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Whose Responsibility is it to PrEP for Safe Sex? Archaic HIV Criminalization and Modern Medicine

Brigid Bone¹

Michael Johnson, or “Tiger Mandingo” as he was known on social media, was twenty-one when he was first charged with exposing a sexual partner to HIV.² Johnson, a wrestler at Lindenwood University in St. Charles, Missouri, had engaged in sex acts with six different men, all of whom claimed Johnson lied about his HIV status.³ Johnson was charged with one count of recklessly infecting a partner with HIV and four counts of ‘attempting to recklessly infect another with HIV.’⁴

Johnson, a gay African American man, faced a jury that was 100% heterosexual, and more than 90% white.⁵ During *voir dire*, only one third of the venire-persons believed that homosexuality was “not a sin.”⁶ The jury sat through five days of a trial peppered with still images from homemade sex tapes, graphic descriptions of Johnson’s penis and “HIV-infected-semen.”⁶ Johnson was found

1. (J.D.) Washington University in St. Louis School of Law, 2017; (A.B) Mount Holyoke College, 2011. My eternal gratitude goes out to my partner, Caitlin, for her love and support.

2. Mark Schlinkmann, *More Potential Victims in Lindenwood U. Student HIV Virus Case*, ST. LOUIS POST DISPATCH (Oct. 10, 2013), http://www.stltoday.com/news/local/crime-and-courts/more-potential-victims-in-lindenwood-u-student-hiv-virus-case/article_24ec8c31-be8d-5517-be8e-9a9c4edcd184.html; Steven Thrasher, *How College Wrestling Star “Tiger Mandingo” Became an HIV Scapegoat*, BUZZFEED (July 7, 2014, 9:00 PM), <http://www.buzzfeed.com/steventhrasher/how-college-wrestling-star-tiger-mandingo-became-an-hiv-scap#.rb5BoezJK>.

3. Steven Thrasher, *A Black Body on Trial: The Conviction of HIV Positive “Tyler Mandingo”*, BUZZFEED (Nov. 30, 2015, 7:26 PM), <http://www.buzzfeed.com/steventhrasher/a-black-body-on-trial-the-conviction-of-hiv-positive-tiger-m#.sbrPaN85j>.

4. *Id.* Furthermore, approximately half of the potential jurors “said being gay was a ‘choice.’” *Id.* All jurors believed that “HIV-positive people who do not tell their sexual partners that they have the virus should be prosecuted.” *Id.*

5. *Id.*

6. *Id.* Still images from a consensual sex tape that Johnson made with a witness were handed out to members of the jury. *Id.*

guilty on five felony counts and was sentenced to thirty years in prison.⁷ With his conviction, Johnson joins the approximately 541 people who have been convicted or pled guilty to having sex while HIV positive since 2003.⁸

HIV transmission statutes were first established in the 1980s, when understanding of the disease was largely based on fear and homophobia.⁹ These statutes rely on an archaic understanding of HIV/AIDS, and criminalize behavior with little-to-no risk of transmission.¹⁰ Additionally, HIV exposure statutes do not reflect dramatic advancements in medical treatment for those with HIV and those at risk of contracting it.¹¹ Today, HIV is a chronic disease, similar to diabetes, yet exposure to it is treated as a death sentence.¹²

Shifting the responsibility of sexual protection away from those with HIV would incentivize those at high risk of contraction to take ownership of their sexual health. By amending HIV exposure laws, all sexually active adults will be responsible for protecting themselves against sexually transmitted disease. Furthermore, amending HIV exposure statutes will protect those who take steps to prevent the spread of HIV and will reduce the stigma HIV positive people face when they engage in consensual sex.

First, this Note examines the history of the HIV/AIDS epidemic and the development of HIV criminal statutes. The History section begins by detailing the early spread of the disease and its devastating impact on the homosexual community. The second section details the

7. Mark Schlinkmann, *Ex-College Wrestler Gets 30 Years in HIV Case in St. Charles County*, ST. LOUIS POST DISPATCH (July 13, 2015), http://www.sltoday.com/news/local/crime-and-courts/ex-college-wrestler-gets-years-in-hiv-case-in-st/article_c3123243-b8d3-58c9-97df-e2c5a504902a.html. Johnson was sentenced to two 30-year sentences, but was permitted to serve them consecutively. *Id.*

8. Sergio Hernandez, *How We Built Our HIV Data Set*, PROPUBLICA (Dec. 1, 2013, 10:55 PM), <https://www.propublica.org/article/how-we-built-our-hiv-crime-data-set>. The investigation includes data through 2013; however, the 2013 data may be incomplete. *Id.*

9. Lehman, *infra* note 33. See also Altman, *infra* note 13; Balzar, *infra* note 23.

10. CTRS. FOR DISEASE CONTROL & PREVENTION, *infra* note 39; Lehman, *infra* note 32.

11. Granich et al., *infra* note 80; FED. DRUG ADMIN., *infra* note 82.

12. Steven G. Deeks et al., *The End of AIDS: HIV Infection as a Chronic Disease*, 382 LANCET 1525, 1525 (“For patients who are motivated to take therapy and who have access to lifelong treatment, AIDS-related illnesses are no longer the primary threat, but a new set of HIV-associated complications have emerged, resulting in a novel chronic disease that for many will span several decades of life.”); Thrasher, *supra* note 3.

development of statutes regulating the behaviors of those with HIV/AIDS. This section dissects the statutes by looking at the behaviors that are criminalized, the disclosure requirements, possible defenses, sentencing and intent requirements. The third part of the history section discusses two specific medical advancements in the field of HIV/AIDS treatment: HAART and PrEP. The last section discusses conviction rates and racial disparities.

Next, this Note analyzes the weaknesses in HIV criminalization statutes as they relate to scientific advancements and today's knowledge of the disease. Finally, this Note proposes amendments to HIV criminal statutes in light of these deficiencies.

HISTORY

I. EARLY YEARS

Since the early days of the AIDS outbreak in the United States, carriers of the disease have been not-so-subtly labeled as deserving of the condition.¹³ Even up until the late 1980s, it was seen as a disease infecting gay men, sex workers, and intravenous drug users.¹⁴ A prominent physician claimed that women engaged in “ordinary heterosexual intercourse” had little to no chance of ever contracting HIV.¹⁵ Early news articles discussing AIDS focused on the sexual

13. Lawrence Altman, *Rare Cancer Seen in Homosexuals*, N.Y. TIMES (July 3, 1981), <http://www.nytimes.com/1981/07/03/us/rare-cancer-seen-in-41-homosexuals.html>. In one of the first media reports on what would soon be known as the AIDS epidemic, the carriers were identified as “homosexual men who have had multiple and frequent sexual encounters with different partners, as many as 10 sexual encounters each night up to four times a week.” *Id.* See also Randy Shilts, . . . *But Fear Rules in San Francisco: Deadly Disease Dims the Lights of San Francisco's Homosexual Scene*, CHI. TRIB. (June 26, 1983), <http://search.proquest.com/docview/175855287?accountid=15159>.

