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Cover Page Footnote

◈ J.D. Candidate, 2022, University of Georgia School of Law; M.P.H. Candidate, 2022, Emory University; B.S., 2017, Emory University. Post-graduation, this author accepted a position as an Assistant District Attorney with the State of Alaska Department of Law. Any opinions expressed in this student Note are the author's alone. I would like to extend my gratitude to the Georgia Law Review Executive and Editorial Boards for their hard work editing and publishing this Note. I would also like to thank Drs. Sophia Hussen and Kimbi Hagen in the Global Health Department at Emory University's Rollins School of Public Health for bringing the issue of HIV criminalization to my awareness. Finally, I want to thank Matthew Eby for always being willing to talk through my views on HIV criminalization and the direction in which I believe the law should turn.

HIV NO LONGER A DEATH SENTENCE BUT STILL A LIFE SENTENCE: THE CONSTITUTIONALITY OF HIV CRIMINALIZATION UNDER THE EIGHTH AMENDMENT

Lauren Catherine Elizabeth Taylor[*]

When the HIV/AIDS epidemic began in the 1980s in the United States, there was mass confusion and hysteria regarding HIV transmission and prevention, leading many states to enact HIV criminalization statutes to prosecute persons living with HIV who either exposed another person to HIV or put someone in danger of being exposed to HIV. Yet, almost forty years later, these statutes are still used to criminalize and control the behaviors of people living with HIV, and in some cases, impose lengthy prison sentences hinging on the possibility of exposure. These HIV criminalization statutes and subsequent criminal cases often do not consider the vast understanding society now has regarding HIV/AIDS or the fact that persons living with HIV can reduce their risk of exposing another to zero through consistent anti-retroviral therapy. This Note argues that HIV criminalization statutes are unconstitutional as applied to virally suppressed persons living with HIV under the Eighth Amendment by using Robinson v. California*'s bar against "status crimes" as a guide.*

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> *"As a trans woman living with HIV, I'm always worried that if I don't disclose to my partner before we even approach the bedroom that they'll turn around and charge me with a crime. When you have to tell a potential partner that you're trans and poz, there's always a fear that they will use that information to make your life hell. I try to always disclose online so that there's a record of them knowing. That way no one can ever come back and claim I didn't tell them before we hooked up. The fear and danger of being sent to jail just for having sex is strong enough that many times, I won't even bother trying if I think someone is litigious." Dee Borego, 29, Boston*[1]

I. INTRODUCTION

In June 2008, Nick Rhoades, a thirty-four-year-old man who is HIV-positive,[2] engaged in consensual sexual intercourse with a twenty-two-year-old man named Adam Plendl without first disclosing his HIV status.[3] Upon discovering Rhoades's HIV status, Plendl went to the hospital for testing, and the hospital informed the police of the incident.[4] Plendl's test later revealed that he had not contracted HIV from Rhoades.[5] Although Rhoades managed his viral load (the amount of virus in his blood) with regular antiretroviral medication (ART),[6] achieved an undetectable and untransmissible level of HIV in his body with these medications,

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[1] Todd Heywood, *4 Stories: The Effects of HIV Criminalization on Sex and Intimacy*, ADVOC. (Apr. 1, 2013, 4:30 AM), https://www.advocate.com/print-issue/current-issue/2013/04/01/four-stories-effects-hiv-criminalization-sex-and-intimacy.

[2] The term HIV-positive refers to persons who are infected with the human immunodeficiency virus (HIV). *HIV Positive*, NAT'L CANCER INST., https://www.cancer.gov/publications/dictionaries/cancer-terms/def/hiv-positive (last visited March 31, 2022).

[3] Saundra Young, *Imprisoned over HIV: One Man's Story*, CNN (Nov. 9, 2012, 8:42 PM), https://www.cnn.com/2012/08/02/health/criminalizing-hiv/index.html.

[4] *Id.*

[5] *Id.*

[6] Antiretroviral Therapy (ART) refers to the daily combination of antiretroviral medications taken by individuals who are HIV-positive to treat their HIV infection. *See, e.g.*, *infra* notes 72–80 and accompanying text.

and wore a condom during intercourse, Rhoades was arrested and charged with criminal transmission of HIV, a felony in Iowa.[7] At the time of Rhoades's case in 2009, criminal transmission of HIV in Iowa had four elements: (1) the defendant engaged in intimate contact with the victim; (2) the defendant was HIV-positive at the time of this intimate contact; (3) the defendant knew of their HIV-positive status; and (4) the victim did not know of the defendant's HIV-positive status at the time of the intimate contact.[8]

The Iowa statute criminalizing HIV transmission defined "intimate contact" as "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that *could* result in the transmission of the human immunodeficiency virus."[9] This language renders any protective measures—including, for example, consistent antiretroviral medication and condom usage like Rhoades used—immaterial. Rhoades pled guilty to his charge, received the maximum sentence of twenty-five years (which was later reduced to time served and a five-year probationary period), and became a registered sex offender upon his release.[10]

The first records of Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS) in the United States date to 1981 among homosexual men.[11] Although AIDS quickly

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[7] Young, *supra* note 3; *see also infra* Section II.A.*2* (discussing the medical consensus that an undetectable HIV viral load is not transmissible).

[8] Rhoades v. State, 848 N.W.2d 22, 27 (Iowa 2014) (quoting State v. Stevens, 719 N.W.2d 547, 549 (Iowa 2006)); *see also* IOWA CODE § 709C.1 (repealed 2014).

[9] *Rhoades*, 848 N.W.2d at 26 (emphasis added) (citing IOWA CODE § 709C.1 (repealed 2014)).

[10] Young, *supra* note 3. Following the publicity surrounding Rhoades's court case, the Iowa legislature reformed the criminal transmission of HIV statute to provide different categories of punishment: persons found guilty of intentional infections of HIV can face up to twenty-five years in prison; persons found to have acted with "reckless disregard" in exposing another to HIV (such as by not using protection) can face one to five years in prison, dependent on whether actual transmission occurred; and persons like Rhoades who took "practical measures to prevent transmission" are exempt from prosecution. Anna North, *These Laws Were Meant to Protect People from HIV. They've Only Increased Stigma and Abuse*, VOX (Oct. 10, 2019, 11:27 AM), https://www.vox.com/the-highlight/2019/10/3/20863210/hiv-aids-law-iowa-criminalization. Some still argue that this new statute did not go far enough. *See id.* (explaining how the changes in laws like Iowa's could both help and hurt Persons Living with HIV (PLWH)).

[11] *See HIV and AIDS Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://npin.cdc.gov/pages/hiv-and-aids-timeline#1980 (last visited Oct. 11, 2021) (documenting HIV in the United States from 1981 to the present); s*ee also About HIV*, CTRS.

became known as a "gay disease,"[12] by the end of 1982, AIDS had also been identified in patients who received blood transfusions and in infants of mothers living with HIV, and by 1984, persons who inject drugs were also displaying symptoms.[13] At the height of the hysteria[14] surrounding the U.S. AIDS epidemic, cities and states implemented restrictive legal measures to prevent the spread of the virus, including criminalizing behaviors that could expose another person to HIV.[15]

The Centers for Disease Control and Prevention (CDC) categorized these statutes, more commonly called "HIV criminalization statutes," into four categories: (1) specific laws that criminalize or control behaviors that can potentially expose another person to HIV; (2) specific laws that criminalize or control behaviors that could expose someone to STDs and communicable or infectious diseases, which could include HIV; (3) sentence enhancement laws for persons living with HIV or for persons with an STD that do not criminalize a behavior but increase the sentence length when a PLWH commits certain crimes; (4) and no specific criminalization

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FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/whatishiv.html (last visited Oct. 11, 2021) (providing an overview of HIV's genesis, symptoms, and treatment).

[12] *See AIDS Crisis Timeline*, HISTORY, https://www.history.com/topics/1980s/hiv-aids-crisis-timeline (last visited Apr. 5, 2022) (identifying the belief that HIV was a "gay disease" during the early stages of the epidemic as well as the use of the terms "Gay Men's Pneumonia," "gay cancer," and "Gay-Related Immune Deficiency" for AIDS's symptoms); Elizabeth Fee & Nancy Krieger, *Understanding AIDS: Historical Interpretations and the Limits of Biomedical Individualism*, 83 AM. J. PUB. HEALTH. 1477, 1477–79 (1993) (explaining the paradigm of AIDS as a "Gay Plague" and the responses of the public, scientists, and the gay and lesbian communities to the rise of AIDS).

[13] *See HIV and AIDS Timeline*, *supra* note 11 (describing the years in which the CDC received reports of a new method of HIV transmission).

[14] *See, e.g.*, Milan Korcok, *AIDS Hysteria: A Contagious Side Effect*, 133 CANADIAN MED. ASS'N J. 1241, 1241–43 (1985) (finding that during the early stages of the AIDS epidemic, city officials responded by "hand-deliver[ing] letters to known AIDS victims warning them of felony charges if they continue[d] to engage in sexual activity," "thousands of children [were] kept out of schools for fear of catching AIDS," and insurance companies "ordered [their] underwriters to screen applicants for high risk AIDS factors" such as being a single male aged 20-49 living in a city with "unusually high populations of AIDS victims"). These responses came to be recognized as symptoms of AIDS "hysteria." *Id.* at 1241.

[15] *HIV and STD Criminal Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/policies/law/states/exposure.html (last visited Oct. 11, 2021) (stating the timing of HIV-specific criminal exposure law implementation).

laws.[16] In all, thirty-five states criminalize HIV exposure in some manner,[17] and twenty-two criminalize[18] or control[19] behaviors through HIV-specific statutes and regulations.[20]

When HIV criminalization statutes focus solely on whether a PLWH disclosed their seropositivity (HIV-positive status) to their sexual partners, they punish not only those who might be trying to maliciously infect others, but also PLWH like Nick Rhoades who are virally suppressed and try to mitigate the risk of transmission through condom usage or are having consensual sex within a relationship.[21] In some cases, this distinction has led to arrests following bad breakups where the HIV-negative person calls the police and reports that their HIV-positive former partner exposed them to HIV.[22] These laws are also medically outdated.[23] While in the 1980s and 1990s HIV/AIDS was poorly understood and was

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[16] *Id.*

[17] *Id.*

[18] *Id.* Criminalized behavior includes donating blood, tissues, and fluids as a PLWH. *Id.*

[19] *Id.* Statues and regulations that control behavior include those that require PLWH who are aware of their status to disclose their status to sex partners. *Id.*

[20] *Id.*

[21] *See What HIV Criminalization Means to Women in the U.S.*, CTR. FOR HIV L. & POL'Y, https://www.hivlawandpolicy.org/sites/default/files/Women%20and%20HIV%20Criminalization.pdf (last visited Oct. 2, 2021) (describing the situations in which a PLWH could be prosecuted under HIV criminalization laws); Young, *supra* note 3 (detailing Nick Rhoades's charges under Iowa's HIV criminalization statute despite his many precautions prior to consensual sex).

[22] *See What HIV Criminalization Means to Women in the U.S.*, *supra* note 21 ("Most HIV criminalization charges appear to happen because of bad break-ups. After a consensual sexual relationship between two adults ended, one partner contacted the police and accused the other partner of exposing him/her to HIV."); *see also* Robert Suttle, *The Dehumanizing Effect of HIV Criminalization: HIV Criminalization Laws Disproportionately Affect Those Already Marginalized*, AM. PSYCH. ASS'N, (Mar. 2017), https://www.apa.org/pi/aids/resources/exchange/2017/03/hiv-criminalization (detailing Robert Suttle's arrest and conviction under Louisiana's "Intentional Exposure to AIDS Virus" statute).

[23] *See HIV Criminalization and Ending the HIV Epidemic in the U.S*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/policies/law/criminalization-ehe.html (last updated Dec. 22, 2021) ("After more than 30 years of HIV research and significant biomedical advancements to treat and prevent HIV, most HIV criminalization laws do not reflect current scientific and medical evidence."); *HIV Criminal Laws*, *supra* note 15 (noting "many state laws are now outdated and do not reflect our current understanding of HIV" as some "criminalize behaviors that cannot transmit HIV–such as biting or spitting–and apply regardless of actual transmission, or intent").

considered fatal, persons living with HIV today can achieve a viral load so low that they are *unable* to transmit HIV to other persons.[24]

This Note analyzes whether modern medicine has effectively rendered these statutes unconstitutional under the Eighth Amendment's bar against "status crimes"[25] or whether the act of non-disclosure would prevent these offenses from being considered a status crime in the traditional sense. The bar against status crimes in the United States is rooted in the U.S. Supreme Court case *Robinson v. California* in which the Court ruled that a statute punishing the "status" of narcotics addiction was unconstitutional under the Eighth[26] and Fourteenth[27] Amendments.[28] In its holding, the Court likened California's statute criminalizing narcotics addiction to statutes that "would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease" before finding that such laws "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." [29]

This Note engages in a constitutional analysis under the Eighth Amendment and weighs PLWH's privacy interests and right to be free from cruel and unusual punishment against the government's interest in curbing HIV exposure and HIV-negative individuals' interest in not being exposed. Under this analysis, this Note

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[24] *See* Jan Albert et al., *Risk of HIV Transmission from Patients on Antiretroviral Therapy: A Position Statement from the Public Health Agency of Sweden and the Swedish Reference Group for Antiviral Therapy*, 46 SCANDINAVIAN J. INFECTIOUS DISEASE 673, 675 (2014) ("There is minimal risk of transmission through vaginal and anal intercourse if the HIV-infected partner is on effective ART and a condom is used throughout intercourse. There is also a very low risk of transmission through vaginal and anal intercourse if the HIV-infected partner is on effective ART and a condom is not used.").

[25] *See* Robinson v. California, 370 U.S. 660, 666 (1962) (establishing that status crimes such as laws "which [made] [the] 'status' of narcotic addiction a criminal offense, for which offender might be prosecuted 'at any time before he reforms'" violated the Fourteenth Amendment).

[26] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[27] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[28] *Robinson*, 370 U.S. at 666–67.

[29] *Id*. at 666.

concludes that HIV criminalization statutes are unconstitutional as applied to persons living with HIV who are treatment-compliant and virally suppressed. Part II explains the background of HIV in the United States, HIV transmission and prevention, and medical advancements since the height of the AIDS epidemic. Part III introduces the four different classes of HIV criminalization statutes. Part IV discusses previous constitutional challenges to HIV criminalization statutes. Last, Part V applies *Robinson*'s holding to argue that HIV criminalization statutes are unconstitutional as applied to persons who are medically unable to transmit HIV.

II. BACKGROUND AND HISTORY OF HIV IN THE UNITED STATES

This Part[30] provides context to HIV criminalization statutes by describing the societal response to the AIDS epidemic in the 1980s and 1990s that led states to implement HIV criminalization statutes; quantifying the American PLWH population; and discussing methods of HIV transmission, prevention, and treatment. Section A details the history of HIV in the United States from 1981 to 2022 and population dynamics within the PLWH community, while Section B focuses on differential risks of transmission and prevention techniques including ART.

