



INDIANA UNIVERSITY

DEPARTMENT OF CRIMINAL JUSTICE
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March 3, 1995

U.S. Sentencing Commission
1 Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

RE: criminalization of HIV transmission

To whom it may concern:

I am a social anthropologist who does ethnographic research on AIDS. More specifically, I am in preliminary stages of a research project on the criminalization of intentional HIV transmission. This letter is in response to the U.S. Sentencing Commission's request for public comment published in the Federal Register, January 9, 1995. I am an assistant professor in the Department of Criminal Justice at Indiana University, however, the opinions expressed herein reflect only my own views.

I believe that it is important for states be able to fairly and effectively prosecute cases of intentional, malicious HIV transmission between individuals and to be able to prosecute organizations such as blood banks for negligence leading to HIV infection of clients. I also believe that it would be advantageous to achieve greater consistency in the way in which such cases are now being handled in the courts. However, given the current state of scientific understanding of the biology and epidemiology of HIV transmission, and the current state of social scientific understanding of the impact of education and counseling on sexual desire, denial, and test-seeking behavior, *I believe it would be a mistake to enact federal laws that make HIV transmission a crime or HIV a "dangerous weapon" or that the definition of "serious bodily injury" or that "permanent and life-threatening bodily injury" should be amended to include HIV-infected bodily fluid.*

The following is an example of how our biological and epidemiological knowledge is insufficient to provide a strong foundation for legal decision-making:

If enacted, the types of laws under consideration would have to place great weight on the significance of the HIV antibody test in determining whether or not someone "knowingly" infected another sexually. As has been known for some time, there is a long latency period (six months or more) between onset of infection and antibody production, so that someone may receive a negative test and yet still be infected. In a study of over 9,000 individuals, researchers from the University of Michigan have found that "a person's chances of getting HIV through unprotected sex was as high as 3 in 10 if a male partner had been infected in the past 60 days. Afterward, once the presence of antibodies makes it possible to detect HIV infection in routine HIV tests, the risk of infection declines to about 3 in 1,000 and stays that way in

an asymptomatic phase which can last for years." In other words, said Carl Simon, a professor of economics and public policy at the university, "*A person with a negative blood test may have a better chance of being highly contagious than a person with a positive test,*" (*AIDS Policy and Law* 1995, v. 10, n. 1, p. 5). The implications of this are staggering in terms of epidemic spread. It points to a much deeper problem than the potential negative impact of proposed laws on the willingness of persons to be HIV tested, challenging the very use of the HIV antibody test as a primary basis for legal intervention in the epidemic, i.e., *if* the goal of criminalizing HIV transmission is to stem the spread of the epidemic, rather than simply punitive.

The following is an example of how our social scientific knowledge is insufficient to provide a strong foundation for legal decision-making:

There has been little research on the question of disclosing HIV status to sex and needle-sharing partners and/or business clients (e.g. prostitutes, blood banks). From what is known so far, it seems that it is not uncommon to disguise a positive HIV status from people with whom one is not intimate in a steady, long-term relationship. There has been little research done evaluating the various forms of counseling that take place when a person receives the news of a positive HIV serostatus. What has been done, seems to suggest that denial mechanisms are quite strong in the initial phases of someone "knowing" of their infection. These denial mechanisms seem to be natural defense mechanisms which may be little affected by initial counseling and education sessions, and would be very difficult to separate from the question of "intent" in the courts. Without evaluation of current counseling techniques, and without an understanding of denial mechanisms (on the individual and corporate level), it is unwise to institute laws and enforcement mechanisms that target HIV positive persons. Such laws and enforcement mechanisms could set the stage for widespread discriminatory, and indeed persecutory, actions against classes of HIV positive persons who are more easily apprehended (gay men, prostitutes, injecting drug users). Beyond the unfairness of this, such legal mechanisms would also provide a dangerously false impression that the epidemic is being controlled, when indeed, the truth is quite the opposite.

Thank you for your attention. Please let me know if I can be of any further service,

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Kane". The signature is written in dark ink and is positioned above the printed name.

Stephanie Kane, Ph.D.