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Shaping Responsible Behavior: Lessons from the AIDS Front

Harlon L. Dalton*

I. Setting the Stage

Imagine that you are from the planet Saturn¹ and are visiting the United States on vacation. You are eager to figure out what makes these earthlings (or at least the subset *homo sapiens americanus*) tick. What matters to them? What thrills them? What troubles them? What moves them to action? What renders them inert? How do they deal with the stresses and strains of daily life? How do they sift through the barrage of information that confronts them every day? How do they handle uncertainty? How do they deal with ambiguity? How do they address their conflicting needs and desires?

Because your time is limited, you decide that the quickest way to enter the species's psyche is to study its legal system. After all, it is well-known throughout the solar system that these creatures use the law as a principal means of articulating their values, resolving their conflicts, and controlling their behavior. Surely law must be a repository of wisdom about human nature!

What would you learn? What picture would emerge from such an examination? You most likely would conclude either that American *homo sapiens* are about as psychologically complex as garden slugs or that they are blessed with precious little self-understanding. In truth, our legal system does a poor job of reflecting our interior selves. It portrays us as psychological stick figures, lacking in color, texture, and dimension. And to the extent that the law does reflect a view about human nature,² that view is curious at best. It is curious because most legislative and judicial utterances imagine us to be

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1. I figure that it is about time to break the Martian monopoly on thought experiments.
2. I use the term "human nature" advisedly, fully recognizing that most of what we take to be "the way we are" is historically, socially, and culturally contingent. Here, I use the term to refer to deeply ingrained patterns, whether or not they are an essential part of being human.

stable, well-knit, fully self-aware creatures even though everyday experience reveals us to be mutable, loosely integrated, and internally opaque.³ Similarly, the law suggests that we are, or at least ought to be, wholly rational beings even though we regularly acknowledge and even celebrate our nonrational side.⁴

When it comes to understanding the human subject, our legal system operates at a level of learning that we would never tolerate in politics or marketing. To call it unsophisticated is to be charitable. Moreover, we seem largely indifferent to the wealth of knowledge that the cognitive and behavioral sciences have accumulated steadily.⁵ One well might ask why. Inertia

3. See generally, e.g., *THE MULTIPLE SELF* (Jon Elster ed., 1985) (exploring various theories of split self); WALTER TRUETT ANDERSON, *THE FUTURE OF THE SELF: INVENTING THE POSTMODERN PERSON* (1997) (discussing complexity of conception of self in society's idea of self).

4. Evidence everywhere demonstrates our affective, emotive, esthetic, spiritual, and otherwise nonrational selves: in museums and art galleries, on playing fields and in sports arenas, in city parks and national forests, at singles' bars and along lovers' lanes. And then there is religion. On Sunday mornings, I join with tens of millions of other religious believers in celebrating the fact that we humans are more than self-interested, rational profit maximizers.

5. Like Rebecca Dresser, I use the term "cognitive science" to encompass both brain-centered neurosciences and mentation-centered psychology. See generally Rebecca Dresser, Review Essay, *Can Law Survive Cognitive Science?*, 10 CRIM. JUST. ETHICS 27 (1991) (comparing possible future scenarios for role of mental state determinations in legal system). For a sophisticated introduction to the field of cognitive psychology, see SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (2d ed. 1991).

Criminal defense counsel are an exception to the proposition that legal actors have been studiously unaware of or indifferent to developments in cognitive science. When resources permit, they have leaned heavily upon psychologists in developing psyche-based defenses such as the battered spouse syndrome. For a view of this relationship from the psychologist's side, see ELISABETH F. LOFTUS & KATHERINE KETCHAM, *WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL* (1991).

Since the 1970s, legal scholars associated with the "Law and Society" movement have been attentive to the relationship between law and the social sciences. In recent years, a small cadre of scholars (only some of whom are associated with Law and Society) has focused specifically on fostering a synergistic relationship between law and cognitive science. See, e.g., Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (arguing that colorblind formalism fails to reduce discrimination and therefore courts should encourage jurors actively to combat their automatic discriminatory tendencies); Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115 (1993) (analyzing whether premises of tort law coincide with theories of psychology in seeking deterrence); Andrew E. Lelling, Comment, *Eliminative Materialism, Neuroscience, and the Criminal Law*, 141 U. PA. L. REV. 1471 (1993) (considering potentially devastating effect on legal system of denying accuracy of most fundamental psychological assumptions); Laura Reider, Comment, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289 (1998) (summarizing theoretical and traditional frameworks for insanity defense and harmonizing them with neuroscientific evidence to create new model for insanity defense).

is, of course, a force we should never discount, particularly in a system that prides itself on maintaining stability. Additional explanations are worthy of consideration.

To begin, perhaps we worry that it simply would cost too much to develop a more sophisticated understanding of human nature. Secondly, perhaps we also have doubts about how much better "better" can be. What benefits would flow from greater self-understanding, and are they worth the candle? A third possible explanation for our reluctance to ask hard questions about ourselves is that we doubt the legal system's capacity to handle human complexity. This is indeed a serious reservation, one to which I will return at this essay's end. Finally, perhaps we shy away from cognitive complexity because we fear that taking people as they truly are would undermine the law's capacity to resolve disputes expeditiously. According to this view, sometimes less is more or, at least, is faster.

Dispute resolution is not, however, the only end to which our system aims. We often are unsatisfied with reaching just any old outcome; we want to reach the *right* one. That is because we use the law as an instrument of social policy and view adjudication as a mechanism for achieving policy goals. That mechanism breaks down if we are indifferent to outcomes. If, for example, we are incapable of determining whether a particular incentive moves people to pollute less or to drive more carefully, we will be hard-pressed to determine whether pertinent laws are working successfully.

Using law to regulate human behavior is not a recent invention. It has been with us from the beginning. Criminal law, for example, represents not just a means of punishing those who act in antisocial ways and of expressing society's condemnation of particular behavior;⁶ it also constitutes an effort to deter others from misbehaving. Similarly, tort law serves not only to compensate specific victims and to allocate costs efficiently; it serves to guide the behavior of the rest of us as well.

This brings me to my central point. To the extent that we use law to regulate behavior or to shape tastes,⁷ it behooves us to understand as best we can what makes people tick. An improved understanding of how we come to grips with an unruly world is important for noninstrumental reasons as well. In seeking to hold accountable those who transgress our social norms, we are

6. For an especially thoughtful exposition of the expressive function of criminal law, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594-605 (1996).

