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Article

When Is HIV a Crime? Sexuality, Gender and Consent

Kim Shayo Buchanan†

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† Associate Professor, University of Southern California Gould School of Law. This Article has benefited greatly from discussions with many more people than can be thanked here, especially Aziza Ahmed, Erez Aloni, Susan Frelich Appleton, Katharine Bartlett, Sam Bray, David Cruz, Anne Dailey, Adrienne Davis, Paul Gowder, Camille Gear Rich, Ariela Gross, Aya Gruber, Isabel Grant, Jill Hasday, Trevor Hoppe, Joy Jones, Margo Kaplan, Alex Lee, Jack Lerner, Martha Shaffer, Giovanna Shay, Nomi Stolzenberg, and the participants in workshops at AALS (Criminal Law and Sexual Orientation and Gender Law sections), Boston University, the Canadian HIV and AIDS Legal Network, Pepperdine, Southwestern Law School, USC, UC Hastings, and Law and Society. I am grateful to Quincy Chuck, Josh Macleod, Henna Pithia, and Nick Shapiro, and especially to librarian Paul Moorman, for invaluable research assistance. Copyright © 2015 by Kim Shayo Buchanan.

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Almost everyone—including most people with HIV—would agree that HIV-positive people (that is, people living with human immunodeficiency virus) should tell their partners of their serostatus before having sex.[1] But should failure to do so be a crime?

Throughout the United States and Canada, courts and legislatures tend to assume that it should be. In nearly every state, people with HIV have been prosecuted for failing to disclose their serostatus before having sex.[2] Between 1987 and

1. *See, e.g.*, Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 503 (2007) (finding that large majorities of HIV-positive and HIV-negative respondents agreed that people with HIV should disclose their serostatus before sex); P.M. Gorbach et al., *Don't Ask, Don't Tell: Patterns of HIV Disclosure Among HIV Positive Men Who Have Sex with Men with Recent STI Practising High Risk Behaviour in Los Angeles and Seattle*, 80 SEXUALLY TRANSMITTED INFECTIONS 512, 516 (2004) (finding that most HIV-positive men recognized an "ethical responsibility" to disclose); Keith J. Horvath et al., *Should It Be Illegal for HIV-Positive Persons To Have Unprotected Sex Without Disclosure? An Examination of Attitudes Among US Men Who Have Sex with Men and the Impact of State Law*, 22 AIDS CARE 1221, 1224 (2010) ("Sixty-five percent of respondents believed that it should be illegal for an HIV-positive person . . . to have *unprotected* sex without telling the other person of their HIV status . . . ." (emphasis added) (The study did not ask whether it should be a crime to have *protected* sex.)); Scott Burris & Matthew Weait, *Criminalisation and the Moral Responsibility for Sexual Transmission of HIV*, 2–3 (Global Comm'n on HIV & the Law, Working Paper, 2011) (acknowledging the principle that people living with HIV owe a moral duty to disclose or practice safer sex). Canadian surveys of HIV-positive respondents found that more than seventy percent supported criminalization of nondisclosure before unprotected sex "in some circumstances." BARRY D. ADAM ET AL., HOW CRIMINALIZATION IS AFFECTING PEOPLE LIVING WITH HIV IN ONTARIO 23 (2012), *available at* http://www.ohtn.on.ca/Documents/Research/B-Adam-OHTN-Criminalization-2012.pdf.

2. *See generally* RENÉ BENNETT-CARLSON ET AL., POSITIVE JUSTICE PROJECT, CTR. FOR HIV LAW & POL'Y, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: STATE AND FEDERAL LAWS AND PROSECUTIONS (2014) [hereinafter CHLP, ENDING AND DEFENDING], *available at* http://hivlawandpolicy.org/resources/ending-and-defending-against-hiv-criminalization-state-and-federal-laws-and-prosecutions, (surveying HIV-specific laws and criminal prosecutions, including nondisclosure and other

2005, twenty-four states passed statutes that criminalize sexual nondisclosure of HIV.[3] In many other states, nondisclosure is prosecuted using general criminal statutes, such as reckless endangerment, aggravated assault, and, occasionally, attempted murder.[4] Criminal laws typically require that a person who knows he or she has HIV must disclose his or her serostatus before engaging in sexual or nonsexual activities that are deemed to expose a partner to HIV.[5] In most states, condom use is no defense.[6] No law distinguishes lies about HIV status from situations in which the complainant simply assumed that the accused was HIV-negative.[7] Generally, if the HIV-positive person does not disclose, he or she is guilty of a crime even if the sexual activity posed very low risk of transmission, or posed no transmission risk at all.[8] In general, nondisclosure complainants have not been infected, and allegations of transmission appear to be rare.[9]

HIV-specific crimes and sentence enhancements across all U.S. states and territories); CTR. FOR HIV LAW & POL'Y, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2014 (2015), *available at* http://www.hivlawandpolicy.org/resources/chlp-publications (follow "Chart: Prosecutions for HIV Exposure in the United States 2008-2014" hyperlink) [hereinafter CHLP, PROSECUTIONS]; Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 248 fig.2 (2002) (presenting the distribution of HIV-related prosecutions by state).

3. Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1518 (2012).

4. CHLP, ENDING AND DEFENDING, *supra* note 2, at 1–2. Many states also have statutes that criminalize exposure to sexually transmissible infections (STI) more generally. According to the CHLP, "The penalties under these statutes tend to be limited to misdemeanors and there is no record of a case of HIV exposure ever being prosecuted under such statutes." *Id.* at 2; CHLP, PROSECUTIONS, *supra* note 2 (documenting the prosecution of HIV nondisclosure, biting and spitting as, inter alia, aggravated assault, reckless endangerment, and attempted murder).

5. *See* CHLP, ENDING AND DEFENDING, *supra* note 2 (detailing the laws of each state).

6. *Id.* at 300. California requires HIV disclosure only before "unprotected" sex, defined as vaginal or anal intercourse without a condom. CAL. HEALTH & SAFETY CODE § 120291 (West 2012); *see also* 720 ILL. COMP. STAT. ANN. 5/12-5.01 (West 2014); MINN. STAT. § 609.2241(1)(e) (2014).

7. *See* CHLP, ENDING AND DEFENDING, *supra* note 2.

8. *See infra* Part I.A.

9. Trevor Hoppe surveyed every HIV-nondisclosure prosecution in Michigan between 1992 and 2010, finding that only four of fifty-eight convictions (6.9%) involved any allegation of transmission. Trevor Hoppe, *From Sickness to Badness: The Criminalization of HIV in Michigan*, 101 SOC. SCI. & MED. 139, 143 (2014). Carol Galletly and Zita Lazzarini surveyed every prosecution in Nashville between 2000 and 2010, finding that only three of sixteen sexual nondisclosure prosecutions (18.75%) involved any allegation of transmission.

Although nondisclosure laws have consistently been upheld against constitutional challenges,[10] a well-established public health critique points out that HIV criminalization bears little relationship to transmission risk and fails to account for advances in medical treatment; it may undermine effective public health interventions; and it does not increase disclosure, deter high-risk behaviors, or reduce transmission.[11] These scholars also critique the retributive rationale for HIV criminalization, pointing out that criminal laws exacerbate the discrimination and stigma that make disclosure so difficult. They question whether nondisclosure is morally culpable in light of partners' ability to protect themselves by using condoms or engaging in safer sexual behaviors.[12] Legal commentators have also criticized the inconsistency of HIV laws with general principles of criminal liability, pointing out that the elements of HIV-disclosure mandates make ill-fitting proxies for risky acts, culpable mental states, and victim consent to transmission risks.[13]

Legislators, police, and prosecutors, however, seem to have been largely impervious to this critique. Although the federal government has recently questioned the utility of HIV criminalization,[14] no state has repealed its HIV criminal law.[15] Nor do

Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000–2010*, 7 AIDS BEHAV. 2624, 2627, 2628 tbl.3 (2013); *see also* CHLP, PROSECUTIONS, *supra* note 2; EDWIN J. BERNARD, KAFKAESQUE: A CRITICAL ANALYSIS OF US HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION CASES, 2007–2009, *available at* https://dl.dropboxusercontent.com/u/1576514/Kafkaesque_poster_A4_download.pdf (finding that, of eighty-two HIV prosecutions identified in a twenty-five-month period in the United States, only seven (8.5%) involved an allegation of transmission).

10. *See, e.g.*, Guevara v. Superior Court, 73 Cal. Rptr. 2d 421, 425–27 (Ct. App. 1998); State v. Musser, 721 N.W.2d 734, 757 (Iowa 2006); State v. Turner, No. 2005-0078 (La. App. 1 Cir. Nov. 4, 2005); 927 So. 2d 438; State v. Gamberella, 633 So. 2d 595, 607 (La. App. 1993); People v. Flynn, No. 199753 1998 WL 1989782, at *4 (Mich. Ct. App. Sept. 25, 1998); People v. Jensen, 564 N.W.2d 192, 194 (Mich. Ct. App. 1997), *vacated in part*, 456 Mich. 935 (1998).

11. *See infra* note 55.

12. *See infra* Part I.C.

13. *See, e.g.*, Kaplan, *supra* note 3; Ari Ezra Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550 (2011).

14. WHITE HOUSE OFFICE OF NAT'L AIDS POL'Y, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 36–37 (2010), *available at* http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf (noting that criminal laws "do not influence the behavior of people living with HIV in those states where these laws exist," they "run counter to scientific evidence about routes of HIV transmission," may undermine public health efforts to encourage test-

prosecutions seem to be slowing down: rather, since the mid-2000s, they seem to be on the rise worldwide,[16] and there are no indications of a slowdown in the United States.[17]

The existing critique has largely neglected another influential rationale for HIV criminalization: sexual autonomy, or "informed consent."[18] If one partner is not told that the other has

ing and treatment, and may deter disclosure by increasing fears of discrimination).

