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Griffin C. Kenyon
Pace University School of Law, gkenyon@law.pace.edu

A Dangerous Situation – The Knowing Transmission of HIV in an Out-of-Body Form and Whether New York Should Criminally Punish Those Who Commit Such an Act

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I. Introduction

In June 2013 the New York State Court of Appeals ("Court of Appeals") held that the saliva of a defendant afflicted with the Human Immunodeficiency Virus ("HIV") does not constitute a dangerous instrument so as to support a conviction for aggravated assault.[1] Despite this holding, the question remains whether the administration of HIV in an out-of-body form to another individual qualifies for dangerous instrument treatment so as to subject greater criminal liability under the New York State Penal Law ("Penal Law").[2] Another question remains – should New York punish those who knowingly transmit HIV to another individual? If so, should the punishment be charged through the Penal Law or through other state legislation? If this legislation does not exist, what should New York consider when drafting legislation?

Part I of this article provides an overview of HIV and how it can be transmitted to an individual. Part II analyzes the Penal Law's current provisions on dangerous instruments and penalties imposed by these provisions. Part III discusses New

* J.D. candidate 2015, Pace University School of Law; B.A. 2010, Hamilton College. I would like to thank my family and friends, and those who I've worked with throughout my undergraduate, law school, and work experiences.

1. *See generally* People v. Plunkett, 971 N.E.2d 363 (N.Y. 2012).

2. *See generally* John M. Castellano, People v. Plunkett: *HIV-Infected Saliva Not a Dangerous Instrument*, 2013 EMERGING ISSUES 6946 (2013).

York case law on dangerous instruments. Part IV evaluates whether administering HIV in an out-of-body form qualifies for dangerous instrument treatment under the Penal Law and New York case law standards. Part V provides an overview of relevant case law on the question of whether a hypodermic needle constitutes a deadly weapon rather than a dangerous instrument. Part VI discusses statutory punishment of defendants who knowingly transmit HIV to another individual. Part VII analyzes factors that New York should consider when drafting specific criminal law provisions that target the knowing transmission of HIV. Part VIII is a brief conclusion of the article.

II. HIV and Transmission of the Virus to an Individual

HIV stands for Human Immunodeficiency Virus. According to AIDS.gov, HIV weakens the human immune system "by destroying important cells that fight disease and infection."[3] Specifically, HIV targets T-cells or CD4 cells, those cells that fight infections and diseases.[4] Over time, HIV destroys these cells so that the human body cannot fight off infections and diseases, and when the human body cannot continue to fight these infections and diseases, the HIV infection can lead to Acquired Immunodeficiency Syndrome ("AIDS"), the final stage of the HIV infection where the human immune system is so badly damaged that it is at risk for opportunistic infections ("OIs").[5]

HIV is found in certain human body fluids. High levels of HIV are found in blood, semen, pre-seminal fluid, breast milk, vaginal fluids, and rectal mucous.[6] According to AIDS.gov, "other body fluids and waste products – like feces, nasal fluid, saliva, sweat, tears, urine, or vomit – don't contain enough HIV

3. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., *What is HIV/AIDS?*, AIDS.GOV, http://aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/ (last revised Apr. 29, 2014).

4. *See id.*

5. *See id.*

6. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., *How Do You Get HIV or AIDS?*, AIDS.GOV, http://aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/ (last revised June 16, 2014).

to infect you, unless they have blood mixed in them and [a person has] significant and direct contact with them."[7]

HIV is transmitted through body fluids during sexual contact, pregnancy, childbirth, breastfeeding, as a result of injection drug use, occupational exposure, or as the result of a blood transfusion with infected blood or an organ transplant from an infected donor.[8] With regard to injection drug use, AIDS.gov explains that "[i]njecting drugs puts you in contact with blood – your own and others, if you share needles . . . . Needles or drugs that are contaminated with HIV-infected blood can deliver the virus directly into your body."[9]

AIDS.gov reports "more than 1.1 million people in the United States are living with HIV infection, and almost 1 in 6 (15.8%) are unaware of their infection."[10]

III. Dangerous Instrument and the Penal Law

The Penal Law defines "dangerous instrument" as "any instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury."[11]

In considering the meaning of dangerous and instrument individually, *Black's Law Dictionary* defines "dangerous" as "likely to cause serious bodily harm" and "instrument" as "a means by which something is achieved, performed, or furthered."[12] With regard to the definitions of article and

7. *See id.*

8. *See id. See also HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/basics/transmission.html (last updated Jan. 16, 2015).

