

Use of the rule of law to take the measure of HIV/aids

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Abstract

The author describes his role in the case of the State of Illinois vs. Timothy Lunsford, the first case to attack the constitutionality of discriminatory HIV criminal statutes appealed to the Illinois and United States Supreme Courts. Legal pleadings are provided in the appendix while the preceding narrative focuses on the problems inherent in a legal system based upon precedent and influenced by political forces and popular elections.

I. Law Like A River.

Law is the aquifer through which human experience is distilled into the elixir intended to cure the problems from which it came. The problem of HIV / AIDS and society's responses through its attempts to control what it considers ill advised behaviors by the imposition of criminal sanctions reveals it to be an imperfect methodology. We often confuse the Law with higher pursuits of academic science. That is not surprising considering the degree of certainty most lawyers and judges convey in their opinions and arguments. That's part of the show, of course, but like good theater, the audience is supposed to believe it as well as believe in it. Backstage, and in chambers, less pretense of divine guidance is evidenced or tolerated.

There are exceptions of course, depending on the cast and the play. An old joke begins with the rhetorical question, "Do you know the difference between God and a federal judge?" followed by the answer "God doesn't think he's a federal judge." The applicability of the remark varies. The federal judge I clerked for was so realistic about his own place and importance in the constellation of juris prudence that he refused to publish his opinions on grounds that they were precedent to no one, and, therefore, only his own vanity would justify killing trees to put them on paper. He was a rare exception, as I came to learn after leaving his service. (1)

A good many jurists take themselves and their elevated position in the courtroom, a bit too seriously. I mean no disrespect by that remark. Respect for the law is required of all of us; (2) respect for a particular judge, however, may be more difficult. They presume too much, beginning with our collective ignorance. My observance of their disregard for or misuse of the many mechanisms of the law to suit their own ends is not awe inspiring, unless it is spelled "ahhhh". Judging is a human undertaking, after all, and humans are prone to error. We try to minimize them, we set out procedures to correct them, but they happen, and some of them endure.

Likewise, practitioners of the law at other levels make errors. Both prosecutor and defense counsel, private practitioner and public servant. We try to avoid them, but the grind and pace and caseload of most attorneys makes them inevitable. Not every day can be your best day and regardless of the system of checks and rechecks that are instituted, over time errors will occur. Few would ever deliberately be wrong and fewer still would intentionally do wrong, but it happens; and it's part of the greater organism that is the living body of the law. Such is the law and I know it, but I would not be so bold as to say, "I know the law".

Not even the highest jurist or the most knowledgeable and respected practitioner would be so foolish as to say they "know" the law. (3) No one knows the law as one knows the DNA of a blood sample, or the number of hydrogen molecules in water. The law is not finite and fixed. I often aid my students in summoning the courage to approach dealing with the law by using the analogy that it is like a river.

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Someone may know where the river is, having been there to see it, may have swum in it, fished in it, bathed in it and perhaps retrieved things from it here and there. It is also possible to fall in and drown after being dragged down by it.

Those who have done so know something of it if they do these things and may speak of it with the familiarity of their experiences as a traveler would who has been to London or Paris, once or twice. In fairness, they may know more of it than the people they are speaking to about it, but their understanding of its depths and contents tomorrow are as much a mystery to them as they are to us today.

If they realized this, and set out to study a particular river so they might know it better and took a slice out of it, say a foot wide, from top to bottom, and carefully analyzed each and every aspect of it, they would then know so much more of it than before as to realize they didn't really know much of it at all. Further, if they put the slice back in, and restored its motion and somehow tracked each part of it they had considered statically, it would yield such a wealth of further evidence of the true nature of that part as repeat the revelation that they had again been mistaken about the truth of it.

Each little stream within the river moves and eddies at its own speed, in reaction to its companions, passengers, and the terrain over which it flows. Whether it is near the surface or the bottom, whether what's ahead is drawing it closer or resisting its approach, all the while carrying along all the debris unfortunate enough to be destined to travel along with it for a while. It cannot be stopped, only diverted or dammed (4). Lives of litigants, innocent and guilty, are dashed upon the rocks and swept away with the bang of a gavel and lamented only by the bailiff's call for the next case and the whispered assurances of the lawyers that they will look into an appeal. The overall impression an outsider has is that no one cares what happens to them. You may as well seek sympathy with the flood that carries you away as to look for it in the halls of justice.

Watching the law work is fascinating, in a way, like sitting by a river and watching it flow down to the sea. Beneath and within the river, like in the law, are a myriad of seemingly fixed and impervious bedrock formations, with swift currents of erosive change running over and through the forward flood of it all in such a confusing torrent as to all seem unknowable, unpredictable, and unusable. Of course, the Army Corps of Engineers could fix it, and man does manage river flow--sort of. But New Orleans after Katrina is a fair example of how well we can control nature when she wants to boogey. The most recent American legal equivalent would be the reversal suffered by gay marriage advocates who saw their movement as having a quality of inevitable justice only to come upon the obstacle of the 1994 national elections won by the Republicans who thought to ask the electorate whether they agreed. (5) Who knew that would happen?

That is the problem of the law. It claims to promote certainty in human interactions, but few who have just completed their initial encounter with it would agree. Mostly you hear them say that they did not know in advance that the law was this or that, or would do this or that to them. It is more of a problem in common law jurisdictions, like the one in which I practiced, but it is a universal problem in some respects to all legal issues everywhere. (6) It is also the weak argument why you should have to have a lawyer to get justice.

II. The Role Of Precedent In Legal Proceedings

In legalese the problem is known as "precedent"--that odd phenomenon that makes lawyers and judges think that just because something was done in another place and another time under similar

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circumstances, they should consider doing it here and now regardless of what justice might call for otherwise. In days past it was an aspect the craft of legal research and a source of some pride that an advocate would be so thorough in his search for precedent as to find the most recent and most similar case to which the court might direct its attention. (7) A case "on all fours" with the one under consideration would, at the very least, require the judge to explain or distinguish his ruling from the one cited. One could hope that the judge might even follow its holdings, but that degree of certainty is never afforded.

Today computer databases have diminished both the task of searching for precedent and the prestige that comes from doing it. Anyone with keyboard skill and the right words for a proximity search can find a case in common with the issue in question. In common law jurisdictions, it lessens the chances that you will be ambushed in court by a case you had never heard of before, but without an understanding of the weight each case should and will be given by the court in its considerations, it amounts to playing chess as just checkers that move in funny ways.

Some courts make precedent by being the first to take up a particular issue, but depending on where they are situated in the pecking order of higher and lower courts, it matters more or less. It matters most if the Supreme Court of the land does it, and the best of all possible worlds for a legal practitioner would be to get there first, with an issue previously undecided, and be on the fundamentally right side of the question so that you might play a small role in helping them issue a landmark decision. Public defense lawyers have few such opportunities during their careers. I had one.

III. Appointment As Counsel

I was working as a public defender in a small county in central Illinois when the case of Timothy Lunsford first came to my attention. (8) The office was made up of several independently functioning criminal defense attorneys who met infrequently, usually over lunch, on days when the court calls of our respective assignments brought some of us together. (9) Our leader and overseer, Mr. Lonnie Lutz, was a dedicated career public servant while most of the rest of us had ambitions of greater things and were giving time from our private practice for reasons known only to ourselves. We had little in common but poor pay and universal, but polite, condescension from both the bench and the local bar association. I often heard new clients assigned to my docket ask the Judge if they couldn't have a "real lawyer" instead.

I had volunteered to serve in the Juvenile Justice Division of the Circuit Court, pretending to have some understanding of teenagers as a result of my years in the classroom. (10) The position came with the additional responsibilities of providing representation to mental health commitment respondents. Occasionally, I also was assigned criminal felony matters in which a conflict of interest had arisen disqualifying one of the other attorneys in the group, usually a case of multiple defendants that required independent counsel for each individual. In private practice I was also referred death penalty matters in part because of my opposition to its use in Illinois.

