legislature felt that the circumstances of this case were not adequately addressed by preexisting criminal law and, therefore, the defendant's HIV infection could not have been used as a weapon when he had unprotected sex with the victim.⁹²

In the case *State v. Gonzalez*,⁹³ the defendant knew he was HIV positive, but began a sexual relationship without disclosing this information to his partner.⁹⁴ Gonzalez was convicted under [Ohio Revised Code section 2903.11](#) on two counts of felonious assault, representing two months of sexual relations without disclosure.⁹⁵ Gonzalez appealed based on the constitutionality of the statute and a number of trial court errors.⁹⁶ The court determined that the statute was not unconstitutionally vague as the word "disclose" is easy to understand, and

further found that the statute did not inflict cruel and unusual punishment.⁹⁷ The court also found that due process was not lacking even though the statute did not provide for an affirmative defense, as the prosecution had the burden of proving disclosure beyond a reasonable doubt.⁹⁸

As for the trial errors, even though the State did not show a “compelling need” for disclosing Gonzalez’s HIV medical records, the court determined that such admission was harmless error.⁹⁹ The court also determined that information pertaining to the victim’s HIV-positive status after the sexual encounter would be irrelevant and inflammatory unless the defendant’s HIV status was contested.¹⁰⁰ However, even though Gonzalez’s status was not at *93 issue, the court again found the disclosure to be harmless error.¹⁰¹ Although the duration of the sexual relationship was debated at trial, the court concluded that the jury had sufficient evidence to convict Gonzalez of two of the four charged counts and that, even though consecutive sentences are disfavored and harsh, it was not disproportionate to the seriousness of his conduct and the danger he posed to the public.¹⁰²

In *State v. Geiger*,¹⁰³ the trial court convicted the defendant of felonious assault because he was HIV-positive and did not disclose this information prior to engaging in sexual conduct with the victim.¹⁰⁴ The trial court sentenced Geiger to a term of four years under a kidnapping conviction and six years under the felonious assault conviction, to be served consecutively, because of Geiger’s attitude of indifference towards infecting unsuspecting sex partners with HIV.¹⁰⁵ Geiger’s conviction, however, was reversed by the court of appeals.¹⁰⁶

In *State v. Roberts*¹⁰⁷ the court affirmed a defendant’s conviction under [Revised Code section 2903.11\(B\)\(1\)](#) because the defendant had failed to timely object at trial.¹⁰⁸ According to the court, the defendant waived an argument on appeal that it was error to admit victim’s testimony that the defendant was HIV positive prior to engaging in sexual relations with the victim.¹⁰⁹

*State v. Reif-Hill*¹¹⁰ predates the change in the felonious assault statute to specifically encompass HIV exposure. The incident began when the defendant refused to allow a blood draw at a psychiatric ward.¹¹¹ She fought with the attendants and claimed that she was not a child, had AIDS, and would not voluntarily give consent for a blood sample to be taken by the technician.¹¹² When a male attendant came to assist, she bit him.¹¹³ Despite the defendant’s actions, the court concluded that the defendant did not “knowingly” cause, or attempt to cause, the victim to be infected with the HIV virus when she bit him since it was later learned from blood tests that she never had the HIV virus to begin with.¹¹⁴

*94 In *State v. Bird*,¹¹⁵ the defendant, who was HIV-positive, was indicted on one count of felonious assault with a deadly weapon after he spit in a police officer’s face.¹¹⁶ Bird entered a plea of no contest and, therefore, was prohibited by the court from challenging whether HIV may be transmitted through saliva and ultimately whether his saliva could be then termed a deadly weapon.¹¹⁷

In *State v. Price*¹¹⁸ the court determined that saliva could be a deadly weapon but on unique facts, since Price was a hemophiliac afflicted with both HIV and Hepatitis C.¹¹⁹ Because Price was a hemophiliac, his saliva contained microscopic blood, which increased his ability to transmit HIV through spitting and biting a police officer.¹²⁰

The most recently decided case, *State v. Branch*,¹²¹ determined that an individual’s saliva that is only infected with HIV can still be found to be a deadly weapon so long as the saliva is believed to contain blood.¹²² In *Branch*, there was sufficient evidence to support Branch’s conviction under [Ohio Revised Code section 2903.11\(A\)\(1\)](#) after he attempted to cause serious physical harm to a Toledo police officer by spitting in his eye.¹²³ Even though the defendant presented testimony that there was only a small risk of getting HIV through saliva, the police officer testified that he believed there to be blood in the saliva when he cleaned out his eye.¹²⁴ Testimony clearly indicated that saliva mixed with blood carries a risk of transmitting the disease.¹²⁵

*95 [Revised Code section 2927.13](#): Selling or donating contaminated blood.¹²⁶ No state or appellate cases were found.

[Revised Code section 2907.24](#): Soliciting; after positive HIV test.¹²⁷ Three cases were found.

In *State v. Wallace*,¹²⁸ the defendant appealed an order from the Montgomery County Court of Common Pleas

requiring him to undergo a test for sexually transmitted diseases pursuant to [Revised Code section 2907.27](#).¹²⁹ The defendant argued that the latter statute was an unconstitutional invasion of privacy and due process.¹³⁰ The appeals court found that the warrantless search provisions of [Revised Code section 2907.27](#), as well as the required treatments for those persons who test positive for HIV, do not violate the protections against unreasonable searches because the statutes are “reasonably related to a special government need to protect the public from the spread of sexually transmitted diseases.”¹³¹

***96** In *State v. Jones*,¹³² the state appealed an order from the Montgomery County Court of Common Pleas that terminated the post-release control supervision of the defendant, who was earlier convicted of Engaging in Soliciting After a Positive HIV Test.¹³³ After the defendant was released from prison, he was indicted for one count of the same offense, as well as assault on a police officer.¹³⁴ A jury acquitted the defendant of all of the charged offenses, but convicted him of disorderly conduct, a lesser-included offense.¹³⁵ The state contended that the trial court erred when it terminated the post-release control because the parole board, not the court, has authority over an offender convicted of a fourth or fifth degree felony that was not a sex crime.¹³⁶ The defendant argued that the court did have the authority to terminate his post-release control under another statute, which authorizes the court to terminate post-release control upon the person’s conviction or plea of guilty to a new felony.¹³⁷ Because the defendant was charged with a felony, but found guilty of a misdemeanor, the appellate court reversed the judgment of the trial court.¹³⁸ The appellate court also determined that [Revised Code section 2907.24](#) was a felony sex offense.¹³⁹