15. Illinois and Iowa are the only states that have amended their HIV laws since the Obama Administration's 2010 urging that they consider doing so. 720 ILL. COMP. STAT. ANN. 5/12-5.01 (West 2014); IOWA CODE § 709D (2015). In response to a 2009 prosecution that failed because the prosecutors could not access the medical records of the accused, the Illinois legislature amended its HIV legislation to authorize prosecutorial access to such records. Ramon Gardenhire, *How Illinois' Criminal HIV Law Has Changed*, AIDS FOUND. CHI. (July 27, 2012), http://www.aidschicago.org/page/news/all-news/howillinois-hiv-criminalization-law-has-changed. In exchange for not opposing the bill, the ACLU of Illinois and two AIDS organizations negotiated changes that limited prosecutions to condomless anal or vaginal penetration with the specific intent to transmit HIV. *Id.*; *see also* 720 ILL. COMP. STAT. ANN. 5/12-5.01 (West 2014).

16. *See, e.g.*, Sally Cameron et al., *International Trends Towards the Criminalization of HIV Transmission UK, New Zealand and Canada: Laws, Cases and Response*, *in* NAT'L ASSOC. PEOPLE LIVING WITH AIDS, THE CRIMINALISATION OF HIV TRANSMISSION IN AUSTRALIA: LEGALITY, MORALITY AND REALITY 32, 32 (Sally Cameron & John Rule eds., 2009), *available at* http://criminalisation.gnpplus.net/sites/default/files/2009_napwa_monograph.pdf (noting that prosecutions for HIV transmission began in Scotland in 2001 and in England in 2003); MATTHEW WEAIT, INTIMACY AND RESPONSIBILITY: THE CRIMINALISATION OF HIV TRANSMISSION 11 (2007); UNAIDS, BACKGROUND PAPER: CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: BACKGROUND AND CURRENT LANDSCAPE 7 (2012) (finding that the United States and Canada account for "the vast majority of reported prosecutions" worldwide); Eric Mykhalovskiy & Glenn Betteridge, *Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-Disclosure in Canada*, 27 CAN. J. L. & SOC'Y 31, 37–38 (2012) (noting a sharp increase in HIV-nondisclosure prosecutions in Canada beginning in 2004); Asha Persson & Christy Newman, *Making Monsters: Heterosexuality, Crime and Race in Recent Western Media Coverage of HIV*, 30 SOC. OF HEALTH & ILLNESS 632, 632–33 (2008) (finding an increase in prosecutions in the West).

17. Comprehensive HIV prosecution data are not available for the United States as a whole, but the two comprehensive jurisdiction-wide surveys of HIV prosecutions that have been conducted to date—in Nashville and in Michigan—found no decline in prosecutions. *See* CHLP, PROSECUTIONS, *supra* note 2 (identifying nineteen prosecutions in 2008, thirty-four in 2009, thirty-three in 2010, forty-four in 2011, twenty-six in 2012, and twenty-eight in 2013); Galletly & Lazzarini, *supra* note 9, at 2628 fig.1 (reporting arrests occurring each year between 2000 and 2010); Hoppe, *supra* note 9, at 144–45 tbl.1 (describing prosecutions for almost every year between 1992 and 2010).

18. This Article uses "sexual autonomy" and "informed consent" interchangeably to describe an intuition that the criminal law should protect a

HIV, his or her sexual consent can be said to be invalid because it is uninformed. This reasoning, which the Supreme Court of Canada has adopted and many U.S. courts have assumed,[19] frames HIV nondisclosure as a crime akin to sexual assault. This rationale might obviate the public health critique: an uninformed partner might be injured by having had sex he or she might otherwise have refused, regardless of whether he or she was harmed or even put at risk. Perhaps because of its intuitive and doctrinal link to sexual assault, feminist and other legal scholars have rarely questioned the sexual autonomy rationale for HIV criminalization.[20] Thus the first major

right of HIV-negative people to know in advance whether their partners have been diagnosed with HIV. Part II.C, *infra*, elaborates three potential interpretations of the informed-consent rationale for HIV criminalization.

19. See *infra* Part II.B.

20. U.S. critics of HIV criminalization have yet to substantively engage with the sexual autonomy rationale. Alison Symington, a Canadian HIV advocate, offers the only systematic critique of the notion that HIV nondisclosure vitiates sexual consent. Alison Symington, *HIV Exposure As Assault: Progressive Development or Misplaced Focus? in* SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE AND WOMEN'S ACTIVISM 635, 655 (Elizabeth A. Sheehy, ed., 2012); *see also* Burris & Weait, *supra* note 1, at 1–3 (discussing nondisclosure and consent). Other Canadian legal scholars have criticized HIV criminalization for various reasons, but have not seriously challenged the holding of the Supreme Court of Canada's 1998 holding in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, 376 (Can.), that nondisclosure vitiates sexual consent. *See, e.g.*, *10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women*, ATHENA NETWORK (2009), http://www.athenanetwork.org (follow "10 Reasons Why Criminalization Harms Women" hyperlink); Rebecca J. Cook, *Developments in Judicial Approaches to Sexual and Reproductive Health*, 21 MED. & L. 155, 161 (2002) (discussing prejudice towards and discrimination against people with AIDS); Matthew Cornett, *Criminalization of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada*, 5 MCGILL J. L. & HEALTH 61 (2011); Isabel Grant, *The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV*, 31 DAL. L.J. 123, 123–80 (2008) [hereinafter Grant, *Boundaries*] (arguing for a limited application of criminal law to nondisclosure); Isabel Grant, *The Over-Criminalization of Persons with HIV*, 63 U. TORONTO L.J. 475, 481 (2013) [hereinafter Grant, *Over-Criminalization*] (suggesting alternatives such as criminal negligence causing bodily harm or common nuisance); Isabel Grant, *The Prosecution of Non-Disclosure of HIV in Canada: Time To Rethink* Cuerrier, 5 MCGILL J.L. & HEALTH 7, 48–49, 57 (2013) [hereinafter Grant, *Time To Rethink* Cuerrier] (arguing that nondisclosure without transmission should be charged as simple sexual assault or common nuisance, rather than aggravated sexual assault); Isabel Grant, *A Tale of Two Cases: Urging Caution in the Prosecution of HIV Non-Disclosure*, 15 HIV/AIDS POL'Y & L. REV. 15–19 (2011) (same); Isabel Grant, *Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions*, 54 MCGILL L.J. 389, 395–404 (2009) (discussing the scope of and approaches to criminal laws related to HIV nondisclosure); Sara Klemm, *Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland*, 13 J. HEALTH CARE L. & POL'Y 495, 519 n.192 (2010) (not-