Mr. Lunsford's name came up at lunch one day while Mr. Lutz and I were having the daily "special" at the only restaurant that would still allow him to smoke. Rick from the title company had joined us as usual and the talk was mostly about the frustration we all felt as fans of Chicago sports franchises. As we discussed the morning's call, the conversation shifted to the HIV/AIDS status of Mr. Lunsford and the charge of criminal transmission of HIV pursuant to a statute as yet untested in the courts. (11) It was brought up as a way of distinguishing one case from another as a matter of shop talk among co-workers. Short hand case descriptions often tagged our clients in discussions with one another as a way of getting

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past a recitation of the facts to just the meat of what was up for discussion. "The Axe murderer," the "clown guy," the "drama queen," were all labels used to distinguish one client from another. Names were not used usually, as they did not matter so much as the legal questions involved and our constant preparation of scouting reports on the moods of particular prosecutors, judges, and newly found caselaw that would be helpful. We were all defense lawyers, but we did not work together on cases or reveal any confidential information; that was always carefully observed. What we did do, was share our discoveries about useful things we may have discovered separately. (12)

Mr. Lutz asked if I would be interested in handling the "HIV" matter, as my application for employment with his office made reference to my research assistance in preparation for the publication of a casebook on the topic. (13) He did not have a conflict, per se, but thought that I might have a head start on the legal issues presented and he was not invested in the case one way or another at that point. He suggested I meet the client to see if we would be comfortable with each other. Totally absent in the initial conversation with my colleagues, and in all that followed, were any bigoted, prejudiced, or homophobic comments. Unknown to most, and uncredited by many, is the truth that there exists within the mechanisms of criminal justice wherever it is administered, dedicated selfless individuals who do what they do simply because they think it is right, whether it seems important or significant to anyone else or not. It was my privilege to serve with such a group here. (14)

Mr. Lunsford was out on bond, and I went to his home after calling on the telephone to announce my purpose. He was a young white man in his 20's, with thick black hair, somewhat of a moustache, and a pleasant appearance. We went out on the porch of his family's small home where we could speak privately. I took notes during our initial interview as I would with any new client. I told him who I was and what my qualifications were and said that I would represent him if he had no objections. He had none and we went about our business without further discussion. I treated it as I would any other matter, making no distinction about him having been diagnosed with AIDS. It was merely a label and it impacted some of the legal issues involved, but not all of them. My interest in it was purely technical.

My assessment of Mr. Lunsford, personally, was that he seemed a great deal cleaner than most of my appointed clientele, a little more articulate, and far less cocky. He was not pretending to be Marlon Brando or James Dean or any other rebel without a cause. His approach was that he had made a mistake without knowing it at the time and wished more than anything that there was some way to undo it. There wasn't, but it need not be made all the worse for no purpose by discriminatory criminalization. His biggest concern was whether he should take the newly available medication to prolong his life in the face of circulating information that they might prevent the cure he was sure to shortly follow. I gave him no advice about that, but did recommend he ask his physician and that he take care of himself.

I explained the criminal charges to him and the possible penalties. He told me his story, to which I listened carefully, not as a normal person, but as a lawyer. Those engaged in the practice of law only coincidentally use the same words as non-combatants. Our language may sound the same and look the same on paper, but the meanings of things singly and in context is so different as to make the languages distinct. I hear things in preparation for admission into evidence, and do not attach the emotional weight a speaker often may feel when saying them to me. It is not that I am callous: on the contrary, I was often rightly accused of caring too much about my clients. It is that to be emotionally allied with the accused may lessen my effectiveness as their advocate, and what they need most is not a friend, but a fighter--a champion, in the medieval view, who will fight for their freedom before the court. I need not love them to be loyal, or even like them for that matter. It simply is not an issue.

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IV. Planning A Defense That Included HIV/Aids Issues

I am pragmatic in planning a defense, as any good lawyer must be. It is not just that I want to zealously represent my client in the present, I must also carefully protect all issues for future consideration and appeal that may not be seen initially. A certain amount of discipline is required to avoid jumping ahead to what seems to be the better foothold. My new client had been in jail, was not well received, and did not want to go back.

My first task was to fashion a weapon to cut through his bonds and keep him out of the hostile environment in the process. In this case, he was bound by an alleged violation of the Illinois Statute condemning the intentional transmission of HIV. The attack was to be on all fronts, beginning with the law itself that was used to hold him. While I planned and prepared, I also sent out diplomatic overtures and set up a meeting with the prosecutor (15) to attempt to negotiate a plea. Later would come the search for flaws in the arrest and investigation; procedural mistakes by the prosecutor; the facts as revealed through witnesses and forensic testimony and finally, ultimately, a trial, if things went that far. They usually did not. The majority of criminal matters are resolved without trials, partly for the sake of conservation of resources, partly due to the nature of human beings about to forfeit their freedom and wanting to minimize, and thereby exert some degree of control over, the damage. (16)

When HIV / AIDS first came to public attention there was a great deal of misinformation disseminated about it. To wit: It had been brought here by an Air Canada steward after visiting Africa and doing things not discussed in polite company; it had then spread to the bath houses of San Francisco and beyond to IV drug users who shared needles, and was now just a plague upon the worst of our society. Depending upon the teller of the tale it was either God's punishment for wickedness or something "people like that" deserved in some way or other. Added to this body of fabrication was the widely circulated urban legend of the young man who had an intimate encounter with a pretty young lady who left his apartment before he awakened the next morning. He was hit hard by reality when he discovered in the bathroom "Welcome to the world of AIDS" on his mirror in lipstick. If any of this was true, even the smallest part of it, the public was horrified at the prospect of being contaminated and desperate to be protected. All logic and clear thinking seemed to have been swept away by the fact that AIDS had no cure and there was no vaccination to prevent contracting the HIV virus.

I am old enough to have been alive during our country's bout with polio and had schoolmates return from summer vacations with their legs horribly twisted and deformed, clamped in heavy metal braces. Science found a cure, but before it did, a similar kind of paranoia swept the country, closing swimming pools and skating rinks and causing movie theaters to pass out surgical masks to its patrons. A great deal of that was part of the public reaction to a sinister problem of unknown dimensions. So has been its reaction to HIV/AIDS.

I was in law school when the moral retribution nonsense began and had been fortunate enough to land a position as a research assistant for my first year contracts instructor, Professor Michael Closen. It helped a tiny bit in the expense of a legal education and it gave me an office in the library from which to work. HIV/AIDS had not been my work for him initially, that had been keeping current of developments in contract law by constantly reading all the opinions published in all jurisdictions that had to do with contract issues for his annual revision of his chapter on contracts for the Illinois Institute of Continuing Legal Education series of practice guides.

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The opinions I reviewed were the reports of appellate court's decisions of cases that had been appealed from lower courts, the lowest of which, in Illinois, would be the Circuit Court where opinions are not published. A great many appellate court opinions in Illinois are not published either if they are not precedential or have some other merit that makes them worthy of the expense. Many times more cases are heard and decided than the public ever hears about. They are not kept from them, actually, but they are not "reported" in the sense that they do not go into the mix that makes up the ebb and flow of legal precedent cited by other courts as rightly decided and worthy of deference. If a case makes it to a published memorandum opinion, it can be cited by other practitioners as influential, or even binding precedent, depending on where they are in the order of things. Different judges are different about how and to what degree they consider the opinions of their colleagues. There are rules about it, but there are also ways around them, so who you have for a judge and what his attitude is about the process can make all the difference.

In my last year of law school, Professor Closen took up the task of writing a casebook about HIV/AIDS and it was my assistance with that research that introduced me to the legal issues involved with the topic. When we considered the Illinois Statute that proposed to criminalize its intentional spread by sex or otherwise between partners, one knowing, one not, it had the trappings of a Shakespearean tragedy. To kill someone with love; how ironic is that ?