In *State v. McPherson*,¹⁴⁰ the defendant appealed his conviction, alleging among other things, that there was insufficient evidence to show that he had actual knowledge that he was positive for HIV, and that the court erred by classifying him as a sexually-oriented offender.¹⁴¹ Upon review of the record, the appellate court found that there was sufficient evidence to convict the defendant of the charged offense.¹⁴² However, the appellate court also found that [Revised Code section 2907.24](#) was not a sexually-oriented offense under Ohio law and reversed the trial court’s classification of the defendant as a sexually-oriented offender.¹⁴³

***97** [Revised Code section 2907.25](#): Prostitution; after positive HIV test.¹⁴⁴ The only case cited in the Ohio Official Reports under this statute is *State v. Wallace*,¹⁴⁵ which is discussed above.

[Revised Code section 2921.38](#): Harrasment with bodily substance.¹⁴⁶ In *State v. Thompson*,¹⁴⁷ the defendant, who was a prisoner at the Southern Ohio Correctional Facility (“SOCF”), threw a styrofoam cup full of feces at a nurse employed by SOCF, hitting her in the face, hair, arms, chest and leg.¹⁴⁸ The defendant was brought before the Rules Infraction Board at the facility, found guilty of violating several disciplinary rules of the facility, and was sentenced to fifteen days in disciplinary control.¹⁴⁹

After the administrative sanctions were entered, the defendant was indicted on two counts of harassment by an inmate.¹⁵⁰ The defendant moved to dismiss on the grounds of double jeopardy, and the trial court overruled the ***98** motion.¹⁵¹ The defendant later pleaded no contest to one count and was sentenced to an additional nine months’ confinement.¹⁵²

The defendant appealed, contending that the disciplinary proceedings at the SOCF were criminal in nature, and that his subsequent conviction under [Revised Code section 2921.38](#) violated the double jeopardy provisions of the U.S. Constitution.¹⁵³ The appellate court sustained the defendant’s conviction, finding that the General Assembly intended administrative sanctions imposed upon an inmate by prison authorities to be civil in nature and that the subsequent criminal action did not violate the Double Jeopardy Clause.¹⁵⁴

A. Discussion

During the 1980’s the federal government largely ignored the problems posited by HIV-AIDS. Policy makers in this era believed that the correct means of combating the AIDS epidemic was education about safe sex practices and counseling for infected individuals. Because AIDS infection was considered a death sentence at the time, society viewed individuals infected with the HIV virus as victims rather than criminals.

By the mid 1990’s, all of this changed. Policy makers felt that the public had grown intolerant of crime and

supported actions such as decreasing amenities for prisoners, three strikes laws, chain gangs, and other punitive measures.¹⁵⁵ For instance, in 1997, Nushawn Williams infected several women, including one minor, and exposed many others to the virus in and around Chautauqua County, New York.¹⁵⁶ Williams's name was released to the public in October 1997, and he soon became the face of HIV criminality in small-town America.¹⁵⁷ Partly in response to this and several other high-profile HIV transmission cases, the Ohio General Assembly enacted the HIV-specific statutes listed above and provided severe penalties for those in violation of the statute, demonstrating society's changing view of HIV-infected individuals as potential criminals rather than victims.

Revised Code section 2903.11, felonious assault, the "flagship" of Ohio's HIV criminalization statutes, is the most prosecuted of the HIV crimes in Ohio. Until amended in 2000, this statute did not include HIV-specific *99 language and prosecutors had to prove that the Defendant's HIV-positive status was a deadly weapon under the statute to gain a conviction.¹⁵⁸

Under the 2000 revision, prosecution became relatively simple. The state did not need to prove transmission of the virus from the Defendant to the victim, so phylogenetic analysis, which could cost up to \$100,000.00 per case,¹⁵⁹ was not necessary. Additionally, the state did not need to prove that the victim was HIV-negative before contact with the defendant and HIV-positive afterwards. Exposure rather than transmission was the necessary element.¹⁶⁰ However, the defendant had to be aware that he or she was infected with the HIV virus for criminal liability to attach.¹⁶¹

An analysis of Ohio's HIV statutes uncovers five fundamental questions: (1) What is the State's purpose? (2) What is disclosure? (3) What is exposure? (4) What is "one count?" and (5) What are the sanctions?

1. Purposes

The Ohio General Assembly has two basic purposes in enacting HIV-specific statutes: (1) to control the spread of the disease and (2) to punish those individuals who expose others to the virus. In practice, both of these purposes have been largely frustrated.

No data exists to show whether Ohio's disclosure-based statutes have slowed the spread of the disease. Even though twenty-three states have enacted HIV disclosure laws, almost no research has been conducted to determine whether these statutes help prevent the transmission of HIV, or whether any negative consequences to these statutes exist. Since the enactment of Ohio's statutes, the reported cases of HIV have actually increased slightly, but this is more likely due to better reporting methods than to higher rates of transmission.¹⁶² Therefore, we cannot determine whether the statutes satisfy the first purpose.

Ohio and several other states enacted HIV laws in the mid-1990's media panic following several high profile HIV transmission cases.¹⁶³ The panic at the time was real; everyone-except possibly those who abstained from sexual *100 activity completely and those who engaged solely in mutually monogamous sexual activity-was at risk for infection.¹⁶⁴ Further, no accepted treatment regimen existed at the time and infection almost always led to death. Some commentators suggested quarantining infected individuals and cited pandemics like swine flu and bubonic plague.¹⁶⁵

Criminal statutes are generally enacted to deter persons from engaging in criminal activity and to incapacitate and possibly rehabilitate offenders.¹⁶⁶ However, Ohio's statutes target specific sexual behavior that is not easily deterred. Proof in such cases-one person's testimony against another-makes prosecution difficult. Therefore, the majority of persons who violate these statutes are not likely to be prosecuted, except in the most egregious cases,¹⁶⁷ thus frustrating the state's second purpose.