14. Robert Gould, *Reassuring News About AIDS: A Doctor Tells Why You May Not Be at Risk*, COSMOPOLITAN, Jan. 1988, at 146. Writing in *Cosmopolitan Magazine*, Dr. Robert Gould argued that fear over AIDS among heterosexual women was unfounded and that women should continue to behave as “fully sexual beings.” *Id.* at 204. Dr. Gould also claimed that the presence of AIDS in heterosexual African women was due to both the frequent incidence of heterosexual anal sex in Africa and a cultural stigma regarding discussions of homosexuality. *Id.* at 147. Furthermore, Dr. Gould claimed “many men in Africa take their women in a brutal way, so that some heterosexual activity regarded as normal by them would be closer to rape by our standards and more likely to cause vaginal lacerations through which the AIDS virus could gain entry into the bloodstream.” *Id.* at 147.

15. *Id.* at 146.

habits of the carriers and lifestyle traits that were considered “risky.”¹⁶ However, there existed a real concern about the health and safety of gay men. In 1980, three years before the first media report of the illness, gay men accounted for 55% of all syphilis and gonorrhea cases in the country.¹⁷ This was specifically prevalent in San Francisco where 70% of all gay men carried the virus for Hepatitis B.¹⁸ In a community where frequent and anonymous sex was prevalent, HIV spread like wildfire.¹⁹ In March of 1983, 1 in 233 gay men that lived in San Francisco’s Castro District had contracted HIV/AIDS.²⁰ That estimate grew to 1 in 100 by 1984, 1 in 3 by 1985, and later, to 1 in 2.²¹

This rapid spread of HIV created a swift and severe public backlash.²² In 1985, 51% of the public polled said that they would support a law making it illegal for someone with AIDS to have sex.²³ The same percentage said that they would support quarantining carriers of HIV/AIDS.²⁴ With the population of those infected with HIV/AIDS being largely homosexual, the nation also saw an increase

16. *Id.*

17. JONATHAN ENGEL, *THE EPIDEMIC: A GLOBAL HISTORY OF AIDS* 14–15 (Smithsonian Books & HarperCollins Publishers Inc. 2006).

18. *Id.*

19. HIV/AIDS spread faster in the United States than in any European country, with 451 Americans dead of AIDS by 1982 compared to only 5 Britains dead by the same date. Michael Hobbes, *Why Did AIDS Ravage the U.S. More Than Any Other Developed Country?*, *NEW REPUBLIC* (May 12, 2014), <https://newrepublic.com/article/117691/AIDS-hit-united-states-harder-other-developed-countries-why>. The author suggests that this rapid spread is due in part to both clustered and highly concentrated high-risk population geographically, and a delay in infection-reducing policies towards intravenous drug users. *Id.* See generally ENGEL, *supra* note 17 (discussing the spread of HIV and barriers to an effective public policy to combat the spread).

20. ENGEL, *supra* note 17, at 16.

21. *Id.*

22. *Id.* at 17.

23. John Balzar, *The Times Poll: Tough New Government Action on AIDS Backed*, *L.A. TIMES* (Dec. 19, 1985), http://articles.latimes.com/1985-12-19/news/mn-30337_1_times-poll.

24. *Id.* In addition to restrictions on sexual activity and quarantining those with HIV, 45% of those polled would vote in support of testing job applicants for AIDS antibodies as a prerequisite of employment. *Id.* An additional 15% would support tattooing those with HIV/AIDS as a method of identification. *Id.* These polling numbers reflected an overall bias against homosexuals at the time, with thirty-nine of respondents reporting that they would “want to spend more money if AIDS affected primarily the heterosexual population.” *Id.* Furthermore, 38% of those polled stated that they would likely vote for a candidate who enacted “anti-homosexual” laws as a method of reducing HIV/AIDS transmission. *Id.*

in hate crimes against the LGBTQ population.²⁵ In New York City alone, reported violent acts against gay men almost tripled, increasing from 176 acts of violence in 1984 to 517 acts of violence in 1987.²⁶

Fear in the face of the AIDS outbreak led the public to push lawmakers to address the epidemic through legislation. When responding to this fear, the limited amount of information about the disease spawned varied reactions from politicians.²⁷ While many members of Congress pushed for increased funding for AIDS research, others pushed for harsh restrictions on carriers of the virus.²⁸ One California proposal required mandatory testing for HIV and quarantine for those with HIV.²⁹ When Congress began discussing avenues of reducing the spread of disease, knowledge about the disease was so limited that many thought AIDS could be spread through tears or perspiration.³⁰ The lack of correct

25. One article reported that:

While homosexuals have always been a target of abuse, gay activists attribute the rising violence to the AIDS epidemic and a conservative backlash. "AIDS has provided a green light to the bashers and the bigots," says Kevin Berrill of the National Gay and Lesbian Task Force. "It's a convenient excuse for those who hate us."

Lawrence Zuckerman, *Open Season on Gays*, TIME (Mar. 7, 1988), <http://content.time.com/time/magazine/article/0,9171,966934,00.html>.

26. *Id.*

27. Congressman Henry Waxman, representing the West Hollywood area in Los Angeles, home to a large community of gay men, voiced frustration at the slow pace of funding AIDS research. See Ellen Hume, *Waxman Scores Reagan Over AIDS Funds*, L.A. TIMES, May 10, 1983, at B10. In contrast, conservative politicians argued restricting carriers was the most effective way of preventing the spread of the disease. See C-SPAN, *infra* note 28. Furthermore, in 1987, the Democratic Congressional Campaign Committee claimed that a Republican pollster recommended exploiting public fears over AIDS in an effort to win political campaigns in 1988. E.J. Dionne, Jr., *AIDS Memo Stirs Both Parties*, N.Y. TIMES, Nov. 6, 1987, at A24.

28. In September of 1982, Congress allocated five million dollars to the CDC and ten million dollars to the National Institute of Health. *A Timeline of HIV/AIDS*, AIDS.GOV, <https://www.AIDS.gov/pdf/AIDSGov-timeline.pdf> (last visited Feb. 7, 2016). Representative Dannemeyer of California gave an interview in which he called for legal restrictions for people with HIV/AIDS. AIDS, C-SPAN (Oct. 8, 1985) [hereinafter C-SPAN], <http://www.c-span.org/video/?49748-1/AIDS>. Congressman Dannemeyer stated, "[h]ow would you like a dentist with AIDS working in your mouth?" *Id.*

29. David L. Kirp, *LaRouche Turns to AIDS Politics*, N.Y. TIMES (Sept. 11 1986), <http://www.nytimes.com/1986/09/11/opinion/larouche-turns-to-AIDS-politics.html>. Congressman Dannemeyer was also a proponent of Proposition 64. *California Proposition 64*, C-SPAN (Oct. 16, 1986), <http://www.c-span.org/video/?150676-1/california-proposition-64>.