contribution of this Article is to challenge the sexual autonomy rationale for singling out HIV as a crime.

Given the weakness of public health, retributive, and autonomy justifications for the continued criminalization of HIV, we should consider other explanations. The seemingly arbitrary inclusions and exclusions of HIV criminal laws (whether for nondisclosure, prostitution, or biting or spitting), and the striking gender disparities in HIV prosecutions, all tend to raise suspicion that discriminatory impulses may be at work.

The second contribution of this Article, then, is to examine the role of race, gender, and sexual inequalities in shaping legal and public perceptions about whether, when, and why HIV is a crime. In previous work, I have shown that discriminatory fallacies about gender, race, and sexuality may shape popular perceptions and legal responses to prison rape. While academics, judges, and policymakers focus disproportionate attention on abuses that conform to preconceptions about race, gender, and sexuality, sexual abuse that confounds stereotypical expectations is largely ignored.[21] This Article reveals a similar dynamic in HIV prosecutions. On paper and in practice, such prosecutions seem to reflect an inchoate expectation that heterosexuals should be free from anxiety about HIV when they are doing what they should: having heterosexual sex and not injecting drugs. Criminal laws tend to treat HIV as morally and legally unproblematic when contained within stigmatized groups such as intravenous drug users, sex workers, Africans, and especially gay men. When HIV-positive people transgress these stereotypical boundaries and cause more privileged heterosexuals to worry about HIV, this transgression seems more likely to be perceived and punished as a crime.

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ing the difference between deceit and nondisclosure); Emily MacKinnon & Constance Crompton, *The Gender of Lying: Feminist Perspectives on the Non-Disclosure of HIV Status*, 45 U. BRITISH COLUMBIA L. REV. 407 (2012); Carissima Mathen & Michael Plaxton, *HIV, Consent and Criminal Wrongs*, 57 CRIM. L.Q. 464 (2011); Martha Shaffer, *Sex, Lies, and HIV:* Mabior *and the Concept of Sexual Fraud*, 63 U. TORONTO L.J. 476, 470–74 (2013) (arguing, largely on the ground of transmission risk, that sexual assault is "too blunt an instrument" to address HIV nondisclosure).

21. *See, e.g.*, Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630 (2012) [hereinafter Buchanan, *Engendering Rape*]; Kim Shayo Buchanan, *E-race-ing Gender: The Racial Construction of Prison Rape*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank R. Cooper & Ann C. McGinley eds., 2012) [hereinafter Buchanan, *E-race-ing Gender*]; Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1 (2010) [hereinafter Buchanan, *Our Prisons, Ourselves*].

Part I of this Article considers two rationales for HIV criminalization: public health and moral retribution. The ways in which criminal laws diverge from their public health justification tend systematically to favor prosecution when the victim is engaged in heteronormative social behavior, and to preclude prosecution on behalf of low-status victims: intravenous drug users, sex workers, or men who have sex with men. Moreover, moral retribution standing alone cannot explain the frequent prosecution of nondisclosures that are not (or are not especially) morally blameworthy.

Part II addresses informed-consent rationales for HIV criminalization. Sexual autonomy offers little reason to single out HIV nondisclosure as a crime when almost all other sexual deception is lawful. HIV disclosure requirements are also incommensurable with medical models of informed consent. Finally, although proponents of criminalization tend to assume it would promote gender equality by requiring HIV-positive men to disclose to their female partners, HIV nondisclosure is not gendered in the way these commentators assume.

Part III considers the role of race, gender, and sexual hierarchies in the origins of HIV criminalization. HIV was largely ignored by criminal law until well-publicized allegations that black men had infected white women. By reframing nondisclosure as sexual assault, HIV laws tend to shift discursive and prosecutorial focus from the people most affected by HIV—men who have sex with men—to heterosexual women. HIV nondisclosure starts to look and feel like a racialized crime that matters most when men do it to women.

