



Criminal Law Bulletin

A WARREN, GORHAM & LAMONT PUBLICATION

SEPTEMBER-OCTOBER 1989

LEGAL RIGHTS OF MENTALLY RETARDED OFFENDERS: HOSPICE AND HABILITATION

Emily Fabrycki Reed

STATE PRISONERS' ACCESS TO FEDERAL HABEAS CORPUS: RESTRICTIONS INCREASE

Richard A. Powers III

THE AIDS VIRUS THROUGH CRIMINAL

IN: CITY OF CANTON V. HARRIS AND THE DIFFERENCE STANDARD

ert

LEGAL ADVOCACY: ADMISSIBILITY OF HEARSAY IN CHILD SEXUAL ABUSE PROSECUTIONS

ham

SUPREME COURT DECISIONS

FEDERAL COURT DECISIONS

STATE COURT DECISIONS

LITERATURE

APPENDIX

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CRIMINAL LAW BULLETIN

Volume 25, Number 5

Contents

- 120091 [411 Legal Rights of Mentally Retarded
Offenders: Hospice and Habilitation
By Emily Fabrycki Reed
- 120092 [444 State Prisoners' Access to Federal
Habeas Corpus: Restrictions Increase
By Richard A. Powers III
- 120593
NCJRS [454 Transmission of the AIDS Virus Through
Criminal Activity
By Mark Blumberg
- NOV 10 1989
120094 [466 Law Enforcement: *City of Canton v.*
Harris and the Deliberate Indifference
Standard
By Geoffrey P. Alpert
- 473 Evidence and Trial Advocacy:
Admissibility of Hearsay Statements in
Child Sexual Abuse Prosecutions
By Michael H. Graham
- 487 United States Supreme Court Decisions
- NCJRS 490 Significant Federal Court Decisions
- OCT 6 1989 494 Selected State Court Decisions
- 499 From the Legal Literature
- ACQUISITIONS 503 Current Bibliography

Criminal Law Bulletin (ISSN 0011-1317) is published 6 times a year, bimonthly, by Warren, Gorham & Lamont, Inc. Offices: *Business*, 210 South Street, Boston, Massachusetts 02111; *Editorial*, Prof. Fred Cohen, 15 Parkwyn Dr., Delmar, N.Y. 12059. Second-class postage paid at Boston, Mass. Subscriptions: \$88.00 a year in the United States, United States possessions, and Canada. \$118.00 a year elsewhere. For subscription information, call 1-800-950-1216; for customer service, call 1-800-950-1202. Copyright © 1989 by Warren, Gorham & Lamont, Inc. All rights reserved. No part of this journal may be reproduced in any form, by microfilm, xerography, or otherwise, or incorporated into any information retrieval system, without the written permission of the copyright owner. *Postmaster*: Send address changes to *Criminal Law Bulletin*, Warren, Gorham & Lamont, Inc., 210 South St., Boston, MA 02111.

September-October 1989

Transmission of the AIDS Virus Through Criminal Activity

By Mark Blumberg*

Fear that criminal activity, such as rape or prostitution, may spread the AIDS virus from high-risk groups to the general population has raised important constitutional issues: Is mandatory AIDS testing of prison inmates constitutional? What about testing of inmates incarcerated for prostitution or sex offenses? Does the victim of a rape have a right to know the antibody status of her assailant?

The answers to these questions will be influenced by the medical evidence of whether AIDS can be easily spread by criminal activity. The author believes that the danger has been exaggerated and demonstrates that AIDS is unlikely to pass into the general population in any of these ways.

The first case of acquired immunodeficiency syndrome (AIDS) in the United States was diagnosed as recently as June 1981.¹ Yet, during the next seven years, more than 84,000 additional cases were reported to the U.S. Public Health Service² and between 1 million and 1.5 million Americans became infected with the human immunodeficiency virus (HIV).³ It is projected that by the year 1991, approximately 270,000 Americans will develop "full blown" AIDS and that 179,000 people will have died from this disease.⁴

As is well-known, HIV is transmitted only through sexual contact, through contact with infected blood, or from an in-

* Professor of Criminal Justice Administration, Central Missouri State University. The author would like to express his appreciation to Douglas Heckathorn, Allen Sapp, and Donald Wallace, who reviewed an earlier draft of this article and contributed valuable comments.