"Intimate contact" was the descriptive phrase used to define the criminal act, and it was broadly stated as being "any" contact capable of spreading the virus. From a criminal statutory perspective, this was dangerous stuff to be put into the hands of prosecutors. In Illinois, prosecutors have nearly unbridled discretion to determine which set of facts relating to the accused violate which statute. Each county is independent of all others, and while they have a hierarchy, and there is a State Attorney General, it is rare that they will meddle in a determination made at the county level. No one wants to be wrong, however; so certainly when new issues arise, there is a flow of information within the system. I have never been a prosecutor so I am not familiar with the form this takes. As a public defender, I received a monthly mailing from the State Appellate Defender's office setting forth excerpts from various cases with brief comments about their potentially precedential holdings, but the roles of prosecution and defense are so distinct as to barely be comprehensible to one another. Prosecutors are afforded broad discretion in their actions and can still claim to pursue the ends of justice down several divergent paths. (17)

In defense of the broad discretion afforded prosecutors, no one can argue that the courts are not already loaded beyond their capacity. One way the case load is kept to a manageable size is by prosecutorial discretion--they simply decide not to go forward with some cases. *Nolle prosequi* is the term used to describe that decision, but it is not usually done without some kind of acknowledgement from the accused that they know they may have done a wrong thing and should not reappear and expect to be let off again without punishment. (18) Another aspect of the prosecutor's discretion was to harshly treat undesirable characters to teach them the lesson they had apparently failed to learn thus far. Within this range of weapons were all manner of other manipulations of the criminal statutes intended to give prosecutors what they needed to do and what the community required of them in terms of keeping the streets free from crime or whatever else they might want to feel safe and secure. One cannot forget here the mantra lurking behind all government action for our own good--"Extremism in defense of liberty is no vice" (19) and the historical example that an imperfect system can permit individuals like Spiro T. Agnew to rise as high as to be next in line for the presidency. The potential for misguided misuse of statutory weaponry is ever present in any power structure with such broad discretion as the American Criminal Justice system.

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In Mr. Lunsford's case, the potential misuse of the statute in question was that it could be used as a tool for homophobic authoritarians in positions of power to send a message of their making. Not much argument existed that homosexual conduct involved intimate contact, and the statistical chance that one of any pair of partners was HIV positive was higher than in the heterosexual community. Prosecutors are elected officials and the electorate may have attitudes they want applied in controlling unapproved behaviors that had as yet not been made criminal. Some saw this statute as the opportunity to do so. All that was missing was a test case to see if the courts would go along or balk at what might be a policy swing in favor of those who saw themselves as the morally "right" (20).

None of this mattered all that much to me, of course, other than the parts of it which were set forth in justification of the statute with which my client was charged. I was not on a crusade of any kind to right the world's wrongs--that would have been politics. I had the assigned task of providing zealous representation to each of my clients who were accused of a crime. This case was simply part of that task for me. I knew more of the topic than some others, that was true, but not so much more than anyone given the opportunity could know. It was not personal at this point, it was business, and how I went about that business only had to do with the interests of Mr. Lunsford.

That none of it mattered all that much to me was a source of trouble in a number of ways for me personally. First of all, it should not be a requirement that all issues of this sort are advocated by those that also advocate homosexual behavior. Whether I do or do not is not at all a matter for public discussion, in my judgment. I am old fashioned enough, perhaps foolish and archaic enough, to think that public people may still have a private life. On the other hand, I have always been, and will always be, an opponent of discrimination without a just purpose. We discriminate against murderers, drug dealers, and pedophiles through the use of criminal sanctions and have every right to do so. It is not correct, therefore, to say that we should never discriminate. There must be a policy examination of its purpose before it is applied, or condemned, and in this case I was suspect of the motivation for persecution through criminal prosecution. How to attack that concern would require a balanced approach that gave some deference to legitimate sanctions for criminal behaviors.

AIDS had and has no cure; hence it is an instrumentality of death. Deliberately administered to another, it is legally, arguably, assault with a deadly weapon. Different jurisdictions have different legal landscapes, and the federal system only impacts them in terms of individually enumerated federal constitutional protections as extended to the citizens of all states. Whether the common law view of how soon after the wound a victim has to die to make it murder may or may not apply, depending upon where you are. In Illinois, having intentionally superceded the common law with the Criminal Code of 1961 and its subsequent revisions, the legislature writes on a clean slate when it comes to new crimes or instrumentalities of crime previously unknown. (21) It did so when it wrote the criminal transmission of HIV statute, and a reading of the background of the statute's creation was inevitably infused with policy considerations that smacked of moral issues.

I did not see that a discussion of policy would aid my client's cause but saw some potential for harm if the subject made it to the front burner of judicial discretion or was considered, even tangentially, by the jury. It is a hard sell in the farm belt to persuade the good citizens that IV drug users and homosexuals have just as much right as anyone else to do what they do, or that the law should not consider their recreational activities in determining their fate. The link was unfortunate between the groups, but the science had drawn the corollary, not the law, and regardless of how we must always battle against discrimination

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when encountered, this was not that fight. That was my judgment about it, anyway, based upon the facts as I knew them. In my work on this case, I found few who would agree with me.

V. The Purpose Of Criminal Law

I digress here for a moment to observe that most people cannot even agree about the purpose of the criminal law as it relates to the broader concept of justice. I believe it is to modify criminal behavior; that is, it is to diminish and extinguish its existence in individuals who have committed proscribed acts, while protecting society from becoming victims of those similarly inclined. It is a behavioral exercise. It is not Mosaic; it is not judgmental in the moral sense, so that we would say someone will be damned to Hell for what they have done and we are going to send them on their way as agents of the Almighty. Mixed questions involving behavior and morality must be carefully dissected. To argue otherwise is to embrace the death penalty and its progeny. (22)

It is always a little worrisome to see the 10 Commandments on the courthouse lawn on your way in to court to defend someone that arguably may have violated half of them. It misses the point, in my view, to bring God into the courtroom if what we are doing as a society is trying to modify behavior, not save souls. Remember they saved Joan of Arc's soul by burning her body at the stake. Was that justice? Did it correct her criminal behavior?

In Illinois, we have the Department of Corrections, not the Administrator of Punishment or the Bureau of Retribution or the Righteous and Most High Office of Moral Justice. What we care about, what we really want, is for our citizens to behave themselves within the boundaries of our laws. The laws are just the fences that set the boundaries of human behavior. We all agree on where to put them in a democratically representative sort of way. Within the boundaries, we may do anything and everything we choose. The law of Illinois is proscriptive, not permissive, and this Land of Lincoln is the land of the free. (State and local taxes notwithstanding).

No matter how much I regret that someone has AIDS or is HIV positive, I must concede that society at large has a right not to have it thrust upon them with criminal intent. Any behavior which would intentionally transmit the virus to another is subject to proscription by the enactment of a criminal law. I can think of no valid argument that society does not have the right to do it. It is a separate question, however, whether such an enactment is effective, or useful, in accomplishing the desired end. (23)

VI. Turning Theory Into Practice

After my initial interview with Mr. Lunsford, I went back to my office and contemplated my options. I put in a call to Professor Closen, and quickly set out the problem. I had not spoken to him in a few years, but I continued to admire his clarity of thought and prolific writing. At that point he had never had a criminal jury trial, nor a trial of any kind so far as I knew, and I had participated in plenty, so as odd as it may have seemed, our respective status to one another had altered drastically in the short time I had gone from being his student, to his assistant, to an experienced public defender. He was much better about that change than I was. I always addressed him as "Professor" and held him in deferential high regard. He never talked down to me once, nor insinuated himself to be anything other than a peer. It is not good to practice law alone as it is too easy to persuade yourself of something without some responsible check and balance from a trusted mind. Sole practitioners stay in touch with others in the field they can bounce things off of just to avoid idiosyncratic foolishness.