Part IV examines the striking gender disparity in HIV prosecutions found throughout the Anglo-American legal world. Although most HIV transmission—and, apparently, most nondisclosure—takes place between men, most prosecutions involve female complainants and male accused. This Part considers potential explanations for this disparity; they are largely consistent with stereotypical expectations that heterosexuals should be exempt from anxiety about HIV.

Part V addresses the policy implications of this critique, arguing that the discriminatory social meaning and effects of HIV criminalization are best addressed by ratcheting down (decriminalization), rather than ratcheting up (criminalizing other diseases and deceptions). In the absence of defensible public health, retributive, or autonomy reasons to criminalize HIV,

the discrimination that seems to pervade the theory and implementation of HIV crime points toward repeal.

I. RATIONALES FOR HIV CRIMINALIZATION: PUBLIC HEALTH AND MORAL RETRIBUTION

Arguments from moral retribution (and sexual autonomy) depend in part on perceptions about how dangerous HIV is, and how likely it is that sexual contact would result in transmission. If sex with an HIV-positive person were very likely to transmit HIV, and transmission would certainly cause premature death, then retributive and sexual autonomy rationales for criminalizing nondisclosure might be more compelling than they are today. Nondisclosure of HIV might matter more to sexual consent than nondisclosure of another, less dangerous sexually transmissible infection (STI). Or it might be uniquely morally blameworthy. Exposing someone to such a terrible risk might warrant criminal punishment in a way other nondisclosures might not, and it might warrant punishment even if criminalization had no deterrent effect. Thus an accurate understanding of the health risks of HIV is essential to evaluating arguments based on moral retribution. This Part addresses those risks. (Readers who are familiar with the public health critique of HIV criminalization may wish to skip directly to Sections B and C of this Part.)

Neither public health nor moral retribution explains why nondisclosure should be a crime when the criminalized behavior cannot transmit HIV. For example, Kanay Mubita and Nick Rhoades, like most nondisclosure accused, did not transmit HIV. Moreover, neither man exposed his uninformed partner to any transmission risk. Mubita, a Zambian-American, was sentenced to four years' imprisonment for nondisclosure after performing oral sex on an Idaho woman.[22] This activity cannot transmit HIV.[23] Likewise, Nick Rhoades, a gay man in Iowa, was receiving antiretroviral treatment that had reduced his viral load (the concentration of HIV in his bloodstream) to unde-

22. State v. Mubita, 188 P.3d 867, 871, 882–83 (Idaho 2008).

23. Saliva cannot transmit HIV. *HIV Transmission: "Can I Get HIV from Being Spit on or Scratched by an HIV-Infected Person?,"* CDC, http://www.cdc.gov/hiv/basics/transmission.html (last updated Sept. 23, 2014). Thus performance of oral sex by a person with HIV carries "little to no risk." *Oral Sex and HIV Risk*, CDC, http://www.cdc.gov/hiv/risk/behavior/oralsex.html#references (last updated May 21, 2014); *see also Mubita*, 188 P.3d at 882–83 (noting Mubita's argument that he could not have exposed his partner to HIV, because they only engaged in oral sex).

tectable levels.[24] As a result, he was incapable of transmitting HIV.[25] Moreover, he used a condom when he had one-time sex with a new partner.[26] This activity posed "no "realistic possibility of transmission."[27] He was sentenced to twenty-five years' imprisonment.[28] After a letter-writing campaign on his behalf, his sentence was suspended and he was released, but Rhoades had to register as a sex offender and was forbidden to see his nieces and nephews.[29]

Many critics have argued that HIV criminalization does not advance public health. I contend here that the seemingly arbitrary ways in which HIV crimes diverge from their public health rationale tend systematically to construct HIV as fairly benign when contained within stigmatized populations such as sex workers, intravenous drug users, and men who have sex with men. At the same time, these laws tend to criminalize the conduct of HIV-positive people when their behavior causes anxiety to more privileged heterosexuals,[30] even when it poses no transmission risk. Unlike rape, HIV nondisclosure is not always so grievously wrong that it should be a crime. Many HIV-positive people, like Mubita and Rhoades, have been prosecuted for nondisclosures that are not morally blameworthy, or are not blameworthy enough to deserve criminal punishment.

24. Rhoades v. State, 848 N.W.2d 22, 25 (Iowa 2014).

25. *See infra* note 41 and accompanying text.

26. *Rhoades*, 848 N.W.2d at 25–26.

27. R. v. Mabior, [2012] 2 S.C.R. 584, 622 (Can.) (reviewing scientific evidence and concluding that sex with a condom while viral load is negligible does not put partner at "significant risk" of HIV infection); *see also infra* notes 39, 41–42 and accompanying text.

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

29. *Id.* As this Article went to press, the Iowa Supreme Court granted postconviction relief on the ground of ineffective assistance of counsel, given that transmission was not "reasonably possible on the facts and circumstances of the case." *Rhoades*, 848 N.W.2d at 28, 32–33.

30. Complainants in nondisclosure cases are usually, but not invariably, women who had sex with men. *See infra* Part IV. As the Rhoades prosecution demonstrates, some complainants are men who had sex with men. Like the Rhoades complainant, many of these men seem to be fairly privileged. *See infra* note 356.

