

# ***THE MORAL READING OF HIV PREVENTION IN THE UNITED STATES: CRIMINAL LAW AND TORT LAW***

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## ***Abstract***

*The United States government has been campaigning to encourage people to take HIV testing and thus get treated. It is puzzling that more than 50% of States have HIV-specific criminal laws that criminalize both exposure and transmission. At the same time, there is an increased tort law to seek financial compensation for unwanted HIV exposure and transmission. While both laws the moral claim of protecting people from HIV infection, this paper is trying to find an answer to the following inquiry: What is the difference of the moral reading between the use of criminal law and tort law in addressing HIV prevention in the United States? This paper uses the traditional descriptive comparison between criminal law and tort law under the American legal system with a nationwide jurisdictional scope. This paper measures the difference using the frame of reference of Ronald Dworkin's law, morality, and interpretation theory. Both criminal law and tort law have been developing similar liability principles regarding HIV exposure and transmission under the United States' common law tradition. For HIV prevention itself, both criminal law and tort law play a marginal role in gaining public health purposes in reversing the HIV epidemic. Criminal law has been scrutinized as not aligned with the purpose of law where misconceptions exist in both substantive dimension and the underlying moral claim. Tort law, on the other hand, suffers an even less moral claim on public health purposes. However, tort law maintains a consistent narrow sense of financial liability.*

*Keywords: criminal law, tort law, HIV.*

## **Abstrak**

Pemerintah Amerika Serikat telah berkampanye untuk mendorong orang untuk melakukan tes HIV dalam rangka pemberian pengobatan. Namun, terdapat anomali bahwa lebih dari 50% negara memiliki hukum pidana khusus HIV yang mengkriminalisasi paparan dan penularan virus. Pada saat yang sama, terdapat peningkatan hukum gugatan kerugian untuk mencari kompensasi finansial terkait kasus paparan dan penularan HIV yang tidak diinginkan. Sementara kedua hukum tersebut (hukum pidana dan hukum gugatan kerugian) memiliki klaim moral untuk melindungi orang dari infeksi HIV. Tulisan ini mencoba menjawab pertanyaan berikut: Apa perbedaan pemahaman moral antara penggunaan hukum pidana dan hukum kerugian dalam menangani pencegahan HIV di Amerika Serikat? Makalah ini menggunakan perbandingan deskriptif tradisional antara hukum pidana dan hukum gugatan kerugian di bawah sistem hukum Amerika dengan lingkup

yurisdiksi nasional. Tulisan ini mengukur perbedaan tersebut dengan menggunakan kerangka acuan hukum, moralitas, dan teori interpretasi Ronald Dworkin. Baik hukum pidana maupun gugatan kerugian telah mengembangkan prinsip-prinsip tanggung jawab yang serupa mengenai pajanan dan penularan HIV di bawah tradisi hukum umum Amerika Serikat. Untuk pencegahan HIV itu sendiri, baik hukum pidana maupun hukum kerugian memainkan peran kecil dalam mencapai tujuan kesehatan masyarakat dalam membalikkan epidemi HIV. Hukum pidana telah dipandang tidak selaras dengan tujuan hukum di mana kesalahpahaman ada baik dalam dimensi substantif dan klaim moral yang mendasarinya. Hukum gugatan, di sisi lain, memiliki klaim moral yang terbatas dalam hal tujuan kesehatan masyarakat. Namun, hukum gugatan mempertahankan rasa tanggung jawab keuangan yang spesifik dan konsisten.

Kata Kunci: hukum pidana, gugatan kerugian, HIV.