2. Disclosure

The Gonzalez case remains the most frequently cited HIV prosecution case in Ohio, largely because most of the problems associated with HIV-disclosure cases occurred there. Gonzalez first argued that the term "disclosure"

was unclear.¹⁶⁸ Did he need to disclose his condition before each encounter, or was a one-time disclosure sufficient to avoid prosecution? Two questions from the jury during deliberations bolstered Gonzalez's argument.¹⁶⁹ The jury's first relevant question was, "[w]hat is the court's definition of disclosure?"¹⁷⁰ The second, "[d]id he need to disclose on each count?"¹⁷¹ As the court instructed the jury, a person hearing or reading the word "disclose" in the statute would likely give the word its ordinary meaning in the English language.¹⁷² However, Gonzalez, who was not a native English-speaking person, could have easily been confused by this term.¹⁷³

Gonzalez then argued that the statute was unclear as to whether verbal disclosure is sufficient to avoid prosecution or whether he should first obtain a signed and notarized acknowledgment from his partner (an exposure *101 disclosure).¹⁷⁴ The court ruled that a person of common intelligence would understand and be unlikely to forget such a significant revelation and did not need to be told before further intimate encounters.¹⁷⁵ However, will two people in the heat of the moment take care of the legal "technicalities" prior to engaging in intimate relations?

During the trial, Gonzalez objected to the victim's testimony that she was HIV-negative before her encounter with Gonzalez and HIV positive afterwards.¹⁷⁶ Gonzalez claimed that this testimony could have inflamed the jury and made the victim a more credible witness.¹⁷⁷ The appellate court agreed; under Ohio law, exposure without disclosure, even without transmitting the virus, was sufficient for conviction.¹⁷⁸

The Gonzalez trial court erroneously admitted the defendant's confidential medical records to prove he had knowledge of his serostatus.¹⁷⁹ The appellate court found this to be harmless error because plenty of other testimony proved that defendant knew his serostatus.¹⁸⁰ The appellate court further found that the trial court could access the defendant's confidential medical records without his permission if a "compelling need" existed.¹⁸¹ However, making confidential medical and counseling records discoverable in criminal court may discourage HIV-positive persons from seeking medical treatment and/or counseling.

Finally, the defendant must be aware that he or she is infected with the HIV virus for criminal liability to attach, thus sparing the large group of individuals whose infection is in the window period¹⁸² from prosecution, such as those who may have tested negative earlier and subsequently acquired HIV, and those who have never been tested. The Centers for Disease Control estimate that as many as 25% of HIV-infected individuals are unaware that *102 they have the virus.¹⁸³ Therefore, a quarter of all potential prosecutions would fail because of the knowledge element, which in turn frustrates both state purposes-controlling the spread of the disease and punishing the responsible individuals. Further, attaching criminal liability to knowledge of one's own serostatus may deter HIV testing, thus frustrating public health efforts that stress frequent testing for at-risk individuals.

3. Exposure

Gonzalez testified that he used condoms during relations with the victim, but the jury did not believe his testimony and neither side raised the issue on appeal.¹⁸⁴ Nevertheless, could condom use be considered an affirmative defense? For more than a decade, Americans have been bombarded with public service announcements touting the effectiveness of condoms in reducing the risk of HIV transmission.¹⁸⁵ However, only three state HIV statutes mention condom use.¹⁸⁶

California prohibits only unprotected sex without prior disclosure, and requires that the defendant intend to infect the victim.¹⁸⁷ North Dakota requires both serostatus disclosure and condom use to avoid prosecution.¹⁸⁸ Whereas Missouri specifically provides that condom use is not a defense.¹⁸⁹ While public health officials agree that condom use significantly reduces the chance for infection, the Ohio statutes have no provision for this or other safe sex precautions that could mitigate the offense.¹⁹⁰ Condom use without serostatus disclosure will not "protect" the parties from conviction in Ohio.¹⁹¹

Ironically, under the felonious assault statute as it is now written, two individuals, who are both infected with HIV, could each be convicted if they have intimate relations with each other and fail to disclose their serostatus.¹⁹² How could such a result possibly satisfy either state purpose?

***103 4. Count**

The penalties for conviction in Ohio are not as severe as in other states.¹⁹³ Ohio classifies felonious assault as a felony of the second degree, with sentences ranging from two to eight years on each count.¹⁹⁴ The Gonzalez prosecutor indicted based on one count for each month of sexual activity without disclosure, and the appellate court found this to be reasonable.¹⁹⁵ Potentially, each sexual encounter without disclosure is a violation, which could lead to extremely long sentences that could be entirely disproportionate to the conduct.¹⁹⁶

5. Sentence

The court sentenced Gonzalez to a maximum term of eight years on each of two counts, to be served consecutively.¹⁹⁷ At the sentencing hearing, the trial judge found that the victim suffered serious physical harm, and that she was “sentenced to death.”¹⁹⁸ The judge further found that Gonzalez showed indifference not only to the life of the victim, but also to the well-being of the entire community.¹⁹⁹

For Gonzalez, who was in the advanced stage of AIDS, the sixteen-year sentence was in reality a life sentence; he was unlikely to survive another sixteen years. However, the testimony of both Gonzalez and his victim ***104** showed “that they had sex several times a week for several months.”²⁰⁰ Each sexual encounter without disclosure was [another] possible charge of felonious assault against Gonzalez.²⁰¹ The state conceivably could have brought 20 charges of felonious assault against him . . . resulting in a 160-year sentence.”²⁰²

Some individuals infected with HIV deliberately, and aware of the consequences, continue to engage in risky or unsafe behavior, often without informing their partners of their condition.²⁰³ Some go so far as injecting infected blood or blood products into their victims. Others fail to inform their partners of their condition for a myriad of reasons, including fear of domestic violence, partner abandonment, and community repercussions. Still others infected with HIV attempt to disclose their serostatus, but for some reason fail to do so effectively; their potential partners may miss some of their subtle hints and unwittingly expose themselves to the virus. Others remain in denial.²⁰⁴ Yet Ohio’s HIV statutes treat this large cross-section of responsible individuals in essentially the same manner.²⁰⁵ Enacting a graduated series of offenses based on the severity of the conduct would be preferable. If preventing transmission is the primary goal, it makes more sense to punish the conduct that poses greatest risk of transmission more severely. The current unequal and inequitable punishment scheme also frustrates the state’s purpose of punishing responsible individuals.