¹ Morgan & Curran, "Acquired Immunodeficiency Syndrome: Current and Future Trends," 101 Pub. Health Rep. 459 (1986).

² Centers for Disease Control, U.S. Pub. Health Serv., AIDS Weekly Surveillance Rep. (Jan. 23, 1989).

³ Centers for Disease Control, U.S. Pub. Health Serv., "Human Immunodeficiency Virus Infection in the United States: A Review of Current Knowledge," 36 Morbidity & Mortality Weekly Rep. 14 (Dec. 18, 1987).

⁴ Morgan & Curran, note 1 *supra*, at 461.

TRANSMISSION OF THE AIDS VIRUS

fectured mother to a newborn child.⁵ There is overwhelming evidence that casual contact with infected persons does not transmit the virus. In the United States, approximately 90 percent of the cases have been reported among two high-risk groups: homosexual/bisexual males and intravenous (IV) drug users.⁶ Despite exaggerated claims to the contrary,⁷ there is little evidence to suggest that the disease is "breaking out" of these high-risk groups into the general population. To date, only 4 percent of the cases have been linked to heterosexual transmission,⁸ and the great majority of these have occurred among the female sex partners of IV drug users.⁹

Because the virus that causes AIDS is primarily transmitted through sexual contact, observers have expressed concern that female prostitutes (many of whom are IV drug users) could become a major source of infection or that rape victims could be at risk for this deadly disease. As a consequence, a number of states have enacted legislation mandating the testing of convicted sex offenders and/or prostitutes.¹⁰ Recently, Congress has made the allocation of certain federal funds contingent upon a requirement that states institute mandatory HIV testing for some inmates, including persons incarcerated for prostitution and sex offenses.¹¹

HIV is transmitted not only through sexual activity, but also as a result of contact with infected blood. In addition, this virus has been isolated in the saliva of some persons who carry HIV. For these reasons, persons working in the criminal justice system have expressed anxiety that they could become infected as a result of a bite or from being spat on. This concern prompted the New York State Office of Court Administration to draft

⁵ Friedland & Klein, "Transmission of the Human Immunodeficiency Virus," 317 *New Eng. J. Med.* 1125, 1135 (1987).

⁶ Centers for Disease Control, note 2 *supra*, at 1.

⁷ W. Masters, V. Johnson & R. Kolodny, *Crisis: Heterosexual Behavior in the Age of AIDS* (1988).

⁸ Centers for Disease Control, note 2 *supra*, at 1.

⁹ Friedland & Klein, note 5 *supra*, at 1129.

¹⁰ Weisenhaus, "The Shaping of AIDS Law," 10 *Nat'l L.J.* 30 (August 1, 1988).

¹¹ "AIDS Grants Require Testing of Inmates Who Might Spread Virus," 19 *Crim. Just. Newsl.* 4 (Nov. 15, 1988).

guidelines that could be used to bar seropositive¹² inmates from the courtroom.¹³ Other jurisdictions have also taken questionable precautionary measures motivated mainly by a fear that infected persons will act in an aggressive manner, thus spreading the virus.

In the pages that follow, the medical risks associated with each of these suggested modes of HIV infection are explored. The discussion begins with an analysis of the danger from AIDS that female rape victims actually confront. This is followed by an examination of the extent to which, if at all, female prostitutes are transmitting HIV to their male customers. In the final section, the following question is posed: What is the likelihood of becoming infected with HIV as a result of being spat on or bitten by a seropositive assailant?

Female Rape Victims

According to the National Crime Survey (NCS), there were 45,640 cases of rape (excluding attempts) in the United States during 1986.¹⁴ To arrive at a definitive determination of the risk of HIV infection for these female victims, answers to two key questions are necessary: (1) What are the risks associated with a single act of forced vaginal intercourse? and (2) What proportion of offenders are infected with HIV? Because tentative data on these questions is now available, it is possible to estimate the number of female rape victims who are likely to seroconvert¹⁵ as a result of criminal activity.