7. If the law can convince individuals to "choose" to act in pro-social ways, there exists no need to regulate their behavior via institutional means. Although efforts to constrain the recalcitrant often draw our attention, the law plays an equally important role in shaping people's tastes to accord with societal norms. See generally GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* (1985) (considering place of ideals, attitudes, and beliefs in our legal system).

not indifferent to whether the transgressors could have done otherwise. In fact, we ask a series of questions designed to determine whether or not the transgressors are "responsible" for their actions and whether or not we can fairly assign blame. Thus, our ability to use the law in a judgmental way is tied inescapably to our ability to assess human will and human capacity.

Finally, in addition to using law to encourage people to act responsibly and to hold accountable those who do not, we use law to determine what is desirable in the first place. Legal process is one of the primary means by which we Americans rethink old norms, fashion new ones, and mediate among rival conceptions of "the good." In so doing, we constantly need to touch base with what is humanly possible. Admittedly, social norms are in part aspirational, an expression of our better angels. But if angels we be, we are neither ascendant nor fallen. We exist somewhere between heaven and hell and therefore must develop a moral compass for the middle sphere. After all, a set of norms that is perfect for cherubim (or Vulcans or Klingons) well might prove too challenging for us mere earthlings.

To be sure, we earthlings come in many sizes, shapes, and colors. We travel in packs and stake out particular territories. We are the products of our past and, in many ways, are the producers of our future. Does it make sense, we might therefore ask, to focus on individual psyches when so much of the space that we occupy is social? Surely the law is every bit as sociologically impoverished as it is psychologically impoverished.⁸

This question is a worthy critique of the individualistic approach I advocate here. Indeed, I am sympathetic to those who contend that individual reality largely is socially determined and that the very idea of "the individual" is problematic. We truly are interconnected creatures, tied to and dependent on others from the moment of conception.

Nevertheless, on any given day in any given place, we can find embodied selves engaging in seemingly purposeful activity, guided by seemingly internal commands. My central thesis is that our legal system needs to understand that

8. I borrow the phrase "sociologically impoverished" from Owen Fiss, who employed it to explain why the bipolar model of adjudication is not up to the task of restructuring large-scale institutions. Owen M. Fiss, *Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121 (1982). For decades, scholars associated with the Law and Society movement and with various branches of critical legal thought (including critical legal studies, feminist jurisprudence, critical race theory, and "LatCrit" theory) have railed against the sociological vacuity of both traditional legal reasoning and "law and economics." However, critical scholars hardly have cornered the market. In recent years, a loosely-organized band of scholars, gathered under the banner of "Socio-Economics," have sought "to advance an interdisciplinary understanding of economic behavior. This understanding is open to the assumption that individual choices are shaped not only by rational self-interest but also by emotions, social bonds, beliefs, expectations, and perhaps most important, a sense of morality." Robert Ashford, *Socio-Economics: What Is Its Place in Law Practice?*, 1997 WIS. L. REV. 611, 612.

internal world, even as we struggle to understand more fully the ideologies, structures, and social arrangements that help to shape it. While heeding the call to social context, we must not lose sight of what we experience as ours alone.

In so saying, I do not mean to suggest that the individual is the only proper unit of analysis or even a necessary starting point for anyone interested in framing social policy or, more loftily, in transforming society. Nor do I mean to join the (growing?) ranks of those who treat deeply entrenched social problems as if they were mere matters of personal choice and individual responsibility. On the contrary, were we to take a good hard look at the complex ways in which people in pain negotiate the concrete circumstances of their lives, we well might call into question the view that ours is a society in which free choice abounds. We might, then, redirect our attention to the institutional arrangements that either foster or inhibit individual flourishing.⁹ And in the process, we just might discover that a mutually reinforcing, or a mutually destructive, relationship forever links individual responsibility on the one hand and collective responsibility on the other.

In this essay, I take the place of our imagined visitor from Saturn. In particular, I reflect on how, if at all, our legal system takes account of the complexities of human thought, feeling, and action. To make that task manageable, I have opted to study a narrowly circumscribed area of law, namely the mechanisms that we use to dissuade persons living with HIV, the virus associated with AIDS, from engaging in behaviors that put others at risk of infection. This subject area has many advantages, including that it involves real people engaging in difficult cognitive and emotional work in the midst of circumstances that are highly conflictual. As I hope to make plain, influencing the behavior of people whose lives have been fractured and whose attention is absorbed by issues of literal survival is no easy task, especially for a legal system that prefers to view all of us as if we were the simple-minded "man on the Clapham omnibus."¹⁰

In Part II of this essay, I take a brief look at some of the ways that society uses law to curb behavior that is thought to¹¹ pose a risk of HIV transmis-

9. For an especially thoughtful treatment of this theme, see Scott Burris, *Gay Marriage and Public Health*, 7 TEMP. POL. & CIV. RTS. L. REV. 417 (1998).

10. The quoted phrase, the British equivalent of the "reasonable man," made its first appearance in *Hall v. Brooklands Auto Racing Club*, 1 K.B. 205, 224 (1933) (referring to "what any reasonable member of the public" or "the man on the street" would intend as term of contract).

11. I use the equivocal phrase "is thought to" because some statutes make it a crime for people living with HIV to engage in behaviors (nonpenetrative sex, for example) that pose little if any risk of HIV transmission. Similarly, prosecutors sometimes pursue indictments in response to behaviors (spitting, for example) that pose little risk. To be sure, this may involve more than mere ignorance regarding matters of science and anatomy. Some legislators and prosecutors may be responding to other forces, including a desire to isolate or to punish people living with HIV (or a subset thereof); a felt need to mollify law enforcement officers (especially

sion.¹² I then narrow my focus to the criminalization of unsafe behavior in which persons living with HIV engage. The basic question I explore is the following: Do such prosecutions make psychological sense? More specifically, what do they implicitly assume about human nature? What do they assume about human motivation and about how we process information, form beliefs, assess risks, order priorities, handle stress, and resolve conflict? Are they well-calculated to deter untoward behavior? Is the message they express a useful one from the standpoint of public health?

After teasing out the patchwork of assumptions underlying such prosecutions, in Part III I consider how well this view of human nature maps onto reality.¹³ To provide a context for that assessment, I explore the real life trials and tribulations of Fabian Bridges, a well-chronicled young man who "knowingly"¹⁴ put others at risk of HIV infection. In reflecting on Fabian's story, I conclude that we are at sea in our efforts to curb risky sexual behavior. For one thing, we never stop to ask what motivates people living with HIV to have sex in the first place, and therefore we have no clue about how to alter their incentive structures. Second, we rarely pause to consider whether our admonitions are truly getting through to their intended targets, and if not, why not. We think it sufficient that people living with HIV have received information about the risk that they pose to others and have heard that they must refrain from sex unless they warn potential partners of their HIV status.