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After we spoke of the statutory concerns, he reminded me that he was not a criminal lawyer and despite his interest in and advocacy of HIV/AIDS issues, he suggested I call someone in the criminal area for procedural appellate questions if I felt the need. I put in a call to the Illinois Bar Association and later the Chicago Bar Association, both groups being helpful and informative. The consensus was to attack all fronts, leave no issue uncontested, and be careful not to corrupt the record with errors of omission. (24) I also called a few classmates practicing in the area, but found none of them had handled such a case. I checked online sources for other cases reported interpreting the statute. There were none, and that is only good if what you want to do is set precedent, it is not helpful if what you want is to keep your client out of prison.

I went back and visited Mr. Lunsford's family. His mother, Peggy, was tearful and charming. She was neither apologetic about her son, nor defensive. She simply wanted to know what she could do to help. I listened to her story and built some bridges between what she told me and what her son had said earlier with a few pointed questions. I did this without consciously labeling anything as the truth or something less. The contracting of HIV had been all too simple: sometime when they lived in California, in a bad neighborhood, or he went to a bad school, or hung out with a bad crowd, or all of the above, young Tim had experimented briefly with drugs that involved needles. How young or how briefly was immaterial. I had not seen any signs of current use. The police report revealed that their initial contact had been an interview at the emergency room where he had wound up after a bad trip on LSD.

While being treated, he had babbled something about being with a young lady when the drug was ingested. The medical staff, knowing he was HIV positive because he had told them, called the police who came and questioned him until he gave up her name. After the passage of a few weeks, she was persuaded to complain about it and become his alleged victim. He was not, however, charged with a drug offense and LSD was not a drug taken by needle. That meant to me that if he had had a needle habit, he had beat it somehow. That sometimes happens on its own, although we don't talk about it much. Uncontrolled drug use will usually lead to a prison cell or a grave in ten years or less. The fortunate may survive long enough to figure out what they are doing to themselves and have enough lucid moments to cut it out before they ruin their lives. The unfortunate do not.

On the street, among those that use illegal drugs, there is a distinction drawn about needles. No one plans to use drugs their whole lives going in. It is common knowledge that if you have a drug habit, either you beat it or it beats you. Once the line is crossed about using drugs at all, not all new users are willing to go so far as to use other drugs that require needles for a transmitter in deference to their hopes of someday not using drugs. Wherever that underground proscription came from, it is fairly universal. It is a line that some arbitrarily just will not cross, thinking somehow that it takes them too far. That conclusion was reinforced with news of the additional risk of contracting HIV. Mr. Lunsford had been a needle drug user and had contracted HIV, which was now killing him in the form of AIDS. Although he had ceased taking drugs in that manner a considerable time ago, it had been too late.

I prepared a Motion to Dismiss premised upon a constitutional attack on the statute. We were fortunate to have an opportunity to confront just the statutory language that was the greatest potential for discriminatory misuse. Had the collective defense bar and others interested in the topic for whatever reason been given the opportunity to create a test case, it could not have been in a better posture procedurally. Mr. Lunsford was not a homosexual, so that distraction would not be in play. There was no evidence of other criminal activity involved, so the risk of judicial overreaching was limited. (25) In my

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motion, I said the law was void for vagueness, lacking the requisite specificity in describing the act that constituted the crime. (26) The statute said that the criminal act was "any" act that could spread the HIV virus and enumerated among the variant subsections "intimate contact" which happened to be the particular act of which Mr. Lunsford was charged.

He was accused of having had intimate contact in a manner that can spread HIV with the victim without telling her he was HIV positive. Factually, we had a defense available as an alibi witness had come forward who had been present when Mr. Lunsford told the victim he was HIV positive before they had intimate contact. That was a weapon for a later fight, however; my initial procedural attack would be statutory, and would focus on the phrase "intimate contact". But what is intimate contact ?

VII. Intimate Contact In The Legal Sense

You may think it a silly question. Doesn't everyone know what "intimate contact" is? Without resorting to a graphic description in the statute, the drafters of the law had simply relied upon this sweeping generality as if everyone understood its plain meaning. If someone suggests that you have "sex" with them, you think you know what they mean. How about if they asked you to have "intimate contact" instead? In an effort to clarify, the statute was bolstered with the additional condition "in a manner that may transmit the HIV virus."

Legislators think in the usual and customary when drafting laws. Lawyers think in the exceptional when striving to create defenses to them. For instance, would it be an exception to the proscription of the law if factually two people could kiss, intimately, and not spread the HIV virus ? Certainly. The development of medical science about the disease, even at this early date, had virtually eliminated kissing as a path for transmission. Therefore, if you could have intimate contact and not spread the disease one time, but could in another instance with altered circumstances but doing the same act, then it was not the act that was doing the harm, but the status of the offender that was creating the risk of harm, or the variables of happenstance over which no control could be asserted. "Intimate contact" was simply legally insufficient in my judgment.

Well, what about an exchange of bodily fluids? That was the language used in the legislative histories and committee comments where Judges sitting in such matters go to discern the intentions of the legislatures who created a law. That exchange was not well defined either, in my opinion, fostering the exception of someone who sneezes in an elevator and inadvertently has "exchanged bodily fluids" with a number of strangers. Under the statute, unless he notified them in advance that he is HIV positive, in Illinois, he may just have made himself a criminal in the process.

Another exception argument to the bodily fluid charge would be someone in a hotel Jacuzzi or swimming pool. Is there fluid exchanged? Certainly there is, but won't the treatment of the water to kill bacteria prevent the virus from being transmitted? Perhaps, but the statute won't allow you to presume such and could find criminal culpability for anyone HIV positive swimming there under its language. The extreme of the exceptions arguments under the "bodily fluids" analysis deals with HIV positive pregnant mothers. They may be transmitting the HIV virus to their unborn children by exposure to their bodily fluids, and whether or not it was arguably consensual through their maternal legal guardianship, there was no specific consent given for the exposure to a fatal infection and the best interests of the child were obviously abdicated by permitting the pregnancy to continue. Think of the dilemma involved here. Once notice of an existing pregnancy is received, the mother has the Hobson's choice of either aborting the unborn child

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or breaking the Illinois statute against transmission of HIV. Motherhood was not the behavior intended to be targeted for attack by the statute certainly, and no one suggested that a prosecutor would bring such a charge, but creating the potential to do so by its wording demonstrated the inadequacy of the statute's language. (27)

VIII. Circuit Court Proceedings

The Lunsford case was set to proceed to preliminary hearing where the prosecution would either present a prima facie (28) case to support its charge or the Defendant would waive the hearing and enter a plea. There was just the one count in the Information that was pending, so the rare potential for a clean statutory attack was there. My personal view of a criminal justice proceeding is that once you have established whether any potential plea negotiations are in the offing, it is your duty to contest every inch of ground between where your client is and the cell in prison where the prosecution wants to send him. That requires a meeting with the prosecutor to see which direction any given case would take.

The assistant prosecutor assigned to the case was a young man, younger than myself, and the Republican candidate for chief prosecutor with an election coming soon. The county was majority Republican and this loyal servant had served well as an able assistant until his superior had decided to retire. It was an inheritance, sort of, with the inconvenience of an election thrown in. That came up as one of the reasons why my client would not get a break of any kind under the circumstances. "Politics" was used as a synonym for "public opinion" in the justification he gave me, piled upon the "you understand" rhetorical comment that came just before it. He and I had met and discussed other cases, and never before had such an issue arisen. We both agreed that it did not matter that Mr. Lunsford was a former IV drug user, or that he had had intimate contact with a young lady out of wedlock. Those were not politically sensitive issues. What mattered was that he was HIV positive and that he had AIDS. Why that mattered is a matter of discussion. I believe the candidate for office was concerned any plea offers would be taken as something less than the publicly approved use of his office under the circumstances. Here is where my view of the criminal law often conflicted with my opponents. I was not in the retribution business, nor in the morality play that some wanted to cast me in. (29) My interest in the behavior of my fellow citizens was to help them with it so that they might conform sufficiently to live among us while protecting the innocent, and especially the children, in the process.