Scientists who study AIDS transmission have devoted a great deal of attention to the risks associated with various sexual practices. In an important study that has received little attention in the media, researchers have calculated that the likelihood of a female seroconverting as a result of a single act of unprotected heterosexual intercourse with an infected male

¹² This term refers to individuals whose blood test indicates that they have been infected with the HIV. Although such persons may not exhibit symptoms of illness, they have the capacity to infect others.

¹³ "Criminal Laws Will Not Play a Big Role on AIDS, Judges Told," 20 *Crim. J. Newsl.* 1 (April 17, 1989).

¹⁴ Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization in the U.S., 1986* (1988).

¹⁵ This term refers to a positive HIV antibody status on the part of a subject who was previously uninfected with the virus.

TRANSMISSION OF THE AIDS VIRUS

to be about 1 in 500.¹⁶ The medical literature¹⁷ also reports that the majority of heterosexual persons who have engaged in vaginal intercourse on a continuing basis with infected partners have not become seropositive. Apparently, the risk of HIV transmission associated with a single act of heterosexual intercourse is quite small. Whether this act is consensual or forced, the risks of seroconversion are similar.

As previously noted, the number of rape victims who can be expected to become infected is a function not only of the risks inherent in a single assault, but also of the proportion of offenders who are seropositive. Unfortunately, data pertaining to the latter is not currently available. However, because some states have begun to require HIV testing for convicted rapists, there should soon be some data on the prevalence of HIV among this group. In the interim, it is possible to estimate the proportion of infected offenders by utilizing other epidemiological data that is currently available.

In 1985, a blood test to detect antibodies to the AIDS virus (HIV) became available. This discovery provided the opportunity to conduct widespread testing of various populations in order to determine their rate of seroprevalence.¹⁸ Hospital patients, blood donors, patients at clinics that treat sexually transmitted diseases (STDs), newborn infants, applicants for the armed forces, and others have all been tested for HIV.¹⁹ The critical question is: Which group is most likely to approximate the rate of HIV infection found among rapists who assault females?

For several reasons, it would appear that the most appropriate epidemiological data for this purpose is the results of HIV tests that have been given to all prospective recruits for the armed forces since October 1985. As previously noted, gay males and IV drug users account for approximately 90 percent of the AIDS cases in the United States. However, it is unlikely

¹⁶ Hearst & Hullett, "Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients the Best Advice?" 259 J. Am. Med. A. 2429 (1988).

¹⁷ Friedland & Klein, note 5 *supra*, at 1125.

¹⁸ The term "seroprevalence" refers to the proportion of individuals in a specific group who are seropositive.

¹⁹ For a summary of the rates of seroprevalence for each of these various groups, see Centers for Disease Control, note 3 *supra*, at 2-9.

that gay males are, to any large extent, participants in sexual assaults directed at females. Intravenous drug addicts are also unlikely to engage in this type of behavior; alcohol is far more likely to be a precipitating factor in the crime of rape than is heroin addiction. Because the military attempts to exclude members of both these high-risk groups from its ranks, the process of self-selection²⁰ probably results in far fewer gay males and IV drug users' being included in this data set than would be the case for an epidemiological survey that examined the entire general population.²¹

The military data is appropriate for other reasons as well. Because applicants for the armed services are largely male, at an age where they are likely to be sexually active, and disproportionately drawn from minority backgrounds, they share some of the same demographic characteristics of apprehended rape offenders²² who are also often young males and, disproportionately, members of minority groups.