But the truth is that we human beings do not simply absorb information like a sponge; we *manage* it, especially when it threatens our equilibrium or puts us at risk of experiencing internal conflict. We filter, sort, evaluate, manipulate, and sometimes embroider incoming news before assigning it to appropriate folders in our brains – including the one marked "trash." We also are quite capable of managing our beliefs, our emotions, our awareness, and consciousness itself.¹⁵ When faced with extremes, we do whatever it takes to cope. We ignore, forget, compartmentalize, think wishfully, deny, repress,

in cases involving biting and spitting); a desire to cater to an electorate presumed (perhaps inaccurately) to be vindictive toward persons living with HIV; and most fundamentally, the decisionmakers' own psychological discomfort from being at risk from AIDS, from sexual dishonesty, and from all that is unseen and unbidden.

12. See *infra* Part II (explaining attempts to regulate risky behavior through law).

13. See *infra* Part III (summarizing documentary of attempts to regulate behavior of Fabian Bridges).

14. See *infra* note 17 (questioning definition of "know").

15. See generally, e.g., FISKE & TAYLOR, *supra* note 5 (summarizing and evaluating research on social cognition); DANIEL GOLEMAN, VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION (1985) (discussing "vital lies" that replace less comfortable truth, creating mental blinds spots); STRESS AND COPING: AN ANTHOLOGY (Alan Monat & Richard S. Lazarus eds., 3d ed. 1991) (providing introduction to current issues and controversies in stress and coping field).

and even self-deceive. That is what you and I do when pressed to the wall, and the same is true for people living with HIV.

This vast gulf between the assumptions we make when attempting to regulate risky behavior and the infinitely more complex mental world that people under stress inhabit raises an important question: *Can the law accomplish what it sets out to do?* That is the central concern of Part IV of this essay.¹⁶ We have several choices. For example, we might enrich the law's understanding of how humans function by permitting or even encouraging expert testimony before legislative committees and in court proceedings concerning such issues as how we humans manage information and how the stresses associated with HIV-infection affect decision-making. Alternatively, we might alter our expectations of what law can do. We might, for example, cease trying to deter Peter by punishing Paul, or we might decide to exact retribution whether or not a wrongdoer has acted voluntarily. A third option would be to decide that adjudication is an ineffective and inappropriate means of curbing sexual risk-taking. And, of course, there is always that old standby, leaving well enough (or not so well enough) alone.

II. *Regulating Risky Behavior*

The notion that persons living with HIV know that they carry the virus and understand fully the myriad consequences that flow therefrom underlies most efforts to curb risky behavior. I want to challenge this premise¹⁷ but not without first acknowledging its reasonableness, especially with respect to people who have tested positive for HIV antibodies. In most cases, upon receiving their test results someone reminded them how HIV is and is not transmitted and counseled them to play safe.

Every state has developed a network of sites where people can be tested voluntarily for HIV-antibodies, and each has enacted laws that, to a greater or lesser degree, assure the confidentiality of test results.¹⁸ As a condition of receiving federal funds for such sites, states must provide both pre-test and post-test counseling.¹⁹ The former, in addition to focusing on whether testing

16. See *infra* Part IV (discussing options of technical fixes, streamlined expectations, deregulation, status quo, and refining goals).

17. The easy jump from information to knowledge fails to take seriously the capacity of human beings to miscode what we perceive, misremember what we encode, compartmentalize, confabulate, deny, repress, and self-deceive. What does it mean to say that I "know" something if I successfully have repressed it or have reshaped it in my memory?

18. See CDC, *Anonymous or Confidential HIV Counseling and Voluntary Testing in Federally Funded Testing Sites – United States, 1995-1997*, 48 MMWR 509, 509 (1999) (stating that all states provide confidential testing).

19. See CDC, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *HIV COUNSELING, TESTING AND REFERRAL GUIDELINES 3-6* (May 1994) (summarizing program standards and guidelines).

is appropriate given the client's risk profile, provides an opportunity for basic AIDS education and risk-reduction planning. Post-test counseling provides a further opportunity to encourage the uninfected to develop habits that reduce their risk of contracting HIV. Of course, when the test result is positive, the counselor's agenda shifts dramatically. She or he provides comfort to the client, assesses the need for medical and psycho-social support, makes appropriate referrals, discusses whom the client should inform of his or her status, and counsels the client on how to avoid transmitting the virus to others.²⁰

In laying out the ground rules for testing and counseling, the Centers for Disease Control and Prevention (CDC), the federal agency charged with stemming the AIDS epidemic, acknowledges that the psychic din that a positive test produces may drown out even the most skillful post-test counseling: "Counselors should recognize that the emotional impact of learning about an HIV positive test result often prevents clients from absorbing other information during this encounter."²¹ Unfortunately, rather than mandate follow-up counseling, the CDC merely observes that it might be useful.²²

Almost always, the news that one has tested positive for HIV turns the recipient's world upside down, even if she or he has anticipated testing positive for some time. Facing the prospect of a drastically foreshortened life, a painful death, diminished capacity, loss of control (over virtually everything from one's own body to one's future), shattered dreams, ruptured relationships, social stigma, and abandonment by those whose support an individual needs most – facing the prospect of all this is not, to say the least, *easy*. And so to be successful, counseling must take place over time and must be marked by a willingness to range far beyond the basics of how individuals transmit HIV and where to go for help. Indeed, even the basics may not sink in until more pressing or frightening issues are addressed.

Some states deal with this reality by forming effective partnerships with private, community-based AIDS organizations.²³ These organizations provide ongoing counseling in a safe and culturally-appealing context. Moreover, in such settings it is possible to provide peer support and to create optimal

20. See *id.* at 9-10 (discussing counseling guidelines regarding positive HIV test result).

21. *Id.* at 9.

22. The observation that "[c]ounseling of patients with positive results . . . may require more than one session" is a suggestive guideline rather than a mandatory standard. *Id.* The corresponding standard merely states that the counselor or provider must "[a]ssess the client's need for subsequent counseling or medical services." *Id.*

23. The CDC acknowledges the value of close collaboration with community-based AIDS organizations, substance abuse treatment programs, and AIDS-friendly religious institutions but does not mandate the development of such links. *Id.* at 4. Although recipients of federal funds must develop "[a] written process for identifying, evaluating, and updating referral sources," the Guidelines are vague as to the nature of such sources, apart from STD clinics and healthcare providers. *Id.*

conditions for the development of peer-based norms that value responsible behavior.