A. THE RISE OF HIV

In June 1981, the CDC reported a spike in *Pneumocystis* pneumonia, a condition only common in immunosuppressed individuals, in five homosexual men in Los Angeles.[31] Within days,

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[30] For more resources on the information presented in this section, see *Transmission Routes, Viral Loads and Relative Risks: The Science of HIV for Lawyers and Advocates*, THE CTR. FOR HIV L. & POL'Y, https://www.hivlawandpolicy.org/sites/default/files/PJP%20HIV%20Science%20for%20Lawyers%20%282.14.14%29.pdf (last visited Apr. 6, 2022) (detailing HIV as a chronic condition and a covered disability under the ADAA, and providing information about transmission routes and relative risks, viral load and treatment, and phylogenetic analysis).

[31] *Pneumocystis Pneumonia — Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REPS., CTRS. FOR DISEASE CONTROL & PREVENTION (June 5, 1981), https://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm (detailing the *Pneumocystis* pneumonia diagnosis in five homosexual men and commenting that as this condition is

physicians in cities across New York and California reported that they too were seeing an abnormal number of cases of both *Pneumocystis* pneumonia and a rare cancer previously only seen in middle-aged Mediterranean men—Kaposi's Sarcoma—in homosexual men.[32] By September 1982, not only had the CDC released a case definition to assist with AIDS diagnoses, but AIDS had also spread beyond the homosexual community and been diagnosed in blood transfusion patients.[33] In 1983, once the CDC realized that AIDS must be bloodborne or sexually contracted, the CDC announced that AIDS was most common among "homosexual men, injection drug users, Haitians, and people with hemophilia" and began to recommend prevention strategies.[34] Further, the CDC ruled out transmission methods such as casual contact, food, water, air, or environmental surfaces.[35] Finally, in January 1985, the CDC identified HIV as the cause of AIDS, and by March 1987, the Food and Drug Administration approved the first antiretroviral drug, called AZT, to block the virus's activity.[36] Yet, by 1992 "AIDS [had become] the number one cause of death for US men aged 25-44"[37]

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typically only seen in immunosuppressed patients, there must be a connection between homosexuality and *Pneumocystis* pneumonia).

[32] *See HIV and AIDS Timeline*, *supra* note 11 (reporting on the spikes in *Pneumocystis* pneumonia and Kaposi's Sarcoma in homosexual men).

[33] *See id.* (indicating the prevalence of the use of the term "AIDS" and expanding the at-risk population).

[34] *See id.* (announcing the populations that have had the most cases of AIDS and announcing recommendations to prevent transmission).

[35] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, CURRENT TRENDS UPDATE: ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS) – UNITED STATES , 32 MORBIDITY & MORTALITY WKLY. REPS. (1983), https://www.cdc.gov/mmwr/preview/mmwrhtml/00000137.htm (emphasizing that 91% of reported cases are among homosexual men, IV drug users, persons with hemophilia, and the partners of each group and that "AIDS is not known to be transmitted through food, water, air, or environmental surfaces").

[36] *See HIV and AIDS Timeline*, *supra* note 11 ("Revised AIDS case definition notes AIDS is caused by HIV."); *id.* (announcing that AZT would be allowed to be used to treat HIV); Alice Park, *The Story Behind the First AIDS Drug*, TIME (Mar. 19, 2017 12:00 PM), https://time.com/4705809/first-aids-drug-azt/ (explaining AZT's origins and rise to use as a HIV treatment).

[37] AIDS.GOV, A TIMELINE OF HIV/AIDS 8, https://www.hiv.gov/sites/default/files/aidsgov-timeline.pdf.

and only two years later "[became] the leading cause of death for *all* Americans ages 25 to 44."[38]

It was not until 1997, when highly active antiretroviral therapy (HAART), a multi-drug treatment regimen, became the standard, that the CDC finally reported a 47% decline in AIDS deaths compared to the previous year.[39] Despite the advances made in medical treatment in the late 1990s, these medications were still cost restrictive and were not easily accessible to all Americans for decades.[40] Similarly, due to barriers to testing or infrequent testing, in 2003, the CDC estimated that approximately 27,000 out of the 40,000 new HIV infections that year occurred in persons who were unaware that they were infected.[41] This announcement sparked the creation of initiatives specifically designed to increase prevention, testing, and treatment efforts in the United States.[42]

Since the early 2000s, HIV treatment and prevention has expanded to include PEP, PrEP, and Treatment as Prevention efforts.[43] Additionally, with modern ART combinations, in 2011, researchers discovered that long-term HIV treatment could reduce transmission by 96%,[44] in addition to extending a PLWH's life expectancy.[45] Today, approximately 79% of all PLWH in the United States know their status, 78% have access to treatment, and of those

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[38] *Id.* (emphasis added); *see also* CTRS. FOR DISEASE CONTROL & PREVENTION, UPDATE: MORTALITY ATTRIBUTABLE TO HIV INFECTION AMONG PERSONS AGED 25-44 YEARS – UNITED STATES, 45 MORBIDITY & MORTALITY WKLY. REPS. (1994).

[39] *See HIV and AIDS Timeline*, *supra* note 11. The FDA was also able to approve "Combivir, a combination of two antiretroviral drugs in one tablet," which decreased the daily pill burden for PLWH and made it easier for PLWH to complete ART. AIDS.GOV, *supra* note 37, at 8.

[40] *See HIV and AIDS Timeline*, *supra* note 11 (aiming to decrease barriers to care and treatment); Michael S. Saag et al., *Antiretroviral Drugs for Treatment and Prevention of HIV Infection in Adults*, 324 JAMA 1651, 1665 (2020) (discussing the cost of HIV medications as a barrier to treatment and optimal adherence).

[41] *See HIV and AIDS Timeline*, *supra* note 11.

[42] *See* CTRS. DISEASE CONTROL & PREVENTION, ADVANCING HIV PREVENTION: NEW STRATEGIES FOR A CHANGING EPIDEMIC – UNITED STATES, 52 MORBIDITY & MORTALITY WKLY. REPS. (2003) (describing trends in HIV/AIDS morbidity and mortality and HIV testing, and proposing an initiative "aimed at reducing barriers to early diagnosis of HIV infection and increasing access to quality medical care, treatment, and ongoing prevention services").

[43] *See HIV and AIDS Timeline*, *supra* note 11 (recommending PEP in 2005, PrEP in January 2011, and Treatment as Prevention in December 2011).

[44] *Id.*

[45] Saag et al., *supra* note 40, at 1664–65 (providing recommendations for Aging and HIV after noting that the lifespan of PLWH is increasing).

who know their status, 86% "have HIV under control" or have achieved viral suppression.[46]

When compared to the total population of Americans living with HIV, however, only 53% have achieved viral suppression.[47] This means that approximately 156,000 PLWH are unaware of their status and may be unconsciously spreading the virus.[48] Additionally, as most HIV criminalization statutes require PLWH to know they are HIV-positive,[49] these 156,000 persons would be unlikely to be convicted of Criminal Exposure of HIV. Conversely, the 641,224 individuals who are aware of their HIV status but have achieved an undetectable and practically untransmissible level of HIV through adherence to ART—like Nick Rhoades[50]—would be subject to prosecution in most states for not disclosing their HIV status before sex despite being unable to spread the virus.[51]

B. HIV TRANSMISSION, PREVENTION, AND TREATMENT

An estimated 1.2 million people in the United States currently live with HIV.[52] Since the peak of the AIDS epidemic in the mid-

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[46] *Id.* at 1665.

[47] For the percentages used in calculating the number of PLWH in the United States who have not achieved viral suppression, see Irene H. Hall, John T. Brooks & Jonathan Mermin, *Can the United States achieve 90-90-90?*, 14 CURRENT OP. IN HIV & AIDS 464, 464 (2019).

[48] *The HIV/AIDS Epidemic in the U.S.: The Basics*, KAISER FAMILY FOUND. (Jun. 7, 2021), https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/ (noting that more than 1.2 million Americans are living with HIV, but 13% of those are unaware of their status).

[49] *See HIV and STD Criminal Laws*, *supra* note 15 (reporting that "[i]n 12 states, laws require people with HIV who are aware of their status to disclose their status to sex partners, and 5 states require disclosure to needle-sharing partners.").

[50] *See* Young, *supra* note 3, at 2, 3 (explaining that Rhoades was still prosecuted, convicted, and sentenced to 25 years in prison despite achieving viral suppression).

[51] *See* Hall et al., *supra* note 47, at 466 tbl. 1 (providing numbers for calculations); *see also HIV and STD Criminalization Criminal Laws*, *supra* note 15, at 3 (noting differences in state laws regarding the required disclosure of HIV).

[52] *See* Ctrs. Disease Control & Prevention, *Estimated HIV Incidence and Prevalence in the United States 2014–2018*, 25 HIV SURVEILLANCE SUPP. REP. 1, 41–45 tbl.8 (2020), https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-supplemental-report-vol-25-1.pdf [hereinafter *Estimated HIV Incidence and Prevalence*] (estimating HIV prevalence among persons aged 13 or older, by year and selected characteristics). It is also important to note that as treatments improve over time, it is not alarming that there are so many PLWH in the United States as this merely means that PLWH are living longer despite

1980s, however, the number of annual infections in the United States has decreased overall by two-thirds.[53] In 2018, the CDC reported only 36,400 new infections—1,600 infections fewer than the 2014–2018 average.[54] While anyone can contract HIV/AIDS, persons who inject drugs and Men who have Sex with Men (MSM)[55] are at the greatest risk of infection.[56] Additionally, risk differs by

being HIV-positive. *See CDC Fact Sheet: Today's HIV/AIDS Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION 1, 2 (2016), https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/todaysepidemic-508.pdf (graphing the number of AIDS Diagnoses and Deaths from 1985 to 2013 with a notation of when Antiretroviral Treatment (ART) became available). However, as the HIV prevalence increases, this also provides more opportunities for infection. *Id.* at 1.

[53] *U.S. Statistics*, HIV.GOV, https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics (last visited Oct. 12, 2021) ("Annual infections in the U.S. have been reduced by more than two-thirds since the height of the epidemic in the mid-1980s.").

[54] *See Estimated HIV Incidence and Prevalence*, *supra* note 52, at 18–20 tbl.1 (showing that there was a total of 36,400 new infections in 2018 compared to 38,000 in 2014, 38,400 in 2015, 38,500 in 2016, and 37,000 in 2017); *U.S. Statistics*, *supra* note 53 ("Annual infections in the U.S. have been reduced by more than two-thirds since the height of the epidemic in the mid-1980s.").

[55] HIV AND GAY AND BISEXUAL MEN, CDC, https://www.cdc.gov/hiv/pdf/group/msm/cdc-hiv-msm.pdf (2021) ("Of the 36,801 new HIV diagnoses in the US and dependent areas in 2019, 69% (25,552) were among gay and bisexual men." (citations omitted)).

[56] *See Estimated HIV Incidence and Prevalence*, *supra* note 52, at 14 (stating that those who engage in male-to-male sexual contact and injection drug use are in the top hierarchical HIV transmission categories).

age,[57] race,[58] ethnicity,[59] gender,[60] geographic location,[61] and whether someone is the receptive or insertive partner,[62] leading to disproportionate burdens of HIV among certain populations in different regions of the country.

1. Methods of Transmission. Despite existing misconceptions,[63] HIV can only be transmitted when specific bodily fluids—blood, semen, pre-seminal fluid, rectal fluids, and breast milk—from a Person Living with HIV (PLWH) come into contact with an HIV-negative person's bloodstream, such as in the case of injection drug use, broken skin or damaged tissue, or mucous membranes inside

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[57] *See U.S. Statistics*, *supra* note 53 (noting that while the HIV infection rates decreased between 2015 and 2019 for persons aged 13–24 and 45–54, rates remained stable for all other age groups).

[58] *See id.* (discussing how Black Americans and African Americans are disproportionately affected by HIV as they accounted for 44% of all HIV diagnoses in 2019). Within racial and ethnic groups, certain subpopulations are at a heightened risk of HIV infection. *Id.* For instance, Black/African American MSM accounted for 26% of the total new HIV infections in 2019 and 37.9% of the new diagnoses among all MSM within the United States. *Id.*

[59] *Id.* (stating that the rate of HIV diagnosis for Hispanic or Latinx persons was 21.7 per 100,000 persons). Hispanic/Latino MSM consist of a large percentage of annual new diagnoses. *Impact on Racial and Ethnic Minorities*, HIV.GOV, https://www.hiv.gov/hiv-basics/overview/data-and-trends/impact-on-racial-and-ethnic-minorities (last visited Oct. 16, 2020) (stating that Hispanic/Latino MSM accounted for 22% of new HIV infections in 2018).

[60] *See U.S. Statistics*, *supra* note 53 ("[T]he annual number of new HIV infections in 2019, as compared to 2015, decreased among males, but remained stable among females. In 2019, the rate for males (21.0) was 5 times the rate for females (4.5).").

[61] *See id.* ("In 2019, the rates [of infection per 100,000 persons] were 15.2 in the South, 9.4 in the Northeast, 9.2 in the West, and 7.2 in the Midwest."); *see also id.* ("More than 50 percent of new HIV diagnoses in 2016 and 2017 occurred in 48 counties, Washington, D.C., and San Juan, Puerto Rico.").

[62] *See* James Wilton, *Putting a Number on It: The Risk from an Exposure to HIV*, STAN. HEALTH CARE, https://stanfordhealthcare.org/medical-conditions/sexual-and-reproductive-health/hiv-aids/causes/risk-of-exposure.html (last visited Oct. 12, 2021) (indicating that receptive anal sex has the highest risk of HIV infection followed by receptive vaginal sex). The term "receptive" is used to describe the partner who is "receiving the penis" into the anus or vagina, while "insertive" refers to the partner who is "inserting the penis" into the anus or vagina. *Id.*

[63] *See* KAISER FAMILY FOUNDATION, 2009 SURVEY OF AMERICANS ON HIV/AIDS: SUMMARY OF FINDINGS ON THE DOMESTIC EPIDEMIC 4 (2009), https://www.kff.org/wp-content/uploads/2013/01/7889.pdf ("One third of Americans (34 percent) harbor at least one misconception about HIV transmission, not knowing that HIV *cannot* be transmitted through sharing a drinking glass (27 percent), touching a toilet seat (17 percent), or swimming in a pool with someone who is HIV positive (14 percent)."); *id.* at 4–5 (noting that the percentage of Americans with misconceptions about HIV transmissions has not improved since 1987).

the rectum, vagina, penis, or mouth.[64] It is *not* possible to be infected by HIV though air or water; saliva, sweat, tears, or closed-mouth kissing; insects or pets; or sharing toilets, food, or drinks.[65] In the United States, HIV is primarily spread by anal or vaginal sex with an HIV-positive partner or through sharing needles or similar injection drug equipment.[66]

The main reason why MSM are at such a high risk for HIV infection is that unprotected anal sex carries a higher risk of infected blood or semen being exchanged than either unprotected vaginal or oral sex.[67] Receptive anal sex carries a risk of one transmission for every seventy-one exposures, while the risks of exposure in the insertive partner were significantly lower and differed by whether the insertive partner was circumcised or not.[68] Comparatively, vaginal sex leads to 1 transmission for every 1,250 exposures for the receptive partner and every 2,500 exposures for the insertive partner.[69] Overall, oral sex (e.g., mouth on penis, vagina, or anus) carries the lowest risk of HIV transmission of all

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[64] *See Ways HIV Can Be Transmitted*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/hiv-transmission/ways-people-get-hiv.html (last visited Oct. 19, 2021) (describing how HIV is passed from one person to another).