9. *Id.*

10. U.S. DEP'T OF HEALTH & HUMAN SERVS., *HIV in the United States: At a Glance*, AIDS.GOV, http://aids.gov/hiv-aids-basics/hiv-aids-101/statistics/ (last revised June 6, 2012) (referencing statistics gathered by the United States Centers for Disease Control and Prevention, specifically 18 CDC 5 (Oct. 2013)) ("Monitoring selected national HIV prevention and care objectives by using HIV surveillance data – United States and 6 U.S. dependent areas – 2011; HIV Surveillance Supplemental Report 2013).

11. N.Y. PENAL LAW § 10.00(13) (McKinney 2013).

12. BLACK'S LAW DICTIONARY 176, 363 (3d pocket ed. 2006).

substance, *Black's* defines "article" as "a particular item or thing" and "substance" as "any matter, especially an addictive drug."[13]

It is important to recognize that a dangerous instrument is one which is "readily capable of causing death or serious physical injury."[14] The Penal Law defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss of impairment of the function of any bodily organ."[15] Less than serious physical injury is physical injury, for which the criminal statute defines as "impairment of physical condition or substantial pain."[16] In order for criminal liability under the criminal statute involving the use of a dangerous weapon, the instrument must be used, attempted to be used, or threatened to be used against another and be readily capable of causing death or serious physical injury. An instrument will not be considered dangerous per se if it is used, attempted to be used, or threatened to be used against another and is capable of only causing physical injury.

Criminal liability for use of a dangerous instrument is most commonly observed in criminal assault cases. According to the Penal Law, a person is guilty of assault in the first degree when "with intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument."[17] If charging the defendant with first degree assault cannot be satisfied, he or she may be charged with assault in the second degree, where criminal liability lies when "with intent to cause serious physical injury to another person, he causes such injury to such person or to a third person;" or "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or

13. *Id.* at 45, 685.
14. N.Y. PENAL LAW § 10.00(13).
15. *Id.* § 10.00(10).
16. *Id.* § 10.00(9).
17. *Id.* § 120.10(1) (assault in the first degree in New York is a class B felony).

dangerous instrument."[18] Where the defendant does not act with an intent to cause serious physical injury, he may still be criminally liable for second degree assault where "he recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument."[19] Additionally, he is criminally liable for second degree assault where "for a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment of injury to another person . . . without his consent . . . by administering . . . a drug, substance . . . capable of producing the same."[20] Where the defendant cannot be held criminally liable for first or second degree assault, he may be charged with third degree assault. According to the Penal Law, the defendant is guilty of assault in the third degree when "with intent to cause physical injury to another person, he causes such injury to such person or to a third person," or "he recklessly causes physical injury to another person," or "with criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument."[21] It is important to note that from first degree assault to third degree assault, use of a dangerous instrument goes from use with an intent to cause death or serious physical injury, to reckless use that causes death or serious physical injury, to criminally negligent use that causes death or serious physical injury, respectively.[22]

According to Alan D. Marrus, "use of dangerous [instruments] significantly elevates the level of . . . an assault prosecution."[23] A dangerous instrument may elevate a misdemeanor assault case to a felony assault, because an act committed with an intent to cause physical injury is transformed to an act committed with the same intent yet the greater

18. *Id.* § 120.05(1)-(2) (assault in the second degree is a class D felony).

19. *Id.* § 120.05(3).

20. *Id.* § 120.05(4).

21. *Id.* § 120.00(1)-(3) (assault in the third degree is a class A misdemeanor).

22. *See* N.Y. PENAL LAW § 120.10(1). *See also* N.Y. PENAL LAW §§ 120.05(1)-(2), 120.00(1)-(3).

23. Alan D. Marrus, *Demonstrating That Defendant Did Not Use of Possess Dangerous Instrument*, in 1-NY CLS DESK ED. GILBERT'S CRIMINAL PRACTICE, ANNUAL DIVISION 2 (2015).

possibility of death or serious physical injury as the result of use of a dangerous instrument.[24] Because "the definition of a dangerous instrument turns not on the inherent nature of an item, *but on the manner in which it is used, attempted, or threatened to be used*, almost any item can be a dangerous instrument."[25] Therefore, according to Marrus, "any innocuous item can be a dangerous instrument within the Penal Law definition of dangerous instrument."[26]

Another potential criminal charge involving a dangerous instrument involves aggravated assault upon a police officer or a peace officer. This section of the Penal Law charges a defendant when "with intent to cause serious physical injury to a person whom he knows or reasonably should know to be a police officer or a peace officer engaged in the course of performing his official duties, he causes such injury by means of a deadly weapon or dangerous instrument."[27] Many New York cases dealing with dangerous instruments and assaults often involve police or peace officers.