30. Congressman Dannemeyer's 1985 interview shows the misinformation and guesswork that went into early discussion on AIDS legislation. C-SPAN, *supra* note 28.

information, and the increasingly rapid rate of infection, led to suggestions ranging from isolating carriers to requiring carriers to be tattooed on the buttocks.³¹

Florida was the first state to enact HIV-specific legislation, and thirty states have followed suit as of the date of publication.³² Initial legislation focused on reducing the number of blood transfusions by carriers of AIDS by prohibiting attempted blood donations of known HIV carriers.³³ In addition, Florida was the first state to criminalize the sexual behavior of those living with AIDS.³⁴ State criminal statutes vary in the severity of punishment, prohibited activity, disclosure requirements and possible defenses to the charge.³⁵

31. Hobbes, *supra* note 19. One conservative commentator stated that intravenous drug users with AIDS should be tattooed on the arm and homosexual males with AIDS should be tattooed on the buttocks to warn unsuspecting sexual partners and those who share needles. William Buckley, *Crucial Steps in Combating the Aids Epidemic; Identify All the Carriers*, N.Y. TIMES (Mar. 18, 1986), <https://www.nytimes.com/books/00/07/16/specials/buckley-aids.html>. Additionally, Rep. Dannemeyer stated that he believed AIDS transmission rates were higher for homosexual men because while “the [vaginal] lining is so constituted that the sperm that enters that in sexual intercourse does not get into the bloodstream of the female[,] . . . the integrity of the lining [of the anus] is such that the sperm enters the blood stream of the recipient.” C-SPAN, *supra* note 28.

32. J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws That Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 997–1000 (2014). In Florida,

[i]t is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.

FLA. STAT. ANN. § 384.24(2) (LEXIS through 2016 Sess.). Tennessee enacted legislation prohibiting anyone with AIDS from donating, or attempting to donate, blood. TENN. CODE ANN. § 68-32-104 (LEXIS through 2016 Sess.). Washington amended its assault in the first degree statute to include a prohibition against anyone who “[a]dministers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance.” WASH. REV. CODE ANN. § 9A.36.011(1)(b) (LEXIS through 2016 1st Special Sess.).

33. § 68-32-104.

34. Lehman et al., *supra* note 32; § 384.24(2).

35. For example, Colorado is the only state to prohibit mutual masturbation with a seropositive person without disclosure, and only four states criminalize the sharing of sex objects without disclosure. Lehman et al., *supra* note 32, at 1001.

II. STATUTORY CONSTRUCTION

A. Behaviors Criminalized

Criminal violations of HIV exposure statutes are most often triggered when a carrier commences one of two actions. The first is when a carrier of the HIV/AIDS virus engages in parenteral activities, or the sharing of needles commonly through intravenous drug use.³⁶ The second method, the primary behavior behind most convictions and the focus of this Note, is sexual behavior of those who are HIV positive.³⁷ Most HIV exposure statutes criminalize a wide array of any sexual activity between a carrier of HIV/AIDS and any individual that does not know their partner's HIV status, scientifically referred to as "serostatus."³⁸ The Center for Disease Control (CDC) has found that the per-act probability of contracting HIV through sexual intercourse from an infected person range from five in ten thousand to fifty in ten thousand depending on whether the individual is giving or receiving vaginal or anal intercourse.³⁹ While sexual intercourse is prohibited in most HIV criminalization statutes,⁴⁰ twenty-one state statutes criminalize oral sex.⁴¹ However,

36. Lehman et al., *supra* note 32. The following states criminalize the use of needles for those who are HIV positive: Georgia, Iowa, Idaho, Illinois, Indiana, Kansas, Minnesota, Missouri, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, and Tennessee. *Id.* at 1001.

37. See generally Positive Justice Project, *Prosecutions and Arrests for HIV Exposure in the United States: 2008–2014*, CTRS. FOR HIV L. & POL'Y., <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/ArrestsandProsecutionsforHIVExposureintheU.S.2008-2015revised6.30.15.pdf>.

38. Lehman et al., *supra* note 32, at 1000–01. Serostatus is defined as "status with respect to being seropositive or seronegative for a particular antibody." *Serostatus*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/medical/serostatus> (last visited Jan. 20, 2016). This note will also use the following terms: "seronegative," "seropositive" and "serodiscordant." When one sexual partner is HIV negative, and another HIV positive, it is sometimes referred to as "serodiscordant." *Mixed-Status Couples*, AIDS.GOV, <https://www.aids.gov/hiv-aids-basics/staying-healthy-with-hiv-aids/friends-and-family/mixed-status-couples/> (last updated Oct. 27, 2014).

39. *Fact Sheet: HIV Transmission Risk*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 2012), <http://www.cdc.gov/hiv/law/pdf/Hivtranmsmission.pdf>. The likelihood of contracting HIV/AIDS from anal sex is 50/10,000 exposures and the risk of transmission from vaginal sex is 10/10,000 exposures. *Id.*

40. Twenty-four out of thirty-three states that criminalize the behavior of those living with HIV include some restrictions on sexual activity: Arizona, California, Florida, Georgia, Iowa, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Mississippi, North

while the CDC has found that HIV transmission through oral sex is not impossible, the likelihood is incredibly low.⁴² Transmission of HIV between two women engaged in oral sex in particular is highly unlikely.⁴³ In fact, one of the first documented cases of potential transmission was reported in 2014.⁴⁴ However, the extremely low probability of transmission through oral sex has not stopped prosecutions based on serostatus status. In 1990, a United States Military Court found that Sargent Nathaniel Johnson could be charged with assault merely from *performing* oral sex on someone who was unaware of his serostatus.⁴⁵ That consensual, sexual act caused Sargent Johnson to be sentenced to a term of six years in prison.⁴⁶

In addition to oral sex, other acts that result in a very small chance of infection have been criminalized under HIV exposure statutes. Currently, eleven states criminalize biting, spitting, or throwing bodily fluids by people that are seropositive.⁴⁷ The CDC has found

Carolina, North Dakota, New Jersey, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and Virginia. See Lehman et al., *supra* note 32, at 1001.

41. Lehman et al., *supra* note 32, at 1001. The states criminalize oral sex acts when one partner has HIV and the other partner claims that they did not disclose. *Id.* California, Kansas, and Kentucky are the only states that do not criminalize oral sex but criminalize vaginal and anal sex. CAL. HEALTH & SAFETY CODE § 120291 (Deering, LEXIS through 2016 Sess. & all 2016 ballot measures), KAN. STAT. ANN. § 21-5424 (LEXIS through 2016 Reg. & Spec. Sess.), KY. REV. STAT. ANN. § 529.090 (LEXIS through 2016 Legis. Sess.).

42. *Oral Sex and HIV Risk*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/riskbehaviors/oralsex.html> (last updated July 8, 2016).

43. *Female-to-Female Sexual Transmission*, NAM AIDSMAP, <http://www.aidsmap.com/Female-to-female-sexual-transmission/page/1323529/> (last visited Dec. 1, 2015).