6. Alternatives

There should be no argument that those HIV-infected individuals who callously and wantonly transmit the HIV virus should be prosecuted.²⁰⁶ Such cases are relatively rare, and, moreover, those who engage in deliberate harm to others could be prosecuted under general criminal statutes including reckless endangerment, second-degree murder, or attempted murder.²⁰⁷ The intimate nature of relations that lead to HIV exposure, the natural reluctance of victims to testify to such relations, and the absence of rape-shield type laws for crime victims should limit frivolous prosecution. When the proof boils ***105** down to which of the intimate partners presents the most credible testimony, prosecutors will think twice before bringing charges.

Oregon did not succumb to the media hysteria that occurred during the mid-1990s.²⁰⁸ Oregon never had an HIV-transmission statute on the books, and though the State has laws that prohibit the intentional transmission of communicable diseases, these have never been applied to HIV.²⁰⁹ Rather, in HIV-related cases, the prosecution relies on invoking attempted murder charges.²¹⁰ As a result, very few cases have been prosecuted, and the cases taken to trial have involved especially egregious conduct.²¹¹

Civil liability also remains a viable option. The plaintiff’s burden of proof in civil cases is far less than in criminal cases, (a preponderance of the evidence instead of beyond a reasonable doubt) and the victim receives compensation for his or her injuries. In civil cases, the victim must suffer actual damages to receive compensation. If the defendant actually transmits the virus to the victim, proving damages should be relatively simple. Exposure without viral transmission might cause mental distress, but proof of mental distress is far more difficult. Compensation for medical expenses and lost income, as well as punitive damages, should also be

available to injured victims.

VIII. Conclusion

The Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome present the greatest challenge to public health officials since the Swine Influenza Epidemic of the 1920s.²¹² Like influenza, HIV/AIDS is a worldwide epidemic.²¹³ Almost all persons are susceptible, and each infection has an extremely high mortality rate.²¹⁴ Unlike influenza, HIV/AIDS is spread largely by sexual contact and as a result, a terrible stigma attaches to those who acquire the disease.²¹⁵

Starting in the mid-1990s, Ohio and several other states enacted HIV disclosure statutes. Ohio's existing statutes, which forbid soliciting and *106 prostitution, simply enhance the penalties from misdemeanors to felonies if the defendant knows he or she carried HIV.²¹⁶ A third statute prohibits persons with knowledge that they carry HIV from selling or donating blood if the donation is for the purpose of transfusion.²¹⁷ A fourth statute serves mainly to protect employees of Ohio's detention facilities from exposure to HIV, hepatitis, and tuberculosis.²¹⁸ Each of these statutes may have served a vital function at the time it was enacted, especially in light of several high-profile AIDS transmission cases prosecuted in other states in the 1990s. Now that the panic has subsided, we should examine each of these statutes more carefully and revise where appropriate.

Gonzalez exposed many of the problems associated with the felonious assault statute. Although the term "disclosure" survived a constitutional challenge for vagueness, that term has not yet been brought before the remaining appellate districts or the Ohio Supreme Court. The terms "exposure" and "count" remain susceptible to a wide range of definitions and could easily lead to sentences that are entirely disproportionate to the conduct.

Ohio's statutes as now written contravene many long established public health measures. By tying criminal liability to knowledge of serostatus, current statutes encourage many high-risk individuals to avoid regular testing. By making a defendant's confidential medical records available to prosecutors, infected individuals may avoid treatment and/or counseling. Making an infected person responsible for disease prevention can create a false sense of security among people who are HIV-negative as well as undermine the public health message that everyone should take measures to reduce or avoid behavior that leads to transmission of the virus. Finally, allowing no provision for mitigation or an affirmative defense for condom use simply makes no sense.

What does make sense is a statutorily-enacted series of non-disease-specific offenses with graduated penalties based on the severity of the conduct. Individuals who purposely infect their victims would face harsher punishment than those who recklessly or accidentally transmit the virus.

Ohio should follow the lead of states like Oregon that rely on non-specific statutes to prosecute HIV offenses. Civil litigation, with its' lower burden of proof and compensation based on damages, should also remain an option.

Footnotes

^{a1} The Author would like to thank the Grant Sawyer Center for Justice Studies, University of Nevada, Reno Nevada, for its assistance in the completion of this project.

¹ For example, Massachusetts passed a comprehensive quarantine law in 1699. John Duffy, *Epidemics in Colonial America* 102 (1953).

² The Book of Leviticus provides: "[H]e shall dwell alone; his dwelling shall be outside the camp." Leviticus 13:46 (New King James).

³ In spite of these measures, by 1912 Secretary of War Stimson admitted that the rate of venereal diseases exceeded the daily average of those sick from all other major diseases combined. Edward M. Coffman, *The Regulars: The American Army, 1898-1941* 80 (2004).

⁴ See 103 F. 1 (N.D. Cal. 1900).

⁵ See generally *id.*

⁶ *Id.* at 3.

⁷ See *id.* at 6.

⁸ See 197 U.S. 11 (1905).

⁹ See *id.* at 39.

¹⁰ *Id.* at 12-13.

¹¹ *Id.* at 25 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824)).

¹² Worldwide HIV & AIDS Statistics (2008), [http:// www.avert.org/worldstats.htm](http://www.avert.org/worldstats.htm).

¹³ Arkansas (AR), California (CA), Florida (FL), Georgia (GA), Idaho (ID), Illinois (IL), Indiana (IN), Kentucky (KY), Louisiana (LA), Maryland (MD), Michigan (MI), Missouri (MO), Nevada (NV), New Jersey (NJ), North Dakota (ND), Oklahoma (OK), Pennsylvania (PA), South Carolina (SC), South Dakota (SD), Tennessee (TN), Virginia (VA), Washington (WA). The Center for HIV Law & Policy, The National Legal Resource and Strategy Center for HIV Advocacy, <http://www.hivlawandpolicy.org/resourceCategories/view/2> (last visited Sept. 14, 2008).

¹⁴ California (CA), Colorado (CO), Florida (FL), Georgia (GA), Indiana (IN), Kentucky (KY), Louisiana (LA), Nevada (NV), Ohio (OH), Oklahoma (OK), Pennsylvania (PA), South Carolina (SC), Tennessee (TN), Utah (UT), Wisconsin (WI). *Id.*

¹⁵ Laura Beil, *Tracing Origin of AIDS Raises New Questions. Study of HIV's History Could Offer Look at Future*, Dallas Morning News, Feb. 22, 1999, available at <http://www.aegis.com/news/dmn/1999/dn990203.htm>.