IV. Dangerous Instrument in New York Case Law

With regard to New York case law interpretations of dangerous instrument, according to the Court of Appeals in *People v. Carter*,[28] Penal Law Section 10.00(13) "makes no attempt to give an absolute definition of the term or to provide a list of items which can be considered dangerous instruments."[29] Instead, "the statute states plainly that 'any instrument, article, or substance,' no matter how innocuous it may appear to be when used for its legitimate purpose, *becomes* a dangerous instrument when it is *used* in a manner which renders it readily capable of causing serious physical injury."[30] The court further explained that "the object itself need not be inherently

24. *Id.*

25. *Id.* (emphasis added). For a list of potential dangerous instruments, see *infra* note 34 and accompanying text.

26. *Id.*

27. N.Y. PENAL LAW § 120.11.

28. People v. Carter, 423 N.E.2d 30 (N.Y. 1981).

29. *Id.* at 31.

30. *Id.*

dangerous. It is the temporary use rather than the inherent vice of the objects which brings it within the purview of the statute."[31] In *People v. Rodriguez*,[32] the New York State Appellate Division, First Department ("First Department") stated "[u]nder New York law, a 'dangerous instrument' is not merely one which *appears* to be dangerous but one which, in fact, is readily capable of causing death or serious physical injury."[33] Because an instrument may be deemed dangerous because of its ready capability for causing death or serious injury, those instruments that are not designed as a weapon, such as a handkerchief, may in situations of temporary use fit the statutory definition of a dangerous instrument.[34] The First Department explained in *People v. Cwikla*, "[b]ecause the essence of 'dangerous instrument' is the manner in which the item is used . . . even ordinary items are included within its scope whenever they are 'readily capable of causing death or other serious physical injury.'"[35]

Other New York decisions have considered whether a person's body part qualifies as a dangerous instrument under the Penal Law. In *People v. Owusu*,[36] the Court of Appeals examined the plain meaning of dangerous instrument and reasoned that such an article "is a device which is capable of

31. *Id.*

32. People v. Rodriguez, 530 N.Y.S.2d 1 (App. Div. 1st Dep't 1988).

33. *Id.* at 2 (internal quotation marks omitted).

34. *See* People v. Cwikla, 400 N.Y.S.2d 35, 37 (App. Div. 1st Dep't 1977). For other instruments that may satisfy the statutory definition of dangerous instrument, see also People v. Galvin, 481 N.E.2d 565 (N.Y. 1985) (sidewalk considered a dangerous instrument where the victim's injuries resulted from the pounding of his head on the pavement); People v. Carter, 423 N.E.2d 30 (N.Y. 1981) (rubber boots on defendant's feet were considered a dangerous instrument when used to stomp upon the head and face of the victim, who had fallen to the ground, causing the victim's head to hit the pavement with tremendous force); People v. Ozarowski, 344 N.E.2d 370 (N.Y. 1976) (baseball bat was a dangerous instrument when used to strike the victim in the head and thereby fracture the victim's skull); People v. Greene, 899 N.Y.S.2d 401, 402 (App. Div. 3d Dep't 2010) ("red-hot" barbecue fork a dangerous instrument as used against victim, where defendant held fork against side of victim's head while victim was restrained, causing victim serious burns to his face, neck, and ear).

35. *Id.*

36. People v. Owusu, 712 N.E.2d 1228 (N.Y. 1999).

causing harm as defined by the statute."[37] In this case, the defendant was charged with assault in the first degree for causing serious physical injury with a dangerous instrument, two counts of assault in the second degree for intentionally causing serious physical injury and intentionally causing physical injury with a dangerous instrument, and two counts of assault in the third degree for intentionally causing physical injury and causing injury with a dangerous instrument through criminal negligence.[38] The charges stemmed from an incident where the defendant "forced his way into his estranged wife's apartment and became embroiled in a fight with another man," for which during the fight, the "defendant bit the victim's finger so severely that nerves were severed."[39] When considering whether a person's body part was a device capable of causing harm, as defined by the statute, the court declined to hold that "a [person's] hands, teeth, and other body parts are . . . in common parlance, instruments."[40] The court came to this conclusion because it reasoned that neither the state legislature nor New York courts had classified hands, teeth, or other body parts as weapons or instruments.[41] Regarding the state legislature, the court stated that with regard to the recodification of the Penal Law, "[t]he State Commission Revision of the Penal Law and Criminal Code noted that the proposed 'dangerous instrument' provision was meant to 'include assaults committed with knives, crowbars, etc., as well as those committed with firearms, blackjacks, metal knuckles," and other enumerated devices.[42] Furthermore, the court concluded that there was "no indication that the purpose [of the revision committee] was to expand the definition of dangerous instrument, as it was understood, to include the human body itself."[43]

37. *Id.* at 1230.

38. *Id.* at 1229.