### **Introduction**

*More than 1.2 million people are living with HIV in the United States since the 1980s.<sup>1</sup> According to the Centers for Disease Control and Prevention, one out of eight of them is not aware of their own HIV status.<sup>2</sup>*

*One of the forefront government campaigns to halt the epidemic is to reduce the HIV risk among the populations and communities most affected by the disease. The first strategy is by initiating a national HIV testing and prevention campaign that encourages all adults to know their HIV status and protect themselves and their community by making HIV testing a part of their regular health routine.<sup>3</sup>*

*To support the campaign, the government also includes the effort to reduce the stigma by promoting appropriate medical treatment to*

*better the quality of life.<sup>4</sup>*

*However, to date, there are also more than 30 states that have HIV-specific criminal laws. The United Nations Global Commission on HIV and the Law had issued legal and policy recommendations that say HIV criminalization is not beneficial to further HIV prevention efforts. Commentators have been debating the use of criminal law over time.<sup>5</sup>*

*At the same time, the use of tort law also gaining a considerable increase by those seeking compensation for HIV exposure incidences. While both laws have been upholding seemingly similar moral messages of disease prevention, there is a gap in investigating the comparison between the two laws.*

*This paper is trying to answer the following inquiry: What is the difference in the moral reading between the use of criminal law and*

<sup>1</sup> CDC, "HIV in the United States | Statistics Overview | Statistics Center | HIV/AIDS | CDC" accessed 16 March 2017, <https://www.cdc.gov/hiv/statistics/overview/ataglance.html>.

<sup>2</sup> Ibid.

<sup>3</sup> CDC, "The National HIV/AIDS Strategy | High-Impact HIV Prevention | Policy and Law |

HIV/AIDS | CDC" accessed 16 March 2017, <https://www.cdc.gov/hiv/policies/hip/strategy.html>.

<sup>4</sup> Ibid.

<sup>5</sup> HIV Law Commission, "Report" accessed 16 March 2017, <http://www.hivlawcommission.org/index.php/report>.

tort law in addressing HIV prevention in the United States?

The inquiry is self-explaining that the paper is presented as a piece of comparative study. Specifically, this paper uses the traditional descriptive comparison between criminal law and tort law under the American legal system with a nationwide jurisdictional scope. This selection of case coverage is purposively selected to gain a broader discussion on the differences between the two objects of study.

This paper is intended to look at the comparison between the two branches of laws in developing principles on HIV prevention. HIV is a public health concern, and thus this paper measures the difference using the frame of reference of Ronald Dworkin's theory of law and morality and interpretation. The rationale behind this selection is because both criminal law and tort law on HIV exposure and transmission share the same importance of interpretation of law over observation and normativity.

This comparison is trying to fill the gap of knowledge stretching between the discourse on HIV-criminal law and HIV-tort law. This paper is organized as follows: (1) Introduction, (2) The Use of Criminal Law, (3) The Use of Tort Law, (4) The Moral Reading of the Comparison, (5) Conclusion.

### **1. The Use of Criminal Law**

*The inclination to use criminal*

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<sup>6</sup> White, Graham, " Pre-Exposure Prophylaxis (Prep) and Criminal Liability Under State HIV Laws", *Yale Law Journal Forum*, Vol. 126, 2016, p. 77.

<sup>7</sup> *Ibid.*

law as a tool to halt HIV transmission has been emanated since the adoption of the Ryan White Care Act, where the federal government requires each state to establish legal avenues in prosecuting HIV exposure as a condition to receive federal fund for AIDS treatment.<sup>6</sup>

The majority of states have addressed HIV exposure in their criminal laws.<sup>7</sup> The notion of criminalizing "HIV exposure" has been preferred instead of "HIV transmission" because by deterring HIV exposure, HIV transmission will be automatically prevented.<sup>8</sup> The other reason is that HIV exposure criminalization will prevent people from intentionally expose HIV to others.<sup>9</sup>

As an example, in the state of Washington, unlawful exposure to HIV is governed by RCW 9A.36.011:

[A] person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance . . .

<sup>8</sup> Lazarini, Zita., et.al., " Evaluating the Impact of Criminal Laws on HIV Risk Behavior", *Journal of Law, Medicine & Ethics*, Vol. 30, 2002, p. 239.