¹⁶ *Id.* HIV-1 is the virus responsible for most of the world's current infections, while HIV-2 remains confined to western Africa. As diagnostic methods improve, other strains of HIV may be discovered.

¹⁷ *Id.*

¹⁸ Annabel Kanabus & Sarah Allen, *The Origins of HIV & the First Cases of AIDS*, Avert.org, last updated July 24, 2008, [http:// www.avert.org/origins.htm](http://www.avert.org/origins.htm).

¹⁹ Beil, *supra* note 15.

- 20 Personal Conversations with Nancy J. Bigley, Ph.D. (1983-84).
- 21 Beil, supra note 15.
- 22 Id.
- 23 Id.
- 24 Id.
- 25 Id.
- 26 Beil, supra note 15.
- 27 Id.
- 28 Id.
- 29 This organism is now known as *Pneumocystis jiroveci*. Mark Cichocki, The History of HIV, About.com, <http://aids.about.com> (last visited Sept. 15, 2007).
- 30 Id.
- 31 Id.
- 32 Id.
- 33 Id. Dr. Luc Montagnier of the Pasteur Institute in France and Dr. Robert Gallo of the National Institutes of Health isolated virtually identical strains of the virus in the summer of 1983. Six years of bitter disputes followed, leading to lawsuits between the two countries. An out-of-court settlement now splits the credit for the discovery. Phillip J. Hiltz, The Doctor's World; U. S. and France Finally Agree in Long Feud on AIDS Virus, N.Y. Times, May 7, 1991, at A1.
- 34 Cichocki, supra note 29.
- 35 Annabel Kanabus & Jenni Fredriksson, HIV & AIDS: 1987 History, Avert.org, last updated Sept. 30, 2008, http://www.avert.org/his87_92.htm.
- 36 Id.
- 37 The HIV Virus belongs to the family known as Retroviruses. Retroviruses are enveloped, positive strand ribonucleic acid (RNA) viruses. Retroviruses are spherical, with a diameter of 80 to 120 nanometers. The virus, an obligate intracellular parasite, is unable to replicate on its' own; a host cell is required. The virus penetrates the host cell by

means of budding from the plasma membrane. Once inside the host cell, the viral RNA transcribes to a DNA intermediate, assembled from nucleotide bases within the host cell cytoplasm. The DNA intermediate serves as a template to manufacture viral RNA and envelope proteins, replicating the virus using the host cell “machinery.” See generally Patrick R. Murray, Ken S. Rosenthal, & Michael A. Pfaller, *Medical Microbiology* (Elsevier Mosby, Philadelphia, 5th ed. 2005).

38 An antigen is a molecule that is recognized by a specific antibody or T-cell, i.e. a molecule that stimulates an immune response. *Id.* at 109.

39 *Id.* at 101.

40 T-cells are named for, and mature in the thymus, one of the body’s primary lymphoid organs. B-cells are named for the Bursa of Fabricius, a lymphoid organ in chickens, where these cells were first discovered. In humans, B-cells mature in the ‘bursal equivalent,’ called the Peyer’s Patches. *Id.*

41 The normal count of CD-4 T-cells in a healthy HIV-negative adult is between 600 and 1200 cells/mm. Aidsmap.com, CD4 T-cell counts, available at <http://www.aidsmap.com/en/docs/D2596CD3-B444-4F86-AE85-DDC5F048CEF3.asp?typ> (last visited May 14, 2007).

42 Murray et al., *supra* note 37, at 663.

43 What is AIDS?, <http://www.immunity.co.za/aids/aids2.html> (last visited Sept. 27, 2008).

44 *Id.* An exception to this general rule occurred in the case of [State v. Price](#), discussed *infra*. 162 Ohio App. 3d 677 (2005). The Defendant suffered from hemophilia and had contracted both HIV and Hepatitis C. Convicted of felonious assault after spitting on a police officer; the evidence established that as a hemophiliac, the Defendant’s saliva contained microscopic blood, which, in turn, contained elevated levels of the HIV Virus. See *id.*

45 World Health Organization, Fact Sheet on HIV/AIDS for Nurses and Midwives (2000), http://www.who.int/mip2001/files/2357/HIV_AIDSFactSheets.pdf.

46 Dr. Manbir Singh, Natural History of HIV Infection, <http://www.manbir-online.com/std/hiv-history.htm> (last visited Sept. 17, 2007).

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 Singh, *supra* note 46.

52 *Id.*

53 Id.

54 Id.

55 Id.

56 Singh, supra note 46.

57 Id.

58 Id.

59 Id.

60 Id.

61 Singh, supra note 46.

62 Id.

63 Id.

64 Bonita de Boer, Criminal, Deliberate and Reckless HIV Transmission, Avert.org, last updated Oct. 2, 2008, <http://www.avert.org/criminal-transmission.htm> (last visited Sept. 17, 2007).

65 Id.; see also *State v. Schmidt*, 699 So.2d 448 (La. 1997).

66 Boer, supra note 64.

67 Id.

68 *State v. Couturier*, No. 99AP-950, 2000 Ohio App. LEXIS 2677, at *11 n.1 (Ohio App. 10th Dist. June 20, 2000).

69 Boer, supra note 64.

70 Id.

71 Id.

72 Id.

73 Id.; see also Michael L. Metzker et al., Molecular evidence of HIV-1 transmission in a criminal case, 99 Proc. Nat'l Acad. Sci. 14292, (Oct. 29, 2002) available at <http://www.pnas.org/content/99/22/14292.full.pdf+html>.

74 Boer, supra note 64.

75 Id.

76 Metzker, et al. supra note 73.

77 Boer, supra note 64.

78 Id. There are three main types of HIV tests. The first is the HIV antibody test. When a virus such as HIV enters the body, the immune system produces special chemicals called antibodies. These antibodies are specific to the causative agent and can be detected within 3-6 months following exposure. When a person shows HIV-specific antibodies in their blood, it is likely that they have been exposed to the virus. An exception would be an HIV+ mother that gives birth to an HIV-child. Since antibodies can pass through the placental barrier in utero, these children can exhibit HIV antibodies that usually disappear from the child's blood in about 6 months. The second type of test is called P24 antigen testing. P24 antigen is a chemical compound that comprises part of the outer coating of the virus. P24 antigen is produced in high levels early in the infection process and can be detected before HIV specific antibodies begin to appear. This test is used both to diagnose early HIV infection and to screen blood supplies. The third type of test is called the viral load test. This test is used when the patient knows that he or she has been infected and it can detect the levels of the virus in the bloodstream. HIV Testing, Avert.org, last updated Sept. 8, 2008, <http://www.avert.org/testing.htm>.