39. *Id.*

40. *Id.* at 1230.

41. *Id.*

42. *Id. See also* COMMISSION STAFF COMMENTS ON CHANGES IN THE NEW PENAL LAW SINCE THE 1964 STUDY BILL, MCKINNEY'S REVISED PENAL LAW SPECIAL PAMPHLET at 272, *reprinted in* 1969 GILBERT CRIMINAL LAW AND PRACTICE, at 1D-15 (1969).

43. *Owusu*, 712 N.E.2d at 1230.

The *Owusu* decision was reaffirmed by *People v. Plunkett*,[44] where the Court of Appeals held that an individual's body part, even if used in a dangerous matter so as to produce injury, is not a dangerous instrument within the meaning Penal Law Section 10.00(13). In addition, *Plunkett* extended the *Owusu* holding to apply to the saliva of an HIV-positive defendant. In *Plunkett*, the defendant was convicted of aggravated assault upon a police officer or a peace officer, for which an element of the statutory provision is the defendant's use of a deadly weapon or dangerous instrument.[45] In the fact pattern, the defendant bit a police officer on the finger as the officer tried to arrest him.[46] At the time of the incident, the defendant was HIV positive.[47] The court in *Plunkett*, discussing *Owusu*, adopted the notion that "a part of one's body is not encompassed by the terms [instrument,] article, or substance as used in the statute."[48] According to the court, in order to avoid a "sliding scale of criminal liability," New York jurisprudence recognized that it had to "[draw] the line at a reasonable interpretation of the term 'instrument.'"[49] With this in mind, the court reasoned that because saliva "came with" the defendant, it would not be considered a dangerous instrument.[50] The court in effect decided against using saliva for "penal enhancement."[51] As a result, in finding that an individual's saliva could not be considered a dangerous instrument necessary to support a conviction for aggravated assault on a police officer, the Court extended its opinion to include the saliva of an HIV-positive defendant.[52]

V. Whether HIV in an Out-of-Body Form Constitutes a Dangerous Instrument

While the saliva of an HIV-positive defendant may not be

44. People v. Plunkett, 971 N.E.2d 363 (N.Y. 2012).
45. *Id.* at 364. *See* N.Y. PENAL LAW § 120.11.
46. *Plunkett*, 971 N.E.2d at 364.
47. *Id.*
48. *Id.* at 368; *Owusu*, 712 N.E.2d at 1230.
49. *Plunkett*, 971 N.E.2d at 368.
50. *Id.*
51. *Id.*
52. *Id.*

considered a dangerous instrument when it "comes with" the defendant's body, the question remains whether HIV in an out-of-body form can be considered a dangerous instrument when administered by a defendant to another.

As stated in Part I, a common method of transmitting HIV is through injection drug use. Such injection is usually performed with a needle or syringe. Although HIV transmission through injection is most commonly observed through drug use, it is still possible for HIV transmission to occur where intended drug use is not the base act of transmission. Situations arise where it is possible for HIV to be transmitted to another individual through a defendant's criminal use, attempted use, or threatened use of a needle or syringe.

The above situation was observed in *People v. Nelson*,[53] where the court held that a hypodermic needle could constitute a dangerous instrument depending on how the needle is used. In *Nelson*, the defendant appeared before the complaining witness, produced a hypodermic needle, claimed it contained the AIDs virus, and pressed it against the complainant.[54] The defendant threatened to jab the complainant with the needle if she did not open a cash register.[55] After the complainant opened the register, the defendant took cash and ran out of the store.[56] The jury found the defendant criminally liable. Evidence supported the jury's conclusion that a hypodermic needle, when used in the manner the defendant had used it, was readily capable of causing serious physical injury, and as a result, the hypodermic needle would constitute a dangerous instrument as defined by Penal Law Section 10.00(13).[57] With regard to the claim that the hypodermic needle contained the AIDs virus, "the prosecution was not required to prove the existence of the AIDs virus since the indictment charged only that the defendant possessed a dangerous weapon."[58]

With regard to the *Nelson* holding, in the situation where a defendant uses, attempts to use or threatens to use a

53. People v. Nelson, 627 N.Y.S.2d 412 (App. Div. 2d Dep't 1995).
54. *Id.* at 412-13.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 413.

hypodermic needle or syringe containing HIV in an out-of-body form to inflict serious physical injury upon another, the fact that the hypodermic needle or syringe *contains* HIV in an out-of-body form may not even matter when charging the defendant. The prosecutor may simply argue under *Nelson* that because that decision held that a hypodermic needle may constitute a dangerous instrument under the Penal Law depending on its use, and since the defendant used, attempted to use or threatened to use the hypodermic needle against an individual, this in itself would subject the defendant to harsher penalties under the Penal Law because of the potential serious physical injury to be sustained by the victim by the hypodermic needle. This outcome would occur even though the hypodermic needle contained HIV in a non-saliva, out-of-body, readily transmittable form, a form which could potentially allow for the transmission of HIV to the victim through injection.

