

Fall 2012

# Rethinking HIV-Exposure Crimes

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## Recommended Citation

Kaplan, Margo (2012) "Rethinking HIV-Exposure Crimes," *Indiana Law Journal*: Vol. 87: Iss. 4, Article 4.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol87/iss4/4>

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# Rethinking HIV-Exposure Crimes

MARGO KAPLAN<sup>\*</sup>

*This Article challenges the current legislative and scholarly approaches to HIV-exposure crimes and proposes an alternative framework to address their flaws. Twenty-four states criminalize consensual sexual activities of people with HIV. Current statutes and the scholarship that supports them focus on HIV-positive status, sexual activity, and knowledge of HIV-positive status as proxies for risk, mental state, and consent to risk. As a result, they are dramatically over- and underinclusive and stigmatize individuals living with HIV. Criminalization should be limited to circumstances in which a defendant exposed her partner to a substantial degree of unassumed risk and did so with a culpable mental state as to transmission. This approach requires a fact finder to consider all evidence relevant to the risk of transmission and the victim's understanding of that risk, a modest requirement that would nonetheless invert outcomes in numerous prosecutions. The Article contextualizes these arguments within the larger debate on the use of rules and standards in the criminal law and explores the implications of its approach for HIV-exposure criminalization as well as any offense drafted in response to an emerging threat.*

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## INTRODUCTION

Since the onset of the AIDS epidemic, the very idea of HIV has shaken Americans' sense of security and fostered deep fear and distrust of people with HIV. This is most striking in our use of criminal law—society's harshest form of condemnation—to punish HIV-positive individuals who engage in consensual sexual conduct without disclosing their HIV-positive status to their partners.<sup>1</sup> In the past two decades, approximately half of state legislatures have criminalized the sexual activities of HIV-positive individuals.<sup>2</sup> Advocates of these statutes argue that criminalization protects the partners of HIV-positive individuals by punishing those who know their HIV-positive status but do not disclose it to potential partners.<sup>3</sup> Critics counter that the statutes are too broad and undermine public

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1. See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1017–19 (1989) (describing calls for criminal restrictions on sexual activities of HIV-positive individuals in the late 1980s); Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 822–25 (2004) (describing media reports of a “new breed of sexual predator” who transmitted HIV to others and consequent support for criminal laws that punish HIV exposure).

2. Twenty-four states have criminal offenses that target the consensual sexual activities of HIV-positive individuals in particular. See ARK. CODE ANN. § 5-14-123 (2006); CAL. HEALTH & SAFETY CODE §§ 120290, 120291 (West 2006); FLA. STAT. ANN. § 384.24(2) (West 2007); GA. CODE ANN. § 16-5-60(C) (2007); IDAHO CODE ANN. § 39-608 (2011); 720 ILL. COMP. STAT. ANN. 5/12-16.2 (West Supp. 2011); IND. CODE ANN. §§ 16-41-7-1 (2011), 35-42-1-9 (2009); IOWA CODE ANN. § 709C.1 (West 2003); LA. REV. STAT. ANN. § 14:43.5 (2007); MD. CODE ANN., HEALTH-GEN. § 18-601.1 (LexisNexis 2009); MICH. COMP. LAWS ANN. § 333.5210 (West 2001); MISS. CODE ANN. § 97-27-14(1) (West 2011); MO. ANN. STAT. § 191.677 (West 2011); NEV. REV. STAT. ANN. § 201.205 (LexisNexis 2006); N.J. STAT. ANN. § 2C:34-5 (West Supp. 2011); 10A N.C. ADMIN. CODE 41A.0202 (2011); N.D. CENT. CODE § 12.1-20-17 (1997); OHIO REV. CODE ANN. § 2903.11 (LexisNexis 2010); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 2002); S.C. CODE ANN. § 44-29-145 (2002); S.D. CODIFIED LAWS § 22-18-31 (2006); TENN. CODE ANN. § 39-13-108 (2010); VA. CODE ANN. § 18.2-67.4:1 (2009); WASH. REV. CODE ANN. § 9A.36.011 (West 2009). This Article does not address general public health laws that criminalize exposing others to communicable diseases because most of these statutes were enacted prior to the discovery of HIV and are usually minor offenses, and I could find no record of a case of HIV exposure being prosecuted under such public health laws. See CTR. FOR HIV L. & POL'Y, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: STATE AND FEDERAL LAWS AND PROSECUTIONS 2 (2010). Offenses where HIV-positive status may increase the severity of the offense and sentence, such as prostitution or assault with bodily fluid, are also beyond the scope of this Article, although its reasoning certainly has implications for these offenses. See, e.g., CAL. PENAL CODE § 647(f) (West 2010) (increasing sentence for prostitution if individual previously tested positive for HIV).

3. See Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 328 (2004) (concluding that the intent of HIV exposure laws is to protect partners of HIV-positive individuals from being exposed to the virus and to prevent transmission); Isabel Grant, *The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV*, 31 DALHOUSIE L.J. 123, 150–56 (2008) (outlining arguments for criminalizing HIV exposure without disclosure of status).

health efforts.<sup>4</sup> In response, the Obama White House recently urged states to consider redrafting or eliminating HIV-exposure crimes.<sup>5</sup> This Article challenges the current legislative and scholarly approaches to HIV-exposure crimes and proposes an alternative framework to address their flaws.

While HIV-exposure laws vary, nearly every statute uses HIV-positive status (positive serostatus), sexual activity, and knowledge of positive serostatus as proxies for risk of transmission, mental state as to transmission, and consent to risk. Specifically, most statutes contain (1) a mens rea requirement that the defendant must know she is HIV positive; (2) an actus reus requirement that the defendant must be HIV positive and engage in certain prohibited conduct, usually specified sexual activities; and (3) a requirement that the defendant's sexual partner must not be aware that the defendant is HIV positive. In South Carolina, for example, an individual is guilty of a felony if she "knows that [she] is infected with [HIV]" and knowingly engages in vaginal, anal, or oral intercourse with another person without first disclosing her positive serostatus.<sup>6</sup>

These statutes import the reasoning of the scholarship surrounding the criminalization of HIV exposure. The dominant scholarship on HIV criminalization can be divided roughly into two branches. The first branch has focused on determining what behavior merits criminalization, reflecting a retributivist principle of punishing only morally blameworthy behavior. This branch has ceded or assumed the need to use sexual activities and serostatus as a proxy for risk, knowledge of serostatus as a proxy for mens rea as to transmission, and a partner's knowledge of the defendant's serostatus as a proxy for consent to risk of transmission. The resulting debate has largely focused on which sexual acts should be prohibited, what constitutes knowledge of serostatus, and whether a partner's knowledge of the defendant's serostatus should serve as a defense. This approach is reflected in the articles by Kathleen Sullivan, Martha Field, and Larry Gostin that forged the scholarly debate on HIV-exposure criminalization in the late 1980s. These articles argued that, to the extent criminal law should be employed in the context of HIV exposure or transmission, it should prohibit specific sexual activities unless the defendant's partner was aware of the defendant's serostatus.<sup>7</sup> Throughout the years, scholarship addressing how to criminalize HIV exposure has focused on revising the proxies to reflect advances in our understanding of HIV.<sup>8</sup>

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4. See Scott Burris & Edwin Cameron, *The Case Against Criminalization of HIV Transmission*, 300 JAMA 578, 580 (2008); Wolf & Vezina, *supra* note 1, at 869–70; Edwin Cameron, Justice, Constitutional Court of S. Afr., Public Lecture at the Canadian HIV/AIDS Legal Network Symposium on HIV, Law and Human Rights: The Criminalization of HIV Transmission and Exposure 13–15 (Jun. 12, 2009).

5. WHITE HOUSE, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 37 (2010), available at <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>.

6. S.C. CODE ANN. § 44-29-145.

7. Gostin, *supra* note 1, at 1053–55; Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 183–86, 196 (1988).

8. See, e.g., Michael L. Closen, *The Arkansas Criminal HIV Exposure Law: Statutory Issues, Public Policy Concerns, and Constitutional Objections*, 1993 ARK. L. NOTES 47 (discussing which acts to prohibit and whether the partner's knowledge of the defendant's serostatus should be a defense); Galletly & Pinkerton, *supra* note 3; Isabel Grant, *Rethinking*

For example, Leslie Wolf and Richard Vezina's more recent works have advocated updating the offenses to exclude activities we now know carry an extremely low risk of transmission.<sup>9</sup> Ian Ayres and Katharine Baker advocated a crime of "reckless sexual conduct," which would criminalize all first-time sexual activity without a condom, with an affirmative defense of consent to unprotected sexual intercourse.<sup>10</sup>

The second branch of scholarship has focused on consequentialist arguments for and against criminalization. The majority of this scholarship is critical of HIV-exposure laws, arguing that they have little deterrent value, undermine public health goals, and stigmatize individuals living with HIV. Scott Burris, Zita Lazzarini, South African Constitutional Court Justice Edwin Cameron, Mary Fan, and others have taken this approach.<sup>11</sup> Scholarship in this branch may overlap with the first branch of scholarship, arguing both that criminal law should not be used but also proposing the best possible law should legislatures insist on prosecuting sexual exposure. For example, articles by Gostin, Sullivan, and Field combine criticisms of criminalizing HIV exposure with the proposals for criminalization discussed above.<sup>12</sup> The first branch of scholarship influences this second branch; by defining what an ideal HIV-exposure statute should be, the first branch of scholarship frames the debate of whether such statutes are worthwhile.

This Article breaks with the current scholarship by challenging the assumptions of the first branch of scholarship and proposing an alternative approach. It argues that proxies are ill-suited to target risk, culpable mental state, and consent to risk in the context of HIV exposure. The proxy-based approach that dominates scholarship and legislation may have seemed appropriate when HIV emerged. But advancements in medical knowledge and technology, as well as developments in the social rules that govern relationships, require a reconceptualization of HIV in the law, and in criminal law in particular. Serostatus and prohibited activities are poor proxies for risk of transmission because they fail to account for the numerous factors that we now know can significantly and interdependently influence risk and

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*Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions*, 54 MCGILL L.J. 389 (2009) (arguing that condom use should be a defense, but not viral load); Christina M. Shriver, *State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications*, 21 N. ILL. U. L. REV. 319 (2001) (advocating criminalizing penile penetration and oral-genital intercourse unless partner knew defendant's serostatus); J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 446 (1994) (suggesting the need for statutes that clearly define prohibited acts and provide defenses of condom use and consent); Wolf & Vezina, *supra* note 1, at 879–80 (arguing no disclosure needed if condoms used).

9. Wolf & Vezina, *supra* note 1, at 879–81.

10. Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599 (2005).

11. See, e.g., Scott Burris, Leo Beletsky, Joseph Burleson, Patricia Case & Zita Lazzarini, *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467 (2007); Burris & Cameron, *supra* note 4; Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 578–580 (2011); Zita Lazzarini, Sarah Bray & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239 (2002).

12. Gostin, *supra* note 1, at 1053–55; Sullivan & Field, *supra* note 7, at 183–86, 196.

reduce it to negligible levels.<sup>13</sup> They also fail to account for cumulative risk over the course of a sexual relationship. A defendant's knowledge of her serostatus is a poor proxy for mens rea because it includes within its sweep individuals who are neither reckless nor negligent; for example, because of the way HIV is transmitted, an individual who knows she is HIV positive may engage in sexual conduct while reasonably—and correctly—believing she poses a trivial risk of transmission to her partner. Current statutes also assume that an individual's knowledge of the defendant's HIV-positive status is both necessary and sufficient to demonstrate her consent to risk of transmission, when in reality it is neither.

This Article proposes a framework for HIV-exposure laws that employs standards rather than rules in order to better address the harm of HIV exposure while minimizing or eliminating the problems of current statutes. In particular, this approach allows the law to adapt to changes in our understanding of HIV transmission and improvements in HIV prognosis, prevention, and treatment. It also allows the fact finder to consider context-specific social norms with regard to sexual activities that influence the wrongfulness of a defendant's actions. Specifically, this Article proposes three changes: (1) the actus reus should be defined in terms of substantial and unjustifiable risk, rather than serostatus and sexual activity; (2) the mens rea should be defined in terms of mental state as to transmission rather than mere knowledge of serostatus; and (3) a defendant should not be liable for the degree of risk to which her partner consented.

The first of these proposed changes—drafting statutes in terms of risk creation and limiting culpability to substantial and unjustifiable risk—requires juries to consider multiple variables that influence the risk to which the defendant exposed the victim, such as viral load and condom use. This approach could invert outcomes in numerous prosecutions. Iowa resident Nick Rhoades, for example, was recently prosecuted under an HIV-exposure statute for a sexual encounter in which he failed to disclose his serostatus.<sup>14</sup> Rhoades was convicted of a felony and sentenced to twenty-five years in prison, a sentence later reduced to probation and mandatory registration as a sex offender.<sup>15</sup> Rhoades's undetectable viral load at the time of the sexual encounter is irrelevant under Iowa's statute but is evidence that he posed a negligible risk of transmission to his partner.<sup>16</sup> Criminalizing only substantial and unjustifiable risk also mitigates the troubling messages inherent in current statutes, which imply that sex with an HIV-positive person is per se harmful.

The second proposed change requires the prosecution to demonstrate the defendant had a culpable mental state as to transmission. This requirement better ensures that a defendant is punished in proportion to her blameworthy mental state. Criminal punishment without a culpable mental state rarely serves the interests of justice.<sup>17</sup> Defining mens rea in terms of the harm of transmission more

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13. See *infra* Part I.B.

14. See IOWA CODE ANN. § 709C.1 (West 2003); Mary Stegmeir, *HIV Case Brings 25-Year Sentence*, WCF COURIER, May 3, 2009.

15. See Arthur Breur, *Nick Rhoades 25-Year Sentence Cut Short, But He's Hardly a Free Man*, ACCESSLINE, Sept. 14, 2009; Lynda Waddington, *Convict Questions Effectiveness, Consistency of Iowa's HIV Transmission Law*, IOWA INDEP., Sept. 16, 2009.

16. Waddington, *supra* note 15.

17. See MODEL PENAL CODE § 2.05 cmt. 1 (1985); DOUGLAS HUSAK,

appropriately targets blameworthy mental states. It also allows the law to punish in proportion to blameworthiness, distinguishing individuals who intend harm from those who are merely negligent.

The third proposed change requires HIV-exposure offenses to incorporate a more nuanced approach to consent that focuses on consent to degrees of risk. Current HIV-exposure statutes address consent indirectly, allowing the defense only where a partner is aware of the defendant's serostatus.<sup>18</sup> This Article argues that awareness of status is neither necessary nor sufficient to establish that an individual consented to the risk to which she was exposed. It proposes that a defendant be liable only if there is a difference between the degree of risk to which her partner consented and the degree of risk to which her partner was actually exposed. Furthermore, the unassumed risk must be substantial and unjustifiable. This approach ensures that HIV-positive individuals are punished only for the substantial and unjustifiable risk to which their partners did not consent. It also gives courts flexibility to consider the nuances of sexual relationships and the context-specific nature of consent therein.

The Article concludes by discussing the broader implications of its arguments. Challenging the first branch of HIV-exposure scholarship transforms the second branch of the HIV-criminalization debate. Conduct that falls within the proposed HIV-exposure statute is likely to be quite rare. Narrowing the category of conduct that the offense targets strengthens second-branch arguments that HIV-exposure offenses have meager benefits in relation to their costs.

This Article also has implications for criminalizing offenses where our understanding of the underlying harm is tentative. In such circumstances, a paradox emerges; while bright-line rules that use proxies provide clarity amid uncertainty, they are stagnant and thus more likely than standards to become anachronistic. HIV-exposure laws demonstrate the need for *ex ante* solutions to such anachronism, particularly where our understanding of the harm at issue is subject to medical, technological, or other scientific advancement. HIV-exposure laws also demonstrate that critical analysis of proxy use can transform the debate over whether to criminalize an action at all. Abandoning proxy use in favor of a more direct approach brings into sharp relief the underlying justifications for criminalization and their merits.

Part I analyzes the misplaced focus of current HIV-exposure statutes on serostatus and activities as proxies for risk, mental culpability, and consent. This results in over- and underinclusive statutes that unnecessarily stigmatize HIV-positive individuals. Part II proposes an alternative framework that criminalizes only unassumed, substantial, and unjustifiable risk, and only where the defendant has a sufficiently blameworthy *mens rea* as to transmission. It then addresses several counterarguments to the proposed framework. Part III discusses the broader implications of the arguments made in Parts I and II for both HIV criminalization and any offense subject to significant uncertainty and scientific advancement.

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OVERCRIMINALIZATION 174–75 (2008) (arguing that an individual should not be punished for risk creation unless she has a culpable mental state with regard to the ultimate harm to be prevented).

18. See Shriver, *supra* note 8, at 322 (discussing the disclosure requirement).

## I. THE MISPLACED FOCUS OF CURRENT HIV CRIMINALIZATION

## A. HIV Exposure Statutes and Harm

In order to understand HIV-exposure statutes, it is necessary to understand the harm that is their concern. HIV-criminalization advocates argue that the need to protect individuals from harm justifies HIV-exposure statutes.<sup>19</sup> Indeed, the physical injury of HIV infection is a harm sufficient to merit the concern of criminal law.<sup>20</sup> HIV is a chronic and serious disease that can substantially diminish an individual's quality of life.<sup>21</sup> It destroys blood cells that are crucial to the body's immune response and inhibits its ability to fight infections.<sup>22</sup> This harm, while not immediate, is directly caused by the introduction of the virus to the system.<sup>23</sup> The late stage of HIV infection, AIDS, involves severe damage to an individual's immune system, which leaves an individual less able to fight infections and certain cancers.<sup>24</sup> An individual who transmits the disease to another causes another physical harm by indirectly impairing the other person's immune system.<sup>25</sup>

19. See Galletly & Pinkerton, *supra* note 3, at 328; Grant, *supra* note 3, at 150–56.

20. Joel Feinberg's influential work on harm to others as justification for criminal law defines harm as a wrongful setback to interests. JOEL FEINBERG, HARM TO OTHERS 31 (1987); see also Dennis J. Baker, *The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation*, 33 AUSTL. J. LEGAL PHIL. 66, 74 (2008); R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 946 (2005); Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 971–72 (2003); Hamish Stewart, *Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law*, 5 BUFF. CRIM. L. REV. 47, 51 (2001). Setbacks to physical health and prolonging life are examples of harms. See FEINBERG, *supra*, at 37; Baker, *supra*, at 75; Sullivan & Field, *supra* note 7, at 188.

21. See *Bragdon v. Abbott*, 524 U.S. 624, 631–48 (1998) (holding that HIV is a disability).

22. LAURA PINSKY & PAUL HARDING DOUGLAS, THE COLUMBIA UNIVERSITY HANDBOOK ON HIV AND AIDS 5 (2009).

23. *Id.* (describing HIV infection and how it weakens the immune system, leaving an individual more prone to infections); Agency for Healthcare Research and Quality, *Understanding Your Body: The Immune System and HIV*, <http://www.ahrq.gov/consumer/bodysys/edbody4.htm>.

24. PINSKY & DOUGLAS, *supra* note 22, at 6–8. AIDS is a diagnostic category, the definition of which has changed over time. Since 1993, AIDS has been defined as an HIV infection and either a specific group of diseases or conditions that are indicative of severe immunosuppression or, where a person is asymptomatic, a significant level of immune suppression characterized by a CD4 cell count below a certain threshold. *Id.* at 6.

25. It is not clear if the harm of HIV transmission includes secondary effects such as opportunistic infections that result from an impaired immune system or the side effects of the medication that is necessary for individuals to treat the virus. Another unresolved question is whether HIV's potential to shorten an individual's life should be considered part of the harm of HIV or if an individual who eventually dies as a result of an opportunistic infection was killed by the HIV infection. See Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93, 106–07, 112–13 (2009). Further removed from the HIV infection is the harm of the side effects and costs of antiretroviral therapy (ART) medications, which often must be taken daily and indefinitely. See PINSKY & DOUGLAS, *supra* note 22, at 41.



