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Make it a Crime to Spread Aids; Counseling Isn't Enough for Reckless or Deliberate Infectors

By DOUGLAS J. BESHAROV

"I HAVE AIDS," Kenny Grice told his friend Lorenzo Owens, three tragic words heard all too often these days. Owens was not sympathetic, though. The two men had just had sex. As Grice dressed, Owens got a knife from the kitchen and slit his lover's throat. Owens subsequently pled guilty to manslaughter.

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

Although most studies document a tremendous reduction in risky sexual behavior by homosexual men, most also show that knowledge of positive test results does not affect the sexual behavior of a small core of AIDS victims -- they do not reduce the number of their sex partners or the number of times that they engage in unprotected anal intercourse.

In a Johns Hopkins study of 1,000 gay men, two years after being tested for AIDS, more than 15 percent still did not want to know the result. (Initially, more than 30 percent had not wanted to know.) In a Miami study, 16 of 28 AIDS patients continued to have unprotected sex for one to three years; 13 of their steady partners later tested positive. Studies in London and Paris show similarly disturbing behavior.

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

Some might say that people assume the risk of contracting AIDS when they have unprotected sex with members of high risk groups, such as gays and drug users. But consider this: In a recent study conducted by Adelphi University researchers, 80 percent of the wives of bisexual men did

not know of their husband's homosexual activity. This is a dangerous lack of information. In a study of 45 married couples with one spouse carrying the disease and the other having no other known risk factor, 26 spouses became infected.

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

Educating and counseling AIDS carriers should certainly be the first and most important steps in trying to prevent such dangerous behavior. But it is denying reality to suppose that they will be enough. Cases like those described above call out for criminal prosecution.

Picturing AIDS victims as emaciated and near death, many will say that criminal prosecution would be heartless -- and useless. But most people who test positive are still healthy and may lead normal lives for years. For them, the prospect of criminal prosecution would not be an empty threat.

The San Antonio health department last year sent letters to 14 AIDS victims warning that further sexual activity would lead to felony charges under the state's Communicable Disease Prevention and Treatment Act. Unlike Texas, however, most states do not have laws that adequately cover the deliberate or reckless exposure of others to AIDS. Although many states have laws making the transmission of communicable diseases a crime, most of these laws are limited to specified diseases, such as syphilis, gonorrhea and even tuberculosis, but not AIDS.

Even when state penal laws do cover all communicable diseases, including AIDS, they usually require an actual "transmission" of the disease. Rarely can this be proven in AIDS cases. Despite some early concern about a high rate of false positive results, the test is now considered very reliable, at least in regard to high risk groups. A more serious legal problem is that the AIDS test only determines the presence of AIDS antibodies, that is, it only shows that someone has AIDS or AIDS-related complex (ARC). Nor are medical experts sure how many of those who test positive can spread the disease or how many will actually come down with the disease. (Most estimates range from 20 to 50 percent, but some go as high as 100 percent; no one really knows.)

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

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

Possible transmission through sexual contact requires special legislation because of the problem of consent. Many courts hold that, by engaging in sexual conduct, a person assumes the risk of becoming infected. But this need not be. As mentioned above, many states have long had statutes that make transmitting venereal diseases a crime. And, over the years, there have been numerous convictions for the intentional transmission of a communicable disease through sexual contact.

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

In any event, it is not necessary to go this far. Adequate protection for sexual partners can be achieved by simply making it a felony not to tell a sex partner about a positive AIDS test. Who could object to that?

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

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