In addition to the above analysis, the administering of HIV in an out-of-body form by means of a hypodermic needle or syringe may satisfy dangerous instrument requirements and circumvent the holding established by *Plunkett* because in the case of an HIV-positive defendant, HIV would not be delivered from the defendant's body to the victim by a part of the defendant's body. In essence, in the situation where the defendant is not HIV-positive, it cannot be said that the administering of HIV through use, attempted use or threatened use of a hypodermic needle or syringe constitutes a transmission of HIV from the defendant's body, because it may be separate and not directly sourced from the defendant's own affliction, so as to hold that it does not "come with" the defendant because he is not infected. The argument may also be proffered that even if a defendant seeks to administer HIV through use, attempted use or threatened use of a hypodermic needle or syringe, where the out-of-body form of HIV is directly sourced from the defendant himself, this out-of-body form may not constitute "coming with" the defendant's body in a sense that it is not administered directly from the defendant's body but from a hypodermic needle or syringe. Thus, it would be understood that the hypodermic needle or syringe is neither a part of the defendant's own body nor "comes with" the defendant's body, but rather is a separate instrument distinct from the defendant's body.

The *Plunkett* holding is also circumvented by the fact that it only holds that the saliva of an HIV-positive defendant is not a dangerous instrument under the Penal Law. The decision does not consider whether HIV in other forms, including other out-of-body forms, may be considered dangerous instruments.

VI. Hypodermic Needle Considered a Deadly Weapon?

Elsewhere in case law analysis, certain cases have held that a hypodermic needle containing HIV constitutes a *deadly weapon* under other statutory provisions. In *State v. Ainis*,[59] the Superior Court of New Jersey, Law Division, Camden County held that a hypodermic needle as used by the defendant was a dangerous weapon. On June 19, 1997, the defendant entered a convenience store and approached a clerk while holding a hypodermic needle in his hand.[60] The defendant stated to the clerk, "Give me all the money unless you want to get AIDS," and defendant threatened to kill the clerk, for which the clerk gave money in the register to the defendant.[61] The defendant was apprehended, charged, and pled guilty to charges of robbery, among other charges.[62] In considering whether the hypodermic needle constituted a deadly weapon under the No Early Release Act,[63] which mandates that "persons who are sentenced to prison terms for committing crimes of the first and second degree involving violence be required to serve at least 85 percent of the term of incarceration imposed by the court before being eligible for parole,"[64] the court determined that the hypodermic needle as used in the case "must absolutely be considered a deadly weapon."[65] The court stated, "to conclude from [the] circumstances that the needle was not a deadly weapon *would defy common sense and fly in the face of rational thinking*."[66] The court continued, "[i]t is generally known that AIDS is a deadly

59. State v. Ainis, 721 A.2d 329 (N.J. Super. Ct. Law Div. 1998).
60. *Id.* at 330.
61. *Id.*
62. *Id.*
63. N.J. STAT. ANN. § 43-7.2 (West 2013).
64. *Ainis*, 721 A.2d at 330-31.
65. *Id.* at 332.
66. *Id.* (emphasis added).

disease, it is obvious that the defendant intended to create the impression that he had a deadly weapon and was willing to use it, and the clerk had every reason to believe that she was being threatened with death or serious bodily injury."[67] The court in reaching its decision also considered the *Nelson* decision. It also analyzed a Californian court interpretation of what constitutes a deadly weapon, specifically the case of *People v. Autry*.[68] The court in *Ainis* quoted the *Autry* court, which reasoned, "a contaminated hypodermic needle is one of the more deadly objects one can imagine outside of firearms . . . a single nick or scratch [from a contaminated needle] may prove fatal."[69] With this reasoning, the *Ainis* court concluded that "the hypodermic needle purportedly infected with the AIDS virus is a deadly weapon."[70] Although this conclusion would persuasively support a prosecution in New York, it must be recognized that the *Ainis* holding pertains to deadly weapon and not dangerous instrument.

Although generally recognized as a more serious instrument, a deadly weapon requires a different standard than a dangerous instrument. Creative prosecutions would need to argue that if a hypodermic needle can be considered a deadly weapon in certain jurisdictions, such a classification is more serious than labeling a hypodermic needle a dangerous instrument. In a sense, the fact that a hypodermic needle may be considered a deadly weapon almost per se recognizes that it could also be considered the "lesser included" dangerous instrument that is often statutorily defined along with deadly weapon.