<sup>9</sup> *Ibid.*

<sup>10</sup>

While the above RCW 9A.36.011 does not explicitly regulate possible defense in the statute, in the state of Washington, defense of consent is availing when a court can establish that the victim had consented to the intentional activity by the defendant to assault great bodily harm by running the risk of HIV exposure or transmission.<sup>11</sup>

The purpose of the law is to stop the transmission of a deadly disease.<sup>12</sup> The court could employ the reasonable test to see what a person does instead of examining who the person is.<sup>13</sup> This means that it is also equally sufficient the crime element for the non-infected individual who injected HIV-infected blood into another person with the intent to inflict great bodily harm.<sup>14</sup> By recognizing that every citizen has the same potential to commit the crime, it is undisputed that exclusively putting HIV—and not all sexually transmitted diseases—in the law is not a violation of the Equal Protection Clause.<sup>15</sup>

To suffice the charge, a court could construct the criminal intent by testing whether a defendant aware of his or her HIV-positive status when the assault carrying HIV exposure or transmission occurred.<sup>16</sup>

For example, in *State v. Stark*, the defendant, had learned his HIV-positive status and had received HIV prevention advice from counselors.

<sup>10</sup> Washington Revised Code Annotated, § 9A.36.011, West.

<sup>11</sup> *State v. Whitfield*, Washington Appellate Vol. 132, 2006, p. 899.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *State v. Stark*, Washington

Still, he did not disclose his HIV status to the victims in activities known as risking HIV transmission.<sup>17</sup> Furthermore, he said to a third party, "I don't care. If I'm going to die, everybody's going to die."<sup>18</sup> Based on the fact if he did not prevent HIV risks after knowing his HIV status and after he had the knowledge of HIV prevention, the court found that Stark sufficed the intent element.<sup>19</sup>

The defense of consent has been exemplified by athletic competition. In athletic competition, the competition participants are considered consent to reasonably foreseeable conduct during the competition, including when the conduct is a violation of the competition's rule.<sup>20</sup>

As to the competition, Washington courts establishes that the sport in question must not be unlawful or prohibited by the law or public policy. Therefore, it will not mount a defense if the consent is given for unlawful activity, for example, in *State v. Hiott*, the court found that shooting a person with a BB gun, even with the victim's consent, does not constitute a defense of consent because it is against the law.<sup>21</sup>

As for a more particular situation, consent to involve in an assault in incarceration is not a defense in *State v. Weber*, the defendant, consented to fight with his fellow inmates.<sup>22</sup> The court found that consent to engage in fighting with inmates would not be a defense because "society has an

Appellate Vol. 66, 1992, p. 433.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *State v. Shelley*, Washington Appellate Vol. 85, 1997, p. 929.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

interest in punishing assaults as breaches of the public peace and order so that an individual cannot consent to a wrong that is committed against the public peace."<sup>23</sup>

Regarding HIV exposure and transmission, the defense can be granted if the fact shows a situation where the victim had consented to a reasonably foreseeable assault with intent to inflict great bodily harm by exposing or transmitting HIV.<sup>24</sup> In *State v. Whitfield*, the defendant did not disclose his HIV status to any of the victims.<sup>25</sup> The court did not grant the defense of consent because the defendant's intentional concealment of his HIV status was not a foreseeable behavior in a consensual sexual intercourse context.<sup>26</sup> The court ruled that consent to consensual sex is not an equal meaning for consent to engage in an assault by exposing and putting HIV transmission risk with intent to inflict great bodily harm.<sup>27</sup>

Consequently, to mount a defense, consent given by the victim is must include the victim's knowledge of the defendant's HIV status prior to the commission of the act.<sup>28</sup> In *Whitfield*, the defendant did not disclose his HIV status to any of the victims, and therefore the court could not be persuaded by the defendant's assertions that the victim should have known the risk of HIV transmission or

exposure given their knowledge of Whitfield's promiscuity and high-risk behavior of drug use.<sup>29</sup>

Similarly, in Iowa, the ICA § 709D. Three explicitly governs that "[I]t is an affirmative defense to a charge . . . if the person exposed to the contagious or infectious disease knew that the infected person was infected with the contagious or infectious disease at the time of the exposure and consented to exposure with that knowledge."<sup>30</sup>