This immune system compromise is a serious and chronic condition that should be distinguished from the “death sentence” it once was.<sup>26</sup> New antiretroviral drugs have been remarkably successful in improving both the length and quality of life for individuals living with HIV.<sup>27</sup> The average life expectancy after an HIV diagnosis has improved significantly since the 1990s, and some studies indicate that the life expectancy of those with access to treatment is approaching that of the HIV-negative population.<sup>28</sup> While some experimental treatments have shown promise in eliminating the disease, there is currently no cure for HIV.<sup>29</sup>

Although HIV exposure without transmission does not impair an individual’s health, criminal law often prohibits conduct that puts another at risk of injury.<sup>30</sup> The numerous penal statutes prohibiting inchoate offenses such as reckless endangerment and reckless driving reflect the principle that risk of physical harm merits criminal punishment.<sup>31</sup> This principle is also well supported by scholarship, and in particular by scholarship advocating a “harm principle” approach to criminalization.<sup>32</sup> HIV exposure puts an individual at risk of infection and thus at risk for harm.<sup>33</sup> Where a statute requires disclosure, the lack of disclosure is not a harm in itself but a circumstance that negates the wrongfulness of the defendant’s conduct because the individual being exposed to risk is aware of the risk and has consented to it.<sup>34</sup>

In contrast, the perceived harm of simply having been intimate with an HIV-positive individual is not the proper concern of criminal law. Sex with an HIV-positive person is not in itself injurious. Punishing an HIV-positive individual for her partner’s perception of being tainted uses the expressive power of the

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26. See Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 319 (2008); Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1165–66 (2009).

27. DEP’T OF HEALTH AND HUM. SERVS., GUIDELINES FOR THE USE OF ANTIRETROVIRAL AGENTS IN HIV-1-INFECTED ADULTS AND ADOLESCENTS 27–33 (2011). Newly infected individuals not on treatment may be asymptomatic for years, and treatment decisions are based primarily on viral load and immune system strength. *Id.*

28. Kathleen McDavid Harrison, Ruiguang Song & Xinjian Zhang, *Life Expectancy After HIV Diagnosis Based on National HIV Surveillance Data from 25 States, United States*, 53 J. AIDS 124, 127 (2010); Ard van Sighem, Luuk Gras, Peter Reiss, Kees Brinkman & Frank de Wolf, *Life Expectancy of Recently Diagnosed Asymptomatic HIV-Infected Patients Approaches That of Uninfected Individuals*, 24 AIDS 1527 (2010).

29. See Gero Hütter, Daniel Nowak, Maximilian Mossner, Susanne Ganepola, Arne Müßig, Kristina Allers, Thomas Schneider, Jörg Hofmann, Claudia Kücherer, Olga Blau, Igor W. Blau, Wolf K. Hofmann & Eckhard Thiel, *Long-Term Control of HIV by CCR5 Delta32/Delta32 Stem-Cell Transplantation*, 360 NEW ENG. J. MED. 692 (2009).

30. See HUSAK, *supra* note 17, at 159; Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 890 (2007); Duff, *supra* note 20, at 941–42, 953.

31. See Duff, *supra* note 20, at 950; Finkelstein, *supra* note 20, at 967.

32. See generally *supra* note 20.

33. See Sullivan & Field, *supra* note 7, at 158.

34. See FEINBERG, *supra* note 20, at 35–36; JOEL FEINBERG, HARM TO SELF 176–80 (1986) (discussing effect of consent on wrongfulness).

criminal law to promote the stigmatization of and discrimination against HIV-positive individuals. This is the very stigma and discrimination that statutes such as the Americans with Disabilities Act (under which HIV has been recognized as a disability) were enacted to eliminate, and criminal law should not promote the social harm of unfounded prejudices.<sup>35</sup>

It is likewise inappropriate to use criminal law to punish an HIV-positive individual for the betrayal her partner may feel upon learning she did not disclose her serostatus prior to their sexual activities. An individual might feel (and actually have been) misled regarding her partner's serostatus, or she may believe that her consent was obtained under false pretenses.<sup>36</sup> With some exceptions, such wrongs are generally not considered harms within the scope of criminal law.<sup>37</sup>

A possible exception to this might be to address HIV exposure as a form of rape. Misleading a sexual partner about information that might change the partner's decision to engage in sex may infringe on the partner's sexual autonomy and constitute rape by fraud.<sup>38</sup> Most jurisdictions criminalize rape by fraud in the factum, in which the defendant misleads the victim about the nature of the activity (e.g., that they are engaging in a gynecological exam as opposed to sex), but do not criminalize fraud in the inducement, in which the defendant misleads the victim about the circumstances of the sex (e.g., the defendant's occupation or marital status).<sup>39</sup> Failure to disclose serostatus constitutes fraud in the inducement, and therefore would not fall within the definition of rape in the vast majority of jurisdictions.<sup>40</sup>

Addressing failure to disclose HIV-positive status as a form of rape would therefore require reconceptualizing rape in most jurisdictions. This change may be beneficial; indeed, many scholars have advocated some form of rape by fraud in the inducement offense.<sup>41</sup> But if failure to disclose serostatus should be criminalized as a form of rape by fraud, then it should be included in a broader rape by fraud offense, rather than one that targets only misrepresentations made by HIV-positive individuals. More importantly, this statute should be the product of a broader discussion of what type of misrepresentations or omissions would constitute rape by fraud. Such a discussion must also consider that using serostatus and lack of

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35. See *Bragdon v. Abbott*, 524 U.S. 624 (1998); 28 C.F.R. § 36.104 (2011).

36. See ROBERT KLITZMAN & RONALD BAYER, *MORTAL SECRETS: TRUTH AND LIES IN THE AGE OF AIDS* 49–50 (2003) (discussing individuals who felt betrayed upon finding out their partners were HIV positive and had not disclosed earlier in the sexual relationship).

37. See FEINBERG, *supra* note 20, at 45–51.

38. See STEPHEN J. SCHULHOFER, *UNWANTED SEX* 274–80 (1998); David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 457–75 (2000); Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1120–21 (1986); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 *BROOK. L. REV.* 39, 157–71 (1998); Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 *BUFF. CRIM. L. REV.* 557, 559–60 (2000).

39. See, e.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122, 125 (Cal. Ct. App. 1985) (noting that fraud in the factum negates consent, while fraud in the inducement does not); see also Falk, *supra* note 38, at 157–59.

40. See Bryden, *supra* note 38, at 457–60; Falk, *supra* note 38, at 108–19.

41. See, e.g., SCHULHOFER, *supra* note 38, at 152–59. See generally Estrich, *supra* note 38.

disclosure as a proxy for lack of consent to sex may be problematic, for the same reasons that (as this Article argues in Parts I.D and II.C) using serostatus and lack of disclosure as a proxy for lack of consent to risk is problematic. A context-specific analysis of whether the defendant's failure to disclose her serostatus constituted rape by fraud might be better suited to contend with the context-specific nature of consent to sexual activity. For these reasons, and because the risk-of-transmission justification for HIV-exposure statutes has been the focus of the prevailing scholarly and legislative debate, this Article focuses on risk of transmission as the harm at issue in HIV-exposure offenses.<sup>42</sup>

Twenty-four states have sought to address this risk by creating specific criminal statutes prohibiting certain consensual sexual conduct of HIV-positive individuals that would otherwise be legal, even when it does not result in HIV transmission.<sup>43</sup> While these HIV-exposure laws<sup>44</sup> vary, nearly every statute contains (1) an actus reus requirement that the defendant is HIV-positive and engage in certain prohibited conduct, usually specified sexual activities; (2) a mens rea requirement that the defendant know her serostatus; and (3) a requirement that the defendant's sexual partner must not be aware of the defendant's serostatus.<sup>45</sup> The following Sections argue that the nuances of HIV transmission render these—and any proxies—ill suited to denote actual risk of transmission, mental culpability, and consent to risk.

### *B. Positive Status and Sexual Activities as Actus Reus*

Despite their differences, most HIV-exposure statutes share a common and problematic trait of defining prohibited conduct in terms of whether (1) an individual is HIV-positive and (2) the individual engaged in certain activities.<sup>46</sup> Michigan, for example, prohibits an HIV-positive individual from engaging in “sexual penetration,” which it defines as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body.”<sup>47</sup>

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42. See Galletly & Pinkerton, *supra* note 3, at 328; Grant, *supra* note 3, at 150–56.

43. See *supra* note 2. For detailed analyses of each statute, see CTR. FOR HIV L. & POL'Y, *supra* note 2, at 7–200. See also Lazzarini et al., *supra* note 11, at 248.

44. Although I argue that many of these prosecutions involved no or negligible risk of transmission, I use the term “exposure” to discuss prosecutions and statutes in which the conduct of HIV-positive individuals is criminalized where there is no transmission.

45. This third requirement may be an element of the offense or an affirmative defense. See, e.g., MICH. COMP. LAWS ANN. § 333.5210 (West 2001) (failure to disclose is an element of the offense); MISS. CODE ANN. § 97-27-14(1) (West 2011) (prior knowledge and willing consent to exposure is affirmative defense).

46. Fourteen states prohibit conduct solely on the grounds of status and specific sexual activity: Arkansas, California, Florida, Georgia, Idaho, Louisiana, Michigan, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, South Carolina, and Virginia. An additional five states prohibit specific conduct but require the conduct pose some sort of risk: Illinois, Indiana, Iowa, South Dakota, and Tennessee. Three statutes prohibit an HIV-positive person from “expos[ing]” another to HIV or “transfer[ing]” HIV to another: Maryland, Mississippi, and Washington. For statutes, see *supra* note 2.

47. MICH. COMP. LAWS ANN. § 333.5210.

The focus on prohibiting HIV-positive individuals from engaging in specific activities reflects the prevailing scholarship. Advocates and critics of these statutes alike have generally agreed that criminal law principles support some form of criminal punishment where an HIV-positive individual exposes another to risk of transmission but vigorously debate precisely *which* sexual activities to criminalize.<sup>48</sup> As discussed further in Part II.E.2, this approach has several benefits, such as providing clear notice of the law's requirements.<sup>49</sup> Accepting these arguments, commentators have largely limited their debates to whether specific activities are sufficiently risky to prohibit and whether these prohibitions would be detrimental or beneficial to public health efforts.<sup>50</sup>

Yet statutes defined in terms of status and activities are inherently problematic because of the way HIV is transmitted. HIV is a fragile virus that will die outside the body within minutes.<sup>51</sup> It requires an entrance into the body of another individual in order to be transmitted.<sup>52</sup> This usually occurs through contact with the mucosal membranes that line the vagina or rectum, although it can occur through the urethra, broken skin, and on rare occasions the mouth.<sup>53</sup> When HIV enters the body, transmission is still uncertain because "the virus must infect a sufficient number of target cells to establish an infection."<sup>54</sup>

Because of these requirements, the risk of transmission in a particular sexual activity varies significantly based on numerous factors that are specific to each individual sexual act.<sup>55</sup> These factors include the type of sexual activity; whether penetration is involved and, if so, the type of penetration; whether the individual is

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48. See, e.g., Galletly & Pinkerton, *supra* note 3, at 334 (proposing that legislatures categorize activities according to risk and prohibit activities by category); Grant, *supra* note 8, at 403 (arguing that the criminal law should not prohibit sex with condoms, but should prohibit sex regardless of viral load); Shriver, *supra* note 8, at 350–52; Strader, *supra* note 8, at 446 (proposing a statute that defines certain acts as risky and provides a defense of consent and condom use); Sullivan & Field, *supra* note 7 (advocating for an affirmative duty to disclose serostatus and take precautions); Wolf & Vezina, *supra* note 1, at 879–80 (arguing that criminal statutes should not criminalize activities that comply with public health prevention guidelines).

49. See *infra* Part II.E.2.

50. See, e.g., Galletly & Pinkerton, *supra* note 3, at 334; Grant, *supra* note 8, at 403; Shriver, *supra* note 8, at 350–52 (proposing a statute criminalizing sexual contact that has been medically proven to be a viable means of transfer of HIV, unless partner was aware of defendant's serostatus); Sullivan & Field, *supra* note 7, at 179–94 (advocating for an affirmative duty approach if HIV-exposure is criminalized, but citing concerns that such criminalization's disadvantages outweigh its costs).

51. HIV is much more fragile than the viruses that cause colds or the flu. It is killed by heat, soap and water, household bleach solutions, alcohol, hydrogen peroxide, and the chlorine used in swimming pools. Bleach kills HIV on contact; soap and alcohol require exposure of a few minutes. PINSKY & DOUGLAS, *supra* note 22, at 13.

52. See *id.* at 11.

53. ERIC MYKHALOVSKIY, GLENN BETTERIDGE & DAVID MCLAY, HIV NON-DISCLOSURE AND THE CRIMINAL LAW: ESTABLISHING POLICY OPTIONS FOR ONTARIO 28 (2010); PINSKY & DOUGLAS, *supra* note 22, at 11–12, 32.

54. MYKHALOVSKIY ET AL., *supra* note 53, at 26.

55. *Id.* at 28–35; PINSKY & DOUGLAS, *supra* note 22, at 36–37.

the insertive or receptive partner; the type of fluid involved in the exposure; whether the HIV-positive individual is on antiretroviral therapy (ART) and her viral load; whether either individual has certain sexually transmitted infections (STIs); and whether condoms or other latex barriers are used.<sup>56</sup>

Transmission rates vary significantly between types of sexual activities depending on the amount and type of the bodily fluids and tissues involved. The lining of the rectum, vagina, and urethra are more susceptible to infection than the mouth due to their cell composition.<sup>57</sup> The lining of the rectum is more susceptible than the vagina because it tears more easily.<sup>58</sup> Insertive partners face a smaller risk of transmission than receptive partners because the lining of the urethra comes in contact with less fluid than the vagina or rectum.<sup>59</sup> The type of fluid involved is relevant because blood and semen contain the highest amount of HIV, cervical secretions contain less, vaginal secretions still less, and pre-ejaculatory fluid contains an extremely low level of the virus.<sup>60</sup>

Table 1 demonstrates how these factors dramatically alter transmission risks for unprotected sexual activities.

**Table 1: Per-Act Transmission Rates For A Single Act of Unprotected Sex<sup>61</sup>**

UNPROTECTED SEXUAL ACTIVITY OF UNINFECTED PARTNER	TRANSMISSION RATE
Receptive Anal Sex	65 to 169 in 10,000 (.65% to 1.69%)
Insertive Anal Sex	6 in 10,000 (.06%)
Receptive Vaginal Sex	5 to 9 in 10,000 (.05% to .09%)
Insertive Vaginal Sex	1 to 3 in 10,000 (.01% to .03%)
Fellatio (making oral contact)	4 to 6 in 10,000 (.04% to .06%), some estimates much lower
Fellatio (receiving oral contact)	Theoretical
Cunnilingus (making oral contact)	No estimates—a few cases reported where blood present
Cunnilingus (receiving oral contact)	Theoretical
Anilingus (performing oral contact)	No estimates—only one documented case
Anilingus (receiving oral contact)	Theoretical
Manual Stimulation	No risk unless open sores, then theoretical risk

56. MYKHALOVSKIY ET AL., *supra* note 53, at 28–35; PINSKY & DOUGLAS, *supra* note 22, at 36–37.

57. PINSKY & DOUGLAS, *supra* note 22, at 32.

58. *Id.*

59. *Id.*

60. *Id.* Pre-ejaculatory fluid is also usually produced in smaller amounts than semen. This, combined with its lower viral load, makes transmission via this fluid much less likely than transmission via semen. *Id.*; Jeffrey Pudney, Monica Oneta, Kenneth Mayer, George Seage III & Deborah Anderson, *Pre-Ejaculatory Fluid as Potential Vector for Sexual Transmission of HIV-1*, 340 LANCET 1470 (1992).

61. *See id.* at 32–36.

These transmission rates are far from fixed; even within a particular sexual activity, numerous variables influence the likelihood of transmission. Perhaps most notably, condoms can virtually eliminate the risk of infection by preventing infected bodily fluids from coming into contact with a mucous membrane.<sup>62</sup> When used consistently, condoms reduce the risk of HIV transmission by an estimated 90%, with greater potential effect for perfect use.<sup>63</sup> For example, if there is a per-act risk of .08% for receptive vaginal intercourse and no additional HIV risk factors, in a group of 10,000 women who had unprotected vaginal intercourse with an HIV-positive man, statistics predict that eight women would become infected with HIV; if all 10,000 used a condom, this number would decrease by 90% to one woman. Water-based lubricants further reduce the risk by lowering the risk of condom breakage.<sup>64</sup> Withdrawal before ejaculation can also decrease the risk of transmission.<sup>65</sup> Male circumcision may reduce the circumcised male's risk of transmission by approximately 60% in the context of vaginal intercourse, but the degree to which it reduces risk during anal intercourse is not yet established.<sup>66</sup>

Because the virus must infect a sufficient number of cells to establish an infection, individuals with low viral loads are much less likely to transmit the disease.<sup>67</sup> ART reduces viral load, which reduces the risk of HIV transmission.<sup>68</sup> Although the exact magnitude of the risk reduction is uncertain, a 2009 study found that ART reduced heterosexual transmission by 92%.<sup>69</sup> This reduces a per-act transmission rate of eight in 10,000 for vaginal intercourse to one in 10,000.<sup>70</sup> The Swiss Federal Commission for HIV/AIDS has concluded that HIV-positive individuals who are taking effective ART, have an undetectable viral load for six months, and are free from other STIs are not sexually infectious.<sup>71</sup>

The stage of infection and the presence of STIs also influence transmission risk. The risk of HIV transmission is higher during the first two to three months of infection, referred to as "primary infection."<sup>72</sup> The per-act risk of HIV transmission during primary infection may increase by a factor ranging from eight to forty-three

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62. *See id.* at 37; UNAIDS, MAKING CONDOMS WORK FOR HIV PREVENTION 15–16 (2004); Galletly & Pinkerton, *supra* note 3, at 328.

63. UNAIDS, *supra* note 62, at 15–16; Galletly & Pinkerton, *supra* note 3, at 328.

64. PINSKY & DOUGLAS, *supra* note 22, at 33; J. Anyanti, B. Ali, A. Ankomah, G. Omoregie, A. Adedeji & B. Ofudje, Soc'y for Family Health, XV International AIDS Conference: Reducing Condom Breakage by Using Condom Lubricants: Evidence from Brothel-Based Sex Workers in Nigeria 96–97 (2004).

65. MYKHALOVSKIY ET AL., *supra* note 53, at 31.

66. *Id.* at 32; *see also* Marie-Claude Boily, Rebecca F. Baggaley, Lei Wang, Benoit Masse, Richard G. White, Richard J. Hayes & Michel Alary, *Heterosexual Risk of HIV-1 Infection Per Sexual Act: Systematic Review and Meta-Analysis of Observational Studies*, 9 LANCET 118 (2009).

67. *See* MYKHALOVSKIY ET AL., *supra* note 53, at 26–27, 32.

68. *Id.* at 32–33.

69. *Id.*

70. *Id.*

71. Edwin J. Bernard, *Swiss Experts Say Individuals with Undetectable Viral Load and No STI Cannot Transmit HIV During Sex*, NAM (Jan. 30, 2008), <http://www.aidsmap.com/page/1429357/>.