What happens when counseling is ineffective (or non-existent) and people infected with HIV continue to engage in risky behavior? Can the government play an effective role?²⁴ Some states have required certain healthcare and social service providers to inform a client's sex partners if the provider knows that the client has not told them that he or she is HIV positive.²⁵ And many states have dusted off old or passed new quarantine laws which confer on public health authorities the power to isolate people who persistently act in ways that threaten the spread of infectious diseases.²⁶ Of course, unlike old-fashioned infectious diseases such as tuberculosis, there is no known cure for HIV, and people remain infectious for life. On the other hand, HIV is nowhere near as easily or readily transmitted. Thus, the use of quarantine laws, other than for the short-term purpose of isolating a person during a period of extreme instability, is deeply problematic.²⁷

As the AIDS epidemic has progressed, the criminal law increasingly has been used as a mechanism for deterring, punishing, and expressing outrage over behavior thought to put others at risk of HIV transmission.²⁸ A substan-

24. Of course, private actors who have contracted AIDS may seek compensation via the torts system and arguably thereby deter risky behavior. See generally Donald H. J. Hermann & Scott Burris, *Torts: Private Lawsuits About HIV*, in *AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC* 334 (Scott Burris et al. eds., 1993) (discussing successes and failures of tort litigation in four areas of HIV-related tort cases). Although the government is involved integrally in even the most mundane of private lawsuits, first by providing a public forum and ultimately by enforcing judgments through the power of the state, I have chosen to focus on those areas of law in which the government makes AIDS policy in a more explicit, public-regarding way. That said, many of the arguments I make concerning deterrence in the criminal law context would be similarly applicable in the torts context.

25. See generally Christine E. Stenger, *Taking Tarasoff Where No One Has Gone Before: Looking at "Duty to Warn" Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. REV. 471 (1996) (examining expansive implications of California Supreme Court's articulation of "duty to warn," as various jurisdictions apply it to physician liability, and as it relates to today's AIDS crisis).

26. See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1028-29 (1989) (summarizing disease- and behavior-based isolation statutes that several states enacted in late 1980s).

27. See generally Larry Gostin, *Traditional Public Health Strategies*, in *AIDS LAW TODAY*, *supra* note 24, at 72-77 (discussing various types of personal control measures available to health authorities to prevent transmission of AIDS).

28. See generally Harlon L. Dalton, *Criminal Law*, in *AIDS LAW TODAY*, *supra* note 24, at 242 (discussing HIV and criminalization of risky behavior); see also generally *HIV/AIDS and the States: A Look at Laws Enacted in 1998*, 14 AIDS POL'Y & L. (BNA) 8 (Jan. 22, 1999) (reviewing major developments in HIV policies in states); *Criminal Exposure to HIV: Evolving Laws and Court Cases*, 13 AIDS POL'Y & L. (BNA) Bonus Report (July 24, 1998) (examining legislative responses to AIDS and implications in courts); LAMBDA LEGAL FOUND. FUND, INC., *STATE CRIMINAL STATUTES ON HIV TRANSMISSION* (August, 1998) [hereinafter *LAMBDA SURVEY*] (providing table of cites and summaries of state statutes).

tial percentage of nonmilitary prosecutions²⁹ involve courtroom, jailhouse, or arrest-scene skirmishes in which a detainee or inmate reportedly spits at or bites a law enforcement officer.³⁰ Often, the detainee punctuates the hostilities by announcing that he or she is infected with HIV.³¹ In some cases, the detainee reportedly expresses the desire to transmit the virus to the officer.³² Not surprisingly, the officers in these cases react with alarm, anger, and fear, especially if they lack proper information about the means of HIV transmission. Seeking retribution, they turn to a criminal justice system that, at least on the margin, they can expect to respond sympathetically to those who serve it day-in and day-out.

The criminal charges lodged in biting and spitting cases have a familiar ring to them: assault, aggravated assault, assault with a deadly weapon, attempted manslaughter, and attempted murder.³³ Most of these charges are quite heavy-duty, even when one factors in the use of over-charging to offset likely plea bargaining. This heavy hand reflects, in my opinion, the reality that some prosecutors are highly phobic when it comes to AIDS, that some prosecutors are overly attentive to the publicity value of high-profile AIDS cases, and that the victims typically are adept at making the system work for them.

These traditional categories of crime are a poor fit. It is exceedingly difficult to satisfy the elements necessary for conviction. Given the nearly negligible probability of transmitting HIV via biting or spitting, it is difficult to identify harm that amounts to an aggravated assault, much less anything

29. See *infra* note 34 (explaining that situation in the military is quite different).

30. See generally GEORGETOWN/JOHNS HOPKINS UNIV. PROGRAM ON L. & PUB. HEALTH, THE AIDS LITIGATION PROJECT: A LOOK AT HIV/AIDS IN THE COURTS OF THE 1990s, pt. 1, § IV (3d ed., July 24, 1996) (visited July 13, 1999) http://hivinsite.ucsf.edu/social/kaiser_family_found/2098.2a96.html (summarizing cases dealing with state restrictions on persons).

31. See, e.g., *Weeks v. Scott*, 55 F.3d 1059, 1061 (5th Cir. 1995) (stating that Weeks revealed his HIV-positive status shortly before spitting in guard's face); *United States v. Sturgis*, 48 F.3d 784, 786 (4th Cir. 1995) (stating that when corpsman asked Sturgis to stop biting and spitting because he was HIV positive, Sturgis explained that he was trying to infect medical personnel); *State v. Smith*, 621 A.2d 493, 497 (N.J. Super. Ct. App. Div. 1993) (stating that Smith threatened to bite officer and to give him AIDS).

32. See, e.g., *Weeks*, 55 F.3d at 1059 (affirming district court's denial of petition for writ of habeas corpus). An HIV positive inmate became agitated while guards transported him from one prison unit to another. *Id.* at 1061. In response to being "placed . . . on the ground and further restrained," he "yell[ed] and curse[d] at the officers" and, according to their testimony, threatened them, saying that he was "going to take somebody with him when he went." *Id.* Thereupon he spit twice in the face of one of the guards. *Id.* He was convicted of attempted murder and, because of Texas's "three strikes" law, received a life sentence. *Id.* The court of appeals affirmed the conviction. *Id.*

33. See THE AIDS LITIGATION PROJECT, *supra* note 30, pt. 1, § IV (noting that generally prosecutors invoke charges of assault and attempted murder).

more serious. To be sure, the injury inflicted is real, but it is primarily psychic. Indeed, in the biting and spitting cases that is often the perpetrator's *goal*: to instill fear and to express loathing. Conduct amounting to the intentional infliction of psychic pain well may be punishable under the criminal law as disorderly conduct, menacing, and the like. For the most part, however, offenses against the psyche occupy the lower rungs of the penal ladder.

It is also difficult in the biting and spitting cases to prove the requisite mental element. In such cases, ample evidence often exists that the defendant harbored ill will toward the victim. However, that is a far cry from a murderous intent or even a desire to inflict severe bodily harm. And what are we to make of the fact that the perpetrators presumably are aware, as a result of the counseling that accompanies HIV-antibody testing, that HIV is not transmissible via saliva and is exceedingly difficult to transmit by biting? How do we square this with the fact that many of them reportedly express the desire to infect their victims?