79 Id.

80 Id.

81 Id.

82 Id.

83 Boer, supra note 64.

84 Id.

85 Id.

86 Id.; see also, Alan Stephens, [Transmission or Risk of Transmission of Human Immunodeficiency Virus \(HIV\) or Acquired Immune Deficiency Syndrome \(AIDS\) as a Basis for Prosecution or Sentencing in Criminal or Military Discipline Case](#), 13 A.L.R.5th 628 (1993).

87 Ohio Rev. Code Ann. § 2903.11 (West 2008). Section 2903.11 states:
(A) No person shall knowingly do either of the following:
(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under [Section 2907.02 of the Revised Code](#).

(D) Whoever violates this section is guilty of felonious assault, a felony of the second degree.

Id.

88 Id.

89 No. 99AP-950 2000 Ohio App. LEXIS 2677 (Ohio Ct. App. June 20, 2000).

90 See generally id.

91 Id.

92 Id.

93 [154 Ohio App. 3d 9, 796 N.E.2d 12 \(Ohio Ct. App. 2003\)](#).

94 [Id. at 18-19, 796 N.E.2d at 19-20](#). Gonzalez and his alleged victim dispute whether the victim knew of Gonzalez's infection. Id.

95 [Id. at 20, 796 N.E.2d at 20-21](#).

96 [Id. at 16, 796 N.E.2d at 17](#).

97 [Gonzalez, 154 Ohio App. 3d at 22, 796 N.E.2d at 23](#).

98 [Id. at 23-24, 796 N.E.2d at 17, 24](#).

99 [Id. at 27, 796 N.E.2d at 29](#) (holding that there was sufficient evidence to prove that Gonzalez knew that he was HIV positive without admitting the medical records).

100 [Id. at 32-33, 796 N.E.2d at 36](#).

101 Id.

¹⁰² Gonzalez, 154 Ohio App. 3d at 38, 796 N.E.2d at 43.

¹⁰³ No. 22073, 2004 Ohio App. LEXIS 6653 (Ohio Ct. App. Dec. 22, 2004).

¹⁰⁴ Id. at **1-2.

¹⁰⁵ Id. at **2, 9.

¹⁰⁶ Id. at *13.

¹⁰⁷ 156 Ohio App. 3d 352, 2004-Ohio-962, 805 N.E.2d 594 (2004).

¹⁰⁸ Id. at 357, 2004 Ohio 902 ¶ 20, 805 N.E.2d at 598.

¹⁰⁹ Id.

¹¹⁰ No. 72864, 1998 Ohio App. LEXIS 5404 (Ohio Ct. App. Nov. 12, 1998).

¹¹¹ Id. at *3.

¹¹² Id.

¹¹³ Id. at *4.

¹¹⁴ Reif-Hill, 1998 Ohio App. LEXIS 5404, at *10.

¹¹⁵ 81 Ohio St. 3d 582, 692 N.E.2d 1013 (1998).

¹¹⁶ Id. at 584, 692 N.E.2d at 1015.

¹¹⁷ Id. at 585, 692 N.E.2d at 1016. Justice Pfeiffer, in a separate dissent, argued that Bird's "no contest" plea did not make his saliva a deadly weapon under Ohio law. Justice Pfeiffer continued:
What if the indictment had said Bird assaulted Officer Shirk with a powder puff, a water balloon, or a jelly doughnut, and Bird had pled no contest? The fact that the indictment calls something a deadly weapon does not make it so [...] A person who makes a plea of no contest does not become his own judge.
Id. at 586, 692 N.E.2d at 1017 (Pfeiffer, J., dissenting); see also *State v. Price*, 162 Ohio App. 3d 677, 2005-Ohio-4150, 834 N.E.2d 847 (2005).

¹¹⁸ 162 Ohio App. 3d 677, 2005 Ohio 4150, 834 N.E.2d 847 (2005).

¹¹⁹ Id. at 680, 2005 Ohio 4150, 834 N.E.2d at 849.

¹²⁰ Id. Price had previously infected another police officer with Hepatitis C, although the police officer in the current case has not tested positive for either HIV or Hepatitis C. [Id. at 680-81, 2005 Ohio 4150 ¶ 23, 834 N.E.2d at 850.](#)

¹²¹ No. L-05-1269, 2006 Ohio App. LEXIS 3750 (Ohio Ct. App. July 21, 2006).

¹²² Id. at ¶¶ 20-21.

¹²³ Id. at ¶ 21.

¹²⁴ Id. at ¶ 20.

¹²⁵ Id. at ¶ 18.

¹²⁶ [Ohio Rev. Code Ann. § 2927.13 \(West 2008\)](#). Section 2972.13 states:

Selling or donating contaminated blood.

(A) No person, with knowledge that the person is a carrier of a virus that causes acquired immune deficiency syndrome, shall sell or donate the person's blood, plasma, or a product of the person's blood, if the person knows or should know the blood, plasma, or product of the person's blood is being accepted for the purpose of transfusion to another individual.

(B) Whoever violates this section is guilty of selling or donating contaminated blood, a felony of the fourth degree

Id. Selling or donating contaminated blood was originally enacted in 1989, and amended in 1996 by Senate Bill 2, which amended a large body of the criminal law in Ohio and created a fifth class of felony. See [id.](#) .

¹²⁷ [Ohio Rev. Code Ann. § 2907.24 \(West 2008\)](#) Section 2907.24 states:

Soliciting; after positive HIV test.

(A) No person shall solicit another to engage with such other person in sexual activity for hire.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in conduct in violation of division (A) of this section.

(C) (1) Whoever violates division (A) of this section is guilty of soliciting, a misdemeanor of the third degree. (2) Whoever violates division (B) of this section is guilty of engaging in solicitation after a positive HIV test. If the offender commits the violation prior to July 1, 1996, engaging in solicitation after a positive HIV test is a felony of the second degree. If the offender commits the violation on or after July 1, 1996, engaging in solicitation after a positive HIV test is a felony of the third degree.