44. Shirley K. Chan et al., *Likely Female-to-Female Sexual Transmission of HIV—Texas, 2012*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 14, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6310a1.html>.

45. *United States v. Johnson*, 30 M.J. 53 (C.M.A. 1990). The Court held that “it is not necessary that such conduct actually cause death or grievous bodily harm, so long as the means employed is ‘used in a manner *likely* to produce . . . [such] harm.’” *Id.* at 57. While Sargent Johnson did perform oral sex on his accuser, he also reportedly attempted to perform anal sex as well. *Id.* at 57. The court found that this was sufficient evidence to show that the defendant “attempted to do bodily harm to [the other sexual partner], i.e., engage in unprotected anal intercourse which would have been likely to transmit a disease which can ultimately result in death.” *Id.*

46. *Id.* at 54 n.1.

47. Lehman et al., *supra* note 32, at 1000–01. Eleven states criminalize spitting, biting or throwing bodily fluids: Georgia, Indiana, Louisiana, Missouri, Mississippi, Nebraska, Ohio, Pennsylvania, South Carolina, South Dakota, and Utah. *Id.* For example, in June of 2015 an Oklahoma man was arrested for “knowingly transmitting HIV” after spitting in a woman’s face.

that “HIV transmission through these exposure routes is technically possible but extremely unlikely and not well documented.”⁴⁸ These states restrict behavior that has little-to-no evidence of transmission.⁴⁹

B. Disclosure Requirements and Possible Defenses

The amount of information provided to the seronegative partner before sexual activity is a key element in HIV exposure statutes. In twenty-four out of the thirty-five states that have an HIV exposure statute, the seropositive partner is required to inform their seronegative sex-partner of their serostatus.⁵⁰

In sixteen out of the twenty-four states with an HIV exposure statute, the prosecution holds the burden of proof to show a lack of disclosure of serostatus.⁵¹ In the remaining states, disclosure is an affirmative defense to a charge of HIV exposure.⁵² Proving disclosure of HIV status between two otherwise consenting adults can be

K. Query, *Report: Man Arrested for ‘Knowingly Transferring HIV’ after Allegedly Spitting on Woman*, KFOR (June 22, 2015, 11:14 AM), <http://kfor.com/2015/06/22/report-man-arrested-for-knowingly-transferring-hiv-after-allegedly-spitting-on-woman>.

48. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 39.

49. The CDC has found that spitting alone has never been the sole cause for anyone getting infected with HIV. *HIV Transmission: Can I Get HIV From Being Spit on or Scratched by an HIV-Infected Person?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/transmission.html> (last updated Sept. 6, 2016).

50. Lehman et al., *supra* note 32, at 1000. For example, the Missouri statute states that a person can be convicted by “[acting] in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV.” MO. REV. STAT. § 191.677.1(2) (LEXIS through 2016 2nd Reg. Sess.).

51. Lehman et al., *supra* note 32, at 1001. The following states include the lack of disclosure element: Arizona, California, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, North Carolina, New Jersey, Ohio, Oklahoma, South Carolina, and Virginia. *Id.*

52. *Id.* The following states place the burden of proof in proving disclosure on the defendant: Iowa, Indiana, Illinois, Mississippi, North Dakota, Nevada, South Dakota, and Tennessee. *Id.* For example, the Tennessee statute states:

[i]t is an affirmative defense to prosecution under this section, which must be proven by a preponderance of the evidence, that the person exposed to HIV knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and gave advance consent to the action with that knowledge.

TENN. CODE ANN. § 39-13-109(c)(1) (LEXIS through 2016 Sess.).

incredibly difficult and may also be dangerous for the HIV positive partner.⁵³

When the defendant and complainant are in a prolonged relationship, the disclosure element is particularly challenging to prove. In Missouri, a man was arrested for allegedly not disclosing his serostatus to his female partner until ten months into their sexual relationship.⁵⁴ However, the sexual relationship continued past the point of disclosure for more than a month before the complaint was filed.⁵⁵ The complainant never contracted HIV from the defendant, and the defendant was sentenced to a year in jail.⁵⁶ Furthermore, some states require that not only must the serostatus of the seropositive sex partner be revealed, but also the seronegative partner must be fully informed as to the risks of exposure before they consent to sexual activity.⁵⁷

Condom use is one method of dramatically reducing the risk of spreading HIV from a seropositive partner to a seronegative partner.⁵⁸ There are four states that allow the use of condoms as a defense to a

53. For example, in 2012, a man stabbed his girlfriend to death after she admitted to him that she had HIV. Jennifer Emily, *Man Who Admitted Killing HIV-Positive Girlfriend: 'I Wanted to Make Her Pay,'* DALLAS NEWS (Oct. 29, 2013), <http://www.dallasnews.com/news/crime/headlines/20131029-man-who-admitted-killing-girlfriend-with-hiv-i-wanted-to-make-her-pay.ece>. In 2014, a man strangled an HIV positive woman to death with an electrical cord after they had sexual contact while under the influence of methamphetamines. Alia Malik, *Man Arrested in San Antonio Suspected of Killing Woman Because She Had HIV*, SAN ANTONIO EXPRESS-NEWS (June 17, 2014, 7:41 PM), http://www.mysanantonio.com/about_us/article/Deputies-Man-caught-in-San-Antonio-killed-woman-5558852.php?utm_source=We+Grieve+for+Elisha+6.18.2014&utm_campaign=Elisha+6.18.2014&utm_medium=email#photo-6467494.

54. *State v. Yonts*, 84 S.W.3d 516, 518 (Mo. Ct. App. 2002). The complainant alleged that the defendant stated that he was taking medication that would prevent the spread of HIV while they were engaging in sexual activity. *Id.* at 519.

55. *Id.*

56. *Id.* at 517–18.

57. See 1 RASHIDA RICHARDSON ET AL., *CTR. FOR HIV L. & POL'Y., ENDING & DEFENDING AGAINST HIV CRIMINALIZATION A MANUAL FOR ADVOCATES* (2d ed. 2015), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%205.4.15%29.pdf>. See also IDAHO CODE ANN. § 39-608(3)(a) (LEXIS through 2016 Sec. Reg. Sess.) (“It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity.”).

58. *Fact Sheet: The Truth About Condoms*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/files/9313/9611/6384/truth_about_condoms.pdf (last visited Feb. 1, 2015). According to a cited study, “the risk of HIV transmission with a condom is reduced—as much as 10,000-fold.” *Id.*

charge of HIV exposure.⁵⁹ For example, the Minnesota statute addressing communicable disease exposure defines sexual penetration as an act “committed without the use of a latex or other effective barrier.”⁶⁰ The remaining twenty states criminalizing HIV exposure between sex partners do not allow condom use to be used as a defense.⁶¹

C. Sentencing

Punishment for violating state HIV exposure statutes vary greatly from state to state, but almost always includes jail time.⁶² Many states require a higher jail time if transmission of HIV results from exposure.⁶³ One element of punishment that is particularly damaging is the requirement in some states for the seropositive person to register as a sex offender.⁶⁴ A woman in Louisiana was required to

59. Lehman et al., *supra* note 32, at 1001. These states include California, Minnesota, North Carolina, and North Dakota. *Id.*

60. MINN. STAT. § 609.2241(1)(e) (LEXIS through 2016 Sess.). Furthermore, the statute states:

It is an affirmative defense to prosecution, if it is proven by a preponderance of the evidence, that:

(1) the person who knowingly harbors an infectious agent for a communicable disease took practical means to prevent transmission as advised by a physician or other health professional.