One possibility is that the perpetrators know full well that transmission is impossible or highly unlikely but are banking on the fact that their targets are likely to be less well-informed. Scary words, much more than spittle or teeth, are the real weapon. Another possibility is that despite all their counseling, the detainees *do* believe that they can transmit the virus in this way. (This, by the way, raises the specter that people living with HIV also could *disbelieve* counselors' warnings that unprotected sex and shared needles can transmit HIV.) There is also a fuzzy middle ground: perhaps the typical perpetrator neither believes nor disbelieves that transmission is possible but exhibits a third mental state in which the question of belief becomes detached from and irrelevant to the task at hand (to wit, appearing as menacing as possible).

If nothing else, this extended rumination on the mental state of the accused in a typical biting and spitting case suggests that the criminal law's conceptual apparatus – abstractions such as "intent," "belief," and "knowledge" – is much too crude to capture actual human thought and feeling. It also suggests that prosecutions of this sort may be ill-advised for pragmatic reasons. It is, of course, not a good idea to permit detainees to intimidate law enforcement officers at will. However, reacting to biting and spitting in an apoplectic manner (for example, by characterizing it as attempted murder) simply feeds the officers' fear and has the perverse effect of handing detainees a huge weapon in the ongoing struggle between the keepers and the kept. When prosecutors respond to biting and spitting as if it were truly dangerous, rather than insulting, degrading, and sometimes painful, every inmate with salivary glands and a set of incisors thereby receives the equivalent of a nine-millimeter Glock that is ever at the ready.

Although the biting and spitting cases may be more numerous, at least in civilian life, it is the cases involving sex that grab the emotions of the public at large.³⁴ They tap into an incredibly deep and murky reservoir of worry, fear, excitement, and dread. Quite apart from AIDS, sex, and especially but not exclusively casual sex, embodies for many of us an unsettling mix of reward and risk, pleasure and danger.³⁵ The thought that unbeknownst to us a lover might carry HIV serves to remind us of how vulnerable we truly are, emotionally as well as physically, when it comes to sex. The fact that we cannot tell whether a lover has HIV is scary both in its own right and in that it reminds us that so much else of importance is also beyond our immediate powers of observation. We wonder: Will Mr. Right prove sensitive to our needs? Will Ms. Right find us wanting? Has she been completely forthcoming about her sexual past? Has he told the truth about where he was last night?

Given our profound unease surrounding sex, together with its near universality as a human pastime (or at least aspiration), it is not surprising that we would look for ways to *compel* others to behave responsibly. We want to feel safe, to be *made* safe, to be protected from bad choices, and to avoid having to reckon fully with the risks of carnal knowledge.

Early on, prosecutors pursued the "sex without disclosure" prosecutions under the same traditional criminal statutes as the biting and spitting cases, and their cases suffered many of the same infirmities. To be sure, the harm element is satisfied more easily, given the very real possibility of sexual transmission of HIV. However, in cases where the victim turns out to be HIV-positive, proof of causation is often difficult and messy. And where the victim is HIV-negative, it is difficult to justify more serious charges such as aggravated assault and attempted murder.

As for the mental element, knowledge and intent are, if anything, more murky in the sex cases than in the biting and spitting prosecutions. Although

34. A large percentage of all prosecutions and about fifty percent of convictions involve armed services personnel who face prosecution in military courts under military law for putting sex partners at risk. See Vivienne Walt, *AIDS-Exposure Laws Debated*, N.Y. NEWSDAY, Sept. 23, 1991, at 27 (stating that about half convictions were for violating military orders to inform their sex partners that they have AIDS virus); THE AIDS LITIGATION PROJECT, *supra* note 30, pt. 1, § IV (stating that military courts have convicted defendants in substantial number of cases involving criminal conviction for engaging in unprotected sex without informing partners). This initially surprising statistic makes sense when one takes into account the military's heightened capacity to monitor people's personal lives, its unique ability to "encourage" reluctant witnesses to come forward, and the availability of such lesser included offenses as "willful disobedience of an order by a superior officer" to use condoms and to warn sex partners.

35. I borrow this latter opposition from Carole Vance, who employed it as the conceptual umbrella for an extraordinary collection of essays, *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (Carole S. Vance ed., 1984).

exceptions doubtlessly exist, it is probably a gross distortion to suggest that people with HIV who fail to reveal their status to sex partners usually do so out of a desire to cause harm. More typically, their probable goal is to avert isolation, to savor intimacy, to affirm rather than extinguish life, and to confirm that they remain sexually desirable. And where commercial sex is involved, the failure to warn reflects the simple desire or need to make money. It is especially ludicrous to charge defendants with attempted murder. Given the improbability of HIV transmission even under "ideal" circumstances such as anal sex without a condom and given the ability of new antiviral drugs to increase longevity even to the point that AIDS may soon constitute a chronic rather than fatal disease, it is hard to imagine that sexual intercourse would be anyone's lethal weapon of choice.

These days, prosecutors increasingly bring cases under HIV-specific statutes. Sixty percent of the state legislatures have passed laws making it a crime for people who know they carry the HIV virus to have sex without warning their partners.³⁶ Some statutes are worded so broadly that they would seem to bar all sexual activity, no matter how unlikely to result in transmission.³⁷ In general, however, such statutes avoid many of the pitfalls associated with the application of traditional crime categories in that prosecutors need not establish harm, causation, and intent.³⁸

The issue remains whether the bare fact that someone has informed the defendant of his or her HIV status implies knowledge. To begin with, what the defendant heard may be different than what the counselor or healthcare provider meant to convey. The fact that he or she acknowledges what the counselor said or even parrots it back is not dispositive. As anyone in a long term relationship knows, the phrase "yes, dear" does not mean necessarily that real communication has taken place.

Sometimes the intended audience may not understand the counselor's words. For example, the warning not to engage in "genital-anal sex" may mean little to someone who regularly employs a markedly different vocabulary for such activity. Equally problematic are words that are inherently

36. See *HIV/AIDS and the States*, *supra* note 28, at 8, 10 (stating that New York and Alabama passed partner notification laws in 1998). The pertinent sex acts vary from statute to statute. Some statutes, in addition to criminalizing "unwarned" sex, make it a crime for persons who know they are infected to share injection needles or to donate blood or organs for transplant. See generally LAMBDA SURVEY, *supra* note 28 (setting out table detailing each statute). I am aware, however, of no cases on point.

37. New Jersey, for example, makes it a crime for someone with HIV to engage in "sexual penetration" without the informed consent of the other person. N.J. STAT. ANN. § 2C:34-5(b) (1999). The definition of "sexual penetration" includes "insertion of the hand, finger or object into the anus or vagina." N.J. STAT. ANN. § 2C:14-1(c) (1995).