[65] *See Ways HIV Is Not Transmitted*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/hiv-transmission/not-transmitted.html (last visited Oct. 19, 2021) (disproving myths of HIV infection methods).

[66] *See HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/transmission.html (last visited Oct. 19, 2021) (identifying the main route of HIV infection in the United States).

[67] *See* Sandra M. Gonzalez, Wbeimar Aguilar-Jimenez, Ruey-Chyi Su & Maria T. Rugeles, *Mucosa: Key Interactions Determining Sexual Transmission of the HIV Infection*, 10 FRONTIERS IN IMMUNOLOGY 1, 1–4 (2019) (explaining how differences in mucosal epithelial structure, the outer layer of organ tissue and "[t]he first barrier for viral entry," in the anus, vagina, penis, and mouth contribute to HIV infection after exposure); *id.* at 3 ("[T]he anorectal epithelium exhibits the highest probability of HIV-transmission (0.3–5%) in comparison to the female (0.05–0.5%) and male genital epithelium (0.04–0.14%), followed by the oral mucosa (0.01%) that is the least susceptible epithelium."); *see also* Wilton, *supra* note 62 (estimating the risk of HIV transmission from unprotected vaginal and anal sex and noting that "vaginal and penile oral sex pose a 'low but *non-zero* transmission probability'" (citation omitted)).

[68] Wilton, *supra* note 62 (analyzing the risks of HIV exposure from anal sex for both receptive and insertive partners regardless of the gender of the receptive partner).

[69] *Id.* (analyzing the risks of HIV exposure from vaginal sex).

types of sexual activity because there is a lower chance of coming into contact with enough blood or semen to lead to transmission.[70]

The risks of infection also increase as a person engages in riskier behaviors such as substance abuse, sex work, and having multiple casual partners, or if either partner already carries a Sexually Transmitted Infection (STI).[71] Although persons can be exposed to or infected with HIV in a variety of ways, this Note focuses on sexual activity as the primary method of HIV transmission.

2. Prevention. HIV prevention takes two people: both the HIV-positive and HIV-negative partners can take steps to limit their risk of spreading the virus or of infection. PLWH can prevent HIV transmission through a concept called "Treatment as Prevention,"[72] where PLWH stay engaged in the "HIV Continuum of Care"[73] by

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[70] *Oral Sex & HIV Risk*, CTRS. FOR DISEASE CONTROL & PREVENTION (2016), https://www.cdc.gov/hiv/pdf/risk/cdc-hiv-oral-sex-fact-sheet.pdf ("The chance an HIV-negative person will get HIV from oral sex with an HIV-positive partner is extremely low. However, it is hard to know the exact risk because a lot of people who have oral sex also have anal or vaginal sex. . . . But the risk is still very low, and much lower than with anal or vaginal sex."); *see also* Wilton, *supra* note 62 (analyzing the risks of HIV exposure from oral sex); Gonzalez et al., *supra* note 67, at 3–4 (discussing the structure of the oral mucosa and epithelium and how this structure hinders HIV infection compared to the penile epithelium).

[71] Joseph P. McGowan et al., *Risk Behavior for Transmission of Human Immunodeficiency Virus (HIV) among HIV-Seropositive Individuals in an Urban Setting*, 38 CLINICAL INFECTIOUS DISEASES 122, 126 (2004) (discussing risky behaviors that are related to HIV infections and explaining that STIs can contribute to greater risks of HIV transmission, either due to the presence of ulcers or "increase[d] HIV viral shedding in the genital tract").

[72] *See* Saag et al., *supra* note 40, at 1653; *Consensus Statement*, PREVENTION ACCESS CAMPAIGN (July 21, 2016), https://www.preventionaccess.org/wp-content/uploads/2021/07/UU-Consensus-Statement.pdf (affirming that "[t]here is now evidence-based confirmation that the risk of HIV transmission from a person living with HIV (PLHIV), who is on Antiretroviral Therapy (ART) and has achieved an undetectable viral load in their blood for at least 6 months is negligible to non-existent" and correcting the use of the word "negligible" to mean "no risk," "zero risk," or "cannot transmit"). As viral suppression in PLWH "prevents transmission of HIV to others through sex," public health organizations have coined the term "Treatment as Prevention" to describe their efforts to prevent new HIV infections through consistent ART use in diagnosed PLWH. CTRS. FOR DISEASE CONTROL & PREVENTION, STARTING THE CONVERSATION: HIV TREATMENT AS PREVENTION 1, 3, 5, https://www.cdc.gov/stophivtogether/library/topics/treatment/brochures/cdc-hiv-lsht-treatment-brochure-transmission-prevention-provider.pdf (defining Treatment as Prevention, describing its benefits, and noting the challenges patients might face in achieving or maintaining viral suppression).

[73] *See HIV Care Continuum*, HIV.GOV, https://www.hiv.gov/federal-response/policies-issues/hiv-aids-care-continuum (last visited Apr. 1, 2022) (defining the HIV Care Continuum

attending frequent check-ups with a HIV specialist, as well as by consistently taking antiretroviral medications[74] starting at the time of diagnosis.[75] Because typical ART regimens combine three different drugs that attack different stages in the infection cycle,[76] PLWH can achieve a suppressed viral load or an undetectable amount of the HIV virus in their blood through long-term ART use.[77]

PLWH who have achieved viral suppression[78] have no risk of infecting someone who is not currently living with HIV as long as the PLWH remains on ART.[79] The risk of HIV transmission while

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and noting the percentage of PLWH in the United States who have achieved each stage of the continuum). The HIV Continuum of Care includes five or six stages that PLWH "go through from diagnosis to achieving and maintaining viral suppression," including diagnosis of an HIV infection, connection to a health care professional who can monitor their viral load and prescribe ART, retention in care or continuing to see a health care professional for viral load tests, initiation of ART, and viral suppression. *Id.*; *see also* Michael J. Mugavero, K. Rivet Amico, Tim Horn & Melanie A. Thompson, *The State of Engagement in HIV Care in the United States: From Cascade to Continuum to Control*, 57 CLINICAL INFECTIOUS DISEASES 1164, 1164–71 (2013) (synthesizing the state of engagement in HIV care and expanding on the HIV treatment cascade—infection, diagnosis, linkage to care, retention to care, ART prescription, and viral suppression).

[74] Antiretroviral medications each focus on a different stage of the HIV infection cycle, and treatment regimens are individualized for each PLWH's "medical comorbidities, potential drug interactions, and . . . preferences (pill burden, frequency of dosing, and food requirements." *See* David H. Spach, *Antiretroviral Medications and Initial Therapy*, NAT'L HIV CURRICULUM (Aug. 30, 2020), https://www.hiv.uw.edu/go/antiretroviral-therapy/general-information/core-concept/all (explaining how ART medications work and how a physician selects a drug regimen for a patient).

[75] Gus Cairns, *International Study of Gay Couples Reports No Transmissions from an HIV-Positive Partner on Treatment*, NAM (July 25, 2017), https://www.aidsmap.com/news/jul-2017/international-study-gay-couples-reports-no-transmissions-hiv-positive-partner (demonstrating the efficacy of Treatment as Prevention); Saag et al., *supra* note 40, at 1652 (describing the three main strategies of initiating ART—rapid ART, immediate ART, or same-day ART).

[76] *See* Spach, *supra* note 74 (providing a list of recommended initial regimens for PLWH and how they work); *see also* Saag et al., *supra* note 40, at 1653–55 (detailing initial ART regimens and recommendations).

[77] Spach, *supra* note 74.

[78] *See id.* (explaining how to measure viral suppression through HIV, RNA, and CD4 monitoring).

[79] *See Consensus Statement*, *supra* note 72, at n.21 ("Once you begin therapy, you stay on therapy, with full virologic suppression you not only have protection from your own HIV...but you also are not capable of transmitting HIV to a sexual partner. With successful antiretroviral treatment, that individual is no longer infectious.").

taking ART medication can be mapped by the function "Undetectable = Untransmittable" (U = U), which is the "widespread clinical guideline that [PLWH] who are on ART and have sustained an undetectable viral load for a minimum of six months cannot sexually transmit HIV."[80] Therefore, while a PLWH continues to treat their existing HIV infection with ART, they also prevent the spread of the virus to persons who are not currently infected.

Persons who are currently HIV-negative can also proactively take an anti-retroviral regimen called Pre-Exposure Prophylaxis (PrEP) to prevent an HIV exposure from becoming an HIV infection.[81] When taken consistently, "PrEP reduces the risk of getting HIV from sex by 99%."[82] Similarly, Post-Exposure Prophylaxis (PEP) is a medical regimen that someone who believes that they were exposed to HIV can take to decrease their chances of being infected with HIV despite exposure.[83] So long as PEP is initiated within 72 hours of a potential exposure, it is almost 100% effective.[84] While PrEP is often taken by persons who are already at a heightened risk for HIV (persons who have had anal or vaginal sex with a partner who is HIV-positive, inconsistently use condoms, or have been diagnosed with an STD),[85] PEP is often utilized in cases of workplace exposure, like when a medical worker is exposed to HIV by accidentally being stuck by a needle used on an HIV-positive person.[86] As such, the best method of preventing HIV transmission from a PLWH is for that person to achieve viral

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[80] Margaret M. Paschen-Wolff, Aimee N.C. Campbell, Susan Tross, Michael Castro, Hayley Berg, Sarah Braunstein, Christine Borges & Don Des Jarlais, *HIV Treatment Knowledge in the Context of "Treatment as Prevention" (TasP)*, 24 AIDS & BEHAVIOR 2984, 2984 (2020).

[81] *See* Saag et al., *supra* note 40, at 1661–63 (detailing PrEP regimens and recommendations).

[82] *PrEP Effectiveness*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html (last visited Oct. 19, 2021).

[83] *See About PEP*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/pep/about-pep.html (last visited Oct. 10, 2021).

[84] *See id.* (detailing the critical time period to begin PEP).

[85] *See Deciding to Take PrEP,* CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/prep/prep-decision.html (last visited Oct. 19, 2021) (classifying certain populations as being at higher risk for HIV and as being prime candidates for PrEP).

[86] *See About PEP*, *supra* note 83 (distinguishing PEP from PrEP).

suppression through consistent ART or for persons who are HIV-negative to consistently take PrEP.[87]

III. HIV CRIMINALIZATION STATUTES

Despite the number of PLWH in the United States who are virally suppressed, and thus unable to transmit the virus, most HIV criminalization statutes have not changed since their genesis between 1986 and 1990, when Congress passed the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990.[88] The Ryan White CARE Act provided federal grants to states and organizations for "the development, organization, coordination and operation of more effective and cost-efficient systems for the delivery of essential services to individuals and families with HIV disease."[89]

In addition to creating a federal grant system for HIV, the Ryan White CARE Act also imposed conditions on the grants, including a "Requirement of State Law Protection Against Intentional

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[87] There are barriers to ART and PrEP adherence, however, such as homelessness, distances to clinics, substance use, and pill burdens. *See* Zara Shubber et al., *Patient-Reported Barriers to Adherence to Antiretroviral Therapy: A Systematic Review and Meta-Analysis*, 13 PLOS MED. e1002183 (2016) (identifying barriers to adherence). "The number of tablets, capsules, or other dosage forms that a person takes on a regular basis [is called a pill burden]. A high pill burden can make it difficult to adhere to an HIV treatment regimen." *Pill Burden*, HIV/AIDS GLOSSARY, https://clinicalinfo.hiv.gov/en/glossary/pill-burden (last visited Sept. 20, 2021).

[88] *See* Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576, 576–628 (1990) (codified throughout 42 U.S.C.); *see also* J. Stan Lehman, Meredith H. Carr, Allison J. Nichol, Alberto Ruisanchez, David W. Knight, Anne E. Langford, Simone C. Gray & Jonathan H. Mermin, *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS BEHAV. 997, 1000, fig. 1 (2014) (graphically displaying state statutes criminalizing HIV exposure from 1986 to 2011). Ryan White, an Indiana teenager, received an infected blood transfusion, which caused him to be diagnosed with AIDS; as a result of this diagnosis, he became an internationally renowned activist for PLWH rights and destigmatizing HIV/AIDS. AIDS.GOV, *supra* note 37, at 3, 6. Following White's untimely death at age eighteen in 1990, Congress passed an Act bearing his name. *Id.* at 6 (noting the death of Ryan White, aged 18, on April 8, 1990).

[89] Ryan White Comprehensive AIDS Resources Emergency Act of 1990 § 2 (amending the Public Health Service Act).

Transmission."[90] Under this section, grants for Early Intervention Services[91] were extended only to states with statutes deemed "adequate to prosecute any HIV infected individual" who knew that they were infected with HIV, engaged in a behavior that could lead to HIV transmission, and intended to expose another to HIV through that behavior.[92] HIV/AIDS care was and is extremely expensive,[93] and these grants would allow states to ensure that their HIV-positive residents would still receive quality treatment if they could not afford it themselves, while also not leaving the state to expend significant state funds.[94]

The federal call to prosecute PLWH for exposing others to HIV in the Ryan White CARE Act echoes the 1988 Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic.[95] This report suggested criminalizing HIV transmission

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[90] *Id.* § 2647(a) (requiring that states protect against intentional transmission by "mak[ing] a donation of blood, semen, or breast milk," "engag[ing] in sexual activity," or "inject[ing] himself or herself with a hypodermic needle and subsequently provid[ing] the needle to another person for purposes of hypodermic injection").

[91] *Id.* § 2641(b)(2) (noting that Early Intervention Services grants encompass counseling, testing, medical services, and therapeutic measures).

[92] *Id.* § 2641 (establishing a program providing grants for early intervention services). While these grants still exist in the current iteration of the Ryan White CARE Act, there is no longer a requirement that a state prosecute PLWH for HIV transmission. *See Ryan White HIV/AIDS Program Legislation*, HRSA, at 1 (2019), https://hab.hrsa.gov/about-ryan-white-hivaids-program/ryan-white-hivaids-program-legislation (summarizing and linking to the 2009 version of the Ryan White CARE Act).

[93] *See* Alice Park, *The Story Behind the First AIDS Drug*, TIME (Mar. 19, 2017, 12:00 P.M.), https://time.com/4705809/first-aids-drug-azt/ (stating that the initial cost of AZT was prohibitive at $8,000 a year ($17,000 today)); Nicole C. McCann, Tim H. Horn, Emily P. Hyle & Rochelle P Walensky, *HIV Antiretroviral Therapy Costs in the United States, 2012–2018*, 180 J. AM. MED. ASS'N. INTERN. MED. 601, 603 (2020) (finding that the average cost of ART in 2018 ranged from $36,000 to $48,000).