72. MYKHALOVSKIY ET AL., *supra* note 53, at 34.

compared to the chronic phase of the infection.<sup>73</sup> Advanced HIV has also been associated with a seven- to twenty-fold increase in risk of transmission.<sup>74</sup> The presence of STIs in either partner may also increase the risk of transmission by a factor of 1.5 to five.<sup>75</sup>

Several statutes prohibit conduct that poses negligible risk of transmission. Arkansas and Michigan, for example, criminalize “any . . . intrusion, however slight, of any part of [an HIV-positive individual’s] body or of any object into the genital or anal openings of another person’s body.”<sup>76</sup> This includes the use of sex toys and mutual masturbation, conduct that not only poses no risk of transmission, but is often encouraged as a safe alternative to intercourse.<sup>77</sup> The statutes’ plain terms could include a gynecological exam performed by an HIV-positive physician.<sup>78</sup> Statutes also over-criminalize by failing to reflect factors that mitigate the risk of sexual activities. Only two states explicitly allow the use of condoms to act as a defense,<sup>79</sup> and one state explicitly prohibits the use of condoms as a defense.<sup>80</sup> Although a low or undetectable viral load can significantly reduce risk of transmission, only one state provides for a defense where a defendant’s physician has advised her that she was noninfectious.<sup>81</sup>

While it is tempting to conclude that such statutes simply need to eliminate glaring outliers such as manual stimulation or provide a condom-use defense, these solutions ignore the statutes’ deeper inadequacies. Sexual exposure statutes that define the offense in terms of status and activity are almost inevitably overbroad. The numerous variables that affect risk—often interdependently—make it difficult (if not impossible) to prohibit categories of sexual activities without being overinclusive. For example, an HIV-positive male with a low viral load demonstrated by blood tests may pose little risk of transmission.<sup>82</sup> Yet, if he also

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73. *Id.*

74. *Id.*

75. *Id.* at 34–35. STIs may increase the viral load in bodily fluids such as semen and may increase an individual’s susceptibility to infection. *See id.*

76. ARK. CODE ANN. § 5-14-123(c)(1) (2006); MICH. COMP. LAWS ANN. § 333.5210(2) (West 2001); Galletly & Pinkerton, *supra* note 3, at 329; *see also* Shriver, *supra* note 8, at 324–25, 337–38.

77. *See* Galletly & Pinkerton, *supra* note 3, at 329 (discussing use of sex toys and manual stimulation as risk-free alternatives to intercourse with an HIV-positive person); Shriver, *supra* note 8, at 325–26.

78. *See* Shriver, *supra* note 8, at 325–26 (Arkansas statute could prohibit rectal exams by HIV-positive physicians).

79. *See* CAL. HEALTH & SAFETY CODE § 120291 (West 2006); MINN. STAT. § 609.2241 (West 2009). North Carolina and North Dakota allow the defendant to rely on condom use as a defense, but only if the defendant disclosed her status to her partner. Rather than presenting a new defense, this merely presents an additional hurdle for a defendant seeking to argue consent. *See* 10A N.C. ADMIN. CODE 41A.0202(1)(a) (2011); N.D. CENT. CODE § 12.1-20-17(3) (1997); *see also infra* Parts I.D and I.C (discussing defense of consent to risk or partner’s awareness of the defendant’s status).

80. *See* MO. REV. STAT. § 191.677 (West 2011).

81. *See* IDAHO CODE ANN. § 39-608(3)(b) (2011).

82. *See supra* notes 67–71 and accompanying text (describing impact of viral load on transmission risk).

has other STIs, the amount of the virus in his semen may be greater than the viral load in his blood.<sup>83</sup> At the same time, these factors are irrelevant if he engages in only oral or manual contact with another's genitals or if he is the receptive partner in anal sex because those activities do not involve his semen coming into contact with his partner's mucus membranes. If he is the insertive partner, condom use or withdrawal before ejaculation will also decrease his risk of transmission.<sup>84</sup>

Defining prohibited conduct in terms of status and activity prevents individuals from demonstrating that, despite falling within these categories, their conduct was not sufficiently risky to merit criminalization. In 2008, Iowa resident Nick Rhoades was convicted under a statute prohibiting HIV-positive individuals from engaging in intentional exposure of the body of one person to a bodily fluid of another "in manner that could result" in HIV transmission.<sup>85</sup> Rhoades had sex with a man he met in an Internet chat room without disclosing his serostatus.<sup>86</sup> Iowa's law does not allow finders of fact to consider factors such as the sexual activity, condom use, viral load, and STI presence, as long as a possibility exists of transmission—indeed, Rhoades was convicted despite the fact that he had an undetectable viral load at the time.<sup>87</sup>

Statutes that define prohibited conduct in terms of status and activity are also potentially both overinclusive and underinclusive because our understanding of what creates risk will change as our understanding of transmission changes and as we develop more effective ways of preventing transmission. Factors that affect the risk of transmission are still being discovered, and the means by and extent to which they do so are unresolved.<sup>88</sup> Recent research demonstrates that low or undetectable viral load reduces transmission risk drastically,<sup>89</sup> but how it does this is not yet completely understood, and the extent to which it does will likely increase as ART becomes more effective.<sup>90</sup> New prevention methods, such as substances that can be applied to the genitals to reduce the infectivity of HIV, are currently being developed.<sup>91</sup> As our knowledge of these factors increases and new prevention methods become available, they will change determinations of whether a particular conduct poses a sufficient risk to merit criminalization.

Statutes that define prohibited conduct in terms of status and activity may also be underinclusive because they eliminate the possibility of culpability for

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83. *See supra* notes 72–75 and accompanying text (describing impact of STIs on transmission risk).

84. *See supra* notes 62–65 and accompanying text (describing impact of condoms and withdrawal on transmission risk).

85. *See* IOWA CODE § 709C.1 (West 2003); *see* Breur, *supra* note 15; Stegmeir, *supra* note 14; Waddington, *supra* note 15.

86. *See* Stegmeir, *supra* note 14.

87. *See* IOWA CODE § 709C.1; Waddington, *supra* note 15.

88. *See* MYKHALOVSKIY ET AL., *supra* note 53, at 32–33 (reviewing studies and limitations).

89. *See id.*

90. *See id.*

91. U.S. AGENCY FOR INT'L DEV., FINAL REPORT: MICROBICIDE STAKEHOLDERS MEETING (2010), available at [http://www.usaid.gov/our\\_work/global\\_health/aids/TechAreas/research/final\\_report\\_microbicide\\_meeting112910.pdf](http://www.usaid.gov/our_work/global_health/aids/TechAreas/research/final_report_microbicide_meeting112910.pdf).



cumulative risk. The statistics in Table 1 demonstrate that the probability of transmission in a single sex act may be exceedingly low.<sup>92</sup> Yet this risk can increase across multiple sex acts.<sup>93</sup> The vast majority of transmission cases have required repeated exposure to the virus through multiple acts of intercourse.<sup>94</sup>

Where statutes require that the specified prohibited activities pose some degree of transmission risk, they usually set the bar for risk so low that an HIV-positive individual engaged in prohibited activities cannot escape liability.<sup>95</sup> Illinois and Iowa, for example, prohibit an HIV-positive individual from engaging in conduct with another involving exposure to bodily fluids that *could* result in transmission, potentially allowing prosecution where the defendant engages in conduct that poses only a theoretical risk of transmission.<sup>96</sup> Similarly, Indiana prohibits sexual activity that has been epidemiologically demonstrated to transmit HIV, no matter how improbable.<sup>97</sup> This could prohibit low-risk activities with some chance of infection; indeed, the Indiana Court of Appeals has interpreted it to include oral sex.<sup>98</sup>

### C. Knowledge of Status as Mens Rea

Statutes that criminalize the otherwise legal sexual activity of HIV-positive individuals unduly focus their mens rea requirements on serostatus. Rather than requiring a prosecutor to demonstrate that the defendant intended to infect her partner or recklessly ignored a risk of transmission, most statutes require a prosecutor to demonstrate only a defendant's awareness of her serostatus.<sup>99</sup> This includes within its sweep those without a blameworthy mental state as to transmission while excluding some individuals who are reckless or intend to transmit. It also results in disproportionate punishment by failing to distinguish individuals who intend harm from those who are merely reckless or negligent.

Over half of HIV-exposure statutes require no mens rea other than a defendant's knowledge of her status and intent to engage in the prohibited activity.<sup>100</sup> Because few individuals unintentionally engage in sexual activity, the crux of the mens rea requirement is the defendant's knowledge of her positive status. These statutes seemingly presume a mens rea of recklessness or at least negligence from an

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92. See *supra* Table 1.

93. See Timothy B. Hallett, Colette Smit, Geoff P. Garnett & Frank de Wolf, *Estimating the Risk of HIV Transmission from Homosexual Men Receiving Treatment to Their HIV-Uninfected Partners*, 87 SEXUALLY TRANSMITTED INFECTIONS 17 (2011).

94. See PINSKY & DOUGLAS, *supra* note 22, at 36.

95. Only two states, South Dakota and Tennessee, require the prosecution to demonstrate that the defendant's conduct presents a significant risk of transmission. See S.D. CODIFIED LAWS § 22-18-31 (2006); TENN. CODE ANN. § 39-13-108 (2010).

96. For example, the risk of transmission for an individual receiving cunnilingus is only theoretical. See *supra* Table 1 and accompanying notes.

97. IND. CODE ANN. § 16-41-7-1 (LexisNexis 2011).

98. See *Johnson v. State*, 785 N.E.2d 1134 (Ind. Ct. App. 2003).

99. Fifteen states have such a statute: Arkansas, Florida, Georgia, Idaho, Illinois, Iowa, Indiana, Michigan, New Jersey, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, and Virginia. See *supra* note 2.

100. See *supra* note 2.

individual's awareness of her status and intent to engage in the activity; that is, the statutes seem to presume that one who knows her serostatus is aware of and ignores—or at the very least should have been aware of—a substantial and unjustifiable risk that the prohibited sexual activity will result in transmission.<sup>101</sup>

Knowledge of one's serostatus, however, is a poor proxy for a culpable mental state. As discussed in Part I.B, an individual who is HIV positive does not necessarily—and indeed often will not—pose a substantial and unjustifiable risk of transmission to an individual through sexual conduct. For example, an individual with a low viral load engaging in oral sex may reasonably and correctly believe she poses a negligible risk to her partner.<sup>102</sup> This individual is neither reckless nor negligent. Statutes that focus solely on her awareness of her serostatus will therefore include within their scope individuals who lack culpable mental states.

Using knowledge of serostatus as mens rea is also potentially underinclusive. An individual who is not certain of her serostatus may still strongly suspect she is infected and intend to transmit HIV to others, or may still recklessly risk transmission to others. As argued below in Part II.B, such scenarios are likely to be quite rare; however, they demonstrate that the flaws of using serostatus knowledge as mens rea may cut both ways by excluding conduct that should be included.<sup>103</sup>

Serostatus-focused mentes rea combine with overinclusive actus rei to allow individuals to be held strictly liable for engaging in harmless acts that pose insignificant risks. For example, an individual who knows her serostatus and engages in anal intercourse, but has a low viral load and uses a condom, may reasonably and correctly believe that she poses a negligible risk to her partner.<sup>104</sup> Yet she will be convicted under several statutes regardless of the risk she posed or her culpability as to that risk.<sup>105</sup>

In addition to punishing nonculpable conduct, these statutes impose disproportionate punishment because they fail to distinguish between different mental states. An individual who negligently fails to perceive the substantial and unjustifiable risk she will infect her partner is less blameworthy than an individual who is aware of that risk but recklessly ignores it.<sup>106</sup> Each of these individuals is

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101. See James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 717–18 (2009).

102. See *supra* Part I.B.

103. See *infra* Part II.B.

104. See *supra* text accompanying notes 62–65 (discussing impact of condom use and viral load on transmission risk).

105. See *supra* note 44.

106. See Alan C. Michaels, Note, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 804 (1985) (arguing that unintended murder should be defined by the defendant's state of mind); Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 325–26 (1996) (arguing that culpability depends upon the actor's mental state at the time of the wrongful act and that the actor's choice was freely made) [hereinafter Moore, *Prima Facie*]; Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 237–38 (1994) (arguing that to determine what punishment someone deserves depends upon how much wrong they did, and with what culpability they did that wrong).

less blameworthy than an individual who intends to transmit HIV to her partner.<sup>107</sup> Focusing on awareness of status ignores these critical distinctions.

*D. Awareness of Status as a Proxy for Consent*

Nearly every HIV-exposure statute reflects the principle that partners should be able to consent to risk of harm in intimate relationships.<sup>108</sup> Allowing a defense of consent respects the privacy of sexual relationships and the autonomy of the individuals engaging in them.<sup>109</sup> It also prevents the criminal law from consigning HIV-positive individuals to a life of celibacy.<sup>110</sup> With a defense of consent, HIV-positive individuals are free to undertake any sexual activity as long as partners are aware of the risks involved.<sup>111</sup>

Yet current statutes apply this principle incorrectly because they focus on a partner's awareness of the defendant's serostatus rather than the partner's awareness of actual risk.<sup>112</sup> Knowledge of a partner's serostatus is neither necessary nor sufficient for consent to risk of transmission.<sup>113</sup> An individual may be aware of her partner's status but believe the risk to be lower than it is—for example, where an individual knows her partner is HIV-positive but mistakenly believes her partner is on ART and is noninfectious. An individual may also be unsure of her partner's status and still be aware of the risk of transmission she is incurring, or even believe the risk to be higher than it actually is. For example, she may consent to unprotected sex with a person of unknown status, only to engage in sex with a condom with an HIV-positive individual who is taking ART, has an undetectable viral load, and is STI-free—a risk that may well be lower than unprotected sex with an individual of unknown status.

Over half of these statutes also require an HIV-positive individual to disclose her status in order for her partner to have consented to the risk.<sup>114</sup> While disclosure is evidence of awareness of risk, the two are not coextensive. Disclosure can occur without awareness—for example, if an individual tells his partner he is HIV-positive, but his partner erroneously believes they are using a condom. Awareness can also occur without disclosure—an individual may know her

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107. See Moore, *Prima Facie*, *supra* note 106, at 325–26.

108. With the exception of Maryland's statute, all offenses listed *supra* note 2 provide a defense where a defendant's partner knew the defendant was HIV-positive. See also Galletly & Pinkerton, *supra* note 3, at 333 (disclosure of serostatus implies consent).

109. See Sullivan & Field, *supra* note 7, at 176–77 (banning all sexual conduct of HIV-positive individuals would be unfair to couples who want to continue sexual relationships in spite of risks).

110. See *id.* at 175–77; Gostin, *supra* note 1, at 1053–54.

111. See Shriver, *supra* note 8, at 352 (arguing for mandatory disclosure); Sullivan & Field, *supra* note 7, at 177–78 (criminal law could avoid requiring total abstinence as long as individual disclosed status or took precautions to avoid transmission).

112. See *supra* note 103.

113. See MATTHEW WEAIT, INTIMACY AND RESPONSIBILITY: THE CRIMINALISATION OF HIV TRANSMISSION 175–76 (2007).

114. Arkansas, California, Florida, Georgia, Idaho, Indiana, Michigan, Minnesota, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Virginia, and Washington require disclosure. For statutes, see *supra* note 2.

partner's serostatus and thus some aspects of the risk of sexual conduct without her partner having disclosed it to her, or may be unsure of a partner's serostatus but be aware of the risk of transmission.<sup>115</sup>

### *E. Troubling Messages and Consequences*

This Section demonstrates an additional troubling dimension<sup>116</sup> to statutes' focus on serostatus and activities: they reinforce negative and unsupported stereotypes about individuals living with HIV. By focusing on serostatus and activities as opposed to risk, current statutes send the message that sex with an individual living with HIV is a harm per se, regardless of transmission risk, and that this harm merits the condemnation of criminal law. This message is reflected in and reinforced by harsh and disproportionate sentences for those convicted under HIV-exposure statutes.

Targeting sexual conduct rather than risk of transmission implies that sexual contact with a person living with HIV is in itself harmful, regardless of the risk of transmission. HIV has historically been, and remains, a stigmatized disease.<sup>117</sup> This is in large part because it is sexually transmitted and because it disproportionately affects marginalized groups such as gay men, drug users, sex workers, the poor, and communities of color.<sup>118</sup> Consequently, individuals receiving positive test results often report feeling "worthless" and "dirty."<sup>119</sup> Sex with an individual living with HIV, even without risk of transmission, brings with it the stigma of being less

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115. See WEAIT, *supra* note 113, at 178.

116. It is difficult to determine the scope of the problem of overinclusive prosecutions for many reasons. First, data on HIV-exposure prosecutions is extremely difficult to compile. This is in part because official data on prosecutions for HIV exposure are not compiled. See Lazzarini et al., *supra* note 11, at 244. Researchers must rely on reported decisions and news coverage. See, e.g., *id.* For example, in 2002, Zita Lazzarini, Scott Burris, and Sarah Bray compiled data on prosecutions between 1986 and 2001 using reported decisions and news articles. See *id.* at 244–45 & tbl.2. They identified eighty-four prosecutions based on consensual sex, with a conviction rate of 76.2%. See *id.* This likely under-represents the prosecutions, as most prosecutions in general do not result in reported decisions or press coverage. The second reason the scope of the problem is difficult to determine is that, even where case law or news coverage is available, data relevant to the magnitude of the risk or the mens rea as to transmission is excluded because this data is often irrelevant under the statute. Thus, the statutes' reliance on overinclusive proxies helps obscure the scope of the problem of their overinclusivity.

117. See WEAIT, *supra* note 113, at 129–47; Cameron, *supra* note 4, at 15–16; Grant, *supra* note 3, at 160–64. See generally Gregory M. Herek & John P. Capitanio, *AIDS Stigma and Sexual Prejudice*, 42 AM. BEHAV. SCIENTIST 1130 (1999).

118. See WEAIT, *supra* note 113, at 136–47; Cameron, *supra* note 4, at 13; Grant, *supra* note 3, at 160–62; Sullivan & Field, *supra* note 7, at 142. The stigma of a disease that is transmitted through sexual activity—particularly sexual activity deemed deviant—was illustrated in the film *District 9*, in which a villainous corporation ostracizes the protagonist from his community by reporting that he has a communicable disease he contracted through sex with alien creatures. *DISTRICT 9* (TriStar Productions 2009).

119. See KLITZMAN & BAYER, *supra* note 36, at 18–25; WEAIT, *supra* note 113, at 133–47.

clean and pure.<sup>120</sup> Criminalizing sexual activity regardless of the actual risk it poses uses criminal law's expressive purpose of condemnation to endorse this stigma.<sup>121</sup> It reinforces the perception that sex with an HIV-positive person is a per se harm that merits the censure and punishment of criminal law.

Current statutes reinforce this message by providing a defense where a partner is aware of the defendant's status rather than a defense of consent to risk. Requiring a defendant's partner to be aware of the defendant's positive status implies that the harm that must be consented to is not risk of transmission, but rather sex with an HIV-positive person. This message is reflected in news reports about prosecutions that focus on defendants' failure to disclose their status to a partner rather than risk of transmission as the culpable conduct.<sup>122</sup> In the Rhoades case, Rhoades's partner read a statement to the court in which he characterized the harm done to him by arguing, "I should have had the right to choose whether to be intimate with someone who was HIV positive . . . . Instead, Nick was manipulative and denied me that right."<sup>123</sup>

This message is also reinforced by the disproportionate punishment accorded to HIV-exposure statutes in comparison to other endangerment offenses. Subjecting HIV exposure to harsher penalties than similar risk creation implies that HIV exposure creates a harm in addition to the risk of transmission. Nearly every state with an HIV-exposure statute classifies the offense as a felony.<sup>124</sup> The average maximum prison sentence is over eleven years, and eight states allow sentences of or in excess of fifteen years.<sup>125</sup> In contrast, most reckless endangerment offenses,

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120. See WEAIT, *supra* note 113, at 133–47. The Fair Housing Act recognizes that the stigma of HIV extends to individuals associated with those living with HIV. It protects an individual who is merely associated or believed to be associated with someone living with HIV from discrimination, even if no one believes the individual is HIV-positive. See 42 U.S.C. § 3604(f) (2006).