§ 609.2241(3).

61. Lehman et al., *supra* note 32, at 1001–02. Missouri specifically prohibits the use of condoms as an affirmative defense in its HIV exposure statute. MO. REV. STAT. § 191.677.4 (LEXIS through 2016 2nd Reg. Sess.).

62. Lehman et al., *supra* note 32, at 1001. States that have sentencing guidelines of up to ten years include California, Colorado, Florida, Illinois, Kansas, Kentucky, Maryland, Michigan, Mississippi, North Carolina, Nebraska, New Jersey, Nevada, Ohio, Oklahoma, Pennsylvania, Utah, and Virginia. *Id.* States that have sentencing guidelines of up to twenty years include Georgia, Idaho, Louisiana, North Dakota, South Carolina, South Dakota, and Tennessee. *Id.* States with sentencing guidelines of more than twenty years include Arkansas, Iowa, Indiana, Missouri, and Washington. *Id.* For example, in Missouri, the sentence of imprisonment for a Class A felony is “a term of years not less than ten years and not to exceed thirty years, or life imprisonment.” MO. REV. STAT. § 558.011.1(1) (LEXIS through 2016 2nd Reg. Sess.).

63. See IOWA CODE §§ 709D.3(1)–(3) (LEXIS through 2016 2nd Reg. Sess.). Iowa statutes make HIV exposure a Class B felony, punishable by up to twenty-five years in jail, if transmission results from exposure. *Id.* Sexual activity that does not result in transmission is a Class D felony and is punishable by five years in prison and a fine. *Id.*

64. See ARK. CODE ANN. §§ 12-12-903(12)(A), (13)(A)(i)(p) (LEXIS through 2016

register as a sex offender after failing to disclose her serostatus to her partner.⁶⁵ Registering as a sex offender not only marks a defendant for life, but also will reduce their chances of obtaining a job, housing, or ability to start a family.⁶⁶

D. Intent Requirement

States differ in the scienter requirements⁶⁷ for each HIV exposure law. While some states require the carrier to have specific intent to infect another person with HIV, other states have a far lower mens rea requirement.⁶⁸ In Missouri, the statute requires that a seropositive person “acted recklessly” by exposing another to HIV.⁶⁹ Evidence of recklessness is shown through evidence that the seropositive person “knew of such infection before engaging in sexual activity with another person . . . biting another person, or purposely causing his or her semen, vaginal secretions, or blood to come into contact with the mucous membranes or nonintact skin of another person.”⁷⁰

In Iowa, the HIV exposure statute triggers harsher judgment based on the level of scienter the seropositive person possessed at time of exposure, and if exposure resulted in infection.⁷¹ The most severe punishments result from a seropositive person infecting another when

Legis. Sess.), S.D. CODIFIED LAWS § 22-24B-2 (LEXIS through 2016 Legis. Sess.). This was previously the case in Iowa, however the statute was amended to remove that provision. IOWA CODE § 692A.102(1)(c)(23) (2010), subsection deleted by Acts 2014 (85 G.A.) S.F. 2297, § 7 (2014).

65. Joe Darby, *Woman Pleads Guilty in HIV Exposure Case*, TIMES-PICAYUNE, Jan. 26, 1999, at B2.

66. In Louisiana, for example, some sex offenders are not able to use any social networking websites. LA. STAT. ANN. § 14:91.5 (Westlaw through 2016 Legis. Sess.). Louisiana sex offenders are also not able to work as taxi drivers, limo drivers, home repair workers or home delivery workers. LA. REV. STAT. § 15:553 (2016).

67. Scienter is defined as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.” *Scienter*, BLACK’S LAW DICTIONARY (10th ed. 2014).

68. Compare CAL. HEALTH & SAFETY CODE § 120291(a) (Deering, LEXIS through 2016 Sess. & all 2016 ballot measures) (there must be a specific intent to infect) with MO. REV. STAT. § 191.677.1(2) (LEXIS through 2016 2nd Reg. Sess.) (the intent requirement is “recklessness”).

69. § 191.677.1(2).

70. *Id.*

71. IOWA CODE § 709D.3(1) (LEXIS through 2016 2nd Reg. Sess.).

it is proven that they have intent to infect.⁷² If a seropositive person recklessly exposes an HIV negative person to the disease, and transmission occurs, or if a seropositive person intends to transmit HIV but is unsuccessful, the resulting punishment is the same.⁷³ In 2009, a seropositive man, Nick Rhoades, plead guilty to criminal transmission of HIV under Iowa law.⁷⁴ Rhoades was taking anti-retroviral medication and had a viral count that was undetectable before the sexual encounter.⁷⁵ In 2008, Rhoades engaged in unprotected oral sex, and protected anal sex, with a man he met on a social networking site without informing him of his serostatus.⁷⁶ Rhoades plead guilty to criminal HIV transmission, even though transmission of HIV did not occur. Rhoades was sentenced to twenty-five years in prison and a lifetime on the sex offender registry.⁷⁷ Following public outcry and advocacy, the Iowa Supreme Court threw out the verdict and the state legislature amended the statute.⁷⁸

72. *Id.* Intent to infect, resulting in infection is a B Felony punishable by up to twenty-five years in prison. *Id.*

73. IOWA CODE §§ 709D.3(2)–(3). The Code states that a felony has occurred if a person exposes an uninfected person with an intent for them to contract the disease, or if a person has a “reckless disregard as to whether the uninfected person contracts the contagious or infectious disease.” *Id.* Both of these cases result in a Class D felony, carrying with it a prison term of no more than five years and a fine. IOWA CODE § 902.9(1)(e). If an HIV positive person “recklessly” exposes another person to HIV and transmission does not occur, the offense becomes a serious misdemeanor and will result in a fine and up to a year in prison. IOWA CODE §§ 709D.3(4), 903.1(1)(b). Prior to a 2014 amendment, all persons convicted of a Class B or Class D felony were required to register as a sex offender. RICHARDSON ET AL., *supra* note 57.

74. Rhoades v. State, 848 N.W.2d 22, 26 (Iowa 2014).

75. *Id.* at 25.

76. *Id.* at 25–26.

77. *Id.* at 26.