However, Washington's law can be distinguished from the law in Minnesota where the explicit affirmative defense is governed by MSA § 609.2241 that "[I]t is an affirmative defense . . . that [the infected person] took practical means to prevent transmission as advised by a physician or other health professional . . ."<sup>31</sup>

At a national level, sexual activity and injecting drug use has been the main risk factor of HIV transmission.<sup>32</sup> The risk of HIV transmission exists when a bodily fluid-carrying HIV is transmitted from a person living with HIV into the bloodstream of an HIV-negative individual.<sup>33</sup> The risk of HIV transmission begins when a bodily fluid carrying the virus, including semen, pre-seminal fluid, blood, rectal fluid, vaginal fluid, or breast milk, is transmitted from a person

<sup>23</sup> *Ibid.*

<sup>24</sup> *State v. Whitfield*, *loc. cit.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 898.

<sup>29</sup> *Ibid.*

<sup>30</sup> Iowa Code Annotated, § 709D.3, West.

<sup>31</sup> Minnesota State Annotated, § 609.2241, West.

<sup>32</sup> Cox, Brian, "Turning the

Tide: The Future of HIV Criminalization After Rhoades v. State and Legislative Reform in Iowa", *Northwestern Journal of Law & Social Policy*, Vol. 11, 2016; HIV Transmission, Centers for Disease Control & Prevention, accessed 18 March 2018, <http://www.cdc.gov/hiv/basics/transmission.html>

<sup>33</sup> *Ibid.*

living with HIV into the bloodstream of an HIV-negative individual.<sup>34</sup>

## 2. The Use of Tort Law

The first type of lawsuit to claim tort liability of HIV exposure is a battery. The battery happens when the person intentionally makes bodily contact with another person without the consent of the other person if such contact is harmful or offensive. Battery attracts the liability for emotional damages resulted from the tortious act.<sup>35</sup>

What constitutes offensive contact is the absence or lack of consent to contact. *Brzoska v. Olson* exemplified the use of the reasonable test to define this category.<sup>36</sup> The plaintiff, a patient, filed a lawsuit against his HIV-positive dentist who performed a dental treatment without informing his HIV-positive status.<sup>37</sup> However, The Supreme Court of Delaware decided that the fact that the dentist was HIV-positive did not make the treatment offensive unless the patient could prove the actual HIV

exposure.<sup>38</sup> This means that the offensiveness of contact is decided based on an objective standard.<sup>39</sup>

*Brzoska* also shows that the treatment by a healthcare provider is considered as an expressive consent of contact.<sup>40</sup> Contrary to that, *Delay v. Delay* shows that in a sexual relationship, explicit consent by a sexual partner is required to avoid battery liability.<sup>41</sup>

The other element of battery is the presence of intent to make contact. Courts have decided that the intent to have a sexual relationship suffices the intent in establishing battery.<sup>42</sup> The courts held that defendants of this lawsuit need not have intended to transmit HIV.

The court in *Brzoska* found that the intent to make contact element, despite the insufficiency of offensiveness element. Similarly, the transmission of HIV is not required to mount a battery. Offensive contact alone is theoretically sufficient for a battery.<sup>43</sup>

The other form of tort liability claim is fraudulent

<sup>34</sup> *Ibid.*

<sup>35</sup> Restatement (Second) of Torts, 1977, § 13; Lee, Sun Goo, "Tort Liability and Public Health: Marginal Effect of Tort Law on HIV Prevention", *South Texas Law Review*, Vol. 54, 2013, p. 684.

The liability for battery is established if one "acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, . . . [and] a harmful contact with the person of the other directly or indirectly results."

<sup>36</sup> *Brzoska v. Olson*, Delaware Supreme Court, Vol. 668,

1995, p. 1361.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* at 1366.

<sup>41</sup> *Delay v. Delay*, Florida District Court, Vol. 707, 1998, p. 402; *Neal v. Neal*, Idaho, Vol. 873, 1994, p. 876-877); *Robinson v. Louie (In re Louie)*, The United States Bankruptcy Court of Northern District of California, Vol. 213, 1997, p. 764.