[94] *Part B: Grants to States and Territories*, HEALTH RES. & SERVS. ADMIN., https://ryanwhite.hrsa.gov/about/parts-and-initiatives/part-b-grants-states-territories (last visited Apr. 1, 2022) (explaining that the Part B grants cover core medical and support services, an AIDS Drug Assistance Program for low-income PLWH, grants to states with emerging communities, and education and outreach to improve minority access to medication assistance).

[95] *See* THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC: SUBMITTED TO THE PRESIDENT OF THE UNITED STATES 130 (1988) [hereinafter PRESIDENTIAL COMMISSION REPORT] (suggesting the criminalization of HIV exposure).

for a PLWH's "failure to comply with clearly set standards of conduct," with hopes of deterring PLWH "from engaging in high-risk behaviors, thus protecting society against the spread of the disease."[96] The Presidential Commission recognized that several obstacles to criminalizing HIV existed, including that states may want to craft HIV-specific statutes because traditional criminal concepts like murder or attempted murder may not be the best theories to prosecute PLWH for criminal exposure.[97] The Commission, however, warned states that "criminal sanctions for HIV transmission must be carefully drawn, must be directed only towards behavior which is scientifically established as a mode of transmission, and should be employed only when all other public health and civil actions fail to produce responsible behavior."[98] The Commission also voiced concerns that there would be "intrusive policing of private sexual activity" and "danger of selective prosecution and misuse of the criminal law to harass unpopular groups."[99] While these recommendations and concerns were not specifically codified in the Ryan White CARE Act in 1990, many of the state statutes that are in effect today mirror suggestions mentioned in the Commission's report—like HIV-specific sentence enhancers in murder or assault cases.[100] Yet many states have not heeded the Commission's warning about only prosecuting activities that scientifically could lead to HIV transmission, and instead have continued to criminalize low-risk behaviors and higher-risk behaviors without regard for viral suppression, condom use, or other risk mitigation factors.[101]

This Part discusses problems associated with HIV criminalization statutes in Section A, including the fact that while understanding and treatment of HIV has improved since the

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[96] *See id*. at 130 (explaining a rationale behind criminalization of HIV transmission).

[97] *See id*. (positing that it would be difficult for prosecutors to prove that "the intent of the HIV-infected individual was to transmit the virus and to cause the victim's death" and that "the act of transmission was the actual cause of death" in a homicide trial); *see also id*. ("Although the assault model provides a more useful tool for criminal prosecution of HIV transmission, the penalties for assault would prove too lenient in those cases where the transmission was intentional.").

[98] *Id.*

[99] *Id.*

[100] *See infra* Section III.B.

[101] *Id.*

beginning of the HIV/AIDS epidemic, the statutes do not reflect these changes; that requiring PLWH to disclose their HIV status might put PLWH at risk of violence, discrimination, and stigmatization; and that HIV criminalization statutes may not be working as legislators may have intended. Section B provides examples of the four categories of HIV criminalization statutes used by the CDC, and the defenses to these statutes, and comments on recent efforts to "modernize" HIV criminalization statutes.

A. PROBLEMS ASSOCIATED WITH HIV CRIMINALIZATION STATUTES

At the height of the HIV/AIDS epidemic, the number of HIV diagnoses and deaths from AIDS spiked, leading to "national panic" regarding the spread of HIV.[102] Criminalizing HIV was only one of several strategies that states and the federal government employed to try to curb the spread of the virus.[103] In all, the states and the federal government expected to use these statutes "1) as a means of informing the public of the proscribed acts medically proven as capable of transmitting HIV, 2) to assuage public fears of casual contagion, and 3) to encourage persons to determine their HIV status and participate in counselling and treatment programs."[104] Still, not all states have restricted their statutes to only include activities that are "medically proven as capable of transmitting HIV."[105]

Yet, there has not been an overall decrease in risky sexual behavior or an increase in protective behaviors such as abstinence, condom use, or seropositive disclosure in states with HIV criminalization statutes compared to those without HIV

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[102] Emma Mustich, *A History of AIDS Hysteria*, SALON (June 5, 2011, 6:01 PM), https://www.salon.com/2011/06/05/aids_hysteria/ (detailing the "national panic" surrounding HIV in the 1980s).

[103] *See, e.g.*, PRESIDENTIAL COMMISSION REPORT, *supra* note 95 (proposing strategies related to HIV incidence and prevalence; patient care; health care providers; basic research, vaccine, and drug development; the public health system; prevention; education; societal issues such as drug abuse or homelessness; legal and ethical issues such as discrimination, sexual assault, and persons in correctional facilities; financing care for PLWH; and international cooperation).

[104] Stephen V. Kenney, Comment, *Criminalizing HIV Transmission: Lessons from History and a Model for the Future*, 8 J. CONTEMP. HEALTH L. & POL'Y 245, 249 (1992).

[105] *Id.*

criminalization statutes.[106] Instead, some researchers suggested that the number of times that a state *enforces* its HIV criminalization laws influences PLWH's likelihood of practicing safe sex, not whether a state had an HIV criminalization statute at all.[107] States with HIV criminalization laws have also not had increased rates of HIV testing or seropositive disclosure; instead, reports suggest that people avoid getting HIV tests out of fear of being prosecuted if the HIV test came back positive.[108] Furthermore, a recent study showed that a majority of participants (63%) were unsure if there was an HIV-specific law requiring positive serostatus disclosure, while 48% of participants did not know which behaviors required serostatus disclosure in their state.[109] Thus, HIV criminalization laws may not be working as intended. Moreover, confusion exists both among PLWH *and* those who are HIV-negative about whether their states have laws criminalizing HIV exposure, what the laws entail, and whether they would actually be prosecuted for non-disclosure of their serostatus.[110]

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[106] *See* Dini Harsono, Carol L. Galletly, Elaine O'Keefe & Zita Lazzarini, *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 21 AIDS BEHAV. 27, 39, 44 (2017) (discussing the efficacy of HIV criminalization laws on decreasing risky sexual behaviors).

[107] *See id.* at 44 ("A second study . . . found that [PLWH] living in states with greater than median rates of prosecutions for undisclosed exposure to HIV were more likely to practice safer sex and to have fewer sex partners than those living in states with lower prosecution rates.").

[108] *See id.* at 44–45 (discussing studies finding that individuals in states with criminal HIV exposure laws were no less likely to report having been tested for HIV than individuals in states without such laws, while PLWH in states with HIV disclosure laws were no more likely to disclose their HIV-positive serostatus to potential sex partners than those who lived in states without such laws); *id.* at 44 (reporting that 21% of survey respondents thought that it was "very reasonable" for someone who is otherwise feeling healthy to not take an HIV test out of fear of being prosecuted, and 25% of survey respondents had told (or been told by) someone that they did not want to take an HIV test out of fear of being prosecuted).

[109] *Id.* at 35, 39.

[110] *See id.* at 35 (discussing findings that only 51% of the HIV-positive participants living in New Jersey were aware of New Jersey's HIV exposure law, and that "[p]articipants' understanding of the content of HIV exposure laws was generally low").

B. HIV CRIMINALIZATION STATUTE TYPES

As of 2021, thirty-five states have statutes either criminalizing or controlling HIV exposure.[111] Among these thirty-five states, the most common criminalized behaviors include sexual intercourse or sexual behavior (seventeen states) and the donation of HIV-positive blood, tissues, and fluids (sixteen states).[112] While criminalizing these two behaviors makes sense in terms of risk of transmission, the next most common behaviors of biting, spitting, throwing, and placing fluids (eleven states),[113] are less likely to lead to the transmission of HIV.[114] Additional criminalized behaviors include sharing needles (ten states), anal sex (nine states), prostitution or solicitation (nine states), vaginal sex (seven states), oral sex (seven states), and sharing sex objects (two states).[115] Overall, twelve states "require people with HIV who are aware of their status to disclose their status to sex partners, and four states require disclosure to needle-sharing partners."[116] States also differ by

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[111] *HIV and STD Criminal Laws*, *supra* note 15. For a compilation of each state and U.S. territory's statutes and caselaw related to HIV criminalization and a more in-depth analysis of state responses to HIV criminalization, see CTR. FOR HIV L. & POL'Y, HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW AND PRACTICE (3d ed. 2022), https://www.hivlawandpolicy.org/sourcebook [hereinafter SOURCEBOOK]. It is also important to recognize that this area of law has changed vastly over the last year as more states have shifted away from HIV criminalization or updated their statutes. *Compare HIV and STD Criminal Laws*, *supra* note 15 (providing data through the end of 2021), *with Web Archive of HIV and STD Criminal Laws,* CTRS. FOR DISEASE CONTROL & PREVENTION, https://web.archive.org/web/20210914072713/https://www.cdc.gov/hiv/policies/law/states/exposure.html (last updated Dec. 21, 2020) (providing data through the end of 2020).

[112] *HIV and STD Criminal Laws*, *supra* note 15.

[113] *Id.*

[114] *See supra* Section II.A.*1* (discussing the transmission risk from different types of sexual activity); *see also Ways HIV Can Be Transmitted*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/hiv-transmission/ways-people-get-hiv.html (last visited Apr. 1, 2022) (stating the low risk of transmission of HIV through biting or spitting); *HIV and STD Criminal Laws*, *supra* note 15 ("Many of these state laws criminalize behaviors that cannot transmit HIV – such as biting or spitting – and apply regardless of actual transmission, or intent.").

[115] *Id.*; *see* Wilton, *supra* note 62 (explaining the risk of HIV transmission from sharing sex objects).

[116] *HIV and STD Criminal Laws*, *supra* note 15.

whether they require actual transmission of HIV prior to prosecution.[117]

The CDC divides the laws of the fifty states, the District of Columbia, and Puerto Rico into four categories of HIV criminalization, describing what constitutes a prosecutable offense in each jurisdiction and how each jurisdiction prosecutes the charge.[118] These categories include: (1) HIV-specific laws that criminalize or control behaviors that can potentially expose another person to HIV; (2) sexually transmitted disease (STD), communicable, contagious, infectious disease laws that criminalize or control behaviors that can potentially expose another person to STDs or communicable or infectious disease—including HIV; (3) sentence enhancement laws specific to HIV or STDs that do not criminalize a behavior but increase the sentence length when a person with HIV commits certain crimes; and (4) no specific criminalization laws.[119]

Table 1 lists the four categories of HIV and STD Criminal Laws used by the CDC and the jurisdictions that fall into each category.

Table 1[120]

Category of HIV and STD Criminal Laws	States Employing This Approach
Criminalize or Control Behaviors Through HIV-Specific Statutes and Regulation (n=22)	Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington
Criminalize or Control Behaviors Through STD/Communicable/Infectious	Alabama, Arizona, California, Iowa, Kansas, Minnesota, Missouri, Montana, Nevada,

[117] *See* SOURCEBOOK, *supra* note 111 (comparing state HIV criminalization statutes).

[118] *HIV and STD Criminal Laws*, *supra* note 15 (organizing HIV-specific criminal exposure laws within the United States into four categories).

[119] *Id.*

[120] *Id.* (reflecting the type of each state's HIV criminalization statute as of February 2022).

Diseases Specific Statutes (n=13)	New York, Rhode Island, Virginia, West Virginia
Sentence Enhancement Statutes (n=4)	Alaska, Colorado, Massachusetts, Wisconsin
None or General Criminal Statutes (n=13)	Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, New Hampshire, New Mexico, Oregon, Puerto Rico, Texas, Wyoming, Vermont

This Section describes each category in more depth and provides an example of a state employing each approach. Section 1 details Georgia's HIV-Specific statute. Section 2 examines Alabama's STD/Communicable/Infectious Diseases Specific statute in contrast with neighboring Georgia's statute. Section 3 reviews Alaska's Sentence Enhancement statute. And Section 4 focuses on HIV criminalization in Texas, the first state to fully repeal its HIV transmission statute but that now prosecutes PLWH for HIV exposure under general criminal laws like attempted murder and aggravated assault.[121]

1. HIV-Specific Statutes. HIV-specific statutes are the most popular manner of criminalizing HIV in the United States: 63% of all jurisdictions that criminalize HIV rely on this approach.[122] In Georgia,[123] PLWH must disclose their status to their oral, anal, and vaginal sexual partners and before sharing needles, or face prosecution, including up to ten years in prison for committing a felony.[124] Furthermore, if a PLWH does not disclose their

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[121] *See* SOURCEBOOK, *supra* note 111, at 130 (noting that Texas was the first state to repeal its HIV-specific criminal law); *id.* at 470 (describing Texas's current approach to prosecuting HIV transmission).

[122] *HIV and STD Criminal Laws*, *supra* note 15 (providing data for percentage calculations).

[123] O.C.G.A. § 16-5-60 ("Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons; assault by HIV infected persons or hepatitis infected persons.").

[124] O.C.G.A. § 16-5-60(c)). As a "Reckless Conduct" statute, Georgia's approach to HIV criminalization requires that PLWH know their positive status before knowingly: engaging in sexual intercourse or other sex acts, allowing another person to use the PLWH's previously used syringe or hypodermic needle for the purpose of injection drug use, offering sexual intercourse or soliciting sodomy for money, or donating organs or bodily fluids like blood

seropositivity when engaging in solicitation of sex or prostitution, the PLWH can receive up to the maximum prison sentence despite prostitution typically only being a misdemeanor.[125] Georgia's statute does not require intent or actual transmission, nor does it consider whether the PLWH is virally suppressed or wore protection during sex.[126]

Conversely, Georgia's statute includes provisions to protect peace officers and correctional officers by making it a felony "for a PLHIV who knows their HIV status to use their blood, semen, vaginal secretions, saliva, urine, or feces to commit an assault, with the *intent* to transmit HIV, against a peace or correctional officer engaged in their duties."[127] Despite studies showing that the likelihood of saliva, urine, or feces transmitting HIV is almost impossible, [128] this provision still punishes PLWH for that remote possibility and carries a potential sentence of five to twenty years.[129]

2. STD/Communicable/Infectious Disease-Specific Statutes. Georgia's neighbor Alabama is one of thirteen states that approaches HIV criminalization through existing communicable disease statutes.[130] For instance, in Alabama, "a person commits the

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without prior disclosure of their HIV status. *Id.* (c). This does not mean, however, that the PLWH must knowingly or intentionally infect others as knowingly engaging in activities which carry a risk of transmission is sufficient for prosecution. *Id.* (c).

[125] O.C.G.A. § 16-5-60(c)(3)–(4); *see also* SOURCEBOOK, *supra* note 111, at 111 ("A conviction for prostitution is normally a misdemeanor, but it is prosecuted as a felony if the defendant is a PLHIV, knows their status, and does not inform the other person.").

[126] SOURCEBOOK, *supra* note 111, at 110 ("Disclosure of one's HIV status is the only affirmative defense to prosecution. A defendant's viral load is not a consideration, and it is no defense if protection, such as a condom, was used during sexual activity.").