78. *Id.* at 33. See also Grant Rogers, *Court Throws Out Rhoades’ HIV Transmission Sentence*, DES MOINES REGISTER (June 13, 2014, 9:40 AM), <http://www.desmoinesregister.com/story/news/crime-and-courts/2014/06/13/court-throws-out-rhoades-hiv-transmission-sentence/10416833/>. Before Rhoades’ sentence was thrown out by the Iowa Supreme Court, his “sentence was suspended and he was placed on five years probation and 10 years on the state’s sex offender registry.” Diane Anderson-Minshall, *Amazing HIV+ Gay Men: Nick Rhoades*, HIV PLUS MAG (Sept. 11, 2014, 4:00 AM), <http://www.hivplusmag.com/people/2014/09/11/amazing-hiv-gay-men-nick-rhoades>. His placement on the registry required that “his contact with children, even his relatives, be limited and that anyone he wanted to have sex with be approved by his probation officer in advance.” *Id.*

III. MEDICAL ADVANCES

Statutes regulating the activities of HIV/AIDS carriers were enacted in a time where a diagnosis of the disease was a death sentence.⁷⁹ While the life expectancy of someone diagnosed with HIV/AIDS in the 1980s was eighteen months post diagnosis, many people with HIV now live as long as or beyond their seronegative peers.⁸⁰ This is in large part to dramatic advances in medication and treatment.⁸¹

A. PrEP

In July 2017, the FDA approved Truvada, the first drug approved to reduce the risk of contracting HIV among seronegative patients.⁸² Truvada, first used as one of multiple anti-retroviral medications to treat a pre-existing HIV infection, prevents the HIV cells from duplicating themselves and establishing a life-long infection.⁸³ When taken every day, PrEP reduces the risk of contracting HIV by 92%.⁸⁴ However, some studies have found that the success rate can be up to 99% effective.⁸⁵

79. *AIDS Patients Now Living Longer, But Aging Faster*, NPR (Nov. 11, 2009, 12:30 AM), <http://www.npr.org/templates/story/story.php?storyId=120249388>.

80. *Id.* Reuben Granich et al., *Trends in AIDS Deaths, New Infections and ART Coverage in the Top 30 Countries with the Highest AIDS Mortality Burden: 1990–2013*, PLOS ONE (July 6, 2015), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4493077/#pone.0131353.ref020> (“evidence is accumulating that people who access ART early in the course of HIV infection may live a near-normal lifespan”).

81. *Id.*

82. Press Release, Fed. Drug Admin., FDA Approves First Drug for Reducing the Risk of Sexually Acquired HIV Infection (July 16, 2012), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm312210.html>.

83. *What is PrEP?*, PREP PROJECT, <http://www.whatisprep.org/> (last visited Dec. 12, 2015).

84. *PrEP Basics: How Well Does PrEP Work?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/prep.html> (last visited Dec. 12, 2015). Even when not taken daily, Truvada’s success rate in reducing AIDS transmission is substantially lowered. *Pre-Exposure Prophylaxis*, AIDS.GOV, <https://www.AIDS.gov/hiv-AIDS-basics/prevention/reduce-your-risk/pre-exposure-prophylaxis/> (last visited Dec. 12, 2015) (“Can I stop and start taking PrEP? No. Some people wonder if they can take PrEP for a few days or weeks, stop for a while, and then start again. This is sometimes called ‘intermittent’ PrEP. Available research shows PrEP’s effectiveness declines greatly if it is not taken consistently.”).

85. Donald McNeil, *Insurer Says Clients on Daily Pill Have Stayed H.I.V.-Free*, N.Y. TIMES (Sept. 2, 2015), www.nytimes.com/2015/09/02/health/insurer-says-

While the Center for Disease Prevention (CDC) found that one in four gay or bisexual men, one in five people who inject drugs, and one in two hundred heterosexuals should be counseled about PrEP, one in three primary care physicians have not heard of the medication.⁸⁶ The CDC recommends anyone who has used intravenous illicit drugs over the last six months, is in a serodiscordant relationship, in a non-monogamous relationship, or with someone who has recently contracted a sexually transmitted disease be prescribed PrEP.⁸⁷ While these guidelines would lead to a large population of PrEP users, especially in the LGBTQ community, there has not been a dramatic surge in prescriptions.⁸⁸ However, with consistently proven studies showing the medication effective, and with ninety-three medical studies in progress or completed as of writing, PrEP may be beginning to gain acceptance.⁸⁹

clients-on-daily-pill-have-stayed-hiv-free.html&usg=AFQjCNHVRL3LlBrhKV529xWMkDEKl66JCw&sig2=TJAouMJ5crnLH8D4gjrQWw; Tim Murphy, *Sex Without Fear*, N.Y. MAG. (July 13, 2014), <http://nymag.com/news/features/truvada-hiv-2014-7/> (“When taken every day, it’s been shown in a major study to be up to 99 percent effective.”).

86. Press Release, Ctrs. for Disease Control & Prevention, New CDC Estimates Underscore the Need to Increase Awareness of a Daily Pill That Can Prevent HIV Infection (Nov. 24, 2015), <http://www.cdc.gov/media/releases/2015/p1124-prevent-hiv.html>. Sumathi Reddy, *Why a Drug to Prevent HIV Infection Is in Low Demand*, WALL STREET J. (Dec. 21, 2015, 1:41 PM), <http://www.wsj.com/articles/why-a-drug-to-prevent-hiv-infection-is-in-low-demand-1450723285>.

87. U.S. Pub. Health Serv., *Preexposure Prophylaxis For The Prevention Of HIV Infection In The United States: A Clinical Practice Guideline*, CTRS. FOR DISEASE CONTROL & PREVENTION 11, 28–30 (2014), <http://www.cdc.gov/hiv/pdf/PrEPguidelines2014.pdf>. The release of the CDC guidelines has been seen as “groundbreaking” in the HIV community as it encourages doctors to consider prescribing PrEP to a large range of at-risk individuals and would bring its usage into the “mainstream.” Jason Potter Burda, *When Condoms Fail: Making Room Under the ACA Blanket for PrEP HIV Prevention*, 52 SAN DIEGO L. REV. 171, 189 (2015).

88. Burda, *supra* note 87, at 190 (estimating that the number of prescriptions as of March 2015 was less than 10,000 across the United States). See also Christopher Glazek, *Why Is No One on the First Treatment to Prevent H.I.V.?*, NEW YORKER (Sept. 30, 2013), <http://www.newyorker.com/tech/elements/why-is-no-one-on-the-first-treatment-to-prevent-h-i-v> (citing concerns from AIDS activists regarding “questions about the drug’s side effects, its price tag, its potential to incite risky behavior, its failure to prevent other S.T.D.s, and the possibility that imperfect adherence to the pill’s daily regimen would lead to the spread of a Truvada-resistant strain of H.I.V.”).

89. Daniel Reynolds, *Study Shows ‘On-Demand’ PrEP to Drastically Reduce HIV Infection*, ADVOCATE (Nov. 17, 2015, 10:28 PM), <http://www.advocate.com/31-days-prep/2014/10/29/study-shows-demand-prep-dramatically-reduce-hiv-infection>. In the second half of 2015, “the Centers for Disease Control and Prevention, World Health Organization, Gov.