121. See Grant, *supra* note 8, at 400 (discussing symbolic purpose of criminal law in the context of HIV exposure, and advocating that law send messages consistent with public health policy); Wolf & Vezina, *supra* note 1, at 859 (arguing that statutes' failure to account for safer sex practices suggests underlying message that HIV-positive individuals should be abstinent).

122. See, e.g., Keith Epps, *Keeping HIV Secret Lands Man in Jail: Failure To Inform Girlfriend About Virus Brings 9-Month Sentence in Stafford*, FREE LANCE-STAR, Mar. 27, 2008; Tom Giamboni, *Husband Allegedly Kept HIV a Secret*, MORNING J., Oct. 2, 2010.

123. See Stegmeir, *supra* note 14.

124. Where states do not classify offenses using the terms "felony" and "misdemeanor," I used the general rule in which an offense with a potential period of incarceration exceeding one year is considered a felony. See, e.g., FED. R. EVID. 609(a) advisory committee's note. Of the statutes set forth *supra* note 2, only Maryland and North Carolina classify the offense as a misdemeanor rather than a felony. Even so, conviction under the Maryland and North Carolina statutes can result in up to three years imprisonment and up to two years imprisonment, respectively. MD. CODE ANN., HEALTH-GEN § 18-601.1(b) (LexisNexis 2009); 10A N.C. ADMIN. CODE 41A.0202 (2011).

125. States that have sentence ranges of or in excess of fifteen years are Arkansas (six to thirty years); Idaho (up to fifteen years); Iowa (up to twenty-five years); North Dakota (up to twenty years); Missouri (five to fifteen years); South Dakota (up to fifteen years); Tennessee (up to fifteen years); and Washington (ninety-three to 318 months). ARK. CODE ANN.

which prohibit recklessly engaging in conduct that creates a substantial risk of serious injury or death to another, are classified as misdemeanors with sentences of up to six months or one year.<sup>126</sup>

Below, Table 2 compares the offense level and sentences for states with both endangerment and HIV-exposure offenses. With the exception of Virginia, HIV-exposure offenses are subject to harsher penalties than other risk-creation statutes, sometimes to a startling degree. In North Dakota, for example, HIV exposure is a felony with a potential prison sentence twenty times that of reckless endangerment, which is only a misdemeanor; even a reckless endangerment that demonstrates an extreme indifference to human life is a lesser offense with a maximum penalty of five years, as compared with a potential twenty-year sentence for HIV exposure.<sup>127</sup> In Illinois, HIV exposure that does not result in transmission is subject to a higher penalty than reckless endangerment that results in grave harm.<sup>128</sup>

**Table 2: Comparison of Endangerment Offenses and HIV-Exposure Offenses**<sup>129</sup>

STATE	ENDANGERMENT OFFENSE CLASSIFICATION	ENDANGERMENT OFFENSE SENTENCE	HIV-EXPOSURE OFFENSE CLASSIFICATION	HIV-EXPOSURE OFFENSE SENTENCE
FL	Second Degree Misdemeanor: No resulting harm  First Degree Misdemeanor: Harm results  Third Degree Felony: Harm to minor due to negligently kept firearm	None  Up to one year  Up to five years	Third Degree Felony: First violation  First Degree Felony: Multiple violations	Up to five years  Up to thirty years
GA	Misdemeanor	Up to one year and/or fine of up to \$1000.	Felony	Up to ten years

§ 5-4-401; IOWA CODE § 902.9; N.D. CENT. CODE § 12.1-32-01; MO. REV. STAT. § 558.011; S.D. CODIFIED LAWS § 22-6-1; TENN. CODE ANN. § 40-35-111.; WASH. REV. CODE ANN. §§ 9.94A510, 9.94A.515, 9.94A.550. For HIV statutes generally, see *supra* note 2.

126. See *infra* note 129; see also Cahill, *supra* note 30, at 933.

127. Compare N.D. CENT. CODE § 12.1-20-17 (1997), with N.D. CENT. CODE § 12.1-17-03 (1997).

128. Compare 720 ILL. COMP. STAT. ANN. 5/12-16.2 (West Supp. 2011), with 720 ILL. COMP. STAT. ANN. 5/12-5 (West 2002).

129. See FL. STAT. ANN. §§ 384.34(5), 775.082, 784.05 (West 2001); GA. CODE ANN. § 16-5-60(b), 17-10-3(a)(1) (2007); 720 ILL. COMP. STAT. 5/5-4.5-35, 5/5-4.5-40, 5/5-4.5-45, 5/5-4.5-50, 5/5-4.5-55, 5/12-5 (West 2002); IND. CODE ANN. §§ 35-42-1-9, 35-42-2-2(b), 35-50-2-6, 35-50-2-7, 35-50-3-3 (2004); N.D. CENT. CODE §§ 12.1-17-03, 12.1-32-01 (1997); TENN. CODE ANN. §§ 39-13-103, 39-13-109, 40-35-111 (2010). For HIV-exposure statutes, see *supra* note 2.

IL	Class A Misdemeanor  Class Four Felony: Grave harm results	Up to one year  One to three years	Class Two Felony	Three to seven years and/or a fine of up to \$25,000.
IN	Class B Misdemeanor  Class D Felony: Deadly weapon or aggressive driving that results in harm  Class C felony: Discharging firearm into an inhabited dwelling or place where people likely to gather, or aggressive driving and results in death	Up to 180 days and/or \$1000 fine  Six months to three years  Two to eight years and/or fine of \$10,000	Class B Misdemeanor: Recklessly fails to comply with statute  Class D felony: Knowingly or intentionally fails to comply with statute	Up to 180 days and/or \$1000 fine  Six months to three years and/or \$10,000 fine
ND	Class A Misdemeanor  Class C Felony: Demonstrated an extreme indifference to life	Up to one year and/or fine of up to \$2000  Up to five years and/or fine of up to \$5000	Class A Felony	Up to twenty years and/or fine of up to \$10,000
TN	Class A Misdemeanor  Class E Felony: Involves deadly weapon	Up to 11 months, 29 days and/or fine of up to \$2000  Up to six years, no less than one and/or fine up to \$3,000	Class C Felony	Three to fifteen years and/or fine of up to \$10,000

While prosecutors have compared violations of HIV-exposure statutes to “playing Russian Roulette” with the life of another,<sup>130</sup> an individual who actually plays Russian Roulette with another may be subject to more modest penalties.<sup>131</sup> Yet firing a revolver with one round in it poses a one in six chance of serious physical harm or death, and many of the prohibited activities in HIV-exposure statutes pose a risk of transmission far less than one in 1000.

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130. See, e.g., Cassidy Friedman, *Sallee Sentenced for Trying to Spread HIV*, THE TIMES-NEWS (Twin Falls), Jan. 5, 2007; Deb Gruver, *Sergeant Found Guilty in HIV-Sex Case*, WICHITA EAGLE, Jan. 20, 2011; Katie Thomas, *Equestrian Is Facing H.I.V.-Related Felony Charge*, N.Y. TIMES, Apr. 12, 2010, at A12.

131. In Florida, reckless endangerment is only a misdemeanor with no prison sentence, even if it results in harm. In North Dakota, reckless endangerment manifesting an extreme indifference to human life is a Class C felony with a sentence of up to five years imprisonment, while HIV exposure is a Class A felony with a sentence of up to twenty years imprisonment. In Tennessee, reckless endangerment involving a deadly weapon is a Class E felony, compared to the Class C felony of HIV exposure. For statutes, see *supra* notes 2 and 129.

Punishing HIV exposure more severely than we punish comparable risks distinguishes it as an exceptional harm, and increases the stigma associated with an already stigmatizing disease. It implies that the harm of exposure is particularly abhorrent, beyond other serious physical harms. This may reflect the underlying belief that the conduct itself is harmful beyond the risk of transmission because sexual conduct with a person living with HIV makes one unclean, while exposing one to the stigma and discrimination of being associated with a person living with HIV. Likewise, one who consents to sex with an HIV-positive individual is no longer protected by criminal law, even if the risk of transmission was greater than what she believed it to be.

In sum, current HIV-exposure statutes are overinclusive, result in disproportionate punishment, and send troubling messages about HIV transmission and individuals living with HIV. Part II proposes an alternative framework that shifts the focus from proxies of serostatus and sexual activity to risk of transmission, culpability as to transmission, and degrees of consent. This framework would mitigate many of these problems, provide a fairer and more accurate means of targeting truly wrongful behavior, and provide finders of fact with more freedom and better guidance to consider the nuances and ambiguities of intimate sexual relationships.

## II. TARGETING UNASSUMED RISK

### A. Risk-Based Statutes for a Risk-Based Offense

Not every risk of harm merits criminalization. Several everyday actions cause harm to another, and almost every action risks harming another.<sup>132</sup> My boarding a subway car while suffering a head cold puts other passengers at risk of becoming ill. Even the most careful and skilled driving puts pedestrians at risk of serious injury or death. Yet such conduct is not criminalized because the risk at issue is not of sufficient magnitude or, if it is, its magnitude is outweighed by the interests in allowing the conduct that creates it.<sup>133</sup> Determining whether a risk is substantial and unjustifiable such that it merits criminalization requires weighing the gravity of the potential harm, its probability, and the interests at stake in allowing the conduct that creates the risk.<sup>134</sup>

It is a widely accepted principle that risk of harm must reach a threshold magnitude to merit criminalization; the degree of gravity and probability must make the risk substantial.<sup>135</sup> The greater the gravity of the risk, the lower the

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132. See FEINBERG, *supra* note 20, at 190; Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 372 (2003).

133. See Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599, 606 (1998) (“The prevention of minor and insignificant risks does not merit the heavy hand of the criminal sanction.”); Robinson, *supra* note 132, at 372.

134. See FEINBERG, *supra* note 20, at 187–93; Robinson, *supra* note 132, at 372.

135. See HUSAK, *supra* note 17, at 161–62 (arguing that risk should not be criminalized unless it is substantial); Robinson, *supra* note 132, at 372; see also FEINBERG, *supra* note 20, at 188–90; Duff, *supra* note 20, at 952–54; Husak, *supra* note 133, at 606. The Model Penal



probability may be for the risk to warrant criminalization; we require a smaller probability to justify criminalizing a risk of death than we would to justify criminalizing a risk of minor injury.<sup>136</sup> But criminalizing conduct that risks death may still be unwarranted if the probability of death is negligible.<sup>137</sup>

Similarly, conduct that risks HIV transmission should not be criminalized unless the probability of transmission reaches a certain threshold that makes the risk substantial. While the harm of HIV infection is significant, it does not follow that any probability of transmission merits criminalization. Otherwise, the state should prohibit any individual from engaging in sexual activity unless she first confirms that she is not HIV-positive.<sup>138</sup> Where an individual is HIV-positive, some sexual activities (such as manual stimulation) categorically involve such minimal risk that they do not merit criminalization.<sup>139</sup> The remaining activities require an individualized inquiry that includes all relevant risk factors.

Prohibiting only conduct that creates a substantial risk of transmission resolves much of the overinclusive nature of current statutes. Statutes that prohibit conduct based on status and activity necessarily include insubstantial risk because the numerous variables that influence HIV transmission make it difficult, if not impossible, to distinguish activities that categorically involve substantial risk.<sup>140</sup> Even those statutes that specify a certain level of risk almost uniformly set this

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Code implicitly reflects this judgment—an individual cannot be reckless or negligent unless he disregards a *substantial* risk, and the Code provides a defense for de minimus harm or risk. See MODEL PENAL CODE §§ 2.03, 2.12(2) (1962).

136. See FEINBERG, *supra* note 20, at 187–93; Robinson, *supra* note 132, at 372.

137. See FEINBERG, *supra* note 20, at 187–93; Robinson, *supra* note 132, at 372. There is also an argument that conduct should be prohibited where a defendant perceives a substantial and unjustifiable risk and engaged in conduct regardless, even where the defendant was wrong and no risk existed. See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 171–97 (2009); Cahill, *supra* note 30, at 890–922 (arguing that there is no good reason to reject an offense of attempted reckless homicide); Finkelstein, *supra* note 20, at 963–64. One way to accomplish this is by criminalizing *attempted* risk creation, even when, unbeknownst to the defendant, the attempt cannot succeed. See Cahill, *supra* note 30, at 889 (discussing attempted risk creation); Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 484 n.119 (1990) (same). In order to limit this Article to manageable size, attempts that are thwarted by impossibility are beyond the scope of this Article.

138. This would be complicated by the fact that there is a “window period” in which individuals who have recently been infected do not test positive for the virus. See Joanne D. Stekler, Paul D. Swenson, Robert W. Coombs, Joan Dragavon, Katherine K. Thomas, Catherine A. Brennan, Sushil G. Devare, Robert W. Wood & Matthew R. Golden, *HIV Testing in a High-Incidence Population: Is Antibody Testing Alone Good Enough?*, 49 CLINICAL INFECTIOUS DISEASES 444, 444 (2009). The duration of this window period can last weeks to months, depending on the test used. To have a negative test result and ensure its accuracy to the best of her ability before engaging in sexual activity, an individual would have to have been abstinent for the duration of the window period after her last sexual encounter. See also W. Thomas Minahan, *Disclosure Before Exposure: A Review of Ohio’s HIV Criminalization Statutes*, 35 OHIO N.U. L. REV. 83, 90 (2009).

139. See *supra* Part I.B.

140. See *supra* Part I.B.

threshold far below substantial risk.<sup>141</sup> Limiting criminal liability to substantial risk requires finders of fact to consider the numerous interdependent factors that influence the degree of risk inherent in the defendant's conduct. The probability that sexual activity will transmit HIV varies widely depending on factors such as the type of sexual activity, whether there is emission of semen, whether the defendant is the insertive or receptive partner, the use of a condom, the viral load of the HIV-positive individual, and the presence of other STIs.<sup>142</sup>

Even if a risk is substantial, criminalization is not warranted unless the risk is also unjustifiable. Every voluntary activity has some value for an individual who engages in it that must be weighed against the magnitude of the risk.<sup>143</sup> Even careful driving in hazardous conditions at night may create a substantial risk of death to other individuals, but the state does not criminalize this activity because of the interests in such driving. Rather than categorically prohibit driving in certain weather conditions, states prohibit reckless driving—that is, driving that creates a substantial and unjustifiable risk.<sup>144</sup> HIV-exposure statutes should require a similar calculus, allowing defendants to present evidence that even substantial risks were justified.

While advocates of HIV-exposure statutes may argue that a serious impairment to health is a much greater harm than simply forgoing sexual activity, this comparison fails to capture the breadth and depth of the interests at issue. The type of interests and their value varies considerably depending on several factors unique to each individual circumstance. These interests may include physical gratification, companionship, economic stability, and procreation.<sup>145</sup> Even those who argue that the law should prohibit an HIV-positive individual from engaging in consensual sexual activity where the uninfected partner is aware of her status and consents to the risk have acknowledged that a potential exception should be made in cases where partners seek to procreate.<sup>146</sup> The value placed on procreation as opposed to sexual activity may, in part, explain why states do not prosecute HIV-positive women for mother-to-child exposure in utero or childbirth, even though the risk of vertical transmission is usually far higher than the risk of transmission through sexual activity.<sup>147</sup>

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141. Illinois and Iowa prohibit activity that could transmit HIV, Indiana prohibits activity that has been epidemiologically demonstrated to transmit HIV, regardless of the probability, and Washington and Mississippi criminalize “exposure,” without clarifying if this must reach a certain threshold probability. Only two states, South Dakota and Tennessee, require the prosecution demonstrate that the conduct “presents a significant risk of HIV transmission.” For statutes, see *supra* note 2.

142. See *supra* Part I.B.

143. See FEINBERG, *supra* note 20, at 191; Robinson, *supra* note 132, at 372.

144. See, e.g., COLO. REV. STAT. ANN. § 42-4-1401 (West 2004); N.J. STAT. ANN. § 39:4-96 (West 2002); N.Y. VEH. & TRAF. LAW § 1212 (McKinney 2011). States do, however, use proxy-based rules to prohibit some types of reckless driving, most notably driving under the influence of intoxication. The argument that rules are similarly appropriate with regard to HIV exposure is addressed in Part II.E.2.

145. See Sullivan & Field, *supra* note 7, at 175–76 (discussing value of individual interest in continuing intimate relationships).

146. See Baker, *supra* note 25, at 114.

147. Where a pregnant woman takes effective ART and takes other precautions such as

Where the statute at issue criminalizes sexual conduct without disclosure of serostatus, the fact finder should also consider the defendant's interests in non-disclosure.<sup>148</sup> An HIV-positive individual may have significant interests in keeping her serostatus private. Individuals who disclose their status to others have no control over subsequent disclosures by others and often find themselves ostracized from their communities, turned away from their homes, and isolated from their families and children.<sup>149</sup> Some who disclose their status face the prospect of domestic violence.<sup>150</sup>

Statutes that explicitly prohibit substantial and unjustifiable risk creation allow juries to consider these factors and determine whether an individual's specific conduct merits criminalization. For example, a statute might prohibit an individual from "engaging in conduct that creates a substantial and unjustifiable risk of transmission." While the meaning of "substantial and unjustifiable" is open to the interpretation of the jury, the statute could provide guidance to juries in interpreting the phrase "substantial and unjustifiable." Based on the Model Penal Code text, Paul Robinson has suggested that a risk is substantial and unjustifiable if "given its nature, degree, and circumstances, its creation is a deviation from the standard of care of a reasonable person."<sup>151</sup>

Defining criminal conduct in terms of substantial and unjustifiable risk of infection also eliminates many of the troubling messages of current statutes described in Part I.D. Unlike status- and activity-based statutes, criminalizing risk does not imply that sex with an HIV-positive individual poses a separate harm distinct from transmission risk. Drafting a statute to target risk makes clear—at

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cesarean surgery prior to the rupture of membranes, transmission rates average 1–2%, a higher rate than most sexual activity. While the risk will vary with each pregnancy, such a risk of transmission for women who do not take ART and other precautions is on average 25%. See Centers for Disease Control and Prevention, *Achievements in Public Health: Reduction in Perinatal Transmission of HIV Infection—United States, 1985–2005*, 55 MORBIDITY & MORTALITY WKLY. REP. 592 (2006).

148. While Larry Gostin has rejected the criminal law as an appropriate response to HIV, he and James Hodge argue that the interest in avoiding an imminent threat of transmission is greater than the interest in privacy. See Lawrence O. Gostin & James G. Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 66–67 (1998); see also RONALD BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH 230 (1989); Amitai Etzioni, *HIV Sufferers Have a Responsibility*, TIME, Dec. 13, 1993, at 100. Scott Burris and South African Constitutional Court Justice Edwin Cameron argue that issues of rights of privacy, autonomy, and self-expression weigh against regulating sexual exposure except in rare circumstances of significant culpability. Burris & Cameron, *supra* note 4, at 579; see also David L. Chambers, *Gay Men, AIDS, and the Code of the Condom*, 29 HARV. C.R.-C.L. L. REV. 353, 378–79 (1994).

149. See Wolf & Vezina, *supra* note 1, at 873–74; KLITZMAN & BAYER, *supra* note 36, at 104–06, 108–14.

150. See KLITZMAN & BAYER, *supra* note 36, at 38; Burris & Cameron, *supra* note 4, at 580; Cameron, *supra* note 4, at 11.