38. Most HIV-specific criminal statutes dispense with these elements of causation and intent. *Criminal Exposure to HIV*, *supra* note 28, Bonus Report 1.

ambiguous. For example, what does "don't exchange bodily fluids" mean? You should not swap a cup of sweat for a pint of mucus? Which fluids, exactly, pose a danger of transmission? And in what sense does oral, or vaginal, or anal sex involve an *exchange* of fluids? Then there is the pesky business of sex itself. Simply warning someone to not have it may not be precise enough. As we all know by now, thanks to recent goings on in Washington, sex has no fixed definition.

Even if a one hundred percent correspondence exists between what a counselor or provider *says* and what she *means* and between what a client *hears* and what he *understands*, that does not end the matter. After all, just because we know a fact at one time does not mean that we know it in the same way at a later time. Anyone who has ever received a disturbing medical diagnosis or has sought legal advice while overwrought knows how hard it is to remember the next day what exactly the doctor or lawyer said. And even if our short term recall is good, it is quite common for memories to change over time.

In part, memories change because we do not store the memory of a particular event in a single place in our brain.³⁹ Take the drafting of this essay, for example. Here I sit in my study at home, teetering piles of paper surrounding me, the computer screen and a slender halogen lamp lighting my work space. If, say, a month from now I were prompted to recall this moment, I would have to retrieve the visuals from one part of my brain, the sounds (none of which – a lazily barking dog, someone hammering outside, the quiet hum of my computer – I noticed until I began to tap out this sentence) from another, the shape of my words from yet another, and their meaning from some fourth location. If I wanted to recall my current mood (buoyant because I stepped out of the shower not long ago, agitated because the remodeling of my kitchen is dragging on, and embarrassed and chastened because this essay is way overdue to my law review editor), I would have to peruse yet a different sector of my brain. Thus, to recapture this precise moment I would have to retrieve its component parts from several locations and would have to reassemble them. To make matters even more complicated, I may have encoded the same stimulus in multiple ways. For example, I may have assigned the content of a given sentence to the tangle of neurons labeled "things I know about AIDS" as well as to the tangles labeled "things I know about cognitive science" and "ideas for the Washington and Lee essay."

39. See generally RICHARD M. RESTAK, *THE MODULAR BRAIN: HOW NEW DISCOVERIES IN NEUROSCIENCE ARE ANSWERING AGE-OLD QUESTIONS ABOUT MEMORY, FREE WILL, CONSCIOUSNESS, AND PERSONAL IDENTITY* (1994) (describing recent discoveries of brain organization and their implications); Daniel Goldman, *Miscoding Is Seen as the Root of False Memories*, N.Y. TIMES, May 31, 1994, at C1 ("The brain stores the memory of each sense in a different part of the cortex.").

As I set about retrieving and reassembling the various pieces of my drafting experience, ample room for error exists. Moreover, during the intervening period between storage and retrieval, alterations to the various component parts are common. I well might unconsciously "fill-in" gaps in the story. I might forget or fail to encode parts that are not particularly salient or germane, such as the barking dog. Because of cognitive dissonance, I might harmonize or drop altogether those elements that seem to be in conflict, such as my buoyant mood and my agitation. Because I am not a cipher and have often reflected on human nature prior to writing this essay, I might in recalling this moment mix together bits and pieces from different sources. Finally, the circumstances which prompt me to recall it might influence my recollection of drafting this page. For example, the picture I reassemble for a seminar on essay writing might differ dramatically from the one I reassemble for a conference on cognitive science and law.⁴⁰

All of what I just have said applies to garden-variety recall. Then there is the special case of information that threatens to disrupt a person's equilibrium or to cause her great stress. We have all had the experience of forgetting something that was too painful to remember. Many of us have engaged in compartmentalizing, which is a fancy term for putting up walls in our minds, and have paid attention to troublesome facts only when it was safe to do so. I, for one, also have engaged in denial concerning things about myself that are embarrassing or unpleasant. And just maybe I have repressed a thing or two as well, although by definition I cannot describe for you anything that remains buried.

It is not unusual for persons living with HIV to engage in each of these coping strategies. Rather than suffer constant reminders of the increased probability of early death, some folk become adroit at mental gatekeeping and admit their HIV status into consciousness only as necessary. Others compartmentalize, deny, or repress so as to avoid having to face up to the foolhardy behavior that put them in harm's way. Still others hide their status from themselves because they are unable to deal with the stigma that AIDS carries. And some solve all these problems by engaging in wishful thinking. "Maybe I have beaten the odds," they think, "and am no longer infectious."

III. *Fabian's Story*

What do we make of such complex mental states? They certainly do not resemble very closely the simple-minded conception of *mens rea* that undergirds the criminal law. Nor do they inspire confidence that we can figure out how to deter irresponsible behavior and can determine with reasonable

40. See generally FISKE & TAYLOR, *supra* note 5, ch. 7-10 (discussing processes of social cognition and their effects).

accuracy who is blameworthy. It is far from clear that people caught up in the swirl surrounding AIDS are able even to hear the criminal law's commands.

We know relatively little about most of the people who find themselves on the wrong side of the "v" in prosecutions for engaging in "sex without warning." Most cases, presumably, are pleaded out. Those that go to trial and result in an acquittal are unlikely to generate much of a paper or digital trail, apart from files stored in a courthouse basement. For that matter, convictions are unlikely to produce a written opinion, except on appeal. Even then, what we learn about the defendant is usually little more than a series of adjectives, some bordering on epithets. AIDS-oriented newsletters and looseleaf services often chronicle the beginnings and endings of cases (usually by relying on reports in local print media), but their descriptions tend to be sketchy.

Occasionally, however, an AIDS case achieves great notoriety. Usually this happens when a tort plaintiff is especially sympathetic, a tort defendant is well known, or a criminal defendant had a large number of partners. Even then, we do not necessarily get to see the case from the defendant's perspective. Usually, journalists and judges alike impute motives to defendants or infer an entire mindset from a single comment or action.

An exception to all of the above is the story of Fabian Bridges, an HIV-positive gay black man whose sexual irresponsibility a nationally-televised PBS documentary broadcasted first in 1986.⁴¹ While filming a contemporaneous account of Bridges's struggle with HIV, the film crew learned that he occasionally engaged in sex with others, notwithstanding his HIV status.