[127] SOURCEBOOK, *supra* note 111, at 111 (citing O.C.G.A. § 16-5-60(d) (2021)) (emphasis added). While O.C.G.A. § 16-5-60(c) does not require a PLWH to act with an intent to transmit HIV through sexual contact, injection drug use, prostitution, or bodily fluid donation, O.C.G.A. § 16-5-60(d) requires intent to transmit HIV when using bodily fluids to commit an assault. O.C.G.A. § 16-5-60(d). This could potentially be attributed to the fact that O.C.G.A. § 16-5-60(c) views the PLWH's actions through a reckless conduct lens, which requires a conscious disregard of a substantial and unjustifiable risk that an act or omission will cause harm or endanger the safety of another. *See* O.C.G.A. § 16-5-60(a) (describing reckless conduct). Meanwhile, O.C.G.A. § 16-5-60(d) views the PLWH's actions through the lens of an assault which requires an intentional act to either attempt to commit or actually commit a violent injury of another. O.C.G.A. § 16-5-60(d).

[128] *See supra* Part II.

[129] O.C.G.A. § 16-5-60(d).

[130] *See HIV and STD Criminal Laws*, *supra* note 15.

crime of assault with bodily fluids if he or she knowingly causes or attempts to cause another person to come into contact with a bodily fluid unless the other person consented to the contact or the contact was necessary to provide medical care."[131] This offense is punishable as a felony if that person has a communicable disease[132] such as measles, influenza, tuberculosis, or HIV.[133] This statute also does not require actual transmission or intent to transmit and criminalizes bodily fluids such as urine, feces, or saliva despite their inability to transmit HIV.[134]

3. Sentence Enhancement Statutes. Alaska, Colorado, Wisconsin, and Massachusetts do not have specific statutes to prosecute criminal exposure of HIV but instead utilize sentence enhancement statutes to increase the punishment when a PLWH commits certain offenses.[135] For example, in Alaska, "[i]f a PLHIV is found guilty of a sexually-based assault, they may receive an enhanced term of imprisonment if (1) the offense involved penetration or (2) the defendant exposed the victim to a risk or fear that HIV transmission could result."[136] Alaska defines sexual penetration to include "genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body."[137] This is particularly important because Alaska not only fails to consider whether the PLWH intended to transmit HIV but also allows PLWH to receive an aggravated sentence solely for the victim's fear of transmission.[138] Finally, as in many other states that criminalize

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[131] ALA. CODE § 13A-6-242(a) (2018); SOURCEBOOK, *supra* note 111, at 10.

[132] *See* ALA. CODE § 13A-6-242(c) (2018) (classifying assault with bodily fluids as a Class C felony if the person commits the crime knowing that he or she has a communicable disease).

[133] S*ee* SOURCEBOOK, *supra* note 111, at 10 ("'[C]ommunicable disease' is not defined, meaning a variety of casually transmitted conditions—such as measles, influenza, or tuberculosis—fall within the plain meaning of the statute, in addition to HIV and other STIs.").

[134] *See* ALA. CODE § 13A-6-242(b) (2018) ("For purposes of this section, a bodily fluid is blood, saliva, seminal fluid, mucous fluid, urine, or feces.").

[135] *See HIV and STD Criminal Laws*, *supra* note 15 (listing the states which increase criminal sentences for PLWH when they commit certain offenses).

[136] *See, e.g.*, ALASKA STAT. § 12.55.155 (2016).

[137] ALASKA STAT. § 11.81.900(b)(62)(A) (2016).

[138] SOURCEBOOK, *supra* note 111, at 21 ("If a PLHIV is found guilty of a sexually-based assault, they may receive an enhanced term of imprisonment if (1) the offense involved penetration or (2) the defendant exposed the victim to a risk or fear that HIV transmission

HIV in some manner, there is no consideration of whether the defendant used protection during sexual activity or if the defendant has a suppressed viral load.[139]

4. No HIV or STD-Specific Statutes. Texas, like thirteen other states, does not have a specific statute to prosecute PLWH for potential exposure to HIV[140]—after the Texas Legislature repealed its HIV transmission statute in 1994.[141] Criminal charges related to HIV exposure that occur in these states, however, are often prosecuted under general criminal laws such as attempted murder or aggravated assault.[142]

C. DEFENSES

In most states, the only affirmative defense to HIV criminalization prosecution is disclosure.[143] This statutory scheme

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could result. Neither the intent to transmit HIV nor actual transmission is required. Nor is there a requirement that a person's 'fear that the offense could result in the transmission of HIV or AIDS' be based on accurate medical science." (citations omitted)).

[139] *Id.* at 21 ("An enhanced sentence can be imposed even if the defendant's viral load is low or non-detectable, if protection, such as a condom was used, or if the crime involved penetration with a body part or object that cannot transmit HIV.").

[140] *See HIV and STD Criminal Laws*, *supra* note 15 (noting the states which do not have a HIV or STD-specific statute to criminalize HIV and use general criminal laws like aggravated assault instead).

[141] SOURCEBOOK, *supra* note 111, at 470 (noting that Texas repealed its HIV transmission statute in 1994).

[142] *See, e.g.*, *id.* at 470–75 (describing the offense of aggravated sexual assault, providing examples of aggravated sexual assault and attempted murder prosecutions of PLWH due to potential HIV exposure, and explaining how HIV has been treated as a "deadly weapon"). In Texas, "HIV status can be considered admissible evidence at the punishment stage of a conviction if it is determined that HIV status is relevant to the offense" which allows judges to consider HIV status as a pseudo-sentence enhancer. *Id.* at 475. Yet this "sentence enhancer" sits firmly within judicial discretion rather than a legislative proscription as seen in Alaska, Colorado, Massachusetts, and Wisconsin. *Id.* at 475; *see also HIV and STD Criminal Laws*, *supra* note 15 (identifying states that utilize sentence enhancers against PLWH in certain cases).

[143] *See, e.g.*, SOURCEBOOK, *supra* note 111, at 110 (identifying disclosure as the only defense to HIV exposure prosecution in Georgia); *id.* at 123 ("It is an affirmative defense [in Idaho] if the defendant can prove that the sexual activity was consensual and their partner was informed 'of the risk of such activity.'" (citation omitted)); *id.* at 259 ("PLHIV [in Missouri] also may assert as a defense that the person claiming exposure was aware that the person accused was living with the health condition at issue and therefore effectively consented to the conduct. However, disclosure of HIV status before sexual intercourse is often difficult to

poses an evidentiary problem because conversations about consent and serostatus frequently occur in private, which makes it difficult for a defendant to prove that disclosure occurred before the parties engaged in an activity that could lead to an HIV transmission.[144] In 2008, a jury in Georgia convicted a woman of reckless conduct after she allegedly engaged in unprotected sex without disclosing that she was HIV-positive.[145] Despite having two witnesses testify that the partner knew of her HIV-positive status and the defendant's status having been published on the front page of a local newspaper, the court upheld the eight-year prison sentence.[146] This defendant's story is not unique. Other PLWH across the country have faced similar prosecutions and, in some cases, have received even harsher sentences.[147] Furthermore, false reporting has become a more

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prove retroactively." (citation omitted)); *id.* at 355 ("The only affirmative defense to prosecution [in Ohio] is the disclosure of one's HIV status to sexual partners prior to engaging in any of these activities. The disclosure must be made prior to the first initial act of such conduct and using condoms or other forms of protection is not a defense.").

[144] "In the majority of known HIV criminalization cases across the globe, HIV transmission is not at issue in the case—only alleged HIV non-disclosure (a complainant claiming that their partner did not tell them that they were living with HIV), which pits the word of two partners against one another in court, and is almost impossible to truly prove. Although many criminal justice systems are meant to be based on ideals of due process and 'innocent until proven guilty,' those values and processes are weakened when people living with HIV are inherently seen as sexual predators and 'infectors' just for having a health condition." *HIV Criminalization and Women*, WELL PROJECT (Oct. 28, 2021), https://www.thewellproject.org/hiv-information/hiv-criminalization-and-women; Heywood, *supra* note 1 ("Who is to say, in a court of law, how and when I have disclosed to my partners my HIV status? . . . I protect from prosecution by disclosing my status each and every time, though without witnesses to my disclosure I worry that it would be impossible to prove in court."); *see also* Aziza Ahmed & Beri Hull, *Sex and HIV Disclosure*, AM. BAR ASS'N (Apr. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/sex_and_hiv_disclosure/ (discussing the problem with HIV criminalization's disclosure requirement and providing hypothetical and actual scenarios to explain the complexity of disclosure).

[145] *See* Ginn v. State, 667 S.E.2d 712, 713–14 (Ga. Ct. App. 2008) (affirming the lower court's ruling that there was sufficient evidence for the jury to conclude that Ginn did not disclose her HIV status to the victim before intercourse).

[146] *See Ginn*, 667 S.E.2d at 714 (discussing the testimony of two witnesses who allegedly heard the conversation between Ginn and the victim regarding her HIV status).

[147] SOURCEBOOK, *supra* note 111, at 113–14 (detailing examples of prosecution in Georgia).

prominent problem in the context of former partners than in the context of strangers.[148]

In response to the difficulty of proving disclosure, PLWH have begun to take advantage of online technology such as emails, text messages, and internet dating app messaging to receive documented consent in writing.[149] Although, disclosure acts as both a sword and a shield as in some cases disclosure can put the PLWH at greater risk of violence, [150] discrimination, and stigmatization[151] regardless of viral suppression.

D. MODERNIZATION OF STATUTES

Recently, nine states modernized or repealed their HIV criminalization statutes[152]—including Iowa after Nick Rhoades's trial.[153] California, Colorado, Illinois, Iowa, Michigan, Missouri, Nevada, North Carolina, and Virginia undertook legislative efforts to "remov[e] HIV prevention issues from the criminal code and includ[e] them under disease control regulations, requir[e] intent to transmit, actual HIV transmission, or provid[e] defenses for taking measures to prevent transmission such as viral suppression or being noninfectious, condom use, and partner PrEP use."[154]

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[148] *What HIV Criminalization Means to Women in the U.S.*, *supra* note 21, at 2 ("Most of these cases have occurred among former sex partners. They turn into 'he said/she said' situations because people seldom have proof that they disclosed their HIV status to their partners before sex. Yet the burden of proof is on the accused person. You can be convicted on the basis of a lie by a former lover if you have no evidence showing that the charge is a lie."); Alexandra McCallum, Note, *Criminalizing the Transmission of HIV: Consent, Disclosure, and Online Dating*, 2014 UTAH L. REV. 677, 680–82 (discussing how online dating sites facilitate disclosure among PLWH).

[149] *See* Heywood, *supra* note 1 (discussing her habit of documenting disclosure online).

[150] *What HIV Criminalization Means to Women in the U.S.*, *supra* note 21, at 3 (explaining the risk of disclosure in a domestic violence situation).

[151] Sergio Hernandez, *Sex, Lies and HIV: When What You Don't Tell Your Partner Is a Crime*, PROPUBLICA (Dec. 1, 2013, 10:58 P.M.), https://www.propublica.org/article/hiv-criminal-transmission (discussing the stigmatization and discrimination faced by PLWH and their family members following disclosure).

[152] *See HIV and STD Criminal Laws*, *supra* note 15.

[153] North, *supra* note 10. Some argue that Iowa's new statute did not go far enough. *See id.* (explaining how the changes in laws like Iowa's could both help and hurt PLWH).

[154] *See HIV and STD Criminal Laws*, *supra* note 15.

Similarly, other states—including Georgia[155]—and the federal government[156] have considered modernizing their statutes but have not enacted any legislation on this point.

These changes are arguably steps in the right direction because they decriminalize the potential for HIV transmission and instead treat potential exposures as a public health problem, require an intent to transmit or actual transmission rather merely criminalizing any sexual activity without disclosure, and consider prevention methods that decrease risk of transmission to almost zero (e.g., viral suppression, condom use, and partner PrEP use).[157] But even with these statutory changes, should any HIV criminalization statutes be constitutional? Conversely, if HIV criminalization statutes as a whole are considered constitutional, should HIV criminalization statutes that do not include safeguards, such as the ones described above, be considered unconstitutional because scientific advances[158] have arguably pushed them into the realm of status crimes?

IV. PREVIOUS CONSTITUTIONAL CHALLENGES TO HIV CRIMINALIZATION STATUTES

In the past, PLWH challenged HIV criminalization statutes' constitutionality on First Amendment, equal protection, substantive due process, and cruel and unusual punishment grounds, yet courts have continued to uphold the statutes as constitutional. Section A discusses First Amendment challenges, Section B details Eighth Amendment challenges under the Cruel and Unusual Punishment Clause, and Section C explains Fourteenth Amendment challenges based on the right to privacy and the Equal Protection Clause.

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[155] Tamar Hallerman, *Georgia Could Overhaul HIV Laws for First Time Since AIDS Crisis*, ATLANTA J.-CONST. (Mar. 8, 2020), https://www.ajc.com/news/state--regional-govt--politics/georgia-could-overhaul-hiv-laws-for-first-time-since-aids-crisis/ (explaining how Georgia House Bill 719 seeks to lessen the effects of HIV criminalization in Georgia to reflect public attitudes).

[156] *See* REPEAL HIV Discrimination Act of 2020, H.R. 6054, 116th Congress (Mar. 2, 2020) ("To modernize laws and policies, and eliminate discrimination, with respect to people living with HIV/AIDS, and for other purposes.").

[157] *See HIV and STD Criminal Laws*, *supra* note 15.

[158] *See supra* Section II.B.*2*.

A. FIRST AMENDMENT CHALLENGES

The First Amendment provides that "Congress shall make no law . . . *abridging the freedom of speech*."[159] Courts have held that this protection of freedom of speech includes "both the right to speak freely and the right to refrain from speaking at all."[160] This protection applies not only to expressions of value, opinion, or endorsement, but also to statements of fact that a speaker would rather avoid[161]—such as a person's seropositivity.

In the Iowa Supreme Court case *State v. Musser*,[162] the defendant claimed that Iowa's HIV criminalization statute[163] violated the First Amendment on these grounds, claiming that disclosure statutes "compel[] speech"[164] that the speaker "would rather avoid."[165] Furthermore, the defendant alleged that even state statutes that do not require PLWH to personally disclose their status—like Iowa's at the time—compel speech because the PLWH may essentially be the only person who *could* notify their potential partner of their seropositivity.[166] Because an "HIV-positive person engaging in intimate contact with another person can avoid criminal liability

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[159] U.S. CONST. amend I (emphasis added).

[160] W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.").

[161] *See* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 573–74 (1995) ("[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . ." (citations omitted)).

[162] 721 N.W.2d 734 (Iowa 2006).

[163] The Iowa statute indicated that "[a] person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person's human immunodeficiency virus status is positive, does any of the following: (a) Engages in intimate contact with another person." IA ST § 709C.1(1)(a) (repealed). It also included an affirmative defense: "It is an affirmative defense that the person exposed to the human immunodeficiency virus knew that the infected person had a positive human immunodeficiency virus status at the time of the action of exposure, knew that the action of exposure could result in transmission of the human immunodeficiency virus, and consented to the action of exposure with that knowledge." IA ST § 709C.1 (5) (repealed).

[164] *Musser*, 721 N.W.2d at 742.

[165] *Hurley*, 515 U.S. at 573–74.