The results of tests given to prospective military recruits indicate that 1.5 out of 1,000 (0.15 percent) are infected with HIV.²³ As previously noted, according to the NCS,²⁴ there were 45,640 completed rape victimizations in the United States during 1986. If it is assumed that 0.15 percent of these offenses are committed by offenders who are seropositive²⁵ (the rate found among military recruits), then sixty-eight of these assailants have the capacity to infect their female victims with HIV through forced vaginal intercourse. However, because the risk of infection from a single heterosexual assault is so slight (0.02

²⁰ There is little doubt that some members of these groups still attempt to enlist in the military. This is not problematic for our analysis because it is likely that some rapists have also engaged in bisexual activities or shared needles during intravenous drug use. Unfortunately, there is no data on the proportion of high-risk individuals in either population. By utilizing the armed forces' epidemiological data, we make the assumption, which we hope is plausible, that these proportions are comparable.

²¹ Epidemiological data that examines the rate of HIV seroprevalence among a random sample of persons in the general population is not yet available.

²² The FBI reports that 46 percent of the persons arrested for rape in 1984 were black and that 43 percent were below age 25. See T. Flanagan & E. McGarrell, *Sourcebook of Criminal Justice Statistics* (1986).

²³ See Centers for Disease Control, note 3 *supra*, at 5.

²⁴ See Bureau of Justice Statistics, note 14 *supra*.

²⁵ Clearly, not all these assaults were committed by different offenders. However, this fact has no bearing on the statistical analysis being undertaken.

TRANSMISSION OF THE AIDS VIRUS

percent), we would expect less than one case of HIV transmission per annum in the United States among female rape victims resulting from this type of criminal activity.²⁶

Confidence in this conclusion is buttressed by the fact that almost one decade into the AIDS epidemic, not a single case has come to light in which a female rape victim has become infected as a result of a sexual assault,²⁷ despite the fact that thousands of cases of forcible rape have occurred each year in the United States during this period. Unfortunately, this significant piece of information has received little attention in the emotionally charged environment that has existed since the beginning of the AIDS epidemic.

Much of the controversy surrounding the issues of AIDS as it relates to the crime of rape has focused on the question of whether suspects should be required to undergo mandatory HIV testing in order that the victim may be informed of the results. Little attention has been directed to the question of whether victims really are at risk of contracting HIV. The fact that the actual danger is minimal brings a new argument to bear on this issue of compulsory HIV testing for offenders.

The push to mandate testing of rapists has arisen from a belief that victims have a right to know the antibody status of their assailants. However, it could be argued that the forced testing of sex offenders is an invasion of the offender's right to privacy.²⁸ If the information gathered through this procedure was beneficial to the victim, one might argue that the intrusion is justified. However, these results are not likely to help the victim in any meaningful way. Because the current test does not detect HIV but the presence of antibodies to the virus, newly

²⁶ For female victims of anal sodomy, the risk is likely to be somewhat greater. However, because relatively few victims experience this form of sexual assault and because few offenders are likely to be infected, this should not change the findings appreciably.

²⁷ In telephone conversations with both the National Institute of Justice (NIJ) AIDS Clearinghouse on January 5, 1989, and the Centers for Disease Control (CDC) on January 12, 1989, staff persons indicated that no cases of AIDS among female rape victims had come to their attention. Although neither agency has compiled data that specifically addresses this issue, the spokesperson at CDC noted that the agency had undertaken an analysis of cases in which females with no known risk factor (i.e., no history of IV drug use, no record of receiving a possibly contaminated blood transfusion, and no identifiable sex partner in a high-risk group) had become infected with AIDS. The agency did not find any of these cases attributable to sexual assault.

²⁸ *People v. Thomas*, 139 Misc. 2d 1072 (May 18, 1988). The court rejected a convicted rapist's claim that such testing would violate his Fourth Amendment rights.

infected offenders will generally not test positive until at least six to twelve weeks have elapsed after the date of exposure.²⁹ Therefore, a negative test at this point cannot reassure the victim that the assailant is not a carrier of the virus. A positive test, on the other hand, is likely to unduly alarm the victim: Because HIV has a very low rate of infectiousness, the odds of the victim becoming infected are quite small even if the offender is seropositive. Providing the victim with positive test results will thus do little more than exacerbate the psychological trauma that she is already facing as a result of the attack.