<sup>42</sup> *Doe v. Johnson*, Western District of Michigan, Vol. 817, 1993, p. 1384-1385.

<sup>43</sup> *Robinson v. Louie (In re Louie)*, *op. cit.* at 763; *Brzoska v. Olson*, *op. cit.* at 1359-1360; *Martinez v. Brazen*, Southern District of New York, No. 91 Civ. 7769 (RPP) WL 93245, 1992, p. 1; *Neal v. Neal*, *loc. cit.*

misrepresentation. It happens when a person misrepresents a fact, an opinion, an intention, or the law to induce another person to act or refrain from acting in reliance upon it, and the other person consequently suffers a pecuniary loss due to justifiable reliance on the misrepresentation.<sup>44</sup>

HIV cases, as a non-commercial realm, also receive compensation when HIV individuals falsely represent their HIV status to others.<sup>45</sup> In *Brzoska*, the court found that HIV individuals are liable when they have either lied or failed to disclose the fact to others despite their duty to inform.<sup>46</sup>

The duty to inform also held by the courts to HIV individuals regarding their HIV status unless they took other preventive measures.<sup>47</sup> The silence of the infected individual asserts the message that the individual is not infected.<sup>48</sup>

On the other hand, tort liability cannot be sufficed without the defendant's knowledge regarding his HIV status.<sup>49</sup> This is also applied even

when the plaintiff expects constructive knowledge.<sup>50</sup> However, constructive knowledge on HIV status requires a narrower condition to amount to this misrepresentation.<sup>51</sup>

The courts also held that the plaintiff's reliance on the misrepresented fact of HIV status does not require evidence of the reliance, so long there is credence to the statement by the plaintiffs that they were not willing to be exposed to HIV.<sup>52</sup>

Another form of tort liability claim is the intentional infliction of emotional distress.<sup>53</sup> This claim requires that the defendant intentionally or recklessly caused severe emotional distress by extreme and outrageous conduct.<sup>54</sup>

Lying about HIV status is considered extreme and outrageous. *Whelan v. Whelan* shows that the court found that it is extreme and outrageous that the defendant was lying about having HIV while, in fact, he had not.<sup>55</sup> This false statement, claimed by the wife-plaintiff, caused her severe emotional distress in

<sup>44</sup> Restatement (Second) of Torts, *op. cit.* at 15 § 525.

<sup>45</sup> *Aetna Cas. & Sur. Co. v. Sheft*, The United States Court of Appeals for the 9th Circuit, Vol. 989, 1993, p. 1108; *Baranowski v. Torre*, Connecticut Supreme Court, No. CV90-0236178 WL 240460, 1991, p. 2; *Brzoska v. Olson*, *op. cit.* at 1367; *Doe v. Dilling*, Illinois Supreme Court, Vol. 888, 2008, p. 39-40; *J.B. v. Bohonovsky*, The United States District Court for the District of New Jersey, Vol. 835, 1993, p. 797; *Robinson v. Louie* (*In re Louie*), *op. cit.* at 761; *Petri v. Bank of N.Y. Co.*, New York Supreme Court, Vol. 582, 1992, p. 613; *Doe v. Johnson*, *op. cit.* at 1388-1389.

<sup>46</sup> *Brzoska v. Olson*, *op. cit.* at 1367

<sup>47</sup> *Oberman, Michelle*, "Sex, Lies, and the Duty to Disclose",

*Arizona Law Review*, Vol. 47, 2005, p. 892.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Doe v. Doe*, New York Supreme Court, Vol. 519, 1987, p. 596-597.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Larsson, Eric M., Talbot, Jean A*, "Cause of Action to Recover Damages for Transmission of AIDS Through Negligence, Misrepresentation or Nondisclosure of Infected Status" 39 *Causes of Action*, 2009, p. 244-245.