Id. Both [R.C. 2907.24](#), Soliciting after Positive HIV Test, and [R.C. 2907.25](#), Prostitution After Positive HIV Test were statutes originally passed in the 1970's to curtail soliciting and prostitution. The General Assembly amended both statutes by House Bill 40 to enhance the penalties from misdemeanors to felonies if the Defendant knows he or she carries the HIV Virus. See [id.](#)

¹²⁸ No. 20030, 2005 Ohio App. LEXIS 1808, (Ohio Ct. App. Apr. 15, 2005).

¹²⁹ Id. at ¶ 1.

¹³⁰ Id.

¹³¹ Id. at ¶ 12.

¹³² No. 19978, 2004 Ohio App. LEXIS 1698, (Ohio Ct. App. Apr. 2, 2004).

133 Id. at ¶¶ 1-2.

134 Id. at ¶ 5.

135 Id.

136 Id. at ¶ 8.

137 [Jones, 2004 Ohio 1698 ¶ 14.](#)

138 Id. at ¶ 16.

139 Id. at ¶ 12.

140 [143 Ohio App. 3d 741, 743, 758 N.E.2d 1198 \(2001\).](#)

141 Id. at 744, 758 N.E.2d at 1200.

142 Id.

143 Id. at 747, 758 N.E.2d at 1202.

144 [Ohio Revised Code Ann. § 2907.25 \(West 2008\). Section 2907.25](#) states:

Prostitution; after positive HIV test.

(A) No person shall engage in sexual activity for hire.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in sexual activity for hire.

(C) (1) Whoever violates division (A) of this section is guilty of prostitution, a misdemeanor of the third degree. (2) Whoever violates division (B) of this section is guilty of engaging in prostitution after a positive HIV test. If the offender commits the violation prior to July 1, 1996, engaging in prostitution after a positive HIV test is a felony of the second degree. If the offender commits the violation on or after July 1, 1996, engaging in prostitution after a positive HIV test is a felony of the third degree.

145 No. 20030, [2005 Ohio App. LEXIS 1808, 2005 Ohio 1913 \(Ohio Ct. App. Apr. 15, 2005\).](#)

146 [Ohio Revised Code Ann. § 2921.38 \(West 2008\). Section 2921.38](#) states:

Harrasment with bodily substance

(C) No person who is confined in a detention facility, with knowledge that the person is a carrier of the virus that causes acquired immunodeficiency syndrome, is a carrier of a hepatitis virus, or is infected with tuberculosis (Only statute to mention virus other than HIV) and with intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner.

(D) Whoever violates this section is guilty of harassment by an inmate. A violation of division (A) of this section is a felony of the fifth degree. A violation of division (B) of this section is a felony of the third degree.

Id. [R.C. 2921.38](#) was enacted in 1997 by House Bill 37. Id. If the offender is infected with HIV or Tuberculosis, the crime is enhanced from a fifth to a third degree felony. See id.

¹⁴⁷ 132 Ohio App. 3d 755, 726 N.E.2d 530 (1999).

¹⁴⁸ Id. at 757, 726 N.E.2d at 531.

¹⁴⁹ Id.

¹⁵⁰ Id. at 758, 726 N.E.2d at 531.

¹⁵¹ Id.

¹⁵² Thompson, 132 Ohio App. 3d at 758, 726 N.E.2d at 531.

¹⁵³ Id. at 758, 726 N.E.2d at 531-32.

¹⁵⁴ Id. at 759, 726 N.E.2d at 532.

¹⁵⁵ See generally Brandon K. Applegate, Francis T. Cullen, & Bonnie Fisher, Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal, 77 Prison Journal 3, 237-258 (1997).

¹⁵⁶ Thomas Shevory, Notorious H.I.V. The Media Spectacle of Nushawn Williams 1 (Univ. of Minn. Press) (2004).

¹⁵⁷ Id. at 1-2.

¹⁵⁸ See Roberts, 156 Ohio App. 3d at 352, 805 N.E.2d at 594.

¹⁵⁹ Chautauqua County District Attorney James Subjak, the Nushawn Williams prosecutor, explained that only two laboratories in the United States could perform the type of phylogenetic analysis necessary to prove that a specific victim infected a particular Defendant. The tests cost \$25,000.00 (in 1999) and the cost of expert and chain of evidence testimony to establish the validity of the test could increase the cost to \$100,000.00. Shevory, supra note 156, at 140-41.

¹⁶⁰ Ohio Rev. Code Ann. § 2903.11(B)(1).

¹⁶¹ Id.

¹⁶² Carol L. Galletly & Steven D. Pinkerton, Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV, Aids Behav 10, 451-61 (2006).

¹⁶³ Id. at 451.

¹⁶⁴ Id.

- ¹⁶⁵ See generally John Gleason, Comment, [Quarantine: An Unreasonable Solution to AIDS Dilemma](#), 55 U. Cin. L. Rev. 217 (1986).
- ¹⁶⁶ See generally Scott Burris, Harlon L. Dalton & Judith Leonie Miller, The Yale AIDS Law Project, *Aids Law Today A new Guide for the Public* 242 (Yale Univ. Press) (1993).
- ¹⁶⁷ Zita Lazzarini, Sarah Bray, & Scott Burris, Evaluating the Impact of Criminal Laws on HIV Risk Behavior, *J.L. Med. & Ethics* 30, 251 (2002).
- ¹⁶⁸ [Gonzalez](#), 154 Ohio App. 3d at 20, 2003-Ohio-4421 ¶ 35, 796 N.E.2d at 21.
- ¹⁶⁹ *Id.* at 21, 2003-Ohio-4421 ¶ 27, 796 N.E.2d at 21.
- ¹⁷⁰ *Id.*, 2003-Ohio-4421 ¶ 27, 796 N.E.2d at 21.
- ¹⁷¹ *Id.*, 2003-Ohio-4421 ¶ 27, 796 N.E.2d at 21.
- ¹⁷² *Id.* at 21-22, 2003-Ohio-4421 ¶ 28, 796 N.E.2d at 21.
- ¹⁷³ [Gonzalez](#), 154 Ohio App. 3d at 22, 2003-Ohio-4421 ¶ 35, 796 N.E.2d at 12, 22.
- ¹⁷⁴ *Id.* at 22, 2003-Ohio-4421 ¶ 35, 796 N.E.2d at 12, 22.
- ¹⁷⁵ *Id.*, 2003-Ohio-4421 ¶ 35, 796 N.E.2d at 12, 22.
- ¹⁷⁶ *Id.* at 34, 2003-Ohio-4421 ¶ 91, 796 N.E.2d at 31.
- ¹⁷⁷ *Id.*, 2003-Ohio-4421 ¶ 95, 796 N.E.2d at 31.
- ¹⁷⁸ [Gonzalez](#), 154 Ohio App. 3d at 35, 2003-Ohio-4421 ¶ 97, 796 N.E.2d at 32.
- ¹⁷⁹ *Id.* at 36, 2003-Ohio-442 ¶ 101 796 N.E.2d at 32. Sero: Of or pertaining to serum. Webster's New World Dictionary 1226 (2d ed. 1994). Serology: The branch of medicine and biology that deals with blood serum. The New Shorter Oxford English Dictionary 2786 (4th ed. 1993). Serostatus refers to whether the patient's blood contains antibodies to the HIV virus. Merriam-Webster Online, Serostatus, <http://medical.merriam-webster.com/medical/serostatus> (last visited Sept. 28, 2008).
- ¹⁸⁰ *Id.* at 36, 2003-Ohio-4421 ¶ 101 796 N.E.2d at 32.
- ¹⁸¹ *Id.* at 31, 2003-Ohio-4421 ¶ 73 796 N.E.2d at 29.