B. HAART Therapy:

In addition to medication that reduces the possibility of a seronegative person becoming infected with HIV, advancements in HIV medication have become so effective that they can wipe any visible trace of the disease from the bloodstream and makes it almost impossible to transfer to another person.⁹⁰ Recently, the Swiss Federal Commission on HIV/AIDS “concluded that an HIV-positive person with an undetectable viral load who has no other STI ‘cannot pass on the virus through sexual contact.’”⁹¹ Since its creation in 1996, Highly Effective Antiretroviral Therapy (HAART) has dramatically improved the health and life expectancy of those living with HIV.⁹² In 2011, a study found that the likelihood of transmission to a seronegative partner was reduced by 96% when treated early with HAART.⁹³ Multiple defendants have attempted to submit their low viral load as evidence that they did not intend, or could not possibly, transmit HIV to a sexual partner, but as of now they have been largely unsuccessful.⁹⁴

Andrew Cuomo of New York, and the Human Rights Campaign have all come forward in support of PrEP.” *Id.* See also CLINICALTRIALS.GOV: U.S. NAT’L INSTS. OF HEALTH, <https://clinicaltrials.gov/ct2/results?term=pre-exposure+prophylaxis+HIV&Search=Search> (last visited Dec. 6, 2015) (finding ninety-three current medical trials on the topic of PrEP and HIV).

90. Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1243–44 (2015).

91. *Id.* at 1243–44. (citing in part Pietro Vernazza et al., *Les personnes séropositives ne souffrant d’aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle*, 89 BULLETIN DES MÉDECINS SUISSES 165, 167 (2008), translated in http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement_May%202008_translation%20EN.pdf (“An HIV-positive individual not suffering from any other STD and adhering to antiretroviral therapy (ART) with a completely suppressed viremia . . . does not transmit HIV sexually, i.e., he/she cannot pass on the virus through *sexual contact*.”).

92. *Prevention Benefits of HIV Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 15, 2013), <http://www.cdc.gov/hiv/prevention/research/tap/> (claiming that the drugs have increased life expectancy “decades rather than months.”).

93. *Id.*

94. *United States v. Dacus*, 66 M.J. 235, 240 (C.A.A.F. 2008) (holding that even though the defendant had an undetectable viral load, and transmission was “very unlikely,” transmission was still possible). See also *State v. Richardson*, 289 Kan. 118, 125 (2009) (finding that although the defendant had an undetectable load shortly after the sexual activity, it was irrelevant when looking at the intent to expose his sexual partner to HIV).

IV. OUTCOMES

When HIV rates in North America are compared with the prevalence of the disease in other parts of the world, specifically Africa, the United States has a significantly lower rate of infection.⁹⁵ However, the United States has prosecuted the highest number of seropositive people for exposing others to the disease.⁹⁶ While the early history of HIV/AIDS shows evidence of a stigma against homosexuals, recent research has suggested that African American men also face conviction at a higher rate than their Caucasian peers.⁹⁷

Furthermore, while HIV exposure laws were enacted in an effort to encourage disclosure and stem the rate of infection, studies have shown that they may not have that effect.⁹⁸ Knowledge of a state exposure law has not led to an increase in disclosure or an increase in the use of protection when engaging in sex.⁹⁹ Moreover, it can lead to seropositive men and women withholding information when discussing their serostatus with healthcare providers.¹⁰⁰

95. The World Health Organization reports that HIV prevalence in Africa is 4.0–4.8% and HIV prevalence in North America 0.4–0.6%. *Global Health Observatory Data*, WORLD HEALTH ORG., <http://www.who.int/gho/hiv/en/> (last visited Feb. 1, 2015).

96. NAM, *HIV & Criminal Law: North America*, AIDSMAP, <http://www.aidsmap.com/law-country/North-America/page/1445031/> (“The United States has prosecuted more people living with HIV for sexual and non-sexual exposure or transmission than any other country in the world. A total of 39 states have prosecuted at least 442 HIV-positive individuals . . . for criminal HIV exposure or transmission.”).

97. Jared Wadley, *Michigan Courts Use HIV Disclosure Laws to Punish Poor, Marginalized Individuals*, MICH. NEWS (July 27, 2012), <http://ns.umich.edu/new/releases/20656-michigan-courts-use-hiv-disclosure-laws-to-punish-poor-marginalized> (reporting on research that found that conviction data “suggests an overrepresentation of African-American men with female partners and an underrepresentation of white men with male partners among those convicted.”).

98. Carol L. Galletly et al., *New Jersey's HIV-Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living with HIV*, 102 AM. J. PUB. HEALTH 2135, 2138 (2012).

99. *Id.* (comparing those who were aware of an HIV exposure law and those who were not, there was no increase in sexual abstinence, use of sexual protection, or disclosure to sexual partners).

100. Patrick O’Byrne et al., *Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-Based Gay Men’s Sex Survey*, 24 J. ASS’N NURSES AIDS CARE 81, 82 (2013) (finding that 13.8% of polled HIV positive patients are reluctant to discuss sexual practices with health care providers because of HIV nondisclosure prosecutions).

ANALYSIS

When HIV first appeared in the early 1980s, fear surrounding its quick spread and unknown method of transmission produced a wide array of reactionary legislation. However, as scientists have uncovered more information about how HIV is transmitted, pioneered new treatments to prolong the life of those afflicted by it, and created an incredibly effective method of prevention, that fear is no longer founded. While legislation protecting the public health is of utmost importance, it must be effective and it must be based in an understanding of science. HIV exposure statutes today do little to encourage seropositive Americans to seek treatment and show a clear disconnect between criminal justice and scholarship on HIV. HIV exposure laws must be amended to reflect both scientific advances, increased knowledge about the disease, and should be drafted with an incentive for both parties to take care of their sexual health.

Furthermore, HIV exposure laws by nature affect large groups of minority populations.¹⁰¹ Largely white, heterosexual juries are often tasked with understanding and passing judgment on gay relationships.¹⁰² The bias present in HIV laws is evidenced when comparing sentences for HIV exposure to sentences for other serious crimes. While only present in two states, requiring that a defendant register as a sex offender is a practically unjust punishment.¹⁰³ While other registered sex offenders were convicted of rape, child abuse, or other offenses involving nonconsensual acts, the seropositive persons engaged in consensual acts with adults, and often there was a very low likelihood of HIV transmission.

In addition to requiring sex offender registration, those convicted of HIV exposure face unduly long prison sentences. HIV exposure in Georgia, including exposure that does not lead to infection, has a minimum sentence of five years in prison.¹⁰⁴ Comparatively, a vehicular homicide charge has a minimum three-year prison

101. Hernandez, *supra* note 8.

102. Thrasher, *supra* note 3.

103. ARK. CODE ANN. § 12-12-903(13)(A)(i)(p) (LEXIS through 2016 Legis. Sess.).

104. *Comparative Sentencing Chart On HIV Criminalization In The United States*, HIV L. & POL'Y CTR. (May 2012), <http://hivlawandpolicy.org/resources/chart-comparative-sentencing-hiv-criminalization-united-states-center-hiv-law-and-policy>.

sentence.¹⁰⁵ In Tennessee, those convicted of HIV exposure can be sentenced to up to twenty-six years, yet one charged with vehicular homicide will face only three to fifteen years.¹⁰⁶ This disparity in sentencing indicates a bias against those living with HIV. Harsh sentences for HIV exposure send the message that even the threat of being exposed to the spit of someone who is seropositive is worse than killing someone with a vehicle.