<sup>53</sup> *Hughes Training Inc. v. Cook*, The United States Court of Appeals for the 5th Circuit, Vol. 254, 2001, p. 594.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Whelan v. Whelan*, Connecticut Supreme Court, Vol. 588, 1991, p. 253.

different unexpected circumstances, including the fear of her son becoming an orphan.<sup>56</sup>

Similarly, it is also considered extreme and outrageous to keep an HIV-positive status a secret even though the plaintiff was HIV-negative.<sup>57</sup> In *Christian v. Shaft*, the court awarded the plaintiff five million dollars as compensation for having a fear of contracting HIV. However, the plaintiff tested HIV-negative more than sixteen times in four years after the exposure.<sup>58</sup>

On whether the extreme and outrageous act, the plaintiff must establish that there is a suffering of severe emotional distress of being exposed to HIV.<sup>59</sup> However, some courts held that HIV infection must be present to compensate for the claimed emotional distress.<sup>60</sup>

In seeking tort claim from negligence, the plaintiff must prove that:

- (1) The defendant owed the plaintiff a duty of care;
- (2) that the defendant breached this duty;
- (3) that the defendant's conduct was both cause-in-fact and a proximate cause thereof;
- (4) that the defendant's conduct

caused harm to the plaintiff; and

(5) the number of damages from the actual harm.<sup>61</sup>

Duty of care is "a legally recognized obligation to conform to a certain standard of conduct towards another person."<sup>62</sup> Duty of care in HIV cases means that HIV individuals have to either take preventive measures or disclose to others about the HIV risk before the risk run.<sup>63</sup>

Negligence operates based on the foreseeable harm acknowledged by the defendant in maintaining the duty of care.<sup>64</sup> This acknowledgment becomes an essential element and could be established by determining whether the defendant has either actual or constructive knowledge that the conduct could harm others.<sup>65</sup>

The court in *Doe v. Johnson* strengthens the recognition of constructive knowledge as an expanded definition.<sup>66</sup> The defendant asserted that he did not take preventive measures and did not warn the plaintiff because he did not seem aware of his HIV status at the time of the exposure.<sup>67</sup>

Nonetheless, the court stated that knowledge of HIV infection could be reasoned for two reasons:

<sup>56</sup> *Ibid.* at 252.

<sup>57</sup> Shahvari, Mandana, "Comment, AfrAIDS: Fear of AIDS as a Cause of Action", *Temple Law Review*, Vol. 67, 1994, p. 782.

<sup>58</sup> *Aetna Cas. & Sur. Co. v. Sheft*, *op.cit.* at 1106.

<sup>59</sup> *Robinson v. Louie (In reLouie)*, *op.cit.* 759; *Kerins v. Hartley*, *California Court of Appeal*, Vol. 33, 1994, p. 179-180; *Petri v. Bank of N.Y. Co.*, *loc.cit.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Dan B. Dobbs, Dan B., "The Law of Torts", 2000, p.2 § 1.

<sup>62</sup> Schoenstein, Richard

Carl, "Note, Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus", *Hofstra Law Review*, Vol. 18, 1989, p. 50.

<sup>63</sup> *Sun Goo Lee*, *op. cit.* at 639, 653 (2013).

<sup>64</sup> *John B. v. Superior Court*, *California Supreme Court*, Vol. 137, 2006, p. 160.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Doe v. Johnson*, *op. cit.* at 1382

<sup>67</sup> *Ibid.* at 1386.



- (1) the individuals experience HIV-related health symptoms; or  
 (2) the individuals have actual knowledge regarding the HIV-positive status of their prior sexual partner.<sup>68</sup>

The case of *Plaza v. Estate of Wisser* shows how a court could construct the causation relationship between the defendant's conduct and the fact of HIV infection to the plaintiff.<sup>69</sup> The court did not use advanced medical technology to track the direction of the infection.<sup>70</sup> Instead, it used the surrounding circumstances that enable the court to draw a causal inference.<sup>71</sup> The facts in the case include the HIV-positive status of the defendant that the plaintiff did not exchange blood or bodily fluids other than through sex, and he had never engaged in other HIV risk activities.<sup>72</sup>