The prosecutor and I had addressed all pending matters between us, and it was apparent that the Lunsford matter was being treated differently. As I would in normal discussions of criminal defendants, I advocated for leniency in part by relaying the punishments that the accused's actions had already brought him. It is that "learned his lesson" sort of approach that you can use with some success provided the individual under consideration does not have an extensive criminal history or a sympathetic victim.

I conveyed to the prosecutor the news that my client was already effectively serving out a death sentence within his own body because of his advanced AIDS diagnosis. I commented on the pain his mother and family were suffering in taking care of him and how the county employees in the jail were not at risk now, but would be if he were returned there as would the prison guards that followed, as well as his fellow inmates. In my attempts to show the prosecutor the weakness of his case, I commented on the circumstances of the revelation that brought on Mr. Lunsford's prosecution, his confession of indiscretion having been made under the influence of a hallucinogenic drug and he not having been afforded his rights in the process. I also mentioned the lapse of time between the act and any complaint from the alleged victim, a person of questionable veracity whose story was refuted by an alibi witness prepared to testify at

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trial. I also commented that a public trial might shine an uncomfortable light of truth upon the accusing victim.

When he countered that additional charges could be added from the facts presented, I suggested that he look again carefully at the reports, where I had seen no indications there was believable evidence of any other crimes. But this was not a case where a grand jury or any fact determining body would consider the question. This was a matter of sole discretion of the man to whom I was speaking, and I had concerns.

I knew the man. He was very much like myself in many ways--dedicated, ambitious, well trained, educated, hopeful. At this point I did not dislike him and based upon our good offices thought that the ends of justice were on both our minds. I broadened my appeal and suggested to him that together we had a rare opportunity to do good here. He didn't see it. I explained how this statute was an invitation to those that would misuse the law for agendas of their own and that we had the chance to let the Supreme Court tell us, and everyone, what was right and prevent that from happening. A constitutional statutory construction case is often spoiled by a prosecutor piling on ancillary issues to prevent a clean appeal. It may have been that he did not see it, or did not believe it, but his vision was more short sighted than I had expected. As is often the case, when professionals in any field invoke the greater good of their vocation over the self interests of themselves and those with whom they deal, the message was not well received. Our meeting continued after a pregnant pause.

We went on to our other cases and upon concluding, I asked what we should do about Mr. Lunsford to serve the ends of justice. As a final point, I reminded him that he could add his additional count after a statutory appeal and would have ample opportunity to revisit all other issues whether the defense won or lost a statutory appeal. Whether he meant to do it or not, whether he needed to do it or not, I reminded him that he did not need to do it now. Doing so now would only be foul, not fair, in the greater sense.

He said he would think about it. He may have, which would be even more disappointing than what I think he really did, which was simply talk to his superiors to see what they thought about it. I don't know what they told him, or how he concluded what should be done. All I know is what happened next. I filed my Motion to Dismiss on September 8, 1992, first thing in the morning. Later that same day, he added the additional charge of criminal sexual assault. I think I was supposed to learn then that it was not about doing what was right in the greater sense, or playing fair with one another, or making history, or setting precedent with a clean record that delineated the practice of law where I found myself. What it was about, at least to some, was winning every case. It is sufficient now to note that we personally had had our differences of opinion in the past without permanent damage. After this, however, my opinion of him never recovered its former status.

There were more players involved than just the two of us, however; among the other concerns of mine was the judge. In any legal matter, a great deal of what happens depends upon the Judge. In Illinois criminal matters, a defendant can remove a judge from his case as a matter of right, once, and for cause as often as it exists. It's a good lawyer who knows the law; it's a better one who knows the judge. That is not a suggestion of impropriety; it's a statement of reality. If I know what issues a judge considers important, whether he is more persuaded by statutory argument, emotional appeal, logical presentation, or whatever, then I will vary my representation before him for the benefit of my client.

Having been a law clerk for a judge, I knew how very much depended upon judicial discretion. That discretion is a wider sea than a poor argument or factual deficiency can cross. That is not to say it was a

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bad thing. I knew few judges who should actually be considered unqualified. By and large they were competent and predictable, which is what they should be. Here and there you would encounter a judge who was temperamental, impatient, and clearly just putting in his time on the day you were before him. It is easy to forget that depending upon which side of the bench you are on, it is just another day like many others, or it's the worst day of your life getting worse.

The aspect of judicial treatment of litigants that is the routine is upsetting to outside observers. Good practitioners and quality jurists may not convey enthusiasm and sincerity the 100th time this week they explain the rights of the accused to someone before them with a 5th grade education who reads at the 3rd grade level, if at all. The humanity they have taken oaths to protect, defend and prosecute by playing their role in the legal drama are oft unappreciative that they are doing a good job of it by mistaking the stoicism of their demeanor for indifference. Bedside manner matters little or nothing on most occasions in court. Judges have heard most of it so often before, and all the words about to be said to them, that regardless of the effort they exert to appear interested, it sometimes fails. (30) Like all humans, they have transformed the sum total of their experience, education and training into what some would call wisdom at best and others might label prejudice at worst. They mean to be fair, honestly, but if they are looking at a black man tell his story and a white man tell the same story, and the issue is credibility, they will have a predisposition about it whether they want to or not. Those predispositions, I expected, would extend to Mr. Lunsford's case.

Most criminal judges are former prosecutors, so it is unlikely to draw one hearing felony cases that was not the prosecutor of such cases for a considerable period of time before going on the bench. Illinois Judges are also subject to recall at election time, so they are not cavalier or quick to act to change the law, especially at the Circuit Court level. Every system has a bottom rung and in the Illinois Criminal Courts it is the Circuit Court. Their decisions are not precedential on anyone and are subject to review by both the Appellate and Supreme Court above them within the state system, and the Federal District Court, Appellate Circuit Court, and United States Supreme Court in the Federal system.

Decisions of circuit judges are not final, but they are not illusory either. They become part of the public record, may set the stage and determine the outcome of any appeals that follow by their rulings, or may not be appealed, in which case they become the final determination of the rights of the parties. They are like the mortar of the rule of law, often overlooked but indispensable. Actually they may really be more like tuck pointing--mortar implies building something new, and few circuit court rulings break new ground, but the image is accurate and the analogy useful.

In the Lunsford case I drew the Honorable Judge Ashton C. Waller, a former prosecutor, and a jurist I was both familiar with and had exhausted to the point of impatience several times with my unwillingness to accept defeat. I regularly appeared before him in Juvenile matters representing children, or the parents of children who had come to be at odds with the state's social service agency. While we did share a sincere concern about the welfare of children, we did not agree about a great many other things, including how much deference and credence to give the Department of Children and Family Services. I particularly was irked when clients of mine had their parental rights terminated after doing all their resources and intellect would let them to hold their families together. I made the mistake of letting my unhappiness show a time or two before his honor and had some thoughts that my track record with him might interfere with my effectiveness for Mr. Lunsford. After considering the alternatives, which would be the other judges that might be assigned to replace him, we elected to give him the benefit of the doubt. That one decision proved to be the most beneficial of the entire litigation.