151. Robinson, *supra* note 132, at 377.

least to a greater extent than activity-based statutes—that activity is criminalized only because of and to the extent that it poses a risk of transmission.<sup>152</sup>

Criminalizing only substantial and unjustifiable risk has a benefit that is particularly valuable in the context of an offense based on emerging medical science: it allows the law to adjust to changing knowledge. The offense can adapt to new evidence regarding HIV transmission, new prevention methods, and more successful HIV treatments. This is particularly important in light of the way recent research and more effective ART have drastically changed our understanding of transmission risks for individuals with low viral loads.<sup>153</sup> Research concluding that certain individuals on successful ART without STIs are noninfectious was published as recently as 2008, and the impact of viral load on transmission is not yet entirely understood.<sup>154</sup> This impact is also likely to change as ART becomes more effective at reducing viral load. Advances in prevention measures, such as microbicides and additional barrier methods, will affect transmission risk.<sup>155</sup> More effective HIV treatment may also change the severity of the underlying harm of HIV infection. Just as HIV is no longer the death sentence it was twenty-five years ago, it will likely become a much less serious condition as treatments and prognoses improve.<sup>156</sup> A statute that prohibits substantial and unjustifiable risk allows courts to consider all of this evidence.

Prohibiting conduct based on risk also better addresses the potential underinclusiveness of current statutes by allowing courts to consider cumulative risks. The fact that most transmission requires multiple acts of intercourse supports the possibility that the risk of a single sex act might be too remote and speculative to justify criminalization. Yet cumulative risks across multiple sexual acts may pose a risk of sufficient magnitude to justify criminalization.

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152. There is nothing about the harm of HIV transmission that merits an exception to the principle that risks should be substantial and unjustifiable to merit criminalization; indeed, such an exception would be inconsistent with the policy goal of eliminating the stigma of HIV and discrimination against individuals based on their HIV status. *See* Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 285 (1987) (discussing purpose of Rehabilitation Act to eliminate discrimination based on mythology associated with stigmatized communicable disease).

153. *See* Grant, *supra* note 8, at 400–01 (discussing how advancements in ART have allowed lower viral loads, and the impact this has on the risk of transmission is considered significant enough to merit criminalization).

154. *See* MYKHALOVSKIY ET AL., *supra* note 53, at 32–33; Bernard, *supra* note 71.

155. *Cf.* Sullivan & Field, *supra* note 7, at 185–86 (noting, in 1988, that ordinary condoms might not be considered sufficient prevention methods in the future if better condoms were available).

156. For example, scholarship written before advances in ART often equated HIV transmission as causing death. These articles discussed the potential for liability for murder or attempted murder and questioned the usefulness of assault and endangerment statutes because they were not offenses associated with causing death. *See, e.g.,* Sullivan & Field, *supra* note 7, at 169.

*B. Limiting Criminalization to Culpable Mental States*

HIV-exposure statutes should require mental culpability with regard to transmission.<sup>157</sup> An individual who creates a substantial and unjustifiable risk of harm may have varying levels of culpability with respect to that harm.<sup>158</sup> Holding an individual strictly liable for risk would unfairly criminalize a host of conduct based solely on her serostatus. HIV-exposure statutes should require a culpable mental state with respect to the ultimate harm at issue: HIV transmission.

The Model Penal Code defines four different types of *mentes reae*, which have been adopted by several states in some form: purposely, knowingly, recklessly, and negligently.<sup>159</sup> In the context of HIV transmission, a *mens rea* of “purposely” would require that it is the defendant’s object to cause another to contract HIV.<sup>160</sup> A mere suspicion that transmission might occur, or even a belief that it will occur, would be insufficient if transmission is not the defendant’s conscious object.<sup>161</sup> A *mens rea* of “knowingly” would require that the defendant is practically certain that her conduct will cause HIV transmission to another.<sup>162</sup> These two *mentes reae* are likely to be the most rare and difficult to prove. Few individuals desire to harm their sexual partners by transmitting HIV to them, and if an individual is even marginally familiar with the low probability of transmission, she will not be “practically certain” that transmission will result through her conduct.<sup>163</sup> Recklessness under the Model Penal Code would require an individual to be aware of, and consciously disregard, a substantial and unjustifiable risk that her conduct would result in HIV transmission.<sup>164</sup> Negligence does not require awareness of this risk; it is sufficient that the individual *should* be aware of a substantial and unjustifiable risk her conduct will result in transmission.<sup>165</sup>

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157. See Cahill, *supra* note 30, at 936–37; HUSAK, *supra* note 17, at 174–75. In the context of attempt offenses prevented by factual impossibility, an individual need only have the requisite culpability for attempt and need not have created an actual risk. The specific intent to cause the result, or belief the result will occur, is generally required for an offense of attempt. See MODEL PENAL CODE § 5.01 (1962); Cahill, *supra* note 30, at 896–907. This would be more straightforward in a statute that punished transmission—an individual could be convicted of attempted transmission if she intended to transmit but failed because it was impossible to do so (if, for example, she mistakenly believed she was HIV positive). However, in risk-creation statutes, attempt and factual impossibility analysis is somewhat more confusing and is beyond the scope of this Article. See PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 161–64 (1997); Cahill, *supra* note 30, at 889; Simons, *supra* note 137, at 484 n.119.

158. Cf. Robinson, *supra* note 132, at 375 (arguing that, under the Model Penal Code, one can create a substantial and unjustifiable risk but not necessarily do so with a *mens rea* of “recklessly”).

159. See MODEL PENAL CODE § 2.03(2) (1985).

160. See *id.*

161. See *id.*

162. See *id.*

163. See Gostin, *supra* note 1, at 1042; Sullivan & Field, *supra* note 7, at 179.

164. See MODEL PENAL CODE § 2.03(2).

165. See *id.*

Most HIV-exposure statutes do not require the prosecution to prove a mens rea as to the harm of transmission. As discussed in Part I.C, several states require only an individual's knowledge of her serostatus, with perhaps an additional requirement that she understand that sexual activity may cause transmission.<sup>166</sup> This knowledge alone serves as proof of a mens rea of recklessness or perhaps merely negligence; the statutes seem to presume that an individual is aware of and ignores—or at the very least should be aware of—a substantial and unjustifiable risk that the prohibited conduct will result in HIV transmission.

This presumption is unwarranted. An individual cannot be reckless without some awareness of the substantial and unjustifiable risk her conduct poses. As discussed in Part I.B, an individual who is HIV positive does not necessarily—and indeed often will not—pose a substantial and unjustifiable risk of transmission to an individual through sexual conduct.<sup>167</sup> A reasonable but mistaken belief can also affect mental culpability. For example, if an individual falsely believes she has an undetectable viral load, this factor affects the determination of whether she was aware of a substantial and unjustifiable risk. The reasonableness of her belief is relevant to determining whether she was negligent.

Rather than using this proxy, legislatures should explicitly require a mental state as to transmission. For example, legislatures that determine that reckless conduct should be criminally liable should require the prosecutor to demonstrate that the defendant ignored a substantial and unjustifiable risk of transmission.<sup>168</sup> Finders of fact could then consider factors such as whether the defendant was aware of her serostatus and her understanding of how HIV is transmitted. This would allow, for example, a defendant to argue that she believed that her viral load was undetectable, or that she has a mental defect that prevents her from understanding her transmission risk. In contrast, legislatures may determine that individuals should only be prosecuted if they demonstrate intent to transmit the virus, an approach that has been taken in three states.<sup>169</sup> An individual's knowledge of her serostatus, condom use, or low viral load, may be relevant to the question of whether she intended to infect her partner.<sup>170</sup>

Requiring a mens rea of recklessness or negligence not only remedies the problem of overinclusive legislation but also remedies a potential gap in current legislation. HIV-exposure statutes that define mens rea in terms of knowledge of serostatus do not allow prosecution of individuals who act recklessly without knowing their serostatus. Arguably, an individual may be unaware of her serostatus

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166. *See supra* Part I.C.

167. *See supra* Part I.B.

168. *See* MODEL PENAL CODE § 2.03(c) (defining “recklessly” as conscious disregard of a substantial and unjustifiable risk).

169. California, Oklahoma, and Washington require an intent to transmit or inflict bodily harm. Virginia requires this intent for a felony conviction, but allows misdemeanor conviction where the defendant was aware of her positive serostatus. For statutes, see *supra* note 2.

170. *See, e.g.,* State v. Richardson, 209 P.3d 696 (Kan. 2009) (defendant's low viral load evidence of lack of intent to transmit).

and yet understand that there is a significant possibility she is HIV positive and engaging in activity that poses a substantial risk of transmission.<sup>171</sup>

Criminalizing the conduct of such individuals raises the concern that prosecutors and juries will target unpopular communities that are more likely (or merely perceived as more likely) to fall into this category. For example, a jury may conclude that an individual who engages in unprotected anal sex should be aware of a risk that he is HIV positive and poses a risk to other partners.<sup>172</sup> This conclusion is likely to disproportionately affect gay men.<sup>173</sup> But fair application of the substantial and unjustifiable risk standard should mitigate this concern because individuals are extremely unlikely to be liable if they do not know their serostatus.<sup>174</sup> In order to demonstrate that an individual who did not know her serostatus was reckless, a prosecutor must prove that the risk the individual was aware of is substantial and unjustifiable. For example, if an individual believed there was a 50% chance she was HIV positive, and her conduct posed a .5% risk of transmission, the prosecutor must demonstrate that the risk the defendant was aware of—a .25% chance of transmission—was substantial and unjustifiable.

This Article argues that statutes should require a mens rea as to transmission; it does not provide a conclusion as to what that mens rea should be. Whatever mens rea a statute requires, however, the offense should punish HIV exposure only to the extent that the criminal code punishes similar risks with similar mentes reae. This eliminates the problematic nature of current statutes, which generally afford much harsher punishments for conviction under HIV-exposure statutes than other statutes involving risk creation.

### *C. Limiting Criminalization to Unassumed Risk*

#### 1. Consent to Risk Should Preclude Liability

Consent plays a fickle role in criminal law. Consent can be, in Heidi Hurd's words, "morally magical," eliminating or reducing a defendant's culpability.<sup>175</sup> The transformative effect of consent is most obvious where lack of consent is an explicit element of the crime, most notably in sexual assault.<sup>176</sup> Consent may also be an implicit defense to a crime. An incursion is only trespass when an individual

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171. See Eric L. Schulman, Note, *Sleeping with the Enemy: Combatting the Sexual Spread of HIV-AIDS Through a Heightened Legal Duty*, 29 J. MARSHALL L. REV. 957, 987–89 (1996) (discussing constructive awareness of serostatus).

172. See Gostin, *supra* note 1, at 1051–52.

173. See *id.*; see also Amy L. McGuire, Comment, *AIDS as a Weapon: Criminal Prosecution of HIV Exposure*, 36 HOUS. L. REV. 1787, 1797 (1999).

174. See Baker, *supra* note 25, at 108 (arguing that an individual must have actual knowledge that she has HIV in order to know she poses a substantial and unjustifiable risk to others).

175. Heidi M. Hurd, *The Moral Magic of Consent*, in 2 LEGAL THEORY 121, 140 (1996); see also VERA BERGELSON, VICTIMS' RIGHTS AND VICTIMS' WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW 99 (2009).

176. See, e.g., ALA. CODE § 13A-6-61 (2011); CAL. PENAL CODE § 261 (West 2011).

is “not licensed or privileged” to enter the property—a consented-to incursion is a visit.<sup>177</sup>

It is often unclear what effect consent to risk of a bodily injury such as HIV transmission has on criminal culpability.<sup>178</sup> Although consent can eliminate liability—boxing and tandem sky-diving are legal if the “victim” has given consent—it is not clear whether and when it does so. The Model Penal Code, for example, allows consent to act as a defense for offenses that cause or threaten serious bodily harm where “the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.”<sup>179</sup> Though the parameters of this defense are far from clear, it has been adopted in whole or in part by several criminal statutes.<sup>180</sup>

Individuals should not be criminally liable for engaging in sexual activity that poses a risk of HIV transmission if their partners have consented to that risk.<sup>181</sup> Where a partner has consented to a risk of transmission, state regulation subjects both parties to excessive intrusion into consensual sexual relations.<sup>182</sup> Criminalization would prohibit a valuable and intimate part of relationships for serodiscordant couples, potentially consign HIV-positive individuals to a life of celibacy, and interfere with couples’ ability to procreate.<sup>183</sup> It is also difficult to justify prohibiting consensual sexual relations in which a partner is aware of the risk of a chronic disease while allowing individuals to consent to dangerous sports that risk serious physical harm and death, such as B.A.S.E. jumping, rodeo, or boxing.<sup>184</sup>

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177. MODEL PENAL CODE § 221 (1962); *see also* Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503, 504 (2005).

178. In tort law, consent to a risk is termed “assumption of the risk,” and may eliminate liability if the individual consented to the specific risk at issue. Assumption of the risk is a form of consent—it is consent to undertake a certain risk of harm. *See* BERGELSON, *supra* note 175, at 97; Hurd, *supra* note 177, at 509; Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1770–71 (2007) (discussing meaning of “assumption of risk”).

179. MODEL PENAL CODE § 2.11(2)(a).

180. *See* BERGELSON, *supra* note 175, at 18, 172–73 n.61 (outlining statutes).

181. *See* Gostin, *supra* note 1, at 1054.

182. *See id.*; Sullivan & Field, *supra* note 7, at 168, 173–74 (arguing the government should use greater restraint in policing intimate activity).

183. *See* Gostin, *supra* note 1, at 1054; Sullivan & Field, *supra* note 7, at 168, 173–74; *see also* Baker, *supra* note 25, at 114 (acknowledging that criminalization of sex where partner consents to risk could inhibit procreation). *But see* Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111, 127–30 (2010) (describing feminist literature arguing that perhaps the desire for intimacy and love can lead to situations in which the law ought not to respect a harmful choice made out of love); Matthew Weait, *Harm, Consent and the Limits of Privacy*, 13 FEMINIST LEGAL STUD. 97, 102–04 (2005) (discussing feminist objections to autonomy-based arguments for allowing harmful sexual acts).

184. *See* BERGELSON, *supra* note 175, at 15; Sullivan & Field, *supra* note 7, at 168 (arguing that the Model Penal Code approach is flawed if it does not allow a defense of informed consent). *But see* Baker, *supra* note 25, at 104–14. It is not clear whether the



The defense that a partner was aware of the defendant's status demonstrates that legislatures generally agree that it is improper to prohibit serodiscordant couples from engaging in sexual relationships where the uninfected partner understands the risk of transmission and assumes it.<sup>185</sup> Similarly, scholarship on this issue almost universally agrees that criminalization is inappropriate where there is such consent.<sup>186</sup> The next Section proposes an approach to consent that differs from current HIV-exposure statutes and scholarship in the application of this principle.

## 2. Consent to Degree of Risk Should Preclude Liability

Consent to risk is a matter of degree. In every activity there is always *some* risk of an unwanted consequence. Yet consenting to a certain activity does not mean one is consenting to *any* degree of risk. In the context of sexual conduct, an individual always consents to some risk, however remote, of HIV transmission. Burris and Cameron argue that "rational people operating with genuine autonomy should recognize exposure as a normal risk of sexual behavior."<sup>187</sup> Yet the degree of risk a person recognizes will differ depending on the information available to her and the context of the relationship. She decides whether to engage in the activity by assessing the risk of transmission given her knowledge of her partner, the type of sexual activity at issue, the use of condoms, and other relevant factors, then weighing this risk against her interests in the sexual activity.

Because individuals should not be liable for risk to which their partners consent, criminalization is not appropriate unless there is a difference between the degree of risk to which an individual consents and the degree of risk to which she is actually exposed. If an individual consents to a 0.2% risk of transmission, and there is actually a 2% risk of transmission, she did not consent to the full risk of transmission to which she was exposed. This approach is consistent with the principle that only wrongful harms should be criminalized, and an injury is not wrongful to the extent the victim consented to it.<sup>188</sup> For example, if an individual consents to the defendant piercing her ear once, but the defendant pierces her ear

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Model Penal Code would allow consent to serve as a defense because it is not clear whether consensual sexual conduct would fall within the Model Penal Code definition of a "concerted activity not forbidden by law." MODEL PENAL CODE § 2.11; BERGELSON, *supra* note 175, at 21. Dennis J. Baker argues that one cannot consent to something that violates human dignity, such as a substantial risk of serious and irrevocable bodily harm, and uses HIV transmission as a specific example. *See Baker, supra* note 25, at 104–14. Baker distinguishes risks that come with some social value and those that do not, distinguishing risk of harm through sexual exposure that will result in procreation from sexual exposure for the sake of sex. *See id.* at 114. While the amount of value inherent in sexual gratification is arguable (and variable), there is no reason to consider it minimal compared to other conduct that involves risk of serious bodily harm. Baker, for example, would allow consent to cosmetic surgery or sports, despite their risk of harm. *See id.* at 118–19.

185. Of the statutes cited *supra* note 2 of this Article, only Maryland does not indicate that a partner's awareness of status is a defense. *See also* BERGELSON, *supra* note 175, at 23 (discussing consensual transmission of HIV to those who want to become HIV positive).

186. *See, e.g., Sullivan & Field, supra* note 7, at 168–69; Shriver, *supra* note 8, at 350–51. *But see Baker, supra* note 25, at 104–14.

187. Burris & Cameron, *supra* note 4, at 579.

188. *See* BERGELSON, *supra* note 175, at 63–64 (discussing consent).

twice, then only the unconsented-to injury—the second piercing—is wrongful.<sup>189</sup> Similarly, in the context of risk, the relevant risk for determining a defendant's liability is the risk that exceeds that to which the victim consented.

Criminal liability is also inappropriate unless the unassumed risk is substantial and unjustifiable. As argued in Part II.C.1, individuals should not be criminally liable for exposing their partners to risk of transmission if that risk is insubstantial or justifiable.<sup>190</sup> Nor should individuals be criminally liable for a risk of transmission to which their partners consent. It follows that the unassumed risk must be substantial and unjustifiable to merit criminalization.

Statutes should also limit criminal liability to defendants who have a culpable mens rea with regard to their partner's consent. An HIV-positive individual may mistakenly believe that her partner is aware of her serostatus, which may lead her to overestimate the degree of risk to which her partner has consented.<sup>191</sup> For the reasons outlined in Part II.B's discussion of culpability and risk, such mistaken beliefs are relevant to an individual's moral blameworthiness.<sup>192</sup> A mens rea requirement of some sort would ensure that the law punishes only morally blameworthy conduct. For example, instead of merely considering the risk to which the partner consented, a fact finder would consider the risk to which the defendant reasonably or non-recklessly believed her partner consented. Depending on the mens rea specified, the defendant's knowledge, recklessness, or negligence with regard to the factors relevant to determining consent—such as her partner's awareness of the defendant's serostatus or viral load, or her partner's awareness that a condom was not being used—would be relevant to demonstrating the requisite mens rea with regard to consent. Conviction would still be appropriate where the defendant knew that her partner was not consenting to the risk of transmission to which her partner was exposed, or where the defendant was reckless or even negligent with regard to her partner's consent to risk. Yet this approach would not punish an individual who honestly and reasonably believed her partner consented to the actual risk.

In application, determining the difference in the degree of assumed risk and the degree of actual risk will not change the outcome in many situations. Where the actual risk was not substantial and unjustifiable, the defendant will not be guilty, regardless of the degree to which her partner consented. For example, where an individual engaged in receptive vaginal sex, had no STIs, and had an undetectable viral load, it is unlikely she exposed her partner to a substantial and unjustifiable risk; therefore the degree of risk to which her partner consented is immaterial. Where risk was substantial but the victim assumed the actual risk, the defendant would also be found not guilty. For example, where a partner knew a defendant was HIV positive and was aware the defendant was not taking ART or using a condom and nonetheless consented, conviction would not be warranted. Similarly, where the actual risk was substantial and the individual clearly assumed only a very

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189. *See id.*

190. *See supra* Part II.C.1.

191. In contrast, an HIV-positive individual may mistakenly believe her partner has not consented to the risk of transmission. In order to limit the scope of this Article, I do not address the admittedly fascinating issues of attempt and impossibility in this context.

192. *See supra* Part II.B.

negligible risk—for example, where an individual was in a monogamous relationship with a defendant who showed her doctored test results—then a complex calculation is not necessary to determine that the unassumed risk was substantial.