A. THE PUBLIC HEALTH CRITIQUE

Public health researchers are near unanimous in arguing that HIV should be decriminalized.[31] They contend that, by

31. *See, e.g.*, GLOBAL COMMISSION ON HIV AND THE LAW, RISKS, RIGHTS & HEALTH 97 (2012) [hereinafter GLOBAL COMMISSION REPORT], *available at* http://www.hivlawcommission.org/resources/report/FinalReport-Risks, Rights&Health-EN.pdf ("Countries must not enact laws that explicitly criminalise HIV transmission."); NAT'L ALLIANCE OF STATE & TERRITORIAL AIDS DIRS., UNDERSTANDING STATE DEPARTMENTS OF HEALTH AND CORRECTIONS COLLABORATION: A SUMMARY OF SURVEY FINDINGS—PART II AND STRATEGIC GUIDANCE TOWARDS ENDING CRIMINALIZATION-RELATED STIGMA AND DISCRIMINATION 4 (2011), *available at* http://www.nastad.org/HIVC/decriminalization_findings.pdf (arguing that HIV criminalization statutes "must be strongly opposed"); UNAIDS, GUIDANCE NOTE: ENDING OVERLY BROAD CRIMINALIZATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: CRITICAL SCIENTIFIC, MEDICAL AND LEGAL CONSIDERATIONS 41–42 (2013) [hereinafter UNAIDS, GUIDANCE NOTE], *available at* http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/docments/document/2013/05/20130530_Guidance_Ending_Criminalisation.pdf (recommending that governments "[r]eview laws in order to limit criminal prosecution in the context of HIV to cases that involve intentional HIV transmission"); UNAIDS, GLOBAL REPORT: UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC 83 (2012), *available at* http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_with_annexes_en.pdf (urging governments to "refrain from explicitly criminalizing HIV exposure, non-disclosure or transmission"); UNAIDS, POLICY BRIEF: CRIMINALIZATION OF HIV TRANSMISSION 6–7 (2008) [hereinafter POLICY BRIEF], *available at* http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf (advising that governments "[r]epeal HIV-specific criminal laws" and "[a]pply general criminal law only to the intentional transmission of HIV"); WHITE HOUSE OFFICE OF NAT'L AIDS POL'Y, *supra* note 14, at 36–37 (urging states to reconsider statutes that criminalize nondisclosure given that such statutes "do not influence the behavior of people living with HIV in those states where these laws exist," that they "run counter to scientific evidence about routes of HIV transmission," may undermine public health efforts to encourage testing and treatment, and that they may deter disclosure by increasing fears of discrimination); Scott Burris & Edwin Cameron, *The Case Against Criminalization of HIV Transmission*, 300 J. AM. MED. ASS'N 578, 580 (2008) ("The use of criminal law to address transmission of HIV is inappropriate . . . ."); Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 335–36 (2004); Kaplan, *supra* note 3, at 1569 (suggesting that the costs of criminalizing HIV are too great); Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1352 (2013) (presenting a number of concerns about current HIV criminalization laws); Mykhalovskiy & Betteridge, *supra* note 16, at 50–51 (observing that there is a critique of HIV criminalization that "regards the criminal law as a blunt and ineffective mechanism"); *see also* POSITIVE JUSTICE PROJECT, CONSENSUS STATEMENT ON THE CRIMINALIZATION OF HIV IN THE UNITED STATES (2012) (opposing criminalization and endorsed by, inter alia, HIV Justice Network, HIV Medicine Association, Gay and Lesbian Medi-

criminalizing low-risk activities, HIV statutes "contribute to the already substantial public misunderstanding of transmission risk,"[32] encouraging mistaken fears that risk reduction strategies such as oral sex and sex with a condom do not work. Most criminal nondisclosure laws punish sexual activities that pose negligible risk of transmission (e.g., penetration with a condom,[33] or receiving oral sex[34]), alongside sexual activities that cannot transmit HIV at all (e.g., performing oral sex[35]).

Even "high risk" sexual activities, these critics point out, do not entail anything close to a probable risk of transmission.[36]

cal Association, Lambda Legal, U.S. Positive Women's Network, AIDS Foundation of Chicago, various HIV advocacy organizations, a few politicians, and several other community groups). *But see* Council on Ethical and Judicial Affairs, *Ethical Issues Involved in the Growing AIDS Crisis*, 259 J. AM. MED. ASS'N 1360, 1361 (1988) (recommending "serious consideration" of criminalization of nondisclosure).

32. Symington, *supra* note 20, at 653; *see also, e.g.*, CHLP, ENDING AND DEFENDING, *supra* note 2, at 3–4 (noting the effect of overly broad statutes on persons with HIV); GLOBAL COMMISSION REPORT, *supra* note 31, at 20, 22–23 ("The criminal justice system fights the health care system . . . ."); Burris & Cameron, *supra* note 31, at 579–80 (noting that criminal prosecutions "undermine public health efforts"); Galletly & Pinkerton, *supra* note 31, at 336 (recommending that "HIV exposure laws and public health recommendations should avoid sending mixed messages to HIV-infected persons . . . regarding what is or is not risky"); Kaplan, *supra* note 3, at 1524–25, 1535, 1539, 1552, 1557–58, 1563 (discussing the effect of HIV statutes in creating misunderstandings about the risks of transmission); Lazzarini et al., *supra* note 31, at 1350–51 (noting the negative effects of HIV laws on public health efforts).