Consequently, the court must order disclosure of the defendant's HIV test result. In balancing the law of confidentiality, courts cited the exceptions that justify the order upon a compelling need to adjudicate a criminal or civil proceeding.<sup>73</sup>

The court established that without the ability to obtain such medical information would deprive the plaintiff's possible recovery, hence contradictory to the public policy of protecting society from the spread of

HIV infection.<sup>74</sup> Moreover, it also contradicts the principle of requiring wrongdoers to compensate victims for the harms they suffered.<sup>75</sup>

Regarding the extent of the actual harm element, it is clear that the fact of HIV infection from the defendant to the plaintiff satisfies the actual harm suffered.<sup>76</sup> However, in other instances, tort liability could also be claimed when, otherwise, there is emotional harm instead of actual physical harm.<sup>77</sup>

### 3. The Moral Reading of the Comparison

Compared to tort law, criminal law is often seen as providing more invasive and restrictive penalization. Criminal law also found as more covered by the media. It is also evident that criminal law is likely to be better perceived by people considering violating the law.

The SERO Project also found that more than one out of four survey participants tested for HIV (26.8%) were counseled about the possibility of prosecution for undisclosed sexual activity.<sup>78</sup> Research of 490 people shows that HIV-specific law did not significantly influence people's sexual behavior. Most survey participants asserted that it is wrong to expose

<sup>68</sup> *Ibid.*, at 1393.

<sup>69</sup> *Plaza v. Wisser*, New York Supreme Court, Vol. 626, 1995, p. 446.

<sup>70</sup> *Ibid.*, at 452.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> New York Public Health Law, 2013, § 2785(2)  
<sup>74</sup> *Plaza v. Wisser*, *op. cit.* at 454.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Petri v. Bank of N.Y. Co.*, *loc. cit.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Sprague, Laurel., Strub, Sean, "The SERO Project: National Criminalization Survey, Preliminary Results", The Sero Project, 2012, accessed 20 April 2018, [http://seroproject.com/wp-content/uploads/2012/07/Sero-Preliminary-Data-Report\\_Final.pdf](http://seroproject.com/wp-content/uploads/2012/07/Sero-Preliminary-Data-Report_Final.pdf).

HIV to others.<sup>79</sup>

The conflict between the use of criminal law and public health imperatives has been growing in the moral question of the purpose of criminal law. Deterrence is the obvious outcome. However, it is also making the avoided conduct more secretive. The conduct will be less detected, but the unwanted impacts would still occur. The interest to take HIV testing may be reduced, thus jeopardizing public health messages.

Consequently, the use of criminal law would have a less moral question if it is formulated base on retribution, not as a contribution to stopping HIV. Criminalization might have a claim to further public health purposes. However, its unintended consequences could counter-productive against the claim itself. At this point, one can question whether punishment is justified for the conduct.

Utilitarian reasons could argue that when the law is against public health objectives, it is an infringement of the people's right not to be punished.<sup>80</sup> Moreover, because punishment has its stigmatizing dimension, then the moral test could

extent to its proportionality.<sup>81</sup>

This conflict of the purpose of using criminal law represents Dworkin's ongoing skepticism on constructive interpretation.<sup>82</sup> Infesting a meaning to criminal law as a tool for HIV prevention opens the door to the misconception that it is betraying HIV prevention itself.<sup>83</sup> Dworkin says that interpretation must be of purpose and not cause.<sup>84</sup> This misconception suggests when criminal law has become the cause of the problem. Then it can be subjected with a constructive interpretation and give the driving element back to the purpose: HIV prevention.

Based on the facts that courts have awarded financial compensation to those exposed to HIV, it clearly shows the ability to use tort liability as a part of HIV response. Unlike criminal law, the development of tort law's legal interpretation of different situations regarding HIV exposure and transmission makes tort law more adaptive to address the purpose of law between plaintiff and defendant.

The courts also mentioned in their decisions that there is an expectation that tort liability can prevent new HIV

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<sup>79</sup> Burris, Scott., et al., "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial", *Arizona State Law Journal*, Vol. 39, 2007, p. 467.