The proposed approach would change the outcome where an individual was aware of some degree, but not all, of a substantial and unjustifiable risk. A may engage in sex with B, knowing that B is HIV positive, but erroneously believing that they are using a condom during intercourse. B has engaged in conduct that merits criminal liability unless the difference between the risk of transmission inherent in sex with a condom and the risk of transmission inherent in sex without a condom was not substantial and unjustifiable.<sup>193</sup> This requires the jury to consider evidence that, for example, B's viral load was sufficiently low that the difference in the risk A consented to and the risk to which A was exposed was insubstantial. In another example, C engages in sex with D without knowing D's serostatus. However, C does not want to use a condom. The jury must consider evidence that the difference between the risk C consented to—unprotected sex with a person of unknown status—and the risk to which C was exposed is insubstantial.

In addition to remedying the over- and underinclusive nature of the current statutes, this approach allows criminal law to reflect how social cues shape consent to certain degrees of risk. An HIV-positive individual may use verbal cues to inform her partner of her serostatus, such as discussing her T-cell count or medications, saying she tested negative but that “it was a while ago,” or saying that her test results are not back yet.<sup>194</sup> She may use nonverbal cues, such as leaving ART medication, brochures, or magazines for HIV-positive individuals where a partner will see them.<sup>195</sup> An individual may also be aware of her partner's status by knowing other characteristics about her partner, such as the fact that her partner lives in housing for HIV-positive individuals.<sup>196</sup> In some communities of gay men, the “code of the condom” provides an unspoken framework for sexual interaction in which condom use exempts partners from discussing HIV and disclosing their status.<sup>197</sup> It is understood that HIV disclosure is more likely in relationships that become more serious; there is a social norm of *not* discussing HIV in order for the relationship to reach a more intimate stage in which it can be discussed safely.<sup>198</sup>

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193. For a discussion of rape by fraud, see *supra* Part I.A.

194. See KLITZMAN & BAYER, *supra* note 36, at 47; Lazzarini et al., *supra* note 11, at 248.

195. See KLITZMAN & BAYER, *supra* note 36, at 48; Lazzarini et al., *supra* note 11, at 248.

196. See, e.g., Amy Leigh Womack, *HIV-Infected Macon Man Sentenced to Two Years in Prison for Reckless Conduct*, MACON TELEGRAPH, Jan. 12, 2009. The defendant's partner was aware that the defendant lived in housing for HIV-positive individuals. *Id.*

197. See generally Chambers, *supra* note 148; see also KLITZMAN & BAYER, *supra* note 36, at 57–58, 139–41; Lazzarini et al., *supra* note 11, at 249.

198. See Chambers, *supra* note 148, at 377–80; KLITZMAN & BAYER, *supra* note 36, at 57–58, 139–41; Lazzarini et al., *supra* note 11, at 249. This code is not universal nor is it universally understood to mean the same thing. Some individuals interpret condom use as demonstrating that a partner may be positive and is therefore taking precautions. See KLITZMAN & BAYER, *supra* note 36, at 140. However, HIV-positive individuals may interpret a partner's lack of condom use as demonstrating the partner is also HIV positive and therefore feels no need to take precautions. See *id.* at 155.

These cues do not necessarily result in awareness of risk, but they are relevant in determining the degree of risk to which the individual was aware and consented.<sup>199</sup>

#### *D. Sample Statute*

The proposed framework radically changes HIV-exposure statutes. An offense would require the prosecution to prove that the defendant exposed her partner to an unassumed, substantial and unjustifiable risk, and that she had a culpable mental state with regard to transmission. While statutes may differ in their phrasing, an example of such a statute follows:

*It is unlawful for an individual*

- (1) *[with the purpose of infecting another with HIV]*
- (2) *[who is aware of and ignores a substantial and unjustifiable risk that her actions will result in HIV infection of another]<sup>200</sup>*
- (3) *[who should have been aware of a substantial and unjustifiable risk that her actions will result in HIV infection of another]*

*to engage in conduct that creates a substantial and unjustifiable risk of infecting another with HIV. For the purposes of this statute, the word “creates” applies only to the degree of risk that the defendant [knows/recklessly disregards a risk/should have known] the victim did not consent to.*

The bracketed areas represent different *mentes rea* that states could choose to apply. Such a statute should grade offenses according to *mens rea* and ensure that the offense does not punish violations more severely than comparable offenses.<sup>201</sup>

199. The cues can be ambiguous, and their meaning may differ depending on the social context. Mentioning a previous partner’s illness, for example, may provide a different cue in the gay-male community, whose history of disproportionate HIV infection and active involvement in HIV education and prevention has resulted in more sophisticated social cues and codes in the context of risk awareness. See Chambers, *supra* note 148, at 378–80; KLITZMAN & BAYER, *supra* note 36, at 46–48.

200. I do not write “recklessly engages in conduct that creates a substantial and unjustifiable risk” because this phrasing could cause confusion. The Model Penal Code defines recklessness as ignoring a substantial and unjustifiable risk. MODEL PENAL CODE § 2.03 (1962). Requiring an individual to recklessly create a substantial and unjustifiable risk could be interpreted as requiring an individual to ignore a substantial and unjustifiable risk that she is creating a substantial and unjustifiable risk. I am proposing that the statute require the individual to ignore a substantial and unjustifiable risk of *transmission*—not a risk of a risk.

201. While attempt and impossibility are beyond the scope of this Article, I assume that an individual who intends to transmit HIV but fails to create risk of transmission would still be liable for an attempted violation of this statute.

*E. Counterarguments*

## 1. It Will Not Change Outcomes

Statutes prohibiting only substantial and unjustifiable risk may still be overinclusive or underinclusive in practice. Juries may construe “substantial and unjustifiable risk” in a way that reflects jurors’ prejudices rather than actual risk of transmission.<sup>202</sup> Prosecutors may interpret statutes based on fear and myth in the context of HIV. For example, prosecutors have interpreted HIV as a deadly weapon in the context of spitting or biting, despite the fact that HIV cannot be transmitted by these methods.<sup>203</sup> A Michigan prosecutor charged an HIV-positive man under the state bioterrorism statute for allegedly biting his neighbor’s lip during a fight.<sup>204</sup> While this charge was dismissed on appeal, several courts have allowed prosecutions and convictions under endangerment or other offenses that require substantial risk even where the conduct at issue involved negligible risk of HIV transmission.<sup>205</sup>

While these arguments raise valid concerns, the potential for misinterpretation could be mitigated by statutory guidance as to what juries must consider in the context of HIV. For example, the statute could make clear that, in the context of HIV, substantial and unjustifiable risk must be demonstrated by current and scientifically sound evidence regarding the particular characteristics of the conduct at issue.

Disability law demonstrates the practicability of this approach. Juries have been making similar determinations for decades under the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act.<sup>206</sup> These statutes prohibit discrimination against people with disabilities, including HIV, but defendants may avoid liability if they can demonstrate that the discriminatory act was necessary in order to prevent the plaintiff from posing a direct threat to others.<sup>207</sup> The direct

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202. See Burris & Cameron, *supra* note 4, at 579 (arguing that risk assessments are heavily influenced by psychological and social biases). Survey data suggests that fifty to ninety-five percent of the public believes the probability of transmitting HIV from a single sexual encounter is high. See Wolf & Vezina, *supra* note 1, at 860.

203. See, e.g., *People v. Shawn*, 107 P.3d 1033 (Colo. App. 2004). The defendant was convicted of felony menacing with a deadly weapon where, when tackled to the ground, he scratched another individual’s skin while yelling that he was HIV positive. *Id.*

204. Todd A. Heywood, *Defendant in HIV-As-Terrorism Case Reaches Plea Deal*, MICHIGAN MESSENGER, Nov. 4, 2010.

205. See, e.g., *Nash v. State*, 881 N.E.2d 1060 (Ind. Ct. App. 2008) (battery with bodily waste prosecuted as a felony because individual was HIV positive); *Burk v. State*, 478 S.E.2d 416 (Ga. Ct. App. 1996) (reckless endangerment based on risk of transmission where individual had bitten police officer); *Shawn*, 107 P.3d at 1033. Courts have rejected attempts to prosecute on the grounds of insufficient evidence of risk in a few cases. See, e.g., *Brock v. State*, 555 So. 2d 285 (Ala. Crim. App. 1989) (lack of scientific evidence that HIV is transmitted via biting).

206. Americans with Disability Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

207. See *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284–88 (1987); see also *Bragdon v. Abbott*, 524 U.S. 624, 649–50 (1998).

threat analysis requires an individualized inquiry into the specific characteristics of the discriminatory action at issue and the individual's disability to determine whether the plaintiff posed a direct threat.<sup>208</sup> The Supreme Court has advised courts to take particular care in the context of contagious diseases to avoid conclusions based on stereotypes or myths and directed lower courts to rely on evidence supported by the medical community, with particular deference to public health authorities.<sup>209</sup>

Granted, although such guidance may mitigate the problem of fear-based decisions in the context of HIV-exposure offenses, it is unlikely to eliminate them entirely. In ADA and Rehabilitation Act cases, appellate courts have upheld direct threat findings that were contrary to medical evidence.<sup>210</sup> In the context of criminal law, an individualized inquiry of risk may not be sufficient to ensure only those who pose substantial and unjustifiable risk of transmission are convicted. Finders of fact may still be swayed by fear and prejudice.

But even if it cannot eliminate overbroad application of the law, the proposed framework is still superior to the alternatives. The individualized inquiry at least provides finders of fact the opportunity to make decisions based on medical evidence rather than outdated knowledge, myth, or fear. Put simply, a statute that may be interpreted in a way that is overbroad is better than a statute that is *necessarily* overbroad.

## 2. Rules and Proxies Are a Necessary Evil

Another counterargument to the proposal is that, while proxies such as serostatus and sexual activity may be overinclusive, they are necessary in order to deter risky behavior. This argument reflects the ongoing debate about the use of standards as opposed to rules in criminal law.<sup>211</sup> Standards provide general guidelines that can be applied on a case-by-case basis depending on the facts.<sup>212</sup> "Reckless driving," for example, employs a standard that requires a fact finder to determine whether a defendant's actions are sufficiently risky to constitute recklessness. Rules, by contrast, delineate specific prohibited activities or outcomes and tend to employ proxies to do so.<sup>213</sup> A speed limit, for example, creates a clear rule for driving by using certain driving speeds as a proxy for recklessness.

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208. See *Arline*, 480 U.S. at 284–88; see also *Bragdon*, 524 U.S. at 649–50.

209. See *Arline*, 480 U.S. at 284–88.

210. See, e.g., *EEOC v. Prevo's Family Market, Inc.*, 135 F.3d 1089 (6th Cir. 1998) (vacating judgment for HIV-positive food service employee).

211. For discussions of the rules/standards debate, see ALEXANDER & FERZAN, *supra* note 137, at 295 & n.99; FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 969–96 (1995); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383–90 (1985).

212. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 29 (2001); Sunstein, *supra* note 211, at 959, 964–65; Schlag, *supra* note 211, at 379–83.

213. See ALEXANDER & SHERWIN, *supra* note 212, at 27, 30; Sunstein, *supra* note 211, at 959, 961–62.

Most HIV-exposure offenses use rules rather than standards. They limit fact-finder discretion in favor of legislative determinations.<sup>214</sup> For example, rather than allowing a fact finder to determine whether a defendant's given activity exposed another to a substantial and unjustifiable risk on a case-by-case basis, legislatures make this determination for the jury by using status and sexual activity as proxies for substantial and unjustifiable risk. This situation leaves the fact finder only to determine whether the defendant is HIV positive and engaged in the prohibited activity.<sup>215</sup> The law is replete with statutes that use rules in the context of risk creation, including driving with a blood alcohol level above the legal limit, driving at speeds exceeding the legal limit, pretending to be a physician, engaging in sexual activity with a minor, and possession offenses.<sup>216</sup>

As Part I of this Article demonstrates, rules have several drawbacks. Most notably, offenses that rely upon proxies tend to be both overinclusive and underinclusive.<sup>217</sup> This violates the retributivist tenet that the criminal law should not punish behavior unless it causes or risks harm and unless the defendant acts with a blameworthy state of mind.<sup>218</sup> Proxy-based rules also result in the proliferation of numerous statutes; rather than creating general endangerment statutes, legislatures that rely on proxy-based rules create specific statutes that designate particular behavior as presumptively risky. The proliferation of numerous statutes prohibiting different specific activities often results in arbitrary differences in punishment level and grossly disproportionate punishment.<sup>219</sup> As discussed in Part I, HIV-exposure laws are nearly universally graded as felonies, with an average maximum sentence of eleven years.<sup>220</sup> This stands in stark contrast to other

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214. See Cahill, *supra* note 30, at 887–88; Sunstein, *supra* note 211, at 1012 (describing the choice to use rules as presenting a principal-agent problem in which the legislature, the principal, seeks to control the decisions of its agent, those who interpret and apply the law); see also Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 11–15 (2009) (arguing that, with offenses such as DUIs and drug-induced homicide, the legislature makes antecedent determinations of unreasonableness rather than delegating to the jury to make ad hoc determinations).

215. This is also a form of the larger concept of imputed liability advanced by Paul Robinson. See Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 623–29, 652, 655–57 (1984).

216. See R.A. DUFF, *ANSWERING FOR CRIME* 166–68 (2007); HUSAK, *supra* note 17, at 163, 167.

217. See ALEXANDER & FERZAN, *supra* note 137, at 297; ALEXANDER & SHERWIN, *supra* note 212, at 35, 53–54; SCHAUER, *supra* note 211, at 31–35, 39; Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1086 (2004); Sunstein, *supra* note 211, at 992–93, 995; Harry Surden, *The Variable Determinacy Thesis*, 12 COLUM. SCI. & TECH. L. REV. 1, 88 (2011).

218. See ALEXANDER & FERZAN, *supra* note 137, at 298, 300–02; DUFF, *supra* note 216, at 168–71; Robinson, *supra* note 215, at 656; see also HUSAK, *supra* note 17, at 155–77; Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 478 (2008). While violating a law can be harmful in itself and may justify punishment, this fails to provide an adequate justification for prohibiting the criminalized conduct in the first place. See DUFF, *supra* note 216, at 168.

219. See Cahill, *supra* note 30, at 937.

220. See *supra* notes 124–130 and accompanying text.

endangerment statutes.<sup>221</sup> It also far exceeds the maximum one-year sentence for DUIs, which are graded as misdemeanors unless the defendant has previous DUI convictions.<sup>222</sup>

Rules are often employed despite these drawbacks because of their many advantages. They give individuals clear notice as to the law's requirements.<sup>223</sup> Using proxy-based rules also eases the burden on the prosecution; it is much easier for prosecutors to demonstrate that an individual is HIV positive and engaged in prohibited activity than to prove that an individual exposed another to a substantial and unjustifiable risk of transmission.<sup>224</sup> Use of proxy-based rules also simplifies the fact finder's analysis.<sup>225</sup> It eliminates the need to consider medical evidence of transmission risk or conflicting testimony about the defendant's intent or knowledge with respect to this risk. These simpler calculations may lead to more consistent verdicts because they allow less fact finder discretion.<sup>226</sup>

Using rules that employ proxies for underlying harms may also help deter risky behavior more effectively than directly addressing the underlying harm and may even encourage desirable social norms. Rules may deter risky behavior by eliminating the possibility that an individual will be able to argue that her behavior was not sufficiently risky to merit criminalization.<sup>227</sup> Rules may also deter people from making poor risk calculations when they lack the information or ability to judge risk accurately.<sup>228</sup> An individual who is intoxicated is likely to be in a poor position to determine whether her driving poses a substantial and unjustifiable risk. Related to this deterrence function is the power of proxy-based rules to change social norms by establishing clear rules of unacceptable behavior.<sup>229</sup> Advocates of HIV-exposure laws may argue that universal disclosure obligations will increase norms of disclosure and openness in relationships.<sup>230</sup>

In sum, rules and standards may each have a place in criminal law, but when to employ either method may be hotly contested. Offenses that employ standards directly target the harm at issue and avoid overinclusion and underinclusion. Offenses that employ proxy-based rules may have greater deterrent value and fewer

221. *See id.*

222. *See* 7A AM. JUR. 2D *Automobiles* § 336 (2011).

223. *See* ALEXANDER & SHERWIN, *supra* note 212, at 30–31; ALEXANDER & FERZAN, *supra* note 137, at 296; Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1052 (1997); Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 803–04 (2005).

224. *See* Robinson, *supra* note 215, at 620, 655–56.

225. *See id.* at 655–56; Schauer, *supra* note 223, at 803–04; Sunstein, *supra* note 211, at 973.

226. *See* DUFF, *supra* note 216, at 167; Sunstein, *supra* note 211, at 974–75, 977.

227. *See* Robinson, *supra* note 215, at 630–31.

228. *See* DUFF, *supra* note 216, at 169–70; Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1195 (1994); Sunstein, *supra* note 211, at 970, 972 (arguing that rules enable people who are compromised by myopia, weakness of will, confusion, venality, or bias to make decisions in individual cases).

229. *See* Sunstein, *supra* note 211, at 970.

230. *But see* Burris et al., *supra* note 11, at 467–68, 489–90 (stating that criminal laws have no effect on disclosure).



administrative costs, but these come at the expense of retributivist principles. In order to preserve these principles, the presumption against proxy-based rules should be overcome only after critical analysis.<sup>231</sup> In other words, the question should not be, “why not use a proxy-based rule in this particular circumstance?” but rather, “why use a proxy-based rule in this particular circumstance rather than directly targeting the harm/mental state directly?”

Analyses of when and how to use proxy-based rules in endangerment offenses often weigh common factors. One of these factors is the value of deterrence.<sup>232</sup> Deterrence may be especially valuable in certain circumstances, particularly when individuals are likely to engage in substantially risky activity if allowed to determine whether the activity is prohibitively risky on a case-by-case basis.<sup>233</sup> Another factor is whether the proxy-based rule accurately targets and deters the harm for which the proxy stands.<sup>234</sup> A proxy-based rule may also be warranted when legislators have information and expertise that is unavailable or prohibitively costly to most individuals.<sup>235</sup> Weighing against rule use is the costs of overinclusion on those whose actions fall within the rule but do not create a blameworthy risk. Legal scholars often weigh these factors in different ways.<sup>236</sup> For example, R.A. Duff argues that we should accept a proxy-based rule if it has a particularly high deterrent value and the consequent prohibition of non-risky behavior does not create an onerous burden.<sup>237</sup>

These factors do not warrant the use of proxy-based rules in HIV-exposure offenses and in fact reveal them to be particularly unsuitable. At first blush, HIV

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231. See ALEXANDER & FERZAN, *supra* note 137, at 300–02; DUFF, *supra* note 216, at 168–71; HUSAK, *supra* note 17, at 164–75 (arguing for a presumption against overinclusiveness and limitations on implicit endangerment crimes); Dillof, *supra* note 223, at 1061.

232. See DUFF, *supra* note 216, at 169–71; Robinson, *supra* note 215, at 656–57; Sunstein, *supra* note 211, at 1003–04.

233. See DUFF, *supra* note 216, at 169–71; Sunstein, *supra* note 211, at 1003–04.

234. See Sunstein, *supra* note 211, at 1012 (arguing that we might prefer not to use rules when there is no reason to distrust decision makers and when it is not possible to come up with rules that fit well); see also Surden, *supra* note 217, at 88 (arguing that an effective proxy requires a high degree of overlap between the factual situations covered in the rule and in the standard).

235. See ALEXANDER & FERZAN, *supra* note 137, at 296; Ferzan, *supra* note 218, at 477–78; Sunstein, *supra* note 211, at 1003–04.