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People can surprise you, however, and I must say that I now hold Judge Waller in the highest regard both personally and professionally. Nothing was ever said or intimated about our respective disagreements in other matters. His calm, studious, professional demeanor was a steadying influence for all concerned. The Lunsford case was handled in exemplary fashion, with integrity and great courage from the bench. It was conducted by the book, and in all fairness and candor to Mr. Lunsford, the prosecutor, and myself. The critical moment came fairly early in the proceedings. The prosecutor and I were in the judge's chambers discussing setting my motion to dismiss for hearing. The prosecutor had not filed a response, but instead had added the additional count. The Judge asked him if he was going to file a response, to which the prosecutor replied that he was not prepared to do so and in any event did not think it necessary. "Well, if you aren't prepared to respond to Mr. Bonelli's motion," said the judge, "you may want to prepare for the possibility that he may win." I was smart enough to keep quiet for once, but leaping for joy in my head. The prosecutor said he would get something on file. He did, but it wasn't enough.

The day came and the courtroom was packed, a rare thing in our small town. The press had come, and there seemed a serious, yet festive, atmosphere afoot. It had the medieval town market quality that was at once strange and familiar. I had never seen anything like it before, nor had anyone else I spoke with afterward. When my time came, I was relieved when my presentation came and went without mishap. It was my favorite aspect of the law, after all, arguing for what was right and being persuasive in the process. My training had prepared me for the moment, and all that later proved surprising was that there were no objections, or questions, or interruptions of any kind. It is not often attorneys get to say all they want. You do not win in court just because you can make a persuasive argument; the law and the facts decide cases. But you can lose with the facts in your favor if you do not make one. Having made one, you listen to your opponent to hear if it will hold up, or some fatal flaw in logic will be revealed you did not detect.

The judge listened intently, following along when I cited statutory authority or caselaw on the copies I had provided to him and the prosecutor. There is no applause in court, so it's a little disconcerting to get through something like that and hear no reaction. The Bailiff gave me a thumb's up at the back of the courtroom, so I knew I had at least been heard. During the conversational buzz that passed around the room as the prosecutor prepared, Mr. Lunsford shook my hand in approval and smiled broadly.

The prosecutor got up and said a few things, rambling mostly about how the law is the law and the defendant was a bad person. As if it were proof somehow, he continually referred to the second charge that had been added to the complaint--a cheap trick. The motion to which he was responding was about constitutional inadequacy, not the guilt or innocence of the defendant should the law hold up. He argued oranges to my apples.

Practitioners listen with some apprehension to their opponents' arguments, to hear if they may need to make an objection for the record, or prepare to respond in some manner. More was at stake here than Mr. Lunsford's future, as it turned out. The advocate for the state was also the candidate for office and was being measured by the electorate. He knew that, we all did. He was not nervous, but it was clear he was being careful. Absent was any passion or conviction in his presentation that had been heard in mine. He was winning the day in a courtroom far away by what he was carefully reading into the record, but he was losing here, in person. His victory would be on paper, after many other lawyers had made a living off what he and I were saying now. No amount of campaigning later, however, would win back the confidence of his constituents who really did not understand what was taking place. He lost in the election

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that would come. We won in the hearing at hand.

The judge declared the statute unconstitutional, (31) and I was probably more elated than my client. There was some attempt to have him put back in jail pending appeal as a consequence of the additional count, and I argued against it, citing the cost of additional security measures and health care to the county and his good behavior so far while out on bond. The judge was agreeable and Mr. Lunsford remained a free man, ... free in that he was not in custody. Certainly he was not really free--the greater punishment still burdened him. He was confined by the court to the jurisdiction pending the resolution of his appeal and had the stigma of his name and photograph being repeatedly publicized with every report of the progress of the matter through the appellate process. An appeal is automatic in cases of a statute having been found unconstitutional at the Circuit Court level so the case did not go away, but stayed in the public view because of the unconstitutionality finding. Such a finding is rare in criminal matters, and usually when it does come it is on a technical, rather than factual point of dispute. Here, the science of HIV / AIDS was not developed to the point that sufficient certainty existed as to what was or was not conduct that was blameworthy.

IX. State Appellate Review

Interest in the case rose after the finding of unconstitutionality, and I was approached by several special interest groups looking to bootstrap the ruling for purposes of their own. I was asked to turn over the case so that more experienced attorneys who specialized in appellate practice could take the lead. I discussed it with my supervisor and Mr. Lunsford, as well as Professor Closen. Mr. Lutz reminded me that the County had done its duty for Mr. Lunsford already by providing him my representation, and that there was an Appellate Defender's Office at the State level that would handle the case from here, unless I was privately retained, or my client wanted some other group to take over his case. Professor Closen offered to assist me with whatever I decided; go on with it, turn it over to the American Civil Liberties Union (ACLU), or let the Appellate Defender handle it. In the end, I left it up to Mr. Lunsford. More than anything, I wanted to be sure he got the right advice. My competitive nature was hungry for the fight, and I did not want to talk him into anything we would both regret. I gave him a week to think it over.

He came to my office on a sunny afternoon shortly thereafter. I didn't know it then, but I was not to see him alive but one more time. I discussed the matter with him, told him his options, and explained the situation. His eyes were glazed over for part of the complex parts, legal stuff I knew he did not understand or care about. When I asked him if he was all right, he just said he wanted me to do it. I told him I just couldn't without getting paid by someone. The county paid me less in a year than some of my classmates now made in a month and I had already spent a considerable amount of time in this matter at the expense of my private practice. I had family who had patiently waited and gone without while I had gone to law school and then to clerk and now to public service without adequately supporting them. I had to do what was right by them as well as for him. I was not sure, when I finished, that he had heard me.

He said nothing, but reached for his wallet. The gesture was difficult for him and made him look suddenly awkward. His body was already beginning to break down and his limbs trembled as he finally pulled it free of his jeans and began to examine its contents. I sat in silence, feeling guilty that I had been so caught up in my own concerns over winning his case that I had not noticed the toll the disease was taking on him all the while. I asked myself what kind of a man in my position could say no to someone like Mr. Lunsford under these

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circumstances ? I could not come up with an answer. When he handed me the folded bills and said he would get more somehow, I took a one dollar bill and gave him back the rest. "This is more than enough," I told him and we shook hands on it. Had I had any doubts that I could not provide him with as good a shot as anyone, I would not have taken the money. I never worked harder for a dollar, and keep it still (32) to remind myself that doing the right thing is not necessarily about money.

Procedurally things got busy after that. I met with the ACLU in Chicago with Professor Closen at my side. He was campaigning for judge and I suggested he join me in the matter on appeal as co-counsel after obtaining Mr. Lunsford's approval. (33) The ACLU wanted to join the case with another they had pending, and I did not object for several reasons, the primary of which was that they had received their ruling first and could file first for appeal. Unless ours was in the forefront of consideration before the Illinois Supreme Court, I knew any adverse decision for theirs would be the end of Mr. Lunsford's appeal. They were on a mission, which was their stated purpose, that only incidentally included this case. I did not disapprove of the mission, per se, but had decided to stay in on behalf of Mr. Lunsford rather than relinquish control entirely. They were disappointed when we insisted on submitting our own brief and giving our own oral argument before the court, expecting us rather to join in theirs. I cannot say that I blame them. They had many times the resources we had available and much more experience at the appellate level. Whether they would have done a better job or not is arguable; we had our differences strategically and legally as we worked forward. They made suggestions after we circulated our briefs to each other. That we did not agree about some things mattered less to me than to them. Our clients, and our goals, were similar, but not identical. (34)

I spoke often to Mr. Lunsford on the phone during the preparation of the brief and when it was completed I dropped a copy by his house. That was the last I saw him. It was horrific. In such a short time how someone so young and vibrant can wither away in such a manner is devastating. Peggy was busy, being strong and caring, and doing all the things that had to be done. She was on emotional automatic at that stage, incapable of letting go even a little for fear of never getting her composure back. I recognized the mode, having been the sentinel on such a vigil for a cancer victim myself. For her it was a son, for me it was a mother; our roles had reversed by generations. I thought hers the worse. She asked a thousand questions but I don't think she heard any of the answers, and she thanked me, over and over, until I finally had to just pull myself away.