33. *See infra* note 39 and accompanying text.

34. The transmission risk of performing oral sex on an HIV-positive person is estimated to be "very low but not zero"—about 0.04%. Rebecca F. Baggaley et al., *Systematic Review of Orogenital HIV-1 Transmission Probabilities*, 37 INT'L J. EPIDEMIOLOGY 1255, 1262, 1264 (2008); *see also* Eric Vittinghoff et al., *Per-Contact Risk of Human Immunodeficiency Virus Transmission Between Male Sexual Partners*, 150 AM. J. EPIDEMIOLOGY 306, 309 (1999) (listing a 0.04% per-contact risk for oral sex).

35. *See supra* note 23.

36. *See* Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts To Control the Spread of HIV*, 10 AIDS & BEHAV. 451, 455 (2006). The per-act probability of HIV transmission may vary greatly, depending on several factors, the most important of which are the viral load of the infected person, and the stage of infection (viral loads are higher during the acute stage immediately after infection, and late stage, when the person has AIDS). Julie Fox et al., *Quantifying Sexual Exposure to HIV Within an HIV-Serodiscordant Relationship: Development of an Algorithm*, 25 AIDS 1065, 1076 (2011). Viral loads are lower during the years-long chronic stage of HIV infection. The lower the viral load, the lower the transmission risk, and vice versa. Kimberly A. Powers et al., *Rethinking the Heterosexual Infectivity of HIV-1: A Systematic Review and Meta-Analysis*, 8 LANCET INFECTIOUS DISEASES 553, 561 (2008). Other factors that can influence the transmissibility of HIV between two people include the

Recent studies estimate the per-act risk of sexual transmission through unprotected vaginal sex at about 0.08% (1 in 1,250) for the HIV-negative woman and about 0.04% (1 in 5,000) for the HIV-negative man.[37] The highest-risk sexual activity—unprotected receptive anal intercourse—presents a per-act risk of 1.4 to 1.7% (1 in 59 to 1 in 71) to the receptive partner, regardless of gender.[38] Researchers have long known that correct use of condoms can reduce this risk by 95%,[39] reducing the risks of, for example, vaginal intercourse to 1 in 25,000 for the woman and 1 in 50,000 for the man. HIV criminal laws also take no account of the effectiveness of highly active antiretroviral treatment (HAART), which has been standard HIV treatment protocol since about 1996.[40] HAART can reduce viral load (the concentration of HIV in the infected person's bloodstream) to undetectable levels, making sexual transmission of HIV almost impossible.[41] Thus, after a 2008 study, the Swiss Federal Com-

presence of ulcerative diseases of the genitals (e.g., active herpes or syphilis sores), which can increase transmissibility of HIV, and circumcision, which can reduce a man's susceptibility to HIV transmission. Fox et al., *supra*, at 1076. Pregnancy can increase a woman's susceptibility to HIV infection. *Id.*

37. Marie-Claude Boily et al., *Heterosexual Risk of HIV-1 Infection Per Sexual Act: Systematic Review and Meta-Analysis of Observational Studies*, 9 LANCET INFECTIOUS DISEASES 118, 120 (2009).

38. Rebecca F. Baggaley et al., *HIV Transmission Risk Through Anal Intercourse: Systematic Review, Meta-Analysis and Implications for HIV Prevention*, 39 INT'L J. EPIDEMIOLOGY 1048, 1053–54, 1055 (2010) (estimating the per-act infectivity of anal intercourse at 1.4% for the receptive partner and 0.3% for the insertive partner).

39. *See* Steven D. Pinkerton & Paul R. Abramson, *Effectiveness of Condoms in Preventing HIV Transmission*, 44 SOC. SCI. & MED. 1304, 1310 (1997) (asserting that the correct use of condoms reduces per-act transmission risk by ninety-five percent); *see also* S.C. WELLER & K. DAVIS-BEATY, CONDOM EFFECTIVENESS IN REDUCING HETEROSEXUAL HIV TRANSMISSION 6 (2002), *available at* http://apps.who.int/rhl/reviews/langs/CD003255.pdf (concluding that "consistent use of condoms results in 80% reduction in HIV incidence").

40. *See* Burris & Weait, *supra* note 1, at 7–8 ("The growing evidence that treatment with ARV medicines significantly reduces the likelihood of transmission is likely to influence the ethical discussion in the future."); Kaplan, *supra* note 3, at 1527–28 (arguing that "statutes defined in terms of status and activities are inherently problematic," because they do not recognize other factors affecting the risk of transmission, such as whether the individual is on antiretroviral therapy); James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 732–33 (2009) (commenting that "[a]s treatments for HIV infection become more effective, [] justification for HIV-specific legislation will continue to erode").