[166] *Musser*, 721 N.W.2d at 742.

only by telling the potential victim that the person is HIV positive and educating the potential victim about the possible transmission of the virus," the defendant in *Musser* argued that the statute therefore compelled speech in violation of the First Amendment.[167]

As the affirmative defense to Iowa's Criminal Transmission statute requires the alleged victim to know the defendant's HIV status,[168] the *Musser* court agreed with the defendant that Iowa's statute *did* compel speech because medical information is confidential and the only way that someone could know if their partner was HIV-positive would be if the PLWH told them.[169] Yet, despite the statute serving as a content-based regulation on speech by compelling PLWH to disclose their HIV status, [170] the court held that the statute withstood strict scrutiny,[171] and therefore was constitutional because the purpose of the statute was to discourage HIV transmission.[172]

In support of its decision, the *Musser* court quoted a Michigan Court of Appeals case, *Michigan v. Jensen*:

> Considering the ease of transmitting AIDS and HIV through sexual penetration and the absence of any

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[167] *Id.* at 741–42.

[168] IA ST § 709C.1(5) (repealed).

[169] *Musser*, 721 N.W.2d at 742.

[170] *Id.* at 744 ("[W]e conclude section 709C.1 regulates speech on the basis of content. The focus of section 709C.1 is not on the time, place, or manner of expression, but on the content of the communication. The statute requires transmission of specific information—the infected person's HIV-positive status."). For an overview on content-based regulations and the Supreme Court cases determining their constitutionality, see David L. Hudson Jr., *Content Based*, FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/935/content-based. "A content-based law or regulation discriminates against speech based on the substance of what it communicates" and is "presumptively unconstitutional and subject to strict scrutiny, the highest form of judicial review" *Id.*

[171] *Musser*, 721 N.W.2d at 744. A statute subject to strict scrutiny, like content-based laws, is presumptively unconstitutional unless "the government…show[s] that there is a compelling, or very strong, interest in the law, and that the law is either very narrowly tailored or is the least speech restrictive means available to the government." David L. Hudson Jr., *Strict Scrutiny*, FIRST AMEND. ENCYC. (Aug. 16, 2021), https://mtsu.edu/first-amendment/article/1966/strict-scrutiny.

[172] *Musser*, 721 N.W.2d at 744–45 (finding that the state has a "compelling state interest" in preventing the spread of HIV and that as the statute merely compels a defendant to "privately inform a potential sexual partner of his or her condition," there was not a "less restrictive way in which the state could accomplish its goal").

> "cure," the state's interest in protecting the public health, safety, and general welfare of its citizenry becomes extremely significant. Although the statute may significantly infringe defendant's individual interests in remaining silent, the state's interest to compel her to disclose that she is HIV infected before engaging in sexual penetration is undeniably overwhelming.[173]

Although the Michigan Court of Appeals decided *Jensen* in 1998—and the scientific community both knows more today about the prevention and treatment of AIDS to the extent that there is essentially a "cure" through consistent ART use,[174] courts continue to agree with the *Jensen* court's view that the government's interest in preventing the spread of AIDS and HIV outweighs any interest that a PLWH might have in non-disclosure.[175] Thus, although the government's interest in "discouraging the transmission of the AIDS virus"[176] through HIV criminalization statutes is potentially less compelling[177] in light of modern medical advances,[178] courts

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[173] *Id.* at 744 (quoting People v. Jensen, 586 N.W.2d 748, 759 (Mich. Ct. App. 1998)).

[174] *See Consensus Statement*, *supra* note 72, at 4 ("People living with HIV on ART with an undetectable viral load in their blood have a negligible risk of sexual transmission of HIV.").

[175] *Jensen*, 586 N.W.2d at 759; *see, e.g.*, State v. Batista, 64 N.E.3d 498, 503 (Ohio Ct. App. 2016) (holding that Ohio's HIV criminalization statute "withstands strict scrutiny and does not violate the First and Fourteenth Amendments to the United States Constitution").

[176] *Musser*, 721 N.W.2d at 744.

[177] *See* Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest ("Although not explicitly defined [by the U.S. Supreme Court], 'compelling' is obviously intended to be a higher interest than 'legitimate' or 'important'; some have described it as 'necessary' or 'crucial,' meaning more than an exercise of discretion or preference."). For examples of when the Court ruled that the government had a compelling interest, see *id.*

[178] If PLWH can achieve viral suppression to the extent where there is no risk that they will infect others, the state's interest in compelling PLWH to disclose their status prior to engaging in sexual intercourse is weaker than it would have been during earlier stages of the AIDS epidemic where fewer PLWH were virally suppressed. *See supra* Section II.A. However, it is likely that courts will continue to find that the state has a compelling interest in curbing the spread of AIDS and the HIV virus. *See* State v. Gamberella, 633 So.2d 595, 604 (La. Ct. App. 1993) ("No one can seriously doubt that the state has a compelling interest in discouraging the spread of the HIV virus.").

have yet to recognize that there are less restrictive means[179] to protect this interest or consider that the statutes as applied might no longer withstand strict scrutiny.

B. EIGHTH AMENDMENT CHALLENGES

The Eighth Amendment prohibits "cruel and unusual punishments" from being inflicted on individuals.[180] Defendants have raised challenges to HIV criminalization statutes on the grounds that prison sentences, like the twenty-five year prison sentences that both Musser and Rhoades received in Iowa,[181] constitute cruel and unusual punishment because they are grossly disproportionate to the crime they committed—namely, allegedly exposing someone to HIV, even when the possibility of transmission was minimal.[182] The U.S. Supreme Court set forth the test for determining whether a sentence is proportional to its offense in *Solem v. Helm*.[183] *Solem*'s test requires that the punishment set by the legislature be considered in relation to the *gravity* of the offense and to the *length* of punishment of other offenses in the jurisdiction to evaluate an offense's proportionality.[184]

In conducting the *Solem* analysis, the *Musser* court stated that:

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[179] Under a "strict scrutiny analysis," the government must prove that it used "the least speech-restrictive means possible to achieve a compelling state interest." Scott Johnson, *Least Restrictive Means*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/494/least-restrictive-means (last updated June 2017). If there is a less restrictive means available but not employed in the statute, the statute will fail to meet strict scrutiny. *See, e.g.*, United States v. Playboy Ent. Grp., 529 U.S. 803, 803 (2000) (finding the statute failed to meet strict scrutiny as there was a less restrictive means of ensuring minors did not access sexually explicit programming). In *Musser*, the court found that the statute was narrowly tailored because "[t]he statute does not absolutely prohibit an infected person from having sexual relations with another" nor does it "compel public disclosure of an infected person's HIV status." *Musser*, 721 N.W.2d at 744 . The question in future cases, however, will likely be whether requiring disclosure is still the least restrictive means of decreasing HIV infections.

[180] U.S. CONST. amend VIII.

[181] *See, e.g.*, *Musser*, 721 N.W.2d at 748 ("Musser claims a twenty-five-year sentence for the criminal transmission of HIV constitutes cruel and unusual punishment in violation of the Eighth Amendment.").

[182] *See*, *e.g.*, *id.* at 750 ("The defendant's sentence does not constitute cruel and unusual punishment.").

[183] 463 U.S. 277, 290–92 (1983).

[184] *Id.* at 290–91.

> Viewed objectively, we cannot say the punishment set by the legislature for the crime of criminal transmission of HIV is grossly disproportionate to the harm sought to be punished and deterred. HIV is "the causative agent of AIDS." AIDS is a chronic, life-threatening condition. Clearly, the dire consequences of this crime can be significant and serious. The potential harm to the public welfare from the spread of this deadly virus is equally grave and severe.[185]

The court further compared the crime of transmission of HIV to first-degree robbery, which neither required an intent to inflict injury nor actual injury, yet carried a prison sentence of twenty-five years in Iowa.[186] Because the crime of transmission of HIV also did not require an intent to inflict injury or transmit HIV, nor actual injury or transmission, and because "just like the robber carrying a gun or a knife, a defendant infected with HIV is armed with a dangerous virus capable of inflicting serious injury or death on the victim," the *Musser* court held that a twenty-five-year sentence for criminal transmission of HIV cannot be considered disproportionate.[187]

C. FOURTEENTH AMENDMENT CHALLENGES

Section 1 of the Fourteenth Amendment states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*."[188]

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[185] *Musser*, 721 N.W.2d at 749 (citations omitted).

[186] *See id.* at 749–50 ("The crime of criminal transmission of HIV is actually quite similar to the crime of first-degree robbery for purposes of proportionality analysis. First-degree robbery does not require an intent to inflict injury (only an intent to commit a theft), and it does not require that any actual injury result from the defendant's action. On the other hand, it does require that the defendant 'purposely inflict[] or attempt[] to inflict serious injury' or be 'armed with a dangerous weapon.'" (citing IOWA CODE §§ 711.1–711.2)).

[187] *Id.* at 750.

[188] U.S. CONST. amend XIV, § 1 (emphasis added).

Criminal defendants have brought challenges on Fourteenth Amendment grounds arguing that mandated disclosure of their HIV status would violate their fundamental right to privacy[189] as established under the Due Process Clause,[190] or that PLWH are treated differently than carriers of other STIs[191] in violation of the Equal Protection Clause.[192] Section 1 discusses the constitutional

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[189] *See, e.g.*, *Musser*, 721 N.W.2d at 747–48 (arguing that Iowa Code §709C.1 infringes on the defendant's fundamental right to privacy as established by *Griswold*, *Eisenstadt*, and *Lawrence* and therefore should be unconstitutional). The applicable test in cases where a litigant is alleging that the government has infringed on a fundamental right, is strict scrutiny where "the statute must directly advance compelling governmental interests and be the least restrictive effective means of doing so." R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CON. L. 225, 228 (2002).

[190] The Due Process Clause mandates that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, § 1. However, the U.S. Supreme Court recognized two different types of due process: procedural due process which "asks whether the government has followed the proper procedures when it takes away life, liberty or property" and substantive due process, which asks "whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose." Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999). Although the Due Process Clause does not explicitly provide a right to privacy, the U.S. Supreme Court has read privacy into the Bill of Rights through the use of substantive due process. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (recognizing a right to privacy in a marital relationship and within the bedroom); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending privacy rights to single individuals in addition to married individuals); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding a law which made it a crime for two people of the same sex to engage in certain intimate sexual conduct was unconstitutional). For a discussion on the development of substantive due process, see Chemerinsky, *supra*.

[191] *See* State v. Batista, 64 N.E.3d 498, 501 (Ohio Ct. App. 2016) ("Here, [defendant] asserts that there is no constitutionally justifiable basis for treating carriers of HIV differently than carries [sic] of other sexually-transmitted diseases."); *id.* ("[Defendant] points out, and we acknowledge, that there have been tremendous advances in the treatment of HIV/AIDS patients since the AIDS epidemic of the 1980s. [Defendant] also argues that, until recently, there was no cure for Hepatitis C, a disease that can also be sexually transmitted, and that there is no statute in Ohio that criminalizes the failure to disclose a positive Hepatitis C status to a partner before engaging in sexual conduct.").

[192] *See* U.S. CONST. amend. XIV, §1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."). While the initial intent of the Equal Protection Clause was to combat discrimination against formerly enslaved persons in the aftermath of the Civil War, the Equal Protection Clause has been used to challenge discrimination against "gay and lesbian persons." Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L. J. 1013, 1053 (2003). In practice, "the

challenges to HIV criminalization statutes based on the right to privacy and why courts have not found these arguments persuasive. Section 2 describes challenges to HIV criminalization statutes under the Equal Protection Clause and why courts have not found these arguments persuasive.

1. Establishing the Right to Privacy. The 1965 U.S. Supreme Court case *Griswold v. Connecticut*, which concerned statutes forbidding the use of contraceptives and providing medical advice on the use of contraceptives,[193] cemented the right to privacy as a fundamental right under the Fifth and Fourteenth Amendments to the U.S. Constitution.[194] The Court found Connecticut's law was "repulsive to the notions of privacy surrounding the marriage relationship" and stated that "[s]uch a law cannot stand in light of the familiar principle . . . that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and

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Equal Protection Clause prohibits the government from targeting people for who they are rather than what they do" and requires the government to treat similarly situated persons alike. *Id.* at 1054. Courts employ strict scrutiny review in "suspect cases" or cases "where there is reason to suspect 'prejudice against discrete and insular minorities.'" Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2771–72 (2005) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n. 4 (1938)). Thus, in cases involving "[c]lassifications based on race, national origin and ethnicity, and alienage," the state must demonstrate "that the classification furthers a compelling governmental interest and is narrowly tailored to further that interest." *Id.* at 2772–73 (citations omitted). Conversely, "[a]ll other classifications are reviewed under the rational basis test, under which they are presumptively constitutional as long as they are rationally related to any conceivable, legitimate governmental interest, even if such interest is offered post hoc." *Id.* at 2773. PLWH would fall under the rational basis scrutiny category as PLWH are not a suspect-class. *Id.* at 2773 (citations omitted).

[193] *Griswold*, 381 U.S. at 480. The defendants in *Griswold*, the Executive Director of the Planned Parenthood League of Connecticut and a physician "gave information, instruction, and medical advice to *married persons* as to the means of preventing conception" and "examined the wife and prescribed the best contraceptive device or material for her use" in contravention of a Connecticut statute. *Id.*

[194] *Id.* at 486 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."); *id.* at 484–86 (finding the right to privacy within the "penumbra" of the Bill of Rights).

thereby invade the area of protected freedoms.'"[195] The Court applied the same reasoning in two other cases. First, in *Eisenstadt v. Baird*, a case involving a statute that allowed married persons to obtain contraceptives to prevent pregnancy but prohibited distribution to single persons for the same purpose, extended the right to privacy to "married *or single*" individuals to decide to have a child.[196] Second, in *Lawrence v. Texas*, which questioned the constitutionality of a Texas statute "making it a crime for two persons of the same sex to engage in certain intimate conduct," the Court recognized that homosexual persons had a "full right to engage in their [private sexual] conduct without intervention of the government."[197]

Despite HIV criminalization statutes infringing on PLWH's rights to privacy[198] and "making their sexual conduct a crime,"[199] courts have struck down challenges to HIV criminalization statutes, finding that the state has an "overriding, legitimate, and compelling interest in preserving the life of its citizens."[200] Additionally, while *Lawrence* "involve[d] two adults . . . *with full and mutual consent*

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[195] *Id.* at 485–86 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

[196] 405 U.S. 438, 440–42, 453 (1972) (emphasis added).

[197] 539 U.S. 558, 578 (2003).

[198] *See* State v. Gamberella, 633 So.2d 595, 604 (La. Ct. App. 1993) (arguing that Louisiana's statute "interfered with [the defendant's] right as an HIV-infected person to engage in sexual activities"). *But see* People v. Jensen, 586 NW.2d 748, 756–57 (Mich. Ct. App. 1998) ("We believe that defendant's ostensible right to withhold disclosure of her HIV status from her sexual partners is not an absolute right when balanced against the state's "unqualified interest" in preserving human life." (quoting Hobbins v. Att'y Gen., 518 N.W.2d 487, 492 (Mich. Ct. App. 1994))); State v. Musser, 721 N.W.2d 734, 748 (Iowa 2006) ("Although section 709C.1(1) infringes on Musser's privacy rights, we conclude the State has a compelling interest in discouraging the spread of the virus and protecting human life.").