41. See generally *AIDS: A Story* (PBS television broadcast, Mar. 25, 1986) (documenting life story of Fabian Bridges).

A more recent exception is Nushawn Williams, an HIV-positive drifter who "admitted to having unprotected sexual intercourse with more than 50 women and teen-age girls in . . . western New York, infecting 13 of them." *Criminal Exposure to HIV*, *supra* note 28, at Bonus Report 1. He, together with Darnell "Boss Man" McGee, who reportedly had sex with more than 100 women and girls in the St. Louis area, infecting 30 or more of them, "put a new face on AIDS" in 1988 and "became the impetus for new legislation on criminal exposure to HIV." *Id.* The Williams case, in particular, generated considerable publicity, perhaps because in addition to everything else he was an African-American male in small town America and most of his sex partners were younger, white females. Although most of the media coverage was both lurid and vapid, JoAnn Wypijewski's cover story in *Harper's Magazine* is stunning in its subtlety and sophistication. JoAnn Wypijewski, *The Secret Sharer: Sex, Race, and Denial in an American Small Town*, *HARPER'S MAGAZINE*, July 1998, at 35 (recounting Williams's impact on Jamestown, New York). Because of its richness of detail and Wypijewski's remarkable ability to get inside the heads of her informants, I have been sorely tempted to mine the article in order to present here a picture of Williams in all his complexity. Ultimately, however, I have decided to feature someone – Fabian Bridges – who is much more typical of HIV-positive folk who act in sexually irresponsible ways. I worry that if I were to focus on an outlier like Nushawn Williams, I would replicate the mistake made by those state legislatures that enacted draconian laws in response to the uproar surrounding him.

They then decided to make that fact – and the bumbling and ineffectual efforts of several public agencies to intervene – a central theme of the documentary. Thus, millions of Americans watched transfixed as Bridges promised his doctor on camera that he would not put others at risk and then later admitted that he subsequently had picked up and had sex with several men in exchange for money.

At first glance, Bridges appeared to be, as one print journalist described him, "a miserable, wretched, uncaring victim-turned-victimizer who used his body as a lethal weapon."⁴² But upon reflection, it is apparent that the primary reason Bridges prostituted himself was because he had no other source of money. Apparently, the documentary makers missed this simple reality. They knew full-well that Bridges was penniless, and in a voice-over they revealed that on occasion they gave him the munificent sum of fifteen dollars so that he could rent a room in a "flophouse" (their word choice) for the night.⁴³ The voice-over explains, sanctimoniously, that they gave Bridges only small amounts of money because they did not want to be implicated in supporting someone who was behaving in such an irresponsible fashion.⁴⁴ Of course, they did not mind exploiting Bridges by filming him "on the stroll" as he picked up tricks.

During the period of time covered by the documentary, Bridges bounced back and forth between three different cities as public health officers, government officials, police, and prosecutors tried to figure out how to curb his behavior. One sheriff gave Bridges a one-way plane ticket and instructed him, in effect, to "get out of Dodge by sunset." Viewers also watched a series of painful interactions between Bridges and his family. We saw him lose his main source of moral support, as his sister's husband forced her to choose between himself and Fabian. "I wouldn't care if it was just me," said the brother-in-law lamely, "but I've got our baby to think of."⁴⁵ We also watched in agony as Bridges desperately tried to get his mother to come see him or to let him come see her. After several plaintive phone calls, his mother finally appeared. And although she looked for all the world like one of those indomitable plus-sized black women that the likes of Hattie McDaniel and Esther Rolle made famous on screen, it quickly became apparent that her only real interest in Fabian was financial.

Far from showing us "a miserable, wretched, uncaring victim-turned-victimizer," the documentary captured something else: a man who was lonely,

42. Howard Rosenberg, "Frontline" AIDS Commentary: *Documentary Makers' Relentless Focus on the Lethal Lifestyle of a Dying Fabian Bridges Puts Minneapolis Station and PBS in the Spotlight*, L.A. TIMES, Mar. 27, 1986, § 6, at 1.

43. *AIDS: A Story*, *supra* note 41.

44. *Id.*

45. *Id.*

adrift, broke, and broken. His voice betrayed resignation and despair, not anger or revenge. Bridges was perhaps most revealing when he described a sexual encounter that was not commercial: "We talked mostly. I liked him. What I liked most was how tender he was. After we cleaned each other up and stuff, he just held me in his arms. I like it when they hold me."⁴⁶ For Bridges, as for many people, sex served as a proxy for intimacy and as a temporary escape from life's miseries. Although he may have put his partners at risk (no one bothered to inquire whether he used a condom or otherwise engaged in safer sex), he did not act out of malice or evil intent. The documentary's ending bears out this interpretation of Fabian's story. Disturbed by what he had been reading in the local newspapers, a leader of Houston's gay community tracked Bridges down and offered him the one thing no one else thought to provide: a place to stay, financial support, and a network of people who cared. Sheltered and protected in this way, Bridges no longer felt tempted to put others at risk.

Bridge's story calls into question many of the assumptions legislators and courts make in criminalizing risky sex. For example, lawmakers assume first that people who have sex without informing their partners of their positive HIV status act out of callousness, indifference, or malice. Secondly, lawmakers assume that when engaging in sex, individuals are capable of functioning as rational profit-maximizers. Thirdly, lawmakers assume that as HIV-positive individuals leap into bed they are actually conscious of the risk they might pose to others and of the criminal law's brooding omnipresence. Fourthly, lawmakers assume that the pain of the criminal sanction far outweighs the benefits of the imminent sexual encounter, even when discounted by the probability of its imposition. Finally, they assume that therefore HIV-positive individuals rationally will choose to obey the law. Without belaboring the point, each of these assumptions is dubious at best.

IV. Implications for "Doing" Law

Given all this, *can* law be effective in regulating risky sexual behavior? I trust that I already have said enough to convince you that the answer to this question is far from an untroubled "yes." Indeed, I suspect that "probably not" is closer to the truth. But this is not necessarily cause for despair. Perhaps we can retool our legal system so as to make it more effective in fostering sexual responsibility. Or perhaps the shortcomings of our legal system are a signal that we ask too much from it or ask the wrong things of it and that we would be better served by directing our energies elsewhere. A third option exists as well. Without retreating from our goal, perhaps we should rethink where best to place the burden of fostering responsible behavior.

46. *Id.*

A. Technical Fixes

By far the rosier conclusion⁴⁷ is that with a little tweaking here and a little boosting there, our legal system can accommodate cognitive complexity in much the same way as it responds to any other kind of scientific challenge. Thus, for example, we might require that legislative committees include staffers well-versed in the cognitive sciences. Similarly, we might insist that proposals to regulate human behavior routinely be vetted in public hearings at which witnesses expert in social psychology, cognitive psychology, social anthropology, and the like testify. Judicial fixes are even easier to imagine. As part of their orientation to the bench, judges could receive sensitivity training on the importance of moving beyond stick-figure justice. Courts could refashion or reinterpret rules of evidence so as to allow counsel, where relevant, to explore the vagaries of perception, memory, and recall and to identify the complex ways in which we human beings manage distressing information.⁴⁸

I have no special insight into whether such technical fixes are likely to make much difference. I do note, however, that our record of adapting to other scientific challenges is spotty at best. And it is especially difficult to change our ways when we have relied on mother wit for centuries.