The Argument at the Illinois Supreme Court was interesting, but anti-climatic. The additional charge of sexual assault added by the prosecutor despite my pleas negated our efforts. We did not have a clear record for a theoretical discussion of the statute and its discriminatory implications. You can't successfully argue hypotheticals when the reality before the court makes them irrelevant. We knew that going in. In the ante-room where counsel prepared for argument, professor Closen and I sat and waited our turn. Only one of us would get to speak, and I had asked him to do so out of respect for his mentoring of me before I was an advocate, and out of deference for someone I considered to be a better judge of the venue than I. I was too emotionally involved at that point, knowing the family as I did and caring about Mr. Lunsford's last days being all they should be.

Legally, our problem was getting past the allegations count II of the amended information to the language of the statute itself. Courts only have jurisdiction over real cases and controversies. We cannot go to them and ask, "what about this?" or "how about that?" They do not give advisory opinions. While there were opinions out there that said that statutory construction challenges should take place on the language in the abstract and not the specifics of the allegations of the case before the court, and we cited them, in our

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brief and in our argument, it was unpersuasive. The court could have taken up the broader view and been more far sighted as to realize that we were 13 years into a pandemic without judicial guidance from our highest court about how and to what extent criminal sanctions would be permitted. But it took the easy path instead and confined itself to the limiting holdings of precedent over the arguments of policy. We lost.

X. United States Supreme Court Review

For me there was no decision as to whether to go on or not. As soon as the record was prepared, I began drafting an appeal to the United States Supreme Court. The process required petitioning for a Writ of Certiorari because while the Supreme Court is the highest court in the land, it is also a court of limited admission. The court decides what cases it will and won't hear. We filed our writ and so far as I know were the first case to present the issue for consideration. (35) They had the opportunity to decide to take the case, or decide to deny taking it. Before they decided, Mr. Lunsford died of AIDS, 6:00 A.M. Monday morning, August 29, 1994. (36)

Sometimes the best decisions are the ones that are made for you. I got the news sometime later from professor Closen that the writ had been denied (37). I was disappointed but not surprised. Illinois still has the same law about the Criminal Transmission of HIV; but all prosecutors have now had our appeal to consider before bringing charges with it for the wrong reasons. (38) That's a win in my book, because it prevents the discriminatory character of the statute from being imposed absent other criminal conduct. It was a bigger win, of course, in Mr. Lunsford's book, who was able to die in peace with what dignity was left him. It was not a get out of jail free card, but he was, once and for all, out of jail.

I attended his funeral and was surprised to find a three piece rock band set up behind his casket. It was a unique distraction, and so like him to want to have it done. They were doing their best to play renditions of songs that I was fairly sure Mr. Lunsford had selected for such an occasion at some point in time. How sad to think someone his age must even contemplate such things. They were not all that good, really, but then neither was I in my own mind as I sat there thinking through what all I could have done differently. It's the ultimate post mortem, for an attorney, after all is said and done, to sit at your client's funeral and hope you served him well.

There are just three things in life that matter; time, money, and relationships. We have no control over how much we get of the first, although we have some choices about how we spend it. The second may or may not be related to the first, as in how much time is required to get how much of it. When I left the practice, my hourly rate was \$250/hour, and that was in a small Illinois town of limited activity. But I had to sacrifice time with my family and friends to get to that point, so much time in fact, that a degree of alienation inevitably crept in. The last matters most as it turns out, for no amount of money will buy you more time or better friends. I now teach law for less money than it costs me to drive to the various locations and campuses where my classes meet, but I would say the rewards are greater; and my stipend is augmented by the tender received from Mr. Lunsford--his undying thanks.

XI. Conclusion

Enacting criminal statutes in response to social pandemics like HIV/AIDS is neither effective nor useful. (39) It is some comfort to those who think they are protected by such laws, and for what it's worth, I don't mind the laws existing so long as they are not misused. There are a great many laws in existence that are

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rarely, if ever, used. A better law would have been to outlaw the HIV virus or impose enhanced penalties against it if it turns into AIDS. Difficult to enforce, sure, but it makes as much sense as making felons out of mothers who refuse to abort their children that may have been infected by their fathers who cannot be punished because they are unknown. We must all do all we can to help each other get through this, whatever this is, so that one day we can collectively congratulate ourselves on a job well done. Anyone who needs my help with that, anytime, need only ask.

Gregg W. Bonelli, Instructor, Lincoln Trail College, IL

(1) 1989--1991 appointment as judicial clerk for the Honorable William L. Beatty, Judge of the United States District Court for the Southern District of Illinois, Alton, Illinois--East St. Louis, Illinois.

(2) I come by it as a matter of family tradition. My great grandfather and my uncle were both Illinois Circuit Judges. The law is a family occupation among far too many of the clan elsewhere, particularly in California.

(3) Care must be taken when speaking of knowledge, of course, and I use the broader meaning here, not exclusively the Biblical and carnal, but not excluding it either.

(4) Civil litigants and criminal defendants either wade in or are thrown into the legal stream of disputation and are carried along to the conclusion of their particular drama. Few see the true importance of their particular predicament in terms of their effect on the river of the law itself. History and hindsight later assign labels the participants would never have put on themselves.

(5) See NPR.org cite about this for January 20, 2006.

(6) I practiced in the State of Illinois, an adopter of the common law of England.

(7) Conversely, a practitioner who cited an old case was the subject of some derision, even if a newer case only said the same thing. On my first appearance before the Cook County Court in Chicago, an elderly lawyer cited an old case which the judge commented on as being as old as its proponent in court to which the lawyer replied, "Marbury vs. Madison is an old case too, judge, but still good law."

(8) *People of Illinois v. Lunsford*, 158 Ill.2d 23, 196 Ill. Dec. 629, 630 Ne.E. 2d 794 (1994) cert. Denied, 513 U.S. 828, 115 S. Ct. 97, 130 L.Ed 47; charging instrument of underlying prosecution attached as Appendix 1.

(9) The Coles County Public Defender's office had been successfully attacked for conflicts of interests by some of its clients on appeal of their convictions on grounds that the attorneys all had the same administrative staff and that confidentiality of client information could not be protected in files held in common. In response to the expense of having to retry those matters, the county board had severed the staff and required each attorney to have separate office and files.

(10) History and Social Studies, Bell, Florida 1974-75; Philosophy, Sociology, History and Social Studies; Cumberland High School, Greenup, Illinois 1975--1986.

(11) Criminal Transmission of HIV ; 720 ILCS 5/12-16.2 (West 1998) Criminal Transmission of HIV. (a)

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A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV: (1) engages in intimate contact with another; (2) transfers, donates, or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration to another, or (3) dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia.... "intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV. Formerly Ill. Rev. Stat. 1991, ch. 38, [pi] 12-16.2 effective Sept. 11, 1989.

(12) For instance, I had discovered when in law school that the Georgetown Law Review annually dedicated an entire volume to updating the law of Criminal Procedure which made a useful tool for citing potential trends in other jurisdictions to Illinois Courts or instructing them on binding Federal precedent in constitutional matters that had not yet been addressed locally.

(13) I had been research assistant to Professor Michael L. Closen of the John Marshall Law School and was acknowledged for research assistance in his book, *Aids, Law & Policy* 1st edition, supplement, ISBN 0196081265, John Marshall Publishing Co., Houston, Tx, Publ. 1990

(14) Lonnie Lutz, Chief Public Defender; Karen Fuqua, felony conflict appointment; Robert Dunst, felony conflict and juvenile appointment; Terese Kane, misdemeanor, felony conflict and juvenile appointment.

(15) Nomenclature varies with jurisdictions. In Illinois they are called "State's Attorneys" but what they do everywhere is prosecute, so I have substituted the universal for the specific for the sake of clarity.