VII. Statutory Punishment for Knowing Transmission of HIV

The Penal Law does not expressly provide a criminal statute provision that specifically punishes the knowing transmission of HIV; however, a person infected with an STD which can cause death, such as HIV, and who commits sex crimes or has

67. *Id.*
68. People v. Autry, 283 Cal. Rptr. 417 (Ct. App. 1991).
69. *See Ainis*, 721 A.2d at 333; *Autry*, 283 Cal. Rptr. at 417.
70. *Ainis*, 721 A.2d at 334.

unprotected sex without telling his or her partner of the infection may be guilty of reckless endangerment.[71] In general, New York deals with HIV-related prosecutions, but does not have an HIV-specific statute.[72] Elsewhere in New York statutory law, the Public Health Law provides that someone who knowingly is infected with an "infectious venereal disease" who has sexual intercourse with another is guilty of a misdemeanor; however, there is no indication in New York statutes that HIV is considered a venereal disease.[73] It must also be considered that the above statute proscribes a person infected with an "infectious venereal disease" from having sexual intercourse with another, rather than knowing transmission of HIV through a dangerous instrument. In general, it is understood that New York law allows for the prosecution of HIV-positive defendants under general criminal laws in lieu of specific and defined HIV exposure criminal statutory provisions.

Other jurisdictions have enacted statutory provisions, which impose criminal liability upon defendants who knowingly transmit HIV to another. To be precise, over thirty states have HIV-specific laws, which criminalize actions taken by people living with HIV.[74] States that have an HIV-specific statute and

71. N.Y. PENAL LAW § 120.25 ("a person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person"). Reckless endangerment in the first degree is a Class D felony. For case law on reckless endangerment and HIV, see People v. Williams, 974 N.Y.S.2d 742 (App. Div. 4th Dep't 2013) ("evidence before grand jury was legally insufficient to find defendant's conduct of not informing sexual partner of his HIV positive status presented grave risk of death to victim, and therefore warranted reducing charges of reckless endangerment in the first degree to reckless endangerment in the second degree").

72. *When Sex Is a Crime and Spit Is a Dangerous Weapon: A Snapshot of HIV Criminalization in the United States*, CTR. FOR HIV L. & POL'Y, *available at* http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Snapshot%20of%20HIV%20Criminalization.pdf (last visited April 8, 2014) [hereinafter *When Sex Is a Crime*].

73. N.Y. PUB. HEALTH LAW § 2307 (McKinney 2013). For a list of sexually transmissible diseases as defined in New York, see N.Y. COMP. CODES R. & REGS. tit. 10, § 23.1 (1953) (grouping sexually transmissible diseases into Group A, B, C, and D).

74. For a list of these states, see *Criminal Statutes on HIV transmission,* KAISER FAMILY FOUND., http://www.statehealthfacts.org/comparetable.jsp/ind=5698cat=11 (last visited February 20, 2014).

have had at least one prosecution involving an HIV-positive defendant in the past two years include Alabama, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, and West Virginia.[75] States which have an HIV-specific statute with no recent reported prosecutions include Alaska, Montana, and Nebraska.[76] Similar to New York, states that deal with HIV-related prosecutions but do not have an HIV-specific statute include Delaware, Massachusetts, New Hampshire, Oregon, Texas, and Vermont.[77] States that have had five or more HIV-positive defendants prosecuted include Florida, Michigan, Missouri, Ohio, South Carolina, Tennessee, and Texas.[78]

A state-by-state analysis showcases that various states statutorily punish HIV-positive defendants who transmit HIV with a variety of punishments.

A defendant is criminally liable for the offense of knowingly exposing another to HIV in Arkansas if he knows that he has tested positive for HIV and exposes it to another through the transfer of blood or other blood products without having first informed the other person.[79]

Georgia sanctions an HIV-positive defendant who "knowingly allows another person to use a hypodermic needle, syringe, or both . . . and the needle or syringe so used had been previously used by the HIV-infected person . . . ."[80] In addition, the code provides that "any person [afflicted] with HIV who assaults a police officer or correctional officer with intent to infect such an officer shall be sentenced to at least five years in prison if convicted."[81]

75. *When Sex is a Crime*, *supra* note 72.
76. *Id.*
77. *Id.*
78. *Id.*
79. ARK. CODE ANN. § 5-14-123 (1989).
80. GA. CODE ANN. § 16-5-60(c)(2) (2003).
81. *Id.* § 16-5-60(d)(1)-(2). *See generally* Burk v. State, 478 S.E.2d 416 (Ga. Ct. App. 1996) (HIV positive defendant convicted of misdemeanor reckless endangerment for attempting to bite a police officer).