[199] *Lawrence*, 539 U.S. at 578.

[200] *See, e.g.*, People v. Jensen, 586 N.W.2d 748, 756 (Mich. Ct. App. 1998) ("Despite the guarantee of personal privacy extended to procreation, contraception, family relationships, child rearing, and child education, we disagree that defendant's asserted right to privacy falls within any of these categories. . . .[D]efendant's actions merely involve one individual's decision to have unfettered or unencumbered sexual relations with others. We will not read these constitutional guarantees of personal privacy so broadly as to render them meaningless. To the contrary, we defer to the state's overriding, legitimate, and compelling interest in preserving the life of its citizens, thereby permitting it to preclude defendant from remaining silent and knowingly exposing others to an incurable disease.").

from each other"[201] and occurred "under circumstances in which no persons 'might be injured or coerced,'"[202] many HIV exposure prosecutions involve a PLWH's non-disclosure of their HIV status[203]—which raises the question of whether the given consent in an HIV criminalization case was valid[204]—and "sexual conduct that would expose another person to a life-jeopardizing disease."[205]

Thus, HIV criminalization statutes do not infringe upon the right to privacy, as described in *Griswold*[206] and *Lawrence,*[207] and are constitutional[208] because these statutes are narrowly tailored to further the state's compelling interests in "discouraging the spread of the virus and protecting human life."[209]

2. Equal Protection Clause. A recent argument under the Equal Protection Clause claiming "that there is no constitutionally justifiable basis for treating carriers of HIV differently" than carriers of other STDs has also failed.[210] In *State v. Batista*, the Ohio

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[201] State v. Musser, 721 N.W.2d 734, 748 (Iowa 2006) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

[202] State v. S.F., 483 S.W.3d 385, 389 (Mo. 2016) (en banc) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

[203] *See* SOURCEBOOK, *supra* note 111 (providing examples of HIV exposure prosecutions nation-wide due to non-disclosure of HIV status).

[204] *Musser*, 721 N.W.2d at 748 ("[I]t cannot be disputed that one considering having sexual intercourse with another would want to know whether the other person is [HIV-positive] prior to engaging in such intimate contact. Consent in the absence of such knowledge is certainly not a full and knowing consent as was present in *Lawrence*."). The *Musser* court also noted that unlike in *Lawrence*, sexual partners of a PLWH are at "serious risk of injury and even death from the prohibited sexual contact." *Id.*

[205] *S.F.*, 483 S.W.3d at 389

[206] Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

[207] *Lawrence*, 539 U.S. at 562.

[208] *See, e.g.*, *Musser*, 721 N.W.2d. at 748 (finding that an HIV criminalization statute constitutional (citing State v. Gamberella, 633 So.2d 595, 603 (La. Ct. App. 1993))); *S.F.,* 483 S.W.3d at 388–89 (noting that the statute "regulates only sexual conduct that would expose another person to a life-jeopardizing disease when that person has not given consent to the conduct with knowledge of the risk of exposure"); People v. Jensen, 586 N.W.2d 748, 756 (Mich. Ct. App. 1998) (deferring to the state's interest in protecting its citizens); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990) (holding that a state can "assert an unqualified interest in the preservation of human life to be weighed against ")the constitutionally protected interests of the individual").

[209] *See Musser*, 721 N.W.2d. at 748.

[210] State v. Batista, 64 N.E.3d 498, 501 (Ohio Ct. App. 2016); *see also* Howton v. State, 619 S.W.3d 29, 36 (Ark. Ct. App. 2021) (finding that compared to other incurable diseases spread through sexual contact like syphilis, "the legislature is justified in treating HIV differently

Court of Appeals determined that the "rational-relation test," its version of "rational basis review," was the applicable standard of review for Equal Protection Clause cases involving PLWH.[211] Under Ohio's rational-relation test, "a legislative decision to treat two groups differently is unconstitutional only if it is based solely on reasons totally unrelated to the pursuit of the state's goals and if no grounds can be conceived to justify the different treatment."[212]

When applying the rational-relation test to the HIV criminalization statute in *Batista*, the court found that "[s]topping the spread of HIV is a legitimate state interest, as it furthers the safety and welfare of Ohio's citizens."[213] Thus, despite the "tremendous advances in the treatment of HIV/AIDS patients since the AIDS epidemic of the 1980s," the *Batista* court found that "[r]equiring an HIV-positive individual to disclose his or her status before engaging in sexual conduct is rationally related to stopping the spread of HIV."[214] Furthermore, while there may not be treatments or cures for other STI, like Hepatitis C, "[t]he state does not have to criminalize every failure to disclose a sexually-transmitted disease to make the [HIV criminalization] statute at issue comport with the Equal Protection Clauses of the state and federal constitutions."[215]

V. HIV CRIMINALIZATION STATUTES AS APPLIED ARE EFFECTIVELY UNCONSTITUTIONAL AS STATUS CRIMES

Courts have generally struck down constitutional challenges to HIV criminalization statutes on grounds that states have a compelling interest in protecting their residents from HIV infection and in curtailing the spread of the virus[216] and that HIV's lifelong

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than other diseases because HIV is both incurable and fatal without treatment and because of the significant medical differences between HIV and other diseases").

[211] *Batista*, 64 N.E.3d at 501 (determining that strict scrutiny or intermediate scrutiny would not apply to defendant's arguments).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *See supra* Part IV; *see, e.g.*, State v. Gamberella, 633 So.2d 595, 604 (La. Ct. App. 1993) ("No one can seriously doubt that the state has a compelling interest in discouraging the spread of the HIV virus. Forcing an infected person to inform all of his sexual partners so the

affliction does not render its punishments disproportionate.[217] The question stands whether time and medical advancements in HIV/AIDS treatment[218] will one day render these statutes unconstitutional. Specifically, does modern medicine effectively render existing HIV criminalization statutes a violation of the constitutional bar against "status crimes"?[219]

This Part answers this question in the affirmative. This Part reasons that HIV criminalization statutes are unconstitutional as applied based on the Eighth Amendment's prohibition against status crimes. Section A provides a background on "status crimes" with *Robinson v. California*, which held that status crimes are unconstitutional,[220] and recent applications of the *Robinson* doctrine in *Powell v. Texas*,[221] which added contextual and "actus reus" requirements to *Robinson*, and *People v. Kellogg*, which was decided on the grounds that the state has an interest in protecting citizens from safety hazards.[222] Section B then determines that HIV criminalization statutes are unconstitutional as applied under *Robinson*, *Powell*, and *Kellogg* because HIV criminalization statutes punish virally suppressed PLWH for their serostatus despite being "reformed" through consistent ART use, that *Powell*'s limitation on *Robinson* should not apply in cases where the "actus reus" (e.g., spitting, biting, virally suppressed sexual activity) cannot transmit HIV, and that the government's interest in curbing the spread of disease is less compelling when a defendant's behavior cannot actually spread disease.

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partner can make an informed decision prior to engaging in sexual activity furthers the state's interest in preventing the spread of the virus.").

[217] *See supra* Part IV; *see, e.g.*, Howton v. State, 619 S.W.3d 29, 37 (Ark. App. 2021) ("Appellant's sentence is not grossly disproportionate to his crimes. . . . Once a person is infected with HIV, that person will have HIV forever, and there is currently no cure. Appellant failed to disclose his HIV-positive status to multiple sexual partners, one of whom alleged she contracted HIV after their sexual encounter.").

[218] *See supra* Part II.

[219] Status crimes are offenses which criminalize a status of defendants rather than a mere act. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (narcotics addict); Powell v. Texas, 392 U.S. 514 (1968) (alcoholic); People v. Kellogg, 14 Cal. Rptr. 3d 507 (Cal. Ct. App. 2004) (homeless alcoholic).

[220] 370 U.S. 660 (1962).

[221] 392 U.S. 514 (1968).

[222] 14 Cal. Rptr. 3d 507 (Cal. Ct. App 2004).

A. CONSTITUTIONAL BAR AGAINST "STATUS CRIMES"

The constitutional bar against "status crimes" under the Eighth Amendment's Cruel and Unusual Punishment Clause[223] was first developed in *Robinson v. California* and later refined by *Powell v. Texas* and *People v. Kellogg*. This Section first discusses *Robinson*'s holding before describing how *Robinson* has been applied in recent years to other "status crimes."

1. Robinson v. California. The statute at issue in *Robinson* states in part that "[n]o person shall use, or be under the influence of, or be addicted to the use of narcotics."[224] The defendant, Robinson, was prosecuted under this statute when a law enforcement officer in Los Angeles "observed 'scar tissue and discoloration on the inside' of the appellant's right arm, and 'what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow' on [Robinson's] left arm."[225] Based on the officer's experience as a member of the Narcotics Division of the Los Angeles Police Department, he "gave his opinion that 'these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile," that Robinson "was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him," and that Robinson "had admitted using narcotics in the past."[226]

Neither the officer nor Robinson testified that Robinson was in possession of or was using narcotics at the time of his arrest.[227] The trial court instructed the jury that "the statute made it a misdemeanor for a person 'either to use narcotics, or to be addicted to the use of narcotics.'"[228] The statute further elaborated the definition of a narcotics addiction:

> To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the

[223] U.S. CONST. amend. VIII.

[224] *Robinson*, 370 U.S. at 661n.1 (citing Cal. Health & Safety § 11721 (repealed)).

[225] *Id.* at 661.

[226] *Id.* at 661–62.

[227] *Id.*

[228] Id. at 662.

> fact that (it) is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present.[229]

The jury returned a guilty verdict, and Robinson appealed his conviction.[230]

Upon appeal, U.S. Supreme Court deemed the California statute unconstitutional because it was a "statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms,'"[231] rather than a statute which "punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration."[232] Taking issue with the fact that someone could be "continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State," the Court held that:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and

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[229] *Id.* at 662–63.
[230] *Id.* at 663–64.
[231] *Id.* at 666.
[232] *Id.*

> unusual punishment in violation of the Eighth and Fourteenth Amendments.[233]

In doing so, the Court set the precedent that "status crimes," such as the one California used to convict Robinson, were unconstitutional cruel and unusual punishments.[234]

2. The Robinson *Doctrine*. While the Court rendered "status crimes" unconstitutional in *Robinson*, it failed to set clear guidelines for circumstances in which this rule should be applied.[235] Six years after the Court decided *Robinson*, it was able to provide guidelines on when the *Robinson* Doctrine should apply in *Powell v. Texas*, where a defendant had been convicted of public drunkenness despite allegedly being "afflicted with the disease of chronic alcoholism."[236]

The defendant, Powell, was "arrested and charged with being found in a state of intoxication in a public place" in violation of Texas law.[237] Powell was then found guilty and fined $20 in the Corporation Court of Austin, Texas where the defendant's lawyers argued that "his appearance in public (while drunk was) not of his own volition,' and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution."[238] The trial court judge "ruled as a matter of law that chronic alcoholism was not a defense to the charge," and Powell appealed to the Supreme Court.[239]

In distinguishing the situation in *Powell* from the one in *Robinson*, the plurality noted that:

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[233] *Id.*

[234] *Id.* at 667.

[235] Benno Weisberg, Comment, *When Punishing Innocent Conduct Violated the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual Crimes*, 96 J. CRIM. L. & CRIMINOLOGY 329, 334 (2005) (explaining the different interpretations of *Robinson*, including both narrow and broad readings).

[236] 392 U.S. 514, 517 (1968) (arguing on behalf of the defendant, his attorneys claimed his appearance in public while drunk was "not of his own volition").

[237] *Id.* ("Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars." (quoting TEX. PENAL CODE ANN., Art 477 (1952))).

[238] *Id.*

[239] *Id.* at 517.

> On its face the present case does not fall within [*Robinson*'s] holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. . . . [The State of Texas] has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper.[240]

Further, the plurality explained that "Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus"[241]—in Powell's case, "being in public while drunk on a particular occasion."[242]

This reading, however, appears to "involve a spatial or contextual element that transforms innocent behavior into culpable conduct."[243] For instance, as Justice White posited in his concurrence in *Powell* and lower courts echoed in their own cases: if someone is homeless and a chronic alcoholic, should they be punished for drinking in public?[244] If someone is homeless and the

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[240] *Id.* at 532.

[241] *Id.* at 533.

[242] *Id.* at 532.

[243] Weisberg, *supra* note 235, at 338.

[244] *See Powell*, 392 U.S. at 551 (White, J., concurring) ("The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking." (footnote omitted)); *see, e.g.*, Manning v. Caldwell *ex rel.* Roanoke, 930 F.3d 264, 276 (4th Cir. 2019) (finding that a state law prohibiting "habitual drunkards" from possessing, consuming, or purchasing alcohol "was designed to target persons, including the homeless, that state officials deem undesirable").

city has inadequate shelter space, should they be punished for sleeping in public?[245]

In 2004, the California Court of Appeals heard the case of a homeless chronic alcoholic who had been convicted of public drunkenness in *People v. Kellogg*[246] and drew a line between the circumstances of *Robinson* and *Powell* in upholding the defendant's conviction, arguing that:

> [T]he reason Kellogg was subjected to misdemeanor culpability for being intoxicated in public was not because of his *condition* of being a homeless alcoholic, but rather because of his *conduct* that posed a safety hazard. If Kellogg had merely been drunk in public in a manner that did *not* pose a safety hazard (i.e., if he was able to exercise care for his own and the public's safety and was not blocking a public way), he could not have been adjudicated guilty . . . .[247]

Therefore, the California Court of Appeals did not decide *People v. Kellogg* on the grounds of alcoholism being a status, as in *Robinson*, or the act of being drunk in public being contextually unlawful, as in *Powell,* but instead decided the case on the grounds that the State has a right to protect its citizens from safety hazards.[248]

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[245] *See* Pottinger v. City of Mia., 810 F. Supp. 1551, 1583 (S.D. Fla. 1992) ("In summary, arresting homeless individuals for such harmless acts as sleeping, eating, or lying down in public generally serves no compelling governmental interest. Furthermore, in no case are such arrests the least intrusive means of accomplishing the City's interests. Consequently, arresting the homeless for the harmless acts which they are forced to perform in public infringes on their fundamental right to travel."); Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 670–71 (Cal. Ct. App. 2015) ("Sacramento's ordinance punishes the acts of camping, occupying camp facilities, and using camp paraphernalia, not homelessness. The ordinance is distinguishable from the statute in *Robinson*, which criminalized the status of being addicted to narcotics and did not require any act by the defendant. Because the Eighth Amendment does not prohibit the punishment of acts plaintiffs' challenge based on cruel and unusual punishment lacks merit." (citations omitted)).

[246] 14 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2004).

[247] *Id.* at 513.

[248] *See id.* ("The state has a legitimate need to control public drunkenness when it creates a safety hazard.").