(16) Consider the 19 year old out buying Sudafed for his uncle to make Methamphetamine. When caught, he made the additional mistake of having a gun in the car, although it was inoperable. Facing a Class X felony sentence of many years, he was offered a plea of probation if he would cooperate and testify against his co-conspirators. He had no prior arrests or convictions. He honored what he thought was the code of honor that applied in such matters and would not betray his co conspirators. He is in prison today; so is his uncle, who was arrested later on other evidence.

(17) Consider the common practice of giving leniency to one co-defendant over another in exchange for cooperation and testimony at trial obtaining a conviction. Who deserves such a break ? It is not just the willing that get the offer, it is often some other unknown factor from the defense attorney's perspective.

(18) When on good terms with prosecutors, this warning was part of my conference with my clients while negotiating just such a disposition. My candor with a prosecutor about a particular client and his propensity to re-offend, if accurate, would translate into a degree of trust between us that led to fair and expeditious resolutions of a good many cases. I acted as the reluctant agent of the prosecution here, as an officer of the court, but with the full understanding that it was for my client's own good. It was off the record, but not out of any of our memories.

(19) Senator Barry Goldwater, who also said "Moderation in pursuit of Justice is no virtue."

(20) In the United States, liberal and conservative views are labeled "left" and "right" respectively. Justice Scalia of the Supreme Court spoke at the John Marshall Law School shortly before my graduation and

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said when he had been appointed to the court and they were posing for the first formal robed portrait, the photographer had told him to "move a little to the right". He jokingly said it was the best advice he ever got.

(21) Compare statutory reactions to HIV/AIDS in other jurisdictions: knowingly transferring bodily fluid containing HIV virus 848 P.2d 394 Idaho; 802 S.W.2d 28 Texas; Intentionally exposing sexual partners to HIV 832 P.2d 109 Washington; reckless conduct by HIV infected persons 396 S.E. 301 Georgia; Aggravated assault 192 WL 59832 Pennsylvania; to MJ 53, U.S. Military; Assault with a dangerous weapon 669 F.Supp.289 and 48 F.3d 784, Federal Prisons; Attempted murder 621 A. 2d 493 New Jersey; 834 S.W. 2d 559, Texas.

(22) Yes, there are biblical references to the death penalty and certainly examples of doing in the evil doers abound, but they are principally Old Testament and simply demonstrate the fallacy of basing a criminal justice system on moral proscriptions. As modern citizens of a global society in the process of watching cultural differences dissolve, we should look ahead to a more enlightened view, a behavioral view, of criminal sanctions. If we cannot control or condone an individual's behavior in the old view we killed them, to be satisfied they would bother us no more. The modern medical progeny of this view would be to make quadriplegics of them surgically, or medically, or to lobotomize them, all in the name of permanently disabling them so they are no longer a threat to the greater society.

(23) Compare, *State v. Stark*, 832 P.2d 109, (Wash.App. 1992); (purposeful exposure through intercourse sufficient to bring criminal culpability); *Commonwealth v. Brown*, 605 A. 2d 429,(prisoner throwing feces culpable); *State v. Haines*, 545 N.E. 2d 834 (Ind. App. 1989)(biting, scratching, spitting blood at officer found brings culpable) *Scroggins v. State*, 401 S.E. 2d 12 (1990) (aggravated assault with intent to murder found for HIV positive inmate biting an officer), *With Waddell v. Valley Forge*, D.C. Docket No. 99-00262-CV-CAP-1 (HIV positive dental hygienist failed to qualify for a ADA benefits after being fired for his HIV status despite evidence of statistically minimal potential for exposing patients). Any risk was considered sufficient and the court focused on the potential harm that might ever be suffered. Accord, *John Doe v. University of Maryland Medical System Corporation* CA-92-2832-HAR (U.S. Dist. Ct. of Md) (Third year neurosurgical resident lost privileges after being stuck with needle and becoming HIV positive while at work despite minimal statistical risk of infecting others).

(24) Under the Rules of Criminal Procedure in Illinois, there are a number of opportunities for counsel to fail to do something they could have done with the result that the defendant may seek appellate review only to discover the waiver of some issues that might have saved him had they been raised. Appellate Court opinions resting on this weak excuse write it off to trial strategy and pretend it is justice to retain men and women in prison that might otherwise have gone free but for ineffective assistance of counsel. Often, when ineffective assistance of counsel issues are presented on appeal, the defendant may see that same "trial strategy" excuse served up with the additional garnish of "harmless error" sprinkled liberally over the mix to tell him that whether his lawyer was right or wrong the result would be the same. And I though "revenge" was the dish best served cold, add "justice" to some menus.

(25) Judges are not supposed to be result oriented when interpreting the constitutionality of statutory language, that is, they should not consider the particular facts presented in the case at bar but should instead focus on the wording in question and whether it passes constitutional muster.

(26) Full text of Motion to Dismiss attached as Appendix 2, with supporting Memorandum of Law as

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Appendix 3.

(27) Illinois is a jurisdiction that believes life begins at conception and mothers who deliver children with alcohol and drug abuse syndromes are subject to prosecution. Questions of fetal exposure to HIV are complicated, and the statute involved in the Lunsford case only make it more so. The area remains volatile and we may expect the trend that began here to continue. That may involve protective custody for mothers who test positive for needle drug use during prenatal care exams. The State could petition for guardianship of the unborn child and take protective custody, which would require concurrent detention of the mother. This is not as far fetched as it may sound. Unborn children are citizens of our state. Once their existence is known and a threat against them identified, the state has standing to intervene for their protection.

(28) Probable cause = sufficient evidence of a crime and enough connection to the defendant to justify holding them for trial. It is not a big hurdle for the prosecution to clear, sometimes described as the equivalent of hopping off a curb.

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(29) I was once told by a judge during a break from proceedings where he was taking children away from their unified home and scattering them out to several state supported foster care facilities necessitating the separation of siblings that we "all have our roles to play." He meant it, and probably believed it as well.

(30) One judge, now retired from Coles County, Illinois, went to sleep while rocked so far back in his tall chair behind his elevated bench that he tipped over backward; the last view the jury had of him was his feet completing the arc he had begun with his head out of their view and off of the Dias. He was helped up by the bailiff and resumed his seat long enough to declare a brief recess. No one knew how long he had slept during the proceedings before his dismount.

(31) See ruling attached as Appendix 4.

(32) See attached Appendix 8.

(33) See attached Appendix 5.

(34) Special interest groups, like the ACLU, do a great many good things, including challenge the

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constitutionality of questionable statutes. The danger of handing your client over to their auspices, however, is that their focus may be more on the greater good than what you would do for your client yourself. They are also remote, where you are local and more accessible. I wanted to keep Mr. Lunsford out of jail, they wanted to keep everyone from being prosecuted with a discriminatory statute. If we could do both at the same time, good for us. If not, I would not sacrifice my client for their ends.

(35) Writ attached as Appendix 7. Professor Closen marshaled the assistance of his contacts at the John Marshall Law School and elsewhere to assist with the procedural and stylistic concerns. Included among those that were so kind as to give their help were Professor Wojak, Professor Mock, and Professor O'Neill. My thanks again to them all.

(36) Suggestion of Death filed by prosecution attached as Appendix 9.

(37) Letter of confirmation attached as Appendix 10.

(38) An electronic search for reference to the statute or the Lunsford case gives very few results today. The case was not precedential nor especially influential in the usual ways, but the chilling effect on the misuse of the statute as evidenced by the lack of subsequent challenges is gratifying to me.

(39) I am not the first, nor will be the last, to say so. Consider, "Any attempt to press the criminal law into service for the purpose of furthering the public goal of reducing the spread of the AIDS virus will be expensive, ineffective, and counterproductive ..." Gene P. Shulz, 7 St. Louis U. Public Law Review 65, 113 (1988).