In Idaho, "one who exposes another with intent to infect, or transfers, or attempts to transfer bodily fluid, knowing that he or she is HIV afflicted, is guilty of a felony," for which consent and medical advice are affirmative defenses available to the charged defendant.[82] Meanwhile, in Indiana, a defendant who "recklessly, knowingly, or intentionally . . . transfers blood or a blood component containing antibodies for HIV" is charged with committing a felony.[83]

Iowa punishes the criminal transmission of HIV, specifically where a defendant, "knowing that his or her HIV status is positive . . . engages in intimate contact . . . with another person; transfers, donates, or provides blood, semen, tissue, organs, or other potentially infectious bodily fluids for transfusion, transplantation, insemination or other administration to another person."[84] The statute does not require actual infection with HIV to have occurred in the victim for the defendant to have committed criminal transmission of HIV; however, "an affirmative defense that the person exposed to the HIV knew that the infected person was HIV-positive at the time of the exposure, [or] knew that the action of exposure could result in transmission, and consented to the action of exposure with that knowledge."[85]

It is a class A misdemeanor in Kansas for a defendant, aware of his own HIV infection, to "share with another individual a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance, or for the withdrawal of blood or body fluids from, the individual's body with the intent to expose another person to a life threatening communicable disease."[86]

In Louisiana, "intentional exposure of another to the AIDS virus . . . through any means of contact . . . without knowing and lawful consent, is a crime of violence with enhanced penalties where the potential victim is a police officer."[87]

82. IDAHO CODE ANN. § 39-608 (1988).
83. IND. CODE ANN. § 16-41-12-15 (West 2014).
84. IOWA CODE § 709C.1 (2013).
85. *Id.*
86. KAN. STAT. ANN. § 21-5424 (2011).
87. LA. REV. STAT. ANN. § 14:43.5 (1987). *See* Meany v. Meany, 639 So. 2d 229, 235 (La. 1994) (violation requires a showing that the infected person knew

A defendant in Maryland who has HIV and knowingly transfers or attempts to transfer HIV to another individual is guilty of a misdemeanor.[88] In Montana, statutory provisions are broader, for "a person infected with *an STD* who knowingly exposes another person to infection is guilty of a misdemeanor."[89]

Likewise, in Missouri it is unlawful "for any individual knowingly infected with HIV to . . . act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV through . . . the sharing of needles, or by biting another person."[90]

Nevada law makes it "a felony for a person who has tested HIV positive to knowingly or willfully act in a manner intended or likely to transmit the disease to another."[91] A defendant charged with a felony under this statute does have an affirmative defense, one that "the exposed person knew the defendant was HIV positive and that the conduct could result in exposure and knowingly consented to such conduct."[92]

North Dakota makes it a Class A felony for "an HIV-infected person to knowingly transfer . . . blood . . . by shared hypodermic needle use."[93] An affirmative defense to a violation by sexual contact is that the activity occurred between consenting adults after full disclosure of risk and with the use of a prophylactic devise.[94]

The Oklahoma criminal code makes it a felony for "any person with HIV or AIDS who engages in conduct reasonably likely to result in the transfer of the person's blood, bodily fluids[95] containing visible blood . . . into the bloodstream of another, or through the skin or other membranes of another person . . . if the person with HIV and AIDS engages in such conduct with intent to infect another person and the other

or should have known he was infected).

88. MD. CODE ANN., HEALTH-GEN. § 18-339 (West 2002). *See* North v. North, 648 A.2d 1025, 1038 (Md. Ct. Spec. App. 1994) (Cathell, J., dissenting).

89. MONT. CODE ANN. §§ 50-18-112, 50-18-113 (1995).

90. MO. REV. STAT. § 191.677 (2002).

91. NEV. REV. STAT. § 201.205 (1995).

92. *Id.*

93. N.D. CENT. CODE § 12.1-20-17 (1989).

94. *Id.*

95. As defined by OKLA. STAT. tit. 63, § 1-502.3 (1992).

person did not give informed consent to the transfer."[96]

Similar to Georgian and North Dakotan criminal code provisions, South Carolina makes it a felony for a person afflicted with HIV "to knowingly . . . share a hypodermic needle, syringe, or both with another person without first informing that person that the needle, syringe, or both has been used by someone infected with HIV."[97]

Exposure of another to HIV is a criminal offense in Tennessee. "A person commits the offense when the person is infected with HIV and knowingly engages in the . . . transfer of blood . . . or another potentially infectious bodily fluids for . . . administration to another in any manner."[98] This criminal exposure of another to HIV is a Class C felony.[99]

Lastly, the state of Washington holds a defendant guilty of assault in the first degree when he or she, "with intent to inflict great bodily harm, administers, exposes, transmits to, or causes to be taken by another the HIV virus."[100]