41. Pietro Vernazza et al., *Les Personnes Séropositives Ne Souffrant d'Aucune Autre MST et Suivant un Traitment Antirétroviral Efficace Ne Transmettent Pas le VIH par Voie Sexuelle*, 89 BULLETIN DES MÉDECINS

mission on HIV/AIDS concluded that an HIV-positive person with an undetectable viral load who has no other STI "cannot pass on the virus through sexual contact."[42]

Finally, although judges, prosecutors and journalists continue to characterize sexual exposure to HIV as a "death sentence,"[43] this description is no longer accurate. Since 1996, HAART has transformed HIV from a lethal disease to a chronic, though life-changing, illness that is manageable with medication.[44] Today, people who receive HAART are likely to enjoy a near-normal lifespan and die of a cause unrelated to HIV.[45] HIV remains incurable, but AIDS is now preventable.

SUISSES 165, 167 (2008), *English translation available at* http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement_May%202008_translation%20EN.pdf. A trial has shown that early treatment with HAART reduces the risk of transmission to an uninfected partner by ninety-six percent. Myron S. Cohen et al., *Prevention of HIV-1 Infection with Early Antiretroviral Therapy*, 365 NEW ENG. J. MED. 493, 503 (2011). The CDC described it as a trial that "definitively showed that early treatment of HIV-infected persons dramatically cuts the rate of new infections." CDC, BACKGROUND BRIEF ON THE PREVENTION BENEFITS OF HIV TREATMENT 1 (2013). *But see* Elizabeth Hamlyn et al., *Plasma HIV Viral Rebound Following Protocol-Indicated Cessation of ART Commenced in Primary and Chronic HIV Infection*, 7 PLOS ONE 1, 6–7 (2012) (explaining that a patient with suppressed viral load may sometimes rebound to infectious levels, increasing their risk of transmission, even though they are following the treatment regimen).

42. Vernazza et al., *supra* note 41, at 165.

43. Hoppe, *supra* note 9, at 143; *see also, e.g.*, Shana Druckerman & Susan Welsh, *How Women United To Stop HIV-Positive Man*, ABC NEWS (Sept. 16, 2009), http://abcnews.go.com/2020/hiv-criminal-busted-women-lied/story?id=8579258 (reporting that a woman who received news of HIV-positive test results thought to herself "I'm going to die, I'm going to die").

44. *See* GLOBAL COMMISSION REPORT, *supra* note 31, at 20 (noting the "success of antiretroviral treatment (ART) in significantly reducing transmission risk and improving the quality of life and longevity for people with HIV"); Antiretroviral Therapy Cohort Collaboration, *Causes of Death in HIV-1-Infected Patients Treated with Antiretroviral Therapy, 1996–2006: Collaborative Analysis of 13 HIV Cohort Studies*, 50 CLINICAL INFECTIOUS DISEASES 1387, 1395 (2010) ("ART continues to dramatically reduce rates of mortality attributable to HIV-1 infection in high-income countries."); Waldman, *supra* note 13, at 559–61 (describing the ability of HAART treatments to neutralize HIV in the body).

45. *See* Antiretroviral Therapy Cohort Collaboration, *supra* note 44, at 1392 (finding that the "cumulative incidence of non-AIDS-related deaths exceeded that of AIDS-related deaths after ~4 years of ART"). Although AIDS deaths continue to occur in Western countries, many such deaths occur because the people were diagnosed late and did not start treatment early enough. HEALTH PROTECTION AGENCY, HIV IN THE UNITED KINGDOM: 2012 REPORT 10–13 (2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335452/HIV_annual_report_2012.pdf.

Public health critics also object that HIV prosecutions undermine public health interventions that, unlike criminalization, have been proven to reduce the spread of HIV: reducing stigma[46] and encouraging testing,[47] treatment, and safer sexual behaviors,[48] including mutual responsibility for risk reduction through condom use.[49] They argue that, by criminalizing knowledge of HIV status, nondisclosure laws disincentivize

46. Nondisclosure laws stigmatize all people with HIV as "vectors of disease and potential criminals." Symington, *supra* note 20, at 653–54; *see also* CHLP, ENDING AND DEFENDING, *supra* note 2, at 3–4 ("[B]eing the subject of a law enforcement investigation of HIV exposure can have significant negative impact on the life of someone with HIV."); GLOBAL COMMISSION REPORT, *supra* note 31, at 20, 25; Burris & Cameron, supra note 31, at 579–80 ("Society's obligation is not to condemn . . . . The blunt use of HIV-specific criminal statutes and prosecutions does the opposite."); Galletly & Pinkerton, *supra* note 36, at 457–58 (HIV "laws counteract the public health goal of reducing HIV-related stigma and the associated benefits to HIV-positive persons and to society."); Kaplan, *supra* note 3, at 1519–20, 1527, 1557, 1563 (discussing the effect of HIV statutes in encouraging stigma and the negative results on public health); Lazzarini et al., *supra* note 31, at 1350–51 ("Laws that criminalize HIV exposure may actually undermine public health efforts by . . . exacerbating HIV-related stigma.").

47. *See* Symington, *supra* note 20, at 653–54; Burris & Cameron, *supra* note 31, at 579; Galletly & Pinkerton, *supra* note 36, at 457, 459; Kaplan, *supra* note 3, at 1562; Lazzarini, *supra* note 2, at 250