236. See, e.g., ALEXANDER & SHERWIN, *supra* note 212, at 54 (a rule is rational and morally desirable if it prevents more errors than it causes); DUFF, *supra* note 216, at 169–71; Dillof, *supra* note 223, at 1054–55 (rules should not be employed unless, at minimum, the use of rules results in less overinclusiveness and underinclusiveness than the use of a standard); Robinson, *supra* note 215, at 656–57 (balance the costs of overinclusion with the need for effective prosecution); Sunstein, *supra* note 211, at 1003–04 (rules are used when the error rate of the particular rule is relatively low, the error rate of rulelessness is high, and the number of cases is large); see also Ferzan, *supra* note 218, at 478 (describing this trade-off and expressing doubt that a retributivist could justify it); Hurd & Moore, *supra* note 217, at 1086 (arguing that a rational penal code drafter might justifiably use proxies if proof of the proxy’s target were impossible).

237. See DUFF, *supra* note 216, at 170–71.

exposure seems like an area in which the value of deterrence might be particularly high. Legislatures, with their numerous resources, might be better able to make decisions about risk than individuals living with HIV. Deterring risky behavior is also especially valuable given the profound consequences of HIV infection. But the proliferation of HIV-exposure offenses that criminalize safe sex alternatives calls into doubt the weight legislative expertise should be afforded in this context. In practice, the overwhelming majority of legislatures have demonstrated significant ignorance about the means that HIV is transmitted.<sup>238</sup> An individual under the advice of her physician is at least as well positioned to determine whether her conduct poses a substantial risk.

There is also significant reason to doubt the deterrent value of HIV-exposure statutes. As discussed more fully in Part III.A, empirical studies have found that HIV-exposure offenses have no deterrent effect.<sup>239</sup> On the contrary, public health advocates have argued that HIV-exposure offenses may promote harmful rather than positive attitudes and behaviors.<sup>240</sup> The laws may encourage individuals to assume a partner is not HIV-positive unless the partner discloses otherwise.<sup>241</sup> These individuals may forego condom use and other precautions that would protect them from infection. This is particularly problematic given that two-thirds of HIV infections occur where the infected partner is unaware of her serostatus.<sup>242</sup> The use of proxy-based rules in HIV-exposure laws also perpetuates myths about HIV transmission.<sup>243</sup> As discussed in Part I, many of the sexual acts used as proxies for risk are, in reality, highly unlikely to transmit HIV, and many acts (such as manual stimulation or the use of sex toys) are encouraged as safe alternatives.<sup>244</sup> The failure of these laws to account for condom or ART use may actually discourage individuals from taking risk-reducing steps by perpetuating the belief that they provide little or no protection against transmission.<sup>245</sup>

The “fit” of the proxies also do not weigh in favor of using a rule over a standard. Because of the many factors that influence risk and the ways these factors interact, proxies such as sexual activities or knowledge of serostatus are a poor fit for the harm HIV-exposure laws seek to prevent. As discussed in Part I, these proxies are vastly overinclusive, reinforce negative stereotypes, and spread misinformation. Even more problematic is the stagnant nature of proxy-based rules. Over the past three decades, new information and scientific advancements have

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238. See *supra* Part I.B.

239. See *infra* Part III.A.

240. See *infra* Part III.A.

241. See Barry D. Adam, Richard Elliot, Winston Husbands, James Murray & John Maxwell, *Effects of the Criminalization of HIV Transmission in Cuerrier on Men Reporting Unprotected Sex with Men*, 23 CAN. J. L. & SOC'Y 143, 149–50 (2008).

242. Burris et al., *supra* note 11, at 476–77; Grant, *supra* note 8, at 399.

243. See ALEXANDER & SHERWIN, *supra* note 212, at 89–90; Alexander & Sherwin, *supra* note 228, at 1215 (arguing that rules that “miss the mark” hamper rather than assist autonomous choice).

244. See Galletly & Pinkerton, *supra* note 3, at 329 (discussing use of sex toys and manual stimulation as risk-free alternatives to intercourse with an HIV-positive person); Shriver, *supra* note 8, at 325–26.

245. See Adam et al., *supra* note 241, at 149–50.

changed our understanding of HIV-transmission risk and what it means to be HIV positive. While the standard-based approach proposed above can adapt to these changes, a rule-based approach cannot. Poorly fitted proxies are likely to become even worse with time.

Nor is this a circumstance in which, as Duff describes, the burdens of overinclusion are not onerous. A rule-based approach is likely to require numerous individuals who do not pose a substantial or unjustifiable risk to their partners to abstain from sexual activity or disclose their serostatus to their partners. As discussed in Part II.B, this raises the prospect of domestic violence, loss of family and community support, and discrimination.<sup>246</sup> These requirements are particularly troubling in the context of the consensual intimate relationships of a marginalized and stigmatized community.<sup>247</sup>

One factor that may weigh in favor of a proxy-based rule in these circumstances is notice. Bright-line rules provide clearer notice of prohibited activities than standards, which are open to interpretation. An HIV-positive individual who seeks to conform his conduct to the law might interpret “substantial and unjustifiable risk” differently than a prosecutor and jury.

This is a legitimate concern, though not necessarily a fatal one. Criminal law routinely punishes acts through similar standards. For example, while driving while intoxicated is prohibited by a rule specifying a blood-alcohol limit, driving while drowsy or ill is not; the question of whether a driver creates a substantial and unjustifiable risk in these states is decided on an individual basis through reckless driving or reckless endangerment statutes.<sup>248</sup> Drivers must consider factors such as the extent of their drowsiness and the driving conditions (e.g., whether it is dark, the weather is hazardous, or the area is heavily populated). An HIV-positive individual may make similar determinations of whether certain conduct is reckless based on factors such as her viral load, the type of sexual activity, and the use of condoms.

The value of notice may also be overrated where acts are specifically prohibited by proxy-based rules, as Doug Husak has argued.<sup>249</sup> For example, a DUI statute prohibits driving with a certain blood-alcohol level. But the notice provided by such a bright-line rule is rarely required because few individuals who have been drinking actually know their blood-alcohol level before deciding whether to drive.<sup>250</sup> Rather, they determine whether their actions have impaired their ability to drive based on factors such as how many drinks they have consumed in a certain

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246. *See supra* notes 142–150 and accompanying text.

247. *See* Burris & Cameron, *supra* note 4, at 579 (“Regulation of sex implicates rights of privacy, autonomy, and self-expression, not to be abridged without a compelling justification.”); Cameron, *supra* note 4, at 14–15 (arguing, while we implement traffic regulations in order to deter risky behavior, these regulations do not stigmatize communities in the same way as HIV-exposure criminalization and do not have dire consequences to violators).

248. *See* Husak, *supra* note 133, at 621–22.

249. *See id.* at 624.

250. *See id.*

amount of time, how long it has been since their last drink, their size, and whether they have eaten while drinking.<sup>251</sup>

In sum, the mere fact that criminal law contains myriad rule-based offenses is insufficient to justify their use in the context of HIV-exposure crimes. With perhaps the exceptions of notice and prosecutorial ease, the factors that may justify a rule-based approach are absent for HIV exposure, and where they are present, these factors do not outweigh the many detriments of proxy-based rules in this context.

### 3. The Consent Analysis Is Too Difficult to Execute

Related to the rules/standards critique is the counterargument that the proposed framework requires fact finders to make determinations about consent and risk that are simply too complex to expect of the average juror. In a game of Russian Roulette, such a calculus would be simple. If an individual consented to the defendant firing a gun with one round in it, and the defendant actually loaded three rounds into the gun, then we could easily calculate the degree of unassumed risk. The victim consented to a one in six chance of being shot and was exposed to a three in six chance of being shot; thus, she did not consent to an additional two in six chance of being shot. But calculations of HIV-transmission risk in sexual relationships are unlikely to yield such precise numbers. Individuals rarely quantify the probabilities of harm they anticipate will befall them.<sup>252</sup> Because it is often difficult to determine what risk they consented to, it is difficult to determine whether they consented to the actual risk they faced and the distinction, if any, between the two. Critics of the proposal may argue that awareness of HIV status as a proxy for awareness of risk is a necessary oversimplification, even if it does result in overinclusive statutes.<sup>253</sup>

Yet it is hardly clear that this oversimplification is necessary. The difficulty of determining precisely what risk an individual is aware of does not preclude determinations of consent in other situations. The Model Penal Code, for example, allows a defense of consent when an injury is a “reasonably foreseeable hazard[] of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.”<sup>254</sup> In practice, this requires fact finders to determine what risks were “reasonably foreseeable” in contexts ranging from professional football to dancing the hora at a wedding. Even if this particular standard is not the ideal formulation, it demonstrates that a statute can provide guidance for a jury’s determination of whether an individual consented to a risk

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251. Indeed, the value of notice in the context of HIV-exposure laws may be called into doubt based on their apparent lack of deterrent effect. *See infra* Part III.A.

252. *See* Hanna, *supra* note 183, at 127–29 (arguing that love can cloud such judgments); Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 118–19 (1993) (arguing that allocation of legal responsibility most likely comes to mind after the accident occurred).

253. For a discussion of the need to exercise care in accepting this reasoning, see *supra* Part II.E.2.

254. MODEL PENAL CODE § 2.11 (1962). It is not clear whether sexual activity falls within the definition of a “concerted activity not forbidden by law.” BERGELSON, *supra* note 175, at 21.

even where, as in both sports and sexual activity, it is not easy to determine what awareness an individual had about the relevant facts that influenced risk.

The complexity of the proposed framework is also one of its strengths. Awareness of transmission risk comes in many forms and many degrees, and the law should allow juries to probe these nuances and allow defendants to provide evidence that their behavior was not wrongful.<sup>255</sup> This is particularly relevant in the context of intimate sexual relationships, in which subtle cues and unspoken agreements may influence consent to risk.<sup>256</sup> A jury may reasonably distinguish, for example, the degree of risk assumed when an individual engages in unprotected sex with a stranger from the degree of risk assumed when an individual engages in sex with a partner whose negative test result she has seen and with whom she believes she has a monogamous sexual relationship. Even if neither of these individuals consented to the actual degree of risk to which they were exposed, the differences in the degree of risk to which they did consent may be starkly different.<sup>257</sup> Criminalizing only the degree of risk to which a partner did not consent, and only when that risk is substantial and unjustifiable, allows juries to distinguish these situations.

#### 4. It Provides a Troubling Defense for Rapists

In the context of HIV, the proposed framework allows a jury to consider a victim's awareness of characteristics about her partner—such as whether he mentioned a past partner who was HIV positive or whether she saw his HIV medication—when determining whether the victim consented to risk. Allowing a jury to consider a victim's knowledge of the defendant's characteristics to

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255. Cf. Matthew Weait, *Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV*, 23 J. SOC. WELFARE & FAM. L. 441, 449–50 (2001) (arguing that the binary model of victim-perpetrator does not adequately capture the complexity of sexual transmission). This approach may require courts to resolve what facts a jury may consider in determining the degree of risk to which an individual consents. Arguably, factors such as seeing an individual's HIV medication would be relevant if it could be shown that the individual was thereby aware of a greater possibility that her partner was HIV positive—a factor relevant to the risk of transmission she was assuming. However, some factors seem more troubling to allow or encourage a jury to consider. For example, HIV rates are disproportionately high in the African American community. See PHILL WILSON, KAI WRIGHT & MICHAEL T. ISBELL, BLACK AIDS INST., LEFT BEHIND: BLACK AMERICA: A NEGLECTED PRIORITY IN THE GLOBAL AIDS EPIDEMIC 17–24 (2008) (documenting disproportionate HIV rates among African Americans); Ctrs. for Disease Control & Prevention, *Disparities in Diagnoses of HIV Infection Between Blacks/African Americans and Other Racial/Ethnic Populations—37 States, 2005–2008*, 60 MORBIDITY & MORTALITY WKLY. REP. 93, 94 (2011). Yet it is concerning to say that an individual was consenting to a greater risk of transmission because of the race of her partner. While the exact parameters of what juries should be allowed to consider is beyond the scope of this Article, statutes and courts could provide guidance to determine the parameters of what juries could consider in such situations.

256. See Lazzarini et al., *supra* note 11, at 247 (discussing the complex ways individuals weigh risks and consent in sexual relationships).

257. See Weait, *supra* note 183, at 106.

determine whether there was consent to risk could be troubling if applied to rape. An individual has not consented to sex simply because she knew information about her date that might lead her to believe that her date would be violent or threatening.<sup>258</sup>

HIV exposure and rape are distinguishable because of the acts they prohibit and the types of consent they require. A defendant is guilty of rape when she engages in *sexual activity* without the victim's consent, not when she exposes her partner to a *risk* of sexual activity.<sup>259</sup> The fact finders in a rape case must determine whether the victim consented to the sexual activity, not whether the victim consented to the defendant creating a risk of the victim being raped.<sup>260</sup> Being aware of characteristics of a person that indicate she may sexually assault you may evince assumption of a risk of the assault occurring. But only consent to the sex itself negates the wrongfulness of the assault.<sup>261</sup> Assuming a risk of being forced to have sex without your consent does not evince consent to sexual intercourse—indeed, it cannot, since what you are risking is sex without consent. By contrast, HIV-exposure statutes criminalize the creation of risk. The consent defense requires a determination of whether an individual consented to risk, and to what degree that consent is fully voluntary.<sup>262</sup>

### III. IMPLICATIONS AND LESSONS LEARNED

#### A. *The HIV Criminalization Debate*

The Introduction to this Article identified two branches of scholarship concerning HIV-exposure crimes: (1) the determination of what conduct merits criminalization, and (2) arguments about the benefits and costs of criminalization. This Article focuses primarily on the first branch of scholarship. Yet its conclusions have implications for the second branch. It strengthens consequentialist arguments against criminalization by limiting offenses to narrow categories of rare conduct. While its focus is to present a better way to criminalize HIV exposure, it

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258. See BERGELSON, *supra* note 175, at 98; Hurd, *supra* note 177, at 512; Hurd, *supra* note 175, at 125–26. *But see* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1333–52 (1997) (arguing that juries nullify rape law by importing the tort concept of contributory negligence or assumption of risk, acquitting defendant when they believe victim acted carelessly).

259. Often rape is defined as sex without consent and with the use of force, or sex with the use of force, but it is widely accepted that the absence of consent is an essential element in rape. When force is required, it has been criticized as merely an evidentiary requirement of lack of consent turned into a separate element. See Estrich, *supra* note 38, at 1095–1100; *see also* PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 201–10 (2004) (discussing the relationship between force and nonconsent in rape law).

260. See Hurd, *supra* note 177, at 511–12.

261. See *id.*; *see also* BERGELSON, *supra* note 175, at 99–100.

262. A victim's knowledge of the defendant's characteristics is also relevant to the underlying issue of consent in both rape and HIV exposure because it may influence the extent to which the victim's consent was fully voluntary.

consequently strengthens arguments that the best choice may be to eliminate all HIV-exposure offenses.

The proposed HIV-exposure statute serves retributivist goals that are likely to arise only in rare circumstances. Of the entire U.S. population, there are approximately one million individuals living with HIV.<sup>263</sup> Of this population, approximately 683,000 are aware of their HIV-positive status.<sup>264</sup> Those who are unaware of their serostatus are unlikely to have the requisite mental state. Given the low likelihood of transmission, substantial and unjustifiable risk may also be rare, much less substantial and unjustifiable risk with a culpable mental state as to transmission. At the very least, the approach proposed in Part II prohibits what is likely to be on average a much narrower category of conduct than the overinclusive offenses that most states employ.

The proposed HIV-exposure statute may also serve consequentialist goals by deterring harmful behavior and encouraging socially desirable behavior.<sup>265</sup> Statutes that criminalize conduct that poses a substantial and unjustifiable risk of transmission may discourage risky conduct, or at least encourage individuals to ensure that partners consent to the substantial and unjustifiable risk.<sup>266</sup> They may also encourage individuals to minimize risks by using condoms, adhering to ART, and seeking testing and treatment for STIs.

But empirical evidence undermines consequentialist arguments in favor of HIV-exposure offenses. The most thorough of the few empirical studies on the topic interviewed nearly 500 individuals in New York and Illinois who were HIV positive or at elevated risk to ascertain what effect HIV-exposure statutes had on individual behavior.<sup>267</sup> The study found that legal requirements had no impact on individuals' behaviors; those who believed the law prohibited exposure and required disclosure were just as likely to engage in risky sexual activities or fail to disclose to partners as those who did not share these beliefs.<sup>268</sup> Legal requirements also failed to affect social norms. Regardless of whether they lived in a state with an HIV-exposure statute or believed that the law prohibited exposure or required disclosure, most people interviewed believed that it is wrong to expose others to HIV infection and that HIV-positive individuals should disclose their serostatus to partners.<sup>269</sup> Similarly, a 2003 study analyzing the impact of criminal laws on HIV transmission in several states concluded that HIV-exposure laws were unlikely to reduce HIV transmission.<sup>270</sup> The deterrent value of these statutes is further undermined by the fact that one-third of HIV-positive individuals do not know they

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263. CTRS. FOR DISEASE CONTROL & PREVENTION, HIV IN THE UNITED STATES: AN OVERVIEW (2010).

264. *Id.*

265. *See* Lazzarini et al., *supra* note 11, at 239 (discussing potential deterrent value of HIV-transmission statutes); Sullivan & Field, *supra* note 7, at 187 (same); Wolf & Vezina, *supra* note 1, at 843 (outlining deterrence argument but dismissing it).

266. *See* Sullivan & Field, *supra* note 7, at 187.

267. *See* Burris et al., *supra* note 11, at 467–68, 489–90.

268. *See id.* at 497–504.

269. *See id.* at 511–15.

270. *See* Sarah J. Bray, *Criminal Prosecutions for HIV Exposure: Overview and Analysis* 10 (Yale U. Ctr. for Interdisciplinary Research on AIDS, Working Paper, 2003).

are HIV-positive and thus would not be deterred by the statute.<sup>271</sup> This is especially concerning given that two-thirds of HIV transmission occurs when the transmitting partner does not know she is HIV positive.<sup>272</sup>

Rather than preventing transmission, HIV-exposure statutes may undermine public health goals.<sup>273</sup> Even the most carefully drafted HIV-exposure statutes place costs on knowing one's serostatus, as knowing one's status may trigger a responsibility to reduce risk of transmission to insubstantial levels or ensure that a partner is aware of the risks. These costs may deter individuals from determining their status through testing.<sup>274</sup> Criminalization also contributes to the stigma associated with HIV, particularly when states draft criminal laws that target HIV exposure as distinct from other harms.<sup>275</sup> Although the framework Part II proposes reduces this stigma, it cannot eliminate it. Stigma deters testing and treatment, both of which are essential to the well-being of HIV-positive individuals.<sup>276</sup> Testing and treatment also reduce transmission, as individuals on ART are less likely to transmit the disease.<sup>277</sup> HIV-exposure laws may also undermine public health programs by shattering the fragile trust they build with at-risk communities.<sup>278</sup> Such offenses may encourage individuals to use "serosorting" as a prevention method—when an individual relies on her ability to determine her partner's HIV-status to protect herself from HIV transmission rather than using condoms.<sup>279</sup> Serosorting is a far less effective harm-reduction strategy than consistent condom use, particularly given the number of HIV-positive individuals who are unaware of their status.<sup>280</sup> Like the potential benefits of HIV-exposure statutes, however, there is little empirical evidence of these detriments.<sup>281</sup>

HIV-exposure statutes may also encourage the abuse and harassment of marginalized communities that are disproportionately affected by HIV, such as gay men or African Americans.<sup>282</sup> Police and prosecutors may threaten investigation

271. Burris et al., *supra* note 11, at 476–77; Grant, *supra* note 8, at 399; Lazzarini et al., *supra* note 11, at 239 (stating that as many as one-third of HIV-positive individuals have not been tested and do not know their status).