VIII. Should New York Enact Legislation Specifically Criminalizing the Knowing Transmission of HIV?

According to the Center for HIV Law and Policy:

> From the beginning of the HIV epidemic, fear and ignorance about HIV's routes and relative risks of transmission have fueled a backlash against people living with HIV, most evident in the laws that punish them for engaging in consensual sex or activities that pose no risk of HIV transmission. The media coverage that accompanies these cases often demonizes people with HIV and misrepresents the risk of transmission, helping to perpetuate stigma that results in denial of jobs and services and decreased willingness to get

96. OKLA. STAT. tit. 21, § 1192.1 (1999).
97. S.C. CODE ANN. § 44-29-145 (1990).
98. TENN. CODE. ANN. § 39-13-109 (2011).
99. *Id.*
100. WASH. REV. CODE ANN. § 9A.36.011 (West 1997).

> tested. Because there is no evidence that HIV-specific criminal laws and prosecutions have any effect on behavior, the argument that these laws serve a deterrent effect is unfounded. Punishing people for behavior that is either consensual or poses no risk of HIV transmission only serves to further stigmatize already marginalized communities while missing opportunities for prevention education.[101]

The Center for HIV Law and Policy also argues that HIV criminalization laws have a negative impact:

> 1. There is no evidence that criminalization laws deter risky behavior.
> 2. Studies have found no differences in risky sexual behavior between residents living in a state with a specific disclosure law compared to residents living in a state without such a law.
> 3. Even when people are aware that an HIV-specific law exists in a particular state, they usually do not understand how the law functions (e.g., types of sexual behavior/activity requiring disclosure, penalty for non-disclosure, etc.).
> 4. Criminalization sends the inaccurate message that attempting to avoid sexual partners with HIV is an adequate prevention strategy.
> 5. HIV criminalization laws weaken the message that sexual health is the

101. *Criminal Law*, CTR. FOR HIV L. & POL'Y, http://www.hivlawandpolicy.org/issues/criminal-law (last visited Feb. 17, 2015). The Center for HIV Law and Policy "is a national legal and policy resource and strategy center working to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV." *About the Center for HIV Law and Policy*, CTR. FOR HIV LAW & POL'Y, http://www.hivlawandpolicy.org/about (last visited May 21, 2015).

responsibility of both partners during sex and increase stigma by strengthening the culture of blame surrounding infection.

6. Treatment reduces transmission risk through all routes to near-zero.
7. HIV Criminalization is based on and reinforces grossly inaccurate perceptions of the actual routes and relative risks of HIV transmission.[102]

According to the Presidential Advisory Council on HIV/AIDS, "clearly the use of HIV-specific criminal laws, of felony laws such as attempted murder and aggravated assault, and of sentence enhancements to prosecute HIV-positive individuals are based on outdated and erroneous believes about the routes, risks, and consequences of HIV transmission."[103] Furthermore, "legal standards applied in HIV criminalization cases regarding intent, harm, and proportionality deviate from generally accepted criminal law principles and reflect stigma toward HIV and HIV-positive individuals."[104]

The above are considerations that the New York State Legislature must take when determining whether to create legislation that specifically criminalizes the knowing transmission of HIV. In enacting a new statute that criminalizes knowing transmission of HIV, legislators must weigh deterring HIV positive persons from knowingly transmitting HIV with the stigmatization that comes from prosecuting an individual afflicted with HIV. Legislators must also be aware of the great advances in medical technology that have made treatment of HIV more efficient and effective.

102. *When Sex Is a Crime*, *supra* note 72.

103. Presidential Advisory Council on HIV/AIDS (PACHA), *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments*, AIDS.GOV, at 1, http://aids.gov/federal-resources/pacha/meetings/2013/feb-2013-criminalization-resolution.pdf (accessed on Feb, 20, 2014)

104. *Id.*

IX. Conclusion

The knowing transmission of HIV in an out-of-body form through the use, attempted use or threatened use of a hypodermic needle or syringe satisfies the definition of "dangerous instrument" as described in the Penal Law and New York case law. The fact that the hypodermic needle or syringe even contains HIV may not be a determining factor with regard to dangerous instrument, because the hypodermic needle or syringe *itself* may constitute a dangerous instrument without need for considering the out-of-body form of HIV. With regard to HIV criminalization in New York and whether the state legislature should adopt HIV criminalization statutes that would proscribe the knowing transmission of HIV in an out-of-body form through a hypodermic needle or syringe, stigmatization and other problems warrant that New York would be better suited to continuing prosecution of HIV-positive defendants under the Penal Law, which in itself allows for charging a defendant regardless of his or her HIV affliction.