<sup>80</sup> Husak, Douglas, "Overcriminalization: The Limits of the Criminal Law", Oxford University Press, New York, 2008, p. 92.

<sup>81</sup> *Ibid.* at 94; Andrew von Hirsch, Andrew von., Ashworth, Andrew, "Proportionate Sentencing: Exploring the Principles", Oxford University Press, 2005, p. 134.

Disproportionate punishments are unjust not because they possibly may

be ineffectual or possibly counterproductive, but because they purport to condemn the actor for his conduct and yet visit more or less censure on him than the degree of blameworthiness of that conduct would warrant.

<sup>82</sup> Dworkin, Ronald, "Law's Empire", *The Belknap Press of Harvard University Press*, London, 1986, p. 79.

<sup>83</sup> *Ibid.* at 83.

<sup>84</sup> *Ibid.* at 52.

*infections and slow the epidemic. However, the success of this expectation has been in question by commentators.*

*There has been no study that investigates the relationship between tort law and the decisions of HIV-positive people to engage in risky behaviors. Without knowing the law, the law cannot influence their behavior in terms of compliance in HIV prevention, which might result from ignorance toward the law.<sup>85</sup>*

*Unlike criminal law, the moral part of tort law lies in the financial liability that might be imposed for morally wrong conduct. However, this purpose is an outlier of the common purpose of tort law, where financial liability can economically benefit in commercial settings.*

*In the United States, bringing a lawsuit is an additional financial burden. In contrast, HIV has been a disease of economically disadvantaged groups in the United States, and thus plaintiffs are risking being not paid after winning the case. This underrepresented moral message makes the public health purpose of tort law more overshadowed by criminal law.*

*The basic idea of tort law is responsibility. Thus one can test the case laws with Dworkin's question of jurisprudence: What makes a good reason for a court's decision? Questioning "good" reasons are equivalent to a moral question. Under tort law, reasons then became quantified into an amount of money that meets the satisfactory level of the injured. Without appropriate injunction order, this would define*

*tort law as a trade constituting economic valuation of morality.*

*As a comparison, moral reading in criminal law highlights the justifiability of criminalization. Contextually, by meaning relative to the epidemic picture, criminalization of HIV transmission and exposure could be situated in the wrong place and at the wrong time. The moral responsibility in criminal law stays somewhere in the statutory law-making processes.*

*Tort law, on the other hand, poses a morality question at the judicial decision dimension of law-making processes. However, the moral reading is limited to the tort law requirement where emotional injury would not be granted. At the same time, tort law has been the main avenue to meet emotional satisfaction over financial claims sought from other's wrongs, where judges play a considerable role in finding good reasons for a decision.*

*Overall, Dworkin's discussion on interpretation plays a considerable role in finding the meaning of using criminal and tort law as a part of HIV intervention. The moral reading also pictured how distant the actual use of these laws and the public health imperatives of HIV prevention as a public interest.*

## **Conclusion**

*Both criminal law and tort law have been developing similar liability principles regarding HIV exposure and transmission under the United States' common law tradition. For HIV prevention itself, both*

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<sup>85</sup> Galletly, Carol L., et. al., "HIV-Positive Persons' Awareness and Understanding of Their State's

*Criminal HIV Disclosure Law", AIDS & Behavior, Vol. 13, 2009, p. 1262.*

*criminal law and tort law play a negative marginal role in gaining public health purposes in reversing the HIV epidemic. Criminal law has been scrutinized as not aligned with the purpose of law where misconceptions exist in both substantive dimension and the underlying moral claim. Tort law, on the other hand, suffers an even less moral claim on public health purposes. However, tort law maintains a consistent narrow purpose of financial liability.*

*This study exhibits a lesson for other countries, especially for countries with relatively high burden of HIV or other communicable diseases. The United States' experience is a valuable starting point for comparable studies in civil law countries. In Asia and the Pacific, democracies like Indonesia could be a suitable case for such further research.*

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