272. Burris et al., *supra* note 11, at 476–77; Grant, *supra* note 8, at 399.

273. See Lazzarini et al., *supra* note 11, at 251.

274. See Cameron, *supra* note 4, at 13–15; Joseph W. Rose, *To Tell or Not to Tell: Legislative Imposition of Partner Notification Duties for HIV Patients*, 22 J. LEGAL MED. 107, 108 (2001); Wolf & Vezina, *supra* note 1, at 869–70.

275. See Cameron, *supra* note 4, at 13–14; Burris & Cameron, *supra* note 4, at 580.

276. See Cameron, *supra* note 4, at 13–15.

277. See *supra* Part I.B (describing effects of ART on transmission risks).

278. See Gostin, *supra* note 1, at 1052.

279. See Susan Cassels, Timothy W. Menza, Steven M. Goodreau & Matthew R. Golden, *HIV Serosorting as a Harm Reduction Strategy: Evidence from Seattle, Washington*, 23 AIDS 2497, 2497 (2009); Matthew R. Golden, Joanne Stekler, James P. Hughes & Robert W. Wood, *HIV Serosorting in Men Who Have Sex with Men: Is It Safe?*, 49 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 212, 212 (2008).

280. See Cassels et al., *supra* note 279; Golden et al., *supra* note 279, at 216–18.

281. See Burris et al., *supra* note 11, at 467–68.

282. See Ctrs. for Disease Control & Prevention, *supra* note 255, at 94; CTRS. FOR DISEASE CONTROL & PREVENTION, *HIV AMONG GAY, BISEXUAL AND OTHER MEN WHO HAVE SEX WITH MEN (MSM) 1* (2010) (describing disproportionate rates of HIV among gay men);



into individuals' sex lives under the guise of law enforcement. Prosecutors may also enforce the law in a discriminatory fashion, targeting gay men and communities of color, and juries may be more likely to convict members of unpopular groups.<sup>283</sup> Well-crafted laws can mitigate these problems, but they cannot eliminate them.

In light of these concerns, the best approach might be to eliminate all HIV-exposure offenses. Given the low probability of transmission and the small percentage of transmission that is the result of individuals who are aware of their status—and thus who potentially have a culpable mental state—culpable conduct is likely quite rare. The potentially slight benefits of these laws may not outweigh the serious concerns they raise.<sup>284</sup>

To the extent the law is involved in HIV exposure, tort law might provide a superior means of regulation. Tort law focuses on the duties actors owe each other and individual harms that result from breaches of duties. This approach might be better suited than criminal law to delve into the nuances of sexual relationships. In general, the eradication of “heart-balm” laws has made courts wary of recognizing a breach of duty in the context of a sexual relationship when the breach does not result in physical harm.<sup>285</sup> Consequently, most jurisdictions do not recognize a civil

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WILSON ET AL., *supra* note 255, at 17–24; *see also* Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1463 (2009) (describing negative media portrayal of African American men in the context of HIV).

283. *See* Gostin, *supra* note 1, at 1051–52; Sullivan & Field, *supra* note 7, at 142, 161–62, 179, 189–91; Wolf & Vezina, *supra* note 1, at 871–72.

284. Eliminating HIV-exposure laws has been proposed by scholars who argue that traditional criminal statutes are better suited to punish culpable HIV exposure. *See, e.g.*, Widney Brown, Johanna Hanefeld & James Welsh, *Criminalising HIV Transmission: Punishment Without Protection*, 17 REPROD. HEALTH MATTERS 119, 119 (2009) (arguing for the use of assault rather than HIV-exposure statutes when an individual intends to transmit the infection); McArthur, *supra* note 101, at 740. Several states use traditional criminal statutes such as assault or reckless endangerment to prosecute HIV exposure or transmission. *See, e.g.*, *Hancock v. Commonwealth*, 998 S.W.2d 496, 498 (Ky. Ct. App. 1998). This approach has its own weaknesses—most notably that these offenses may also punish conduct that is insufficiently risky and do not adequately account for the importance of consent. Assuming HIV infection qualifies as “bodily injury,” the assault offense would encompass the actions of an individual who exposes another to a substantial and unjustifiable risk of HIV infection with intent to transmit the disease. Using assault in this manner may be problematic, however, because such statutes may fail to mitigate liability appropriately when the victim consents to a risk of bodily injury. *See supra* note 254. Endangerment offenses also fail to provide adequate guidance on the role of consent. *See supra* Part II.C. Endangerment statutes are often poorly drafted as well, with text that leaves vague what degree of risk it requires. The Model Penal Code prohibition on conduct that “may place” another in danger is particularly confusing because it creates the possibility that it is illegal to create even a risk of a risk. *See Cahill, supra* note 30, at 925–26. The Model Penal Code does not require actual endangerment but rather conduct that *may* place another in danger. *Id.*

285. *See* John Diamond, *Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) §§ 45–47*, 16 VA. J. SOC. POL'Y & L. 141, 163–64 (2008); Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 787–802 (2007) (describing liability for transmission of sexually transmitted disease); Fan, *supra* note 11, at 41–42.

claim for sexual HIV exposure without transmission.<sup>286</sup> A few states, however, have allowed plaintiffs to state a claim for negligent infliction of emotional distress where they were exposed to HIV in the absence of transmission.<sup>287</sup> Courts have limited these claims to circumstances in which a defendant's breach of a duty owed to the plaintiff has resulted in the plaintiff being exposed to "a scientifically accepted method of transmission of the virus."<sup>288</sup> Tort law allows the court to weigh factors such as the context of the sexual relationship, the likelihood of transmission, the defendant's understanding of the risk of transmission (e.g., whether the defendant knew she tested positive for HIV or was symptomatic), and the burden disclosure posed to the defendant in determining whether the defendant breached a duty to her sexual partner.<sup>289</sup>

### *B. Criminalization amid Evolving Knowledge*

The arguments set forth in this Article also have implications for broader debates about what and how the law should criminalize. HIV-exposure laws demonstrate a paradox that plagues the rules/standards debate. When a new type of harm surfaces, lawmakers may lack access to the information necessary to create good law. Little may be known about the harm and how to best curtail it. Rules can provide clarity and consistency while our understanding of the threat develops. Yet rules, more than standards, are prone to anachronism when information changes. The best short-term response to a novel threat may become the worst long-term response.

HIV-exposure laws exemplify legislation passed in response to a new but poorly understood threat. Most HIV-exposure laws were passed either in an environment of fear and uncertainty in the 1980s or in the early-to-mid 1990s in response to recommendations from the Reagan administration that were codified in the Ryan White Care Act.<sup>290</sup> At that time, far less was known about HIV transmission and

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286. See Diamond, *supra* note 285, at 163–64; Fan, *supra* note 11, at 41–43; Pollard, *supra* note 285, at 783–802 (describing liability for transmission of sexually transmitted disease).

287. See, e.g., Roes v. FHP, Inc., 985 P.2d 661 (Haw. 1999); Majca v. Beekil, 701 N.E.2d 1084 (Ill. 1998); Ornstein v. New York City Health & Hosps. Corp., 881 N.E.2d 1187, 1189–90 (N.Y. 2008); McLarney v. Cmty. Health Plan, 680 N.Y.S.2d 281 (N.Y. App. Div. 1998); Carroll v. Sisters of St. Francis Health Servs., Inc., 868 S.W.2d 585, 590 (Tenn. 1993). It is important to note, however, that these claims do not recognize the risk of infection itself as a harm, but rather the plaintiff's emotional distress caused by the possibility of infection.

288. Ornstein, 881 N.E.2d at 1190 (citation omitted). These cases have often arisen in circumstances in which a hospital's negligence has resulted in a hospital worker being exposed to a needle stick where the needle contained the blood of an HIV-positive individual. See, e.g., *id.*; McLarney, 680 N.Y.S.2d 281. But courts have, on occasion, allowed such claims for sexual exposure. See, e.g., O'Neill v. O'Neill, 694 N.Y.S.2d 772 (N.Y. App. Div. 1999).

289. See, e.g., Doe v. Johnson, 817 F. Supp. 1382, 1392–93 (W.D. Mich. 1993) (discussing analysis in the context of HIV-transmission claim).

290. Pub. L. No. 101-381, 104 Stat. 576 (2006). In order to be eligible for funding under the Ryan White Care Act, states were required to demonstrate that their criminal law could

prevention.<sup>291</sup> ART was not readily available, and the therapy available was less effective at decreasing transmission rates.<sup>292</sup> Certain sexual activities might have seemed adequate proxies for substantial and unjustifiable risk in this environment. But if lack of information justified these proxies, advancements over the past decades have rendered them archaic. And new proxies that align with existing medical knowledge will likely become outdated as we discover more effective methods of HIV prevention and treatment.

Laws drafted in response to new threats reflect and magnify a broader dilemma in lawmaking: in any circumstance, even a well-reasoned decision of whether to use a rule and which rule to use, can become outdated. Legislatures are bound by the information—or lack thereof—available to them when the legislation is drafted.<sup>293</sup> An ideal legislature rationally considers the most recent and accurate information to determine the extent to which a proxy measures its underlying target, whether a rule is likely to have a deterrent effect, and if the value of this deterrence outweighs the burdens created by the proxy's overinclusiveness. Knowledge of the proxy's accuracy, deterrent value, and the burden it imposes on individuals can change drastically over time. Even if all factors seem to weigh clearly in favor of proxy use when legislation is drafted, the information used in this analysis may quickly become anachronistic.<sup>294</sup>

While all legislation can become outdated with changes in knowledge, attitudes, and scientific advancements, proxy-based rules are particularly prone to these problems. A statute that directly addresses the target of the proxy can more easily adapt to changing circumstances. For example, the framework suggested in Part II, which requires evidence of substantial and unjustifiable risk of transmission, incorporates changes in understanding of transmission rates, creation of newer, more effective prevention methods, and even changes in the severity of the harm of HIV transmission as treatment becomes more effective. In contrast, the proxy of “sexual penetration” is stagnant and cannot incorporate new knowledge.

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prosecute HIV transmission and exposure. *See* Wolf & Vezina, *supra* note 1, at 844. This was a recommendation from the Reagan administration's AIDS Commission Report. CTR. FOR HIV L. AND POL'Y, AIDS STIGMA AND THE CREATION OF A VIRAL UNDERCLASS 2 (2011). Only three states have enacted statutes since 2000 (Virginia, South Dakota, and Mississippi), and at least twelve states passed statutes prior to breakthroughs in ART in 1996 (Arkansas, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Nevada, Oklahoma, South Carolina, and Tennessee). For statutes, see *supra* note 2.

291. Michael H. Merson, Jeffrey O'Malley, David Serwadda & Chantawipa Apisuk, *The History and Challenge of HIV Prevention*, 372 LANCET 475 (2008).

292. *See* Zita Lazzarini & Robert Klitzman, *HIV and the Law: Integrating Law, Policy, and Social Epidemiology*, 30 J.L. MED. & ETHICS 533, 534 (2002) (describing the introduction of ART and its effects on improving HIV-infection prognosis and decreasing transmission rates); Timothy Mastro, *The Global Fight Against AIDS and HIV: Current State of the Global Epidemic*, 17 EMORY INT'L L. REV. 413, 418–19 (2003) (describing significant improvements in ART since the introduction of AZT in the 1980s); Lisa Terrizzi, *The Need for Improved Access to Experimental Drug Therapy: AIDS Activists and Their Call for a Parallel Track Policy*, 4 ADMIN. L.J. 589 (1991) (describing the introduction of AZT in the 1980s and the limited access to treatment in the 1980s and early 1990s).

293. *See* Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 266–67 (2007); Sunstein, *supra* note 211, at 993–94.

294. *See* Gersen, *supra* note 293, at 266–68; Sunstein, *supra* note 211, at 993–94.

The problem of anachronistic proxies is exacerbated by the impracticability of legislative reform. Ideally, legislatures could amend outdated legislation in response to new information about HIV transmission by changing or eliminating the proxies. But even bad law is difficult to change.<sup>295</sup> This is in part because retracting criminal law is more administratively burdensome and less politically popular than maintaining the status quo.<sup>296</sup> For example, calls to reform Iowa's HIV-exposure statute after the Rhoades case were met with some skepticism by a member of the legislative committee charged with reorganizing the criminal code, who cautioned that the last major review of Iowa's criminal code occurred in 1978 and began in the 1960s.<sup>297</sup>

The proliferation of proxy-based rules in criminal law therefore raises several concerns that merit additional attention. One such concern is whether there are practical methods to minimize, *ex ante*, the likelihood that the proxy will become anachronistic where current knowledge weighs in favor of proxy use.<sup>298</sup> For example, can legislators include provisions requiring periodic reconsideration of a proxy's fit, deterrent value, and costs?

Temporary legislation provides a possible solution.<sup>299</sup> Richard E. Myers II has suggested a constitutional amendment requiring all criminal laws to have sunset provisions.<sup>300</sup> Myers suggests that sunset provisions can narrow the gap between public sentiment and criminal offenses, noting that criminal laws are often hopelessly out of touch with community values.<sup>301</sup> HIV-exposure laws demonstrate a separate problem that is equally if not more troubling: where criminal laws reflect public sentiment but not scientific evidence.<sup>302</sup> This is particularly likely to arise where the offense affects marginalized groups or unpopular activities, which

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295. Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1337–38 (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 527–28 (2001).

296. Myers, *supra* note 295, at 1337–38.

297. See Lynda Waddington, *Considering Changes to Iowa's HIV Transmission Law May Make Sense, But Hesitation Persists*, IOWA INDEP., July 3, 2009.

298. There are many *ex post* methods of changing (or failing to apply) a rule that makes no sense in context or has grown anachronistic. These methods, rather than changing the creation of a rule, alter how universally the rule is followed or applied. As such, they may have many problems; for example, they may undermine the rule of law, place enormous discretion at the hands of rule-followers or rule-enforcers (who may have their own biases or lack information that would enable them to determine when following the rule is warranted), or fail to correct the potential chilling effect a rule may have on behavior that should not be prohibited but nonetheless falls within the rule. See ALEXANDER & SHERWIN, *supra* note 212, at 61–73; SCHAUER, *supra* note 211, at 202–05; Alexander & Sherwin, *supra* note 228, 1203–05, 1212–13; Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1010 (1989); Schauer, *supra* note 223, at 804–05; Sunstein, *supra* note 211, at 1006–1010.

299. For a thorough discussion of temporary legislation, see Gersen, *supra* note 293.

300. See Myers, *supra* note 295.

301. See *id.* at 1335.

302. See Gersen, *supra* note 293, at 266–78 (discussing benefits of temporary legislation where available information may change).

strengthens its political inertia.<sup>303</sup> Sunset provisions might therefore be especially useful where the harm is medical or technological in nature and involves a stigmatized group or activity. Drug use and possession offenses, as well as prostitution, provide examples of such offenses. A sunset provision on drug possession statutes would require periodic re-evaluation of its justifications as new evidence emerges, and allowing an offense to merely lapse could provide lawmakers with a more politically tenable alternative to active decriminalization.<sup>304</sup> Sunset provisions, however, have significant administrative costs and other detriments.<sup>305</sup> Even if they are instituted, they may fail to solve the problem of politically popular but scientifically outdated offenses.<sup>306</sup>

To the extent that anachronism cannot be prevented, HIV-exposure laws demonstrate the need to consider how possible anachronism should be considered in determining whether a proxy use is appropriate when drafting a given criminal offense. At minimum, such costs and the difficulty of determining them only underscore the need for legislatures and scholars to employ an exacting analysis prior to drafting a proxy-based rule, and to re-evaluate their use periodically as circumstances change.

HIV-exposure statutes also provide an object lesson in the overcriminalization debate. Numerous criminal law scholars have argued that there has been an unwarranted expansion in the depth and breadth of criminal law, even as they disagree about the scope of this problem and how to address it.<sup>307</sup> This Article's analysis of HIV-exposure offenses contributes to that debate by illustrating that critical analysis of *how* to criminalize an act can reshape the debate of *whether* to criminalize it. Proxy-based rules tend to focus the criminalization debate on which proxies to employ.<sup>308</sup> This obscures the question of whether the behavior that is the real target of the proxies is worth the costs of criminalization. In the context of HIV exposure, refocusing the statutes on unassumed, substantial, and unjustifiable risk strengthens arguments that the costs of these statutes outweigh their benefits.

This refocusing can transform other criminalization debates. Prostitution provides a notable example. Outside the context of human trafficking, prostitution is arguably an implicit endangerment offense. Exchanging sex for money may not be harmful in an isolated circumstance, but it risks other harms.<sup>309</sup> It risks

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303. A related problem is the tendency of both ordinary and expert citizens to overestimate and overreact to newly recognized risks. *See id.* at 263, 268–71.

304. *See Myers, supra* note 295, at 1365.

305. *See id.* at 1369–80 (discussing detriments of sunset provisions); Gersen, *supra* note 293, at 263–66.

306. For example, sunset provisions might encourage lawmakers to pass duplicative offenses as a means of entrenching legislation that will expire when the lawmakers who support it are no longer in power.

307. *See HUSAK, supra* note 17. *See generally* Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

308. *Cf. ALEXANDER & SHERWIN, supra* note 212, at 1218–19 (arguing that rules that purport to be something they are not distort the debate of what the rules are about and the ends to which they are directed).

309. Human trafficking constitutes a harm in itself, at the very least because it involves forms of kidnapping and rape.

physically and psychologically harming the prostitute and contributing to the moral decay of society and the patriarchal structural inequality of women.<sup>310</sup> The exchange of sex for money serves as a proxy for these risks. If this proxy were critically examined, as suggested in Part III.A, and the proxy's fit, deterrent value, and costs were weighed, it might reasonably be determined that prostitution is a poor proxy for these risks. Yet, if these harms are targeted directly, they might not warrant criminalization. For example, a criminal prohibition on sexual conduct that poses a substantial and unjustifiable risk of contributing to the moral decay of society might seem outdated in a post-*Lawrence v. Texas* world.<sup>311</sup> Similarly, criminalizing sex that poses a substantial and unjustifiable risk of psychologically harming one partner arguably would not justify punishing the partner whose welfare was risked.<sup>312</sup> Other crimes, such as possession offenses, merit the same analysis.

#### CONCLUSION

Our understanding of HIV has changed and continues to change. Yet our method of criminalizing HIV exposure remains rooted in an approach that, however well intentioned, has far outgrown its usefulness. Focusing on proxies of serostatus and sexual activities is incompatible with the nuances of HIV exposure and transmission and sexual relationships. This Article proposes a framework that is more in line with these nuances and, just as important, that can adapt as they change. While the proposed framework comes at the expense of higher administrative costs, these costs are outweighed by the prospect of better law in theory and in practice.

This framework is no panacea to the problems of HIV criminalization, and should be the beginning of a larger debate rather than the end of one. While this Article is primarily concerned with what it terms the first branch of the HIV criminalization debate, its argument transforms the second branch. By limiting criminalization to rare conduct, it strengthens arguments that the costs of these offenses outweigh their benefits. Careful consideration of the costs of HIV criminalization may support the argument that the best approach is no offense at all.

HIV criminalization is an important chapter in the ongoing debate about how legislatures should employ the criminal law in the context of new threats. Where uncertainty abounds, rules provide clarity but leave little room for growth. This is a profound problem where our understanding of the underlying harm is likely to change with new information. The political impracticability of changing legislation—particularly criminal law—requires legislators and scholars alike to carefully consider the costs of anachronism when drafting legislation. HIV is not the first serious transmittable disease and it is unlikely it will be the last. Outside

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310. See Alexander & Sherwin, *supra* note 228, at 1217; Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1738–39, 1744–45 (2010).

311. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional a statute criminalizing sodomy).

312. See Alexander & Sherwin, *supra* note 228, 1217–18.

the context of disease transmission, statutes that incorporate changing technologies and scientific innovations—or even statutes whose primary justification is a deterrent effect that can be scientifically disproven—must contend with the problem of proxy anachronism. Going forward, we should carefully heed the lessons of HIV-exposure offenses.