182 That early period when the infected individual can show large numbers of the virus in blood, semen or breast milk even though they show a negative HIV-antibody test. San Francisco AIDS Foundation, HIV Testing, http://www.sfaf.org/aids101/hiv_testing.html (Last visited Sept. 14, 2008).

183 M. Glynn & P. Rhodes, Estimated HIV Prevalence in the United States at the End of 2003 (abstract), National HIV Prevention Conference (June 2005), available at <http://www.aegis.com/conferences/NHIVPC/2005/T1-B1101.pdf>.

184 [Gonzalez, 154 Ohio App. 3d at 19, 2003-Ohio-4421, ¶ 21, 796 N.E.2d at 19.](#)

185 [Galletly & Pinkerton, supra note 162, at 453-54.](#)

186 [Id. at 455.](#)

187 [Cal. Health & Saf. Code § 120291 \(West 2006\)](#) (stating that condom use by the defendant indicates he or she lacked intent to transmit the virus).

188 [N.D. Cent. Code § 12.1 20 17 \(West 2008\)](#) (requiring both disclosure and condom use suggests that the state determines that condoms are not completely effective in preventing HIV infection).

189 [Mo. Rev. Stat. § 191.677 \(West 2008\)](#) (contravening public health measures that stress condom use reduces the chance of transmission).

190 See, e.g., [Ohio Rev. Code Ann. § 2903.11 \(West 2008\)](#).

191 See [§ 2903.11\(B\)\(1\)](#).

192 See [Ohio Rev. Code Ann. § 2903.11\(B\)\(1\)\(West 2008\)](#).

193 Arkansas, for example, provides sentences up to thirty years for non-disclosed exposure. [Ark. Code Ann. §§ 5-4-401\(a\)\(2\), 5-14-123\(d\), \(2008\)](#).

194 [Ohio Rev. Code Ann. §§ 2903.11\(B\), 2929.14\(A\)\(2\) \(West 2008\)](#).

195 [Gonzalez, 154 Ohio App. 3d at 43-44, 2003-Ohio-4421 ¶¶ 139-41, 796 N.E.2d at 38.](#)

196 [Id., 2003-Ohio-4421 ¶ 141, 796 N.E.2d at 38.](#)

197 [Id., at 43, 2003-Ohio-4421 ¶ 141, 796 N.E.2d at 38.](#) Ohio law also provides that if an offender is convicted of: multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court finds any of the following:

- (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing [or was under community control;]
- (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for

any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct[; or]

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

§ 2929.14(E)(4).

¹⁹⁸ Gonzalez, 154 Ohio App. 3d at 41, 2003-Ohio-4421 ¶ 128, 796 N.E.2d at 36-37.

¹⁹⁹ Id. 2003-Ohio-4421 ¶ 128, 796 N.E.2d at 36-37.

²⁰⁰ Id. at 43, 2003-Ohio-4421 ¶ 141, 796 N.E.2d at 38.

²⁰¹ Id. 2003-Ohio-4421 ¶ 141, 796 N.E.2d at 38.

²⁰² Id. at 43-44, 2003-Ohio-4421 ¶ 141, 796 N.E.2d at 38.

²⁰³ Zita Lazzarini, Sarah Bray, & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 *J.L. Med. & Ethics* 239, 239 (2002).

²⁰⁴ Robert Klitzman & Ronald Bayer, *Mortal Secrets: Truth and Lies in the Age of AIDS* 21, 55 (2003).

²⁰⁵ See, e.g., *Ohio Rev. Code Ann.* § 2903.11 (West 2008).

²⁰⁶ Shevory, *supra* note 156, at 136-37.

²⁰⁷ Id. at 137.

²⁰⁸ See *id.* at 145-46.

²⁰⁹ Id. at 145.

²¹⁰ Id.

²¹¹ Shevory, *supra* note 156, at 145-46.

²¹² See Jeffery K. Taubenberger & David M. Morens, 1918 Influenza: the Mother of All Pandemics, 12 *Emerging Infectious Diseases*, (Jan. 2006) available at <http://www.cdc.gov/ncidod/EID/vol12no01/05-0979.htm> (last visited Sept. 28, 2008).

²¹³ See generally Avert, *Worldwide HIV & AIDS Statistics Commentary*, <http://www.avert.org/worlstatinfo.htm> (last visited Sept. 28, 2008).

²¹⁴ See generally *id.*

²¹⁵ See Medical Encyclopedia, Sexually Transmitted Diseases, available at <http://www.answers.com/topic/sexually-transmitted-infection> (last visited on Sept. 28, 2008).

²¹⁶ Ohio Rev. Code Ann. § 2907.24 (West 2008).

²¹⁷ Ohio Rev. Code Ann. § 2927.13 (West 2008).

²¹⁸ Ohio Rev. Code Ann. § 2921.38 (West 2008).