State HIV exposure laws should be revised to reflect both current sexual health messaging and the incredible advancements in both the prevention and treatment of HIV.¹⁰⁷ Moreover, amending the intent requirement in HIV exposure statutes, in addition to limiting the conduct that is criminalized, would limit the number of seropositive people facing unduly harsh jail time.

As PrEP has proven to prevent HIV transmission, and new HIV medication is making the disease almost invisible in the bloodstream, it is time to share the responsibility of unsafe sex.¹⁰⁸ Rather than convicting hundreds of seropositive Americans, HIV transmission can be prevented through medication and common-sense sexual health protection. Legislation should incentivize both the treatment of HIV and its prevention by putting the responsibility for sexual health on all parties involved.

Increasing the number of vulnerable seronegative Americans on PrEP should be the primary goal in the effort against HIV. While the CDC has spoken out in favor of an increase of those on PrEP, it should mandate that doctors counsel all recommended candidates for PrEP.¹⁰⁹ As a large number of medical professionals do not have enough information regarding PrEP and those who are recommended to take it, the CDC must first work to educate medical professionals through an extensive information campaign.¹¹⁰ Efforts should shift from the criminal justice system to public health authorities, focusing instead on stopping the spread of HIV proactively through

105. *Id.*

106. *Id.*

107. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 92.

108. Fed. Drug Admin., *supra* note 82; Buchanan, *supra* note 90.

109. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 84.

110. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 86.

preventative medication, rather than imprisoning hundreds of sick, largely minority Americans.¹¹¹

In addition to increasing the number of Americans on preventative medication, HIV exposure statutes must be amended to reflect our knowledge of the disease. Furthermore, HIV exposure statutes should be made uniform across the United States. Inconstancy in HIV exposure elements from state-to-state leaves seropositive Americans vulnerable to prosecution when they are unfamiliar with specific requirements. Currently there are states that criminalize “reckless” exposure, while the majority of states criminalize intentional exposure.¹¹² This inconsistency is troubling as one state doesn’t criminalize exposure, but another imposes harsh sentences for something as trivial as spitting.¹¹³ This inconsistency is particularly unfair as these “illegal activities” are legal for all seronegative citizens. The following sections propose changes to the statutory construction of HIV exposure laws specifically through amending the behaviors that are criminalized and the level of intent required for conviction.

I. BEHAVIORS CRIMINALIZED

The statutes that were enacted in the late 1980s and early 1990s were based on widespread lack of information about HIV transmission.¹¹⁴ Spitting, biting, or throwing bodily fluids has almost no chance of transmitting HIV, yet it is prohibited in eleven states.¹¹⁵ Furthermore, oral sex is prohibited in twenty-one states, but has an incredibly low rate of infection.¹¹⁶ Finally, female-to-female sexual contact resulting in HIV transmission has one of the lowest rates of infection and only a few cases have ever been reported.¹¹⁷ All criminal statutes should be revised to only include sexual contact

111. Hernandez, *supra* note 8.

112. MO. REV. STAT. § 191.677.1(2) (LEXIS through 2016 2nd Reg. Sess.).

113. While states like Oregon do not have a statute that criminalizes carriers of HIV, eleven states criminalize spitting. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 39.

114. See C-SPAN (Oct. 16, 1986), *supra* note 29.

115. Lehman et al., *supra* note 32; CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 49.

116. Lehman et al., *supra* note 32.

117. Chan et al., *supra* note 44.

with a realistic chance of infection, including vaginal and anal sex.

Criminalizing behavior that is scientifically not dangerous only acts to stigmatize the HIV-positive community. While there is still a small chance of infection, treating all forms of sexual contact as though they have the same level or risk is unnecessarily punitive.

II. INTENT

In addition to changing the conduct that is prohibited under HIV exposure laws, the mens rea requirement must be amended so as to not punish those taking steps to protect others from infection. State laws should require that any conviction under an HIV exposure statute include exposure with intent to infect. Many agree that if one intends to infect another sexual partner, the court should impose a consequence.¹¹⁸ By requiring intent to infect, only those who are HIV positive and act maliciously to infect others would be penalized. Those who act “recklessly” by engaging in sex with someone who is seronegative with no proven intent to infect would not be penalized.

As was shown in the *Johnson* case, juries may have moral objections to behavior that seropositive people engage in, specifically men sleeping with men.¹¹⁹ This disapproval could lead them to convict unnecessarily if they personally view a behavior as “reckless” in lay terminology. By raising the required level of intent to exposure with intent to infect, it would ensure that only those who have a proven disregard for the health of others would be penalized.

HIV medication, such as HAART, has made it easier than ever for a seronegative partner to remain healthy in a serodiscordant relationship. This development should be reflected in HIV exposure statutes, and should serve to incentivize HAART therapy in those who are seropositive. As a consequence of amending the mens rea, condom use and HAART therapy would become a complete defense to a charge of HIV exposure. A seropositive person engaging in HAART or using condoms when they engage in sexual activity is

118. See generally Amanda Mikelberg, *HIV-positive Man Who Intentionally Infected 'Thousands' of Partners Turns Himself in*, N.Y. DAILY NEWS (Dec. 30, 2011, 11:53 PM), <http://www.nydailynews.com/life-style/health/hiv-positive-man-intentionally-infected-thousands-partners-turns-article-1.999178>.

119. Thrasher, *supra* note 3.

taking active steps to protect their partner.¹²⁰ While there are currently four states that allow condom use as a defense to an HIV exposure charge, raising the mens rea requirement would allow HART therapy to disprove any intent to infect a partner.¹²¹

CONCLUSION

As of 2014, it is estimated that more than one million Americans are living with HIV/AIDS in the United States, with approximately fifty thousand new cases diagnosed every year.¹²² While historically lawmakers have attempted to limit exposure to the disease through restrictive criminal laws, they have instead stigmatized minority groups suffering from HIV/AIDS. Amending HIV exposure statutes to align with scientific developments would reduce the number of an already vulnerable population who are incarcerated for having sex while HIV positive.

Furthermore, those who are sexually active should be educated and encouraged to take responsibility for their health and utilize the medication available, such as PrEP. Our scientific understanding of HIV, how it is transmitted, treated, and prevented should shape the way we tackle the epidemic. Laws based on bigotry, fear, and discrimination only serve to disincentive safe sex and punish those infected.

120. PLANNED PARENTHOOD, *supra* note 58.

121. Lehman et al., *supra* note 32.

122. *HIV in the United States: At a Glance*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 29, 2015), <http://www.cdc.gov/hiv/statistics/overview/ataglance.html>.