Because the U.S. Supreme Court has yet to clarify how to navigate the divide between the unconstitutionality of status crimes, as in *Robinson*, and the contextual and constitutional criminalization of conduct, as in *Powell*, lower federal and state courts remain in conflict regarding how to apply the holdings in *Robinson* and *Powell*, specifically in cases related to public drunkenness and homelessness.[249]

B. HIV CRIMINALIZATION STATUTES ARE STATUS CRIMES UNDER *ROBINSON*

As HIV prevention has improved to the extent that at-risk persons who are not currently HIV-positive can take PrEP and reduce their risk of infection to almost zero percent, and HIV treatment has advanced to the point that virally suppressed PLWH have zero risk of transmitting HIV to someone else,[250] the question becomes whether HIV criminalization statutes operate similarly to "status crimes" by punishing PLWH for having a "venereal disease" without consideration of whether they have "reformed."[251] Conversely, as criminal exposure to HIV involves an action, such as sex, needle-sharing, or spitting, or a failure to act such as non-disclosure of a PLWH's serostatus, should these statutes be excluded from *Robinson*'s[252] prohibition against status crimes like the act of being drunk in public was excluded in *Powell*?[253] Further, does the government have an interest in protecting public safety that outweighs the effects of a status crime under *Kellogg*?[254]

This Section argues that HIV criminalization statutes are unconstitutional as applied because a PLWH could be "continuously

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[249] *Compare* Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019) ("[T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."), *with* Joel v. City of Orlando, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (noting that there was no Eighth Amendment violation as the ordinance criminalized conduct rather than status). The Ninth Circuit created a circuit split with its *Martin* decision. For a description of the split, see West Menefee Bakke, *Against the Status Crimes Doctrine*, 73 SMU L. REV. F. 232 (2020).

[250] *See supra* Section II.B.*2*.

[251] Robinson v. California, 370 U.S. 660, 666 (1962).

[252] *Id.*

[253] 392 U.S. 514, 533 (1968).

[254] People v. Kellogg, 119 Cal. App. 4th 593, 602–03 (Cal. Ct. App. 2004).

guilty"[255] of criminal exposure regardless of whether they are virally suppressed, and therefore "reformed." Next, this Section discusses why *Powell*'s "active reus" requirement should not apply in HIV criminalization cases and why criminal penalties should not attach. Last, this Section argues that medical advancements have lessened the government's interest in preventing the spread of HIV before concluding that HIV criminalization laws are unconstitutional as applied to virally suppressed PLWH.

1. "Reformed" Yet Still Punished. HIV criminalization statutes punish virally suppressed PLWH for their serostatus despite being "reformed." Although courts have held that HIV criminalization statutes are constitutional under the First Amendment, the Eighth Amendment, the Fourteenth Amendment's Equal Protection Clause, and Fourteenth Amendment substantive due process doctrine,[256] it is still unclear whether under *Robinson*, HIV criminalization statutes could be ruled unconstitutional as punishing PLWH for being HIV-positive and conducting ordinary human activities like having sex with casual or monogamous partners without disclosing their serostatus[257] even when there is zero chance of HIV transmission.[258]

The *Robinson* court took issue with California's law, which "made it a misdemeanor for a person 'either to use narcotics, or to be addicted to the use of narcotics,'" as it was a "statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'"[259] In the case of HIV criminalization, as discussed in Section III.B., many statutes are often written in a manner similar to Tennessee's, which states in part that "a person commits the offense of criminal exposure of another to human immunodeficiency virus (HIV) when, knowing that such person is infected with HIV, such person knowingly . . . [e]ngages in intimate contact with another."[260]

Under this type of statute, a PLWH is guilty of the offense of criminal exposure of HIV to another if they merely knew that they

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[255] *See Robinson*, 370 U.S. at 660.

[256] *See supra* Part IV.

[257] *See supra* Section III.B.

[258] *See supra* Section II.B.

[259] *Robinson*, 370 U.S. at 662, 666.

[260] TENN. CODE ANN. § 39-13-109(a)(1) (1994).

were HIV-positive and subsequently engaged in intimate contact with another,[261] regardless of whether they actually transmitted HIV to that person.[262] Thus, a PLWH is guilty of the offense of criminal exposure of another any time they expose another person to a bodily fluid in "any manner that presents a significant risk of HIV . . . transmission."[263]

While some people would argue that the act of "[e]ngag[ing] in intimate contact with another"[264] should invalidate a PLWH's claim under *Robinson* and would shift the analysis to that of *Powell*, in many ways, HIV criminalization statutes such as Tennessee's are not too far removed from the statute in *Robinson* that made it unlawful to be an addict (or to have been an addict) and be present in the State of California.[265] In states that mirror Tennessee's statute, where HIV-positivity alone is sufficient to sustain a conviction, virally suppressed PLWH could be "continuously guilty [of criminal exposure to HIV],"[266] despite no longer being infectious—or, in the words of *Robinson*, reformed[267]—by engaging in a variety of "intimate encounters."[268] As such, HIV criminalization statutes prosecute PLWH for criminal exposure, not for the *actual* potential of exposure to HIV or *actual* transmission of HIV, but for their HIV *status* in conjunction with everyday activities.

2. Requirement of an "Actus Reus" Under Powell *and* Robinson. *Powell's* "actus reus" limitation on *Robinson* should not apply in

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[261] *Id.*

[262] *See id.* (d) ("Nothing in this section shall be construed to require the actual transmission of HIV in order for a person to have committed the offense of criminal exposure of another to HIV.").

[263] *See id.* § 39-13-109(b)(2) ("'Intimate contact with another' means the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV transmission.").

[264] TENN. CODE ANN. § 39-13-109(a)(1) (1994)

[265] Robinson v. California, 370 U.S. 660, 662 (1962).

[266] *See id.* at 666 ("California has said that a person can be continuously guilty of this offense . . . .").

[267] *See id.* at 663 (explaining that the California statute would continue to prosecute persons who were once addicts regardless of whether they had reformed).

[268] *See* Kevin Rawluk, *HIV and Shared Responsibility: A Critical Evaluation of Mabior and DC*, 22 DALHOUSIE J. LEGAL STUD. 21, 28 (2013) ("In my view, recognizing that HIV positive and negative individuals have shared agency in intimate encounters better promotes personal autonomy and sexual integrity than a unilateral disclosure obligation.").

cases where the "actus reus" could not lead to actual transmission of HIV. In its holding, the *Powell* plurality distinguished the case of a chronic alcoholic charged with public drunkenness from the narcotic addiction case in *Robinson*, by stating that:

> The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.[269]

With HIV criminalization statutes, the "actus reus" is typically engaging in a behavior that could lead to the transmission of HIV[270] or non-disclosure of the PLWH's serostatus in states that require disclosure to partners.[271] For individuals who are aware of their HIV status but have an undetectable and practically untransmissible level of HIV through adherence to ART,[272] these statutes are criminalizing little more than their abilities to "engage in intimate contact"[273] with others without disclosure of their serostatus.

If there is no probability that an act or person can spread HIV to others, then the requirement of an "actus reus" is not met. When a virally suppressed PLWH cannot infect their partner through intimate contact, it is impossible to accurately argue that the PLWH *actually* exposed their partner to HIV and committed the "actus reus" of exposure to HIV. Unlike the "actus reus" in *Powell*—being intoxicated in public[274]—the "actus reus" in HIV criminalization statutes for the estimated 641,224 individuals who have achieved

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[269] Powell v. Texas, 392 U.S. 514, 533 (1968).

[270] *See, e.g.*, TENN. CODE ANN. § 39-13-109(a)(1) (1994) ("Engages in intimate contact.").

[271] *See, e.g.*, O.C.G.A. § 16-5-60(c)) ("Knowingly engages in sexual intercourse or performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person and *the HIV infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to that intercourse or sexual act*." (emphasis added)).

[272] *See* Hall et al., *supra* note 47, at 467 (providing data for calculations).

[273] TENN. CODE ANN. §39-13-109 (a)(1) (2014).

[274] *Powell*, 392 U.S. at 517.

viral suppression in the United States[275] no longer poses a hazard to the community. Instead, a virally suppressed PLWH is more analogous to the "reformed addict" in *Robinson*, who was prosecuted based on his status and not his actual harms to society through drug possession or sales.[276]

3. Failure to Meet Standards of a Compelling Government Interest. The Government's interest in curbing the spread of disease and protecting public safety is lessened when the defendant is not acting in a manner that could realistically spread disease. In prior constitutional challenges to HIV criminalization statutes,[277] courts have found the statutes constitutional because the state has an interest in slowing the spread of HIV and in protecting the lives of their residents.[278] These facts are undisputed. In a world in which consistent HIV treatment with ART eliminates the possibility of HIV transmission,[279] the question is whether these state interests are stronger than the PLWH's privacy interests or liberty interests in not being sentenced to prison for non-disclosure of their serostatus despite their inability to infect others. Further, as in *Kellogg*, if PLWH can "exercise due care" and are no longer a "safety hazard," [280] under the court's logic, shouldn't they too be excluded from HIV criminalization liability?

If modern medicine and the reality that PLWH are no longer truly a "safety hazard" once they achieve and maintain viral suppression[281] moot the state's reasoning for implementing such harsh statutes to prevent the spread of HIV, then it is time that

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[275] *See* Hall et al., *supra* note 47, at 466 tbl. 1 (providing data for calculations).

[276] *See* Robinson v. California, 370 U.S. 660, 666 (1962) (asserting that the statute makes the "status" of a drug addict a criminal offense).

[277] *See supra* Part IV.

[278] *See, e.g.*, State v. Musser, 721 N.W.2d 734, 744 (Iowa 2006) ("We think section 709C.1 promotes a compelling state interest . . . ."); State v. Gamberella, 633 So. 2d 595, 601 (La. Ct. App. 1993) (emphasizing the state's interest in prosecution the defendant for his violation); Cruzan v. Dep't of Health, 497 U.S. 261, 280–81 (1990) ("[A] State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality.").

[279] *See supra* Section V.B.

[280] *See* People v. Kellogg, 119 Cal. App. 4th 593, 602–03 (Cal. Ct. App. 2004) (upholding the conviction solely because the defendant's drunkenness was a "safety hazard" to both himself and others while noting that if he was able to "exercise care," he would not have been able to be guilty due to his status as a homeless drunk).

[281] *See supra* Section II.B.

states revise their statutes to target those who can and may spread HIV, rather than those who have "exercise[d] care"[282] to prevent the spread of the virus. Until states reform their statutes to ensure that they only criminalize activity that scientifically could expose someone to HIV, or until courts carve out an implied defense for virally suppressed PLWH or PLWH who actively try to prevent exposure, HIV criminalization statutes are unconstitutional as applied.

VI. CONCLUSION

Since the genesis of the HIV epidemic in the late 1980s and early 1990s, there have been remarkable advancements in the medical treatment of HIV leading to 53% of Americans living with HIV achieving viral suppression and being medically unable to transmit the virus to anyone else.[283] Yet, many states have not updated their statutes criminalizing HIV to reflect the growing number of PLWH who are virally suppressed nor removed references to archaic methods of HIV transmission, such as spitting, from the elements of their offenses.[284] As such, many of these statutes likely violate the *Robinson* bar against "status crimes"[285] when focusing on the contextual aspects of the behaviors—not the behaviors themselves—or whether the behavior *actually* carries a possibility of transmission.[286]

If statutes criminalize actions committed by virally suppressed PLWH who *cannot* transmit the virus[287] and acts that have little to no risk of HIV transmission (e.g., spitting),[288] these statutes effectively prosecute the "status" of being HIV-positive. While it is

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[282] *Kellogg*, 119 Cal. App. 4th at 602–03.

[283] *See* Hall et al., *supra* note 47, at 464 (providing the data used to calculate the percentage of PLWH in the United States who have not achieved viral suppression).

[284] *See supra* Section III.B.

[285] Robinson v. California, 370 U.S. 660 (1962).

[286] *See* Weisberg, *supra* note 235, at 338 ("Thus, the constitutionally punishable crime of public intoxication would seem to involve a spatial or contextual element that transforms innocent behavior into culpable conduct. If the state may punish conduct, but may not punish status, then this contextual element, which arose in *Powell* but not in *Robinson*, blurs the distinction between status and conduct.").

[287] *See supra* Section II.B.*2* (explaining the efficacy of ART use in preventing transmission).

[288] *See supra* Section II.B.*1* (explaining HIV transmission).

important to note that many state statutes *do* provide an affirmative defense if the PLWH discloses their serostatus prior to engaging in certain activities,[289] it is also important to recognize that disclosure can be risky for PLWH or may lead to further stigmatization.[290] Additionally, one's HIV status is deeply personal medical information that a PLWH may not want to share with every partner they might have for every instance of "intimate contact" such as oral or manual sex—which both are significantly less likely to result in an HIV infection than acts like vaginal or anal sex even in PLWH who are not virally suppressed[291]—especially if they *are* virally suppressed and unable to spread the virus.[292]

For these reasons, it is important to review HIV criminalization statutes as written to determine whether the statutes are truly targeting the behaviors that they seek to bar or if they are predominantly prosecuting behaviors and persons who have little to no ability to spread HIV. To update these statutes, it is important that lawmakers consult with HIV/AIDS experts to ensure that the statutes are narrowly tailored to solely criminalize behaviors that *will* lead to the spread of HIV or *did* lead to the spread of HIV. In doing so, states can decrease the burden on PLWH while still protecting their residents from truly criminal or culpable behavior, such as the malicious and intentional spread of HIV.[293]

Last, as studies have shown that HIV criminalization statutes might lead to decreased rates of HIV testing among persons who may be at high risk for HIV transmission,[294] revisions to state HIV criminalization statutes could provide an affirmative defense or a

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[289] *See supra* Section III.C. (discussing possible defenses to HIV criminalization).

[290] *See What HIV Criminalization Means to Women in the U.S.*, *supra* note 21, at 3 (detailing the dangers of disclosure for women).

[291] *See supra* Section II.B.*1*.

[292] *See supra* Section II.B.2.

[293] This change would also be in line with the distinction between *Robinson* and *Powell* proposed by Weisberg, in which he argues that "[u]nder the Eighth Amendment, innocent conduct may be de-criminalized without decriminalizing culpable conduct if courts ignore the semantic categories of 'status' and 'conduct,' and make objective determinations about whether targeted conduct is innocent or culpable." Weisberg, *supra* note 235, at 331.

[294] *See* Harsono, *supra* note 106, at (discussing studies on HIV criminalization statute efficacy); North, *supra* note 10 (noting that "HIV criminalization laws may actually increase the spread of the virus" given that the stigmatization of criminal penalties results in people being "afraid to get tested").

mitigating factor—like the statute recently adopted in Iowa following *Rhoades*[295]—if the PLWH has achieved viral suppression or took steps, such as wearing a condom, to limit the potential spread of HIV. Changes to HIV criminalization statutes that reward ART adherence, frequent medical visits, and viral suppression—rather than penalize lack of knowledge of one's HIV status—could additionally encourage PLWH or persons at risk of HIV-exposure to take every available precaution to curb the spread of HIV.

[295] North, *supra* note 10 (applauding the new Iowa law, passed in 2014, that significantly reduced the penalties for exposing others to HIV).