Statutes that mandate HIV testing of convicted rape offenders pose other problems as well for victims of sexual assault. For one thing, many rapists are never apprehended. In those cases in which the perpetrator is taken into custody, a great deal of time may pass before a conviction is obtained. To compensate for this delay, Standard 9-63 of the President's Commission on the Human Immunodeficiency Virus Epidemic has recommended that offenders be tested "at the earliest possible juncture in the criminal justice process."³⁰ In fact, two states (Texas and Colorado) now allow HIV testing to be conducted prior to conviction.³¹ However, because suspects are presumed innocent until proven guilty, mandatory testing prior to conviction raises a number of potential legal and ethical issues.

Given all the problems that surround the mandatory testing of rape offenders, the best policy may be to encourage those victims who seek reassurance to undergo testing themselves. Before this decision is made, the victim should be counseled by medical personnel that the likelihood of HIV infection is negligible and that there are no documented cases in which a rape victim has become seropositive as a result of this experience.

Female Prostitution

Public concern over AIDS has sometimes been directed at infected female prostitutes. Because many female prostitutes

²⁹ Petricciani & Epstein, "The Effects of the AIDS Epidemic on the Safety of the Nation's Blood Supply," 103 Pub. Health Rep. 236 (1988).

³⁰ Burnley, "The Transmission of AIDS Through Sexual Assault: A Deadly Problem in Search of a Policy," 12 Nat'l Organization for Victim Assistance Newsl. 7 (May 1988).

³¹ Hevesi, "AIDS Test for Suspect Splits Experts," N.Y. Times, Oct. 16, 1988, at 30.

TRANSMISSION OF THE AIDS VIRUS

are IV drug users, a substantial proportion have become infected with HIV.³² The question is, How much of a risk are these individuals to the general population? Do prostitutes spread AIDS to their male customers? Would a crackdown on female prostitutes slow the epidemic?³³ Intuitively, one would think that because AIDS is sexually transmitted, prostitutes would play a major role in this epidemic. However, there are many reasons for believing that this is not the case. For one thing, it has already been noted that a single heterosexual encounter with a seropositive partner is highly unlikely to transmit the virus.³⁴ Indeed, only a handful of cases have been reported in the United States of AIDS transmission from females to males.³⁵

Second, a recent study of the behavioral practices of prostitutes³⁶ indicates that oral sex (which is believed to be less risky)³⁷ is the most common activity and that many prostitutes are using condoms. Third, there are a small number of cases reported among military recruits who claimed to have become infected through contact with prostitutes. However, further investigation revealed that many of these individuals had actually engaged in "high risk" behavior (i.e., homosexual activity or IV drug use).³⁸ Given the prohibition that the military places on these activities, this deception is not surprising. Fourth, if prostitutes were transmitting AIDS to their male customers (many of whom are married), there would already be reported cases in

³² HIV antibody testing in Miami revealed that 40 percent of inner-city prostitutes were infected but none among those working for an escort service.

³³ During World War I, more than 30,000 prostitutes were placed in quarantine in institutions supported by the federal government. However, this policy had no impact on the rate of venereal disease, which increased dramatically during the war. See Brandt, "AIDS: From Social History to Social Policy," 14 L., Med. & Health Care 233 (1986).

³⁴ See note 16 *supra* and accompanying text.

³⁵ Epidemiologists disagree on the reasons why female-to-male transmission of HIV has rarely occurred in the United States. Some believe that the virus may not pass easily from women to men. Others argue that such cases are rare because relatively few women are infected with HIV.

³⁶ Friedland, "Prostitutes' Role in AIDS Surveyed," N.Y. Times, April 4, 1987, § 11, at 1.

³⁷ Winkelstein & Ascher, "Minimal Risk of AIDS-Associated Retrovirus Infection by Oral-Genital Contact," 255 J. Am. Med. A. 1703 (1986).