B. Streamlined Expectations

If, despite our best efforts, we are unable to rework our legal system to take account of human complexity, one intellectually honest response is to alter our expectations of what law can do. In particular, we might identify those legal determinations that are especially cognition-sensitive and frankly acknowledge that they are beyond the law's scope. For example, we might decide that general deterrence is more than we can hope for, given the uncer-

47. In labeling this approach "rosy," I do not mean to suggest that it is therefore wrong-headed or soft-nosed. After all, I have been accused publicly, perhaps correctly, of being a "daffy optimis[t]." J. Anthony Lukas, *Race Matters*, N.Y. TIMES, Oct. 1, 1995, §7 (Book Review), at 10.

48. Professor Jody Armour has proposed a similar approach in the context of racial stereotyping. See generally Armour, *supra* note 5 (arguing that colorblind formalism fails to reduce discrimination and therefore courts should encourage jurors actively to combat their automatic discriminatory tendencies). Drawing on empirical research by leading social psychologists, he observes that stereotypes are the result of "well-learned internal associations about social groups that are governed by automatic cognitive processes." *Id.* at 733. Even genuinely nonprejudiced people act in discriminatory ways when something triggers deeply ingrained stereotypes. Armour argues, therefore, that courts should allow counsel for socially marginalized clients explicitly to raise the issue of unconscious stereotyping in cases of alleged discrimination. *Id.* at 733-34, 759-61. Far from "play[ing] to the prejudices of the jury," *id.* at 733, once the subterranean world of stereotypes is made visible, nonprejudiced jurors are able to avoid reflexively responding to them and instead can follow their conscious commitments to racial justice. *Id.* at 734, 759-61. I find Armour's argument persuasive, but I note that the cognitive processes he describes are far simpler than those in which people struggling to live with HIV engage.

tain connection between punishing Peter and influencing Paul. Or we might decide to disconnect retribution from blameworthiness, reasoning that we lack the competence both to distinguish between voluntary and involuntary (if that is indeed where the line should be drawn) and to appraise mental states.

Alternatively, we might conclude that absent the ability to assess blameworthiness with confidence, we should abandon retribution as a justification for imposing criminal sanctions. Of course, if our heightened sense of limitation leads us to abandon both general deterrence and the retributive ideal, the criminal law would be left with the slenderest of moral foundations.⁴⁹

C. Deregulation

Any queasiness we feel about proceeding under either of these circumstances – punishing without confidence that we are morally justified or punishing without regard for moral justification – would be allayed substantially if it turns out that we can foster responsible behavior without resort to the criminal justice system except in extreme cases. If private institutions or noncoercive governmental institutions successfully can navigate the cognitive world of people in pain, perhaps we should give deregulation a try.

Of course, we lawyers have a difficult time seeing beyond legal institutions on the one hand and the mythic or mythical market on the other. But the truth is that most conformity to social expectations has little to do with either. If we recall the story of Fabian Bridges, it was neither the dictates of the law nor the invisible hand of the market that led him to set his life aright, but rather the quite visible hand of a community of people who identified with and cared for him.

That said, it is (as usual) unwise to draw too sharp a distinction between public commands and private ordering. One of government's functions is to create the conditions in which private institutions can flourish. Recall that in the AIDS arena, government-sponsored HIV testing and counseling serves, at its best (although not in Fabian's case), to funnel HIV-positive people into supportive environments that allow for the development of peer-based norms of safe behavior.

D. Standing Pat

If it turned out that none of the strategies discussed above moves us any closer to achieving the ideal of responsible sexual behavior, we would have

49. Although we could continue to impose sanctions solely as a means of expressing our collective distaste for and condemnation of particular behavior, we thereby would open ourselves to moral vacuity and majority oppression of the merely different. See generally Harlon L. Dalton, Book Review, "*Disgust*" and *Punishment*, 96 YALE L.J. 881 (1987) (considering whether government can prohibit conduct that is offensive but not harmful).

to consider the otherwise unpalatable option of leaving things as they are. Indeed, even if other options are partially successful, we should consider whether some side effects make the cure worse than the disease. For example, if we opt to make adjudication more "scientific," we run the risk of removing decision-making from citizen jurors. In criminal cases and in some civil cases, that shift is of constitutional import. And unlike some clauses of that great document, the Sixth and Seventh Amendments are direct expressions of our commitment to government of the people, by the people, and for the people.⁵⁰ Indeed, lawsuits in general and actions tried to a jury in particular, constitute our Nation's most intimate form of governance. Therefore, we should be careful in adopting reforms that trench on citizen-centered government.

Similarly, reforms that frankly acknowledge the limits of our capacity to deal with cognitive complexity run the risk of undermining our faith in the legislative and judicial enterprises. That is a good thing, up to a point. It is one thing to spotlight our shortcomings and to push for a radical reimagining of the law's human subject. But it is quite another to foster cynicism and to counsel despair. Perhaps at the end of the day, justice that is rough but comfortable to the pursuers and the pursued alike will have to do.

E. Rethinking Our Goals

Finally, all of these ruminations may lead us back to an option that I foreshadowed early on in the essay. If despite our best efforts we keep falling short in our attempts to promote responsible sexual behavior, the take-home lesson may be that we are training our sights on the wrong target or on a target that is too small. Instead of focusing solely on individual conduct, we would do well to pay attention to the environment that conditions the "choices" that individuals make.

Is there so much static in the air that others cannot hear our messages, no matter how carefully we craft them? Are there any institutional barriers – such as the possible loss of health insurance upon discovery of one's HIV status or the risk that one's sexuality, drug history, or HIV status will become an issue in a child custody battle – that militate against telling all to potential sex partners? Do current laws – such as those prohibiting the distribution of condoms in schools, limiting the content of sex education, prohibiting the sale of injection needles without a prescription, or denying funding to organizations that treat homosexuality as an acceptable lifestyle – undermine or impede efforts to play safe? Do structural features – such as an economic system that virtually assures that some people will live on the margin – promote instability, thereby making wise choices more difficult? Do aspects of our

50. U.S. CONST. amends. VI & VII.

culture – such as elevating sexiness to a position above both cleanliness and godliness – create a powerful counterforce to responsible behavior?

Individual decisions are never made in a vacuum. If we do not pay attention to the environmental factors that impede, distract, or dissuade individuals from behaving responsibly and do not take steps to transform or at least to neutralize them, we then well may discover that even the most cognitively sophisticated legal system will leave us wanting.