³⁸ Stoneburner, Chaisson, Solomon & Rosenthal, "Risk Factors in Military Recruits Positive for HIV Antibody," 315 New Engl. J. Med. 1355 (1986).

which the female partners of these men and/or their newborn infants had become infected. This has not occurred. The overwhelming majority of cases involving heterosexual transmission to females has occurred among the sex partners of IV drug users.³⁹ Likewise, the great majority of infected infants have been born to mothers who are IV drug users or the regular sex partners of IV drug users.⁴⁰ Finally, despite the thousands of AIDS cases in the United States, not a single one has been definitively traced to prostitution.⁴¹

Ironically, it is not a crackdown on, but the legalization of, prostitution that may offer the best hope of ensuring that female prostitutes do not transmit AIDS to their male customers. Although it is not likely to occur given the current political climate in the United States, legalization would make it possible for states to screen prostitutes at regular intervals to ensure that they do not use intravenous drugs and that they are free of HIV. The state of Nevada utilizes this approach, and to date, not a single prostitute has become infected.⁴²

Spitting and Biting

One of the earliest cases in which criminal charges were filed against a person infected with HIV involved a suspect who was charged with attempted murder in Flint, Michigan, for spitting at two police officers.⁴³ These charges were later dropped because there is no medical evidence to suggest that AIDS can be transmitted in this manner. To date, not a single case has been reported in which this has occurred.⁴⁴

Although HIV has been isolated in the saliva of some infected persons, there is strong evidence for believing that transmission of the virus through spitting is highly improbable.

³⁹ D. DesJariais, *AIDS and Intravenous Drug Use* 3 (1988).

⁴⁰ Moss, "AIDS and Intravenous Drug Use: The Real Heterosexual Epidemic," 294 *Brit. Med. J.* 389 (1987).

⁴¹ Dalton, Burris & Yale AIDS Law Project, *AIDS and the Law: A Guide for the Public* 83-84 (1987).

⁴² Friedland, note 36 *supra*, § 11, at 1.

⁴³ *People v. Richards*, No. 86-36743-FH (Flint, Mich. 1986).

⁴⁴ T. M. Hammett, *Precautionary Measures and Protective Equipment: Developing a Reasonable Response* 2 (1988).

TRANSMISSION OF THE AIDS VIRUS

For one thing, laboratory tests have revealed that HIV is present in the saliva of very few infected persons,⁴⁵ and when the virus is present, it is in such minute quantity that transmission to another person would be quite difficult. It has been estimated that one quart of saliva would have to enter the bloodstream of an individual for infection to occur.⁴⁶ Second, HIV does not pass through intact skin. Unless a seropositive individual spat directly upon an open sore, transmission would not occur even if the virus were present in sufficient quantity (which it is not) in saliva. Finally, studies of individuals living in households where persons with AIDS reside report no instances of viral transmission except through sexual contact or needle sharing. This is in spite of the fact that many of these family members shared plates, silverware, toothbrushes, and other items likely to have become contaminated with saliva from the infected individual.⁴⁷

It is unlikely that we will witness any future AIDS-related prosecutions for this offense because spitting at another does not pose any real danger.⁴⁸ In fact, *The Wall Street Journal* has reported a case in which a seropositive individual spat in the face of a San Francisco police officer.⁴⁹ Because the officer knew that HIV is not transmitted through saliva, he only tightened his grip on the suspect's arm. "I never really thought about catching anything," the officer stated.⁵⁰

Many of the AIDS-related criminal charges filed against persons with AIDS and seropositive individuals involve assaults through biting. In Rochester, Minnesota, an infected federal inmate was convicted by a jury of assault with a deadly weapon after biting two prison guards.⁵¹ The conviction was upheld on

⁴⁵ Ho, Byington & Schooley, "Infrequency of Isolation of HTLV-III Virus from Saliva in AIDS," 313 *New Eng. J. Med.* 1606 (1985).

⁴⁶ T. M. Hammett, *AIDS in Correctional Facilities: Issues and Options* 16 (1988).

⁴⁷ Friedland, "Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis," 314 *New Engl. J. Med.* 344, 349 (1986).

⁴⁸ Of course, the assailant may be charged with simple assault for the act of spitting on another.

⁴⁹ Robichaux, "Safety vs. Civil Rights: Police Procedure for Suspects With AIDS Stirs Controversy," *Wall St. J.*, Sept. 18, 1987, at 31.

⁵⁰ *Id.*

⁵¹ "Deadly Weapon in AIDS Verdict Is Inmate's Teeth," *N.Y. Times*, June 25, 1987, at 18, col. 6.

appeal even though there was no evidence that the victims had become infected.⁵² Similar charges have been filed in other cases which allege that the suspect attempted to spread HIV through a bite.⁵³

Because HIV cannot be transmitted unless the virus enters the bloodstream, it might appear that a bite poses a serious risk of infection. The evidence to date, however, suggests that this is not so. No cases have been documented in which a victim seroconverted as a result of a bite.⁵⁴ Recently, a study reported the findings from blood tests given to thirty health care workers who had been bitten by a single AIDS patient. None of these individuals were infected with HIV.⁵⁵ This outcome is not surprising, since it is the assailant who generally comes in contact with blood through a bite and not the victim.⁵⁶

Unlike cases that involve spitting, criminal prosecution of infected persons who bite others is likely to continue. For one thing, a bite could transmit other diseases (e.g., tetanus). Second, it is still too early to completely rule out the possibility that HIV could be transmitted in this manner, especially if the assailant was bleeding from the mouth. Studies of health care workers indicate that a very small proportion (less than one percent) of those individuals who received accidental needle-stick wounds with instruments that were contaminated with the blood of seropositive patients actually seroconverted.⁵⁷ The same may be true with respect to human bites. Finally, despite the minimal risks associated with a bite, victims of such assailants are likely to experience intense fear that they have contracted a life-threatening ailment. Medical personnel should reassure them that this danger is actually quite remote.

⁵² *United States v. Moore*, 669 F. Supp. 289 (D. Minn. 1987), *aff'd*, 846 F.2d 1163 (8th Cir. 1988).

⁵³ Boorstin, "Criminal and Civil Litigation on Spread of AIDS Appears," N.Y. Times, June 19, 1987, at A16.

⁵⁴ Hammett, note 44 *supra*, at 2.

⁵⁵ See Hammett, note 46 *supra*, at 16.

⁵⁶ The victim would only be exposed to blood if the assailant was bleeding from the mouth.

⁵⁷ See Friedland & Klein, note 5 *supra*, at 1125.

Conclusion

It is clear that much of the apprehension surrounding the potential for transmission of HIV to innocent parties through criminal activity is unwarranted. The AIDS epidemic has been with us for almost a decade. Yet, there are no documented cases in which this virus has been transmitted through an assault—whether it be a bite, a spitting incident, or a case of rape. Despite the thousands of cases of sexual assault that occur each year in the United States, there is not a single report to date of a female becoming infected as a result of being attacked by an assailant.⁵⁸ In addition, there is little evidence to suggest that the virus is being transmitted by female prostitutes to their customers. As previously noted, further investigation of claims made by military personnel with respect to alleged infection through contact with prostitutes has shown most of these to be false. Because the likelihood of contracting HIV in a single heterosexual encounter is so slim, infected prostitutes probably present a much greater danger to persons with whom they may share needles than to their customers.

It is unfortunate that the media have not done more to inform the public of these important facts regarding HIV transmission. For the most part, these findings have remained buried in scientific journals that are read by few individuals outside the medical profession. Ignorance of this information, however, has provided the basis for much of the misguided public policy that currently exists in this area. Politicians believe they must be perceived as doing something about the AIDS epidemic. Therefore, some states have enacted legislation requiring all convicted sex offenders and/or prostitutes to be tested for HIV. Some judges have ordered seropositive defendants to wear gloves in the courtroom. In other jurisdictions, correctional facilities continue to place infected inmates in segregation. As long as there is not better understanding of the ways in which HIV is and is not actually being transmitted, these politically expedient measures will appear to the public as an adequate response on the part of policy makers to the challenges posed by the AIDS epidemic.

⁵⁸ Of course, this fact does not in any way mitigate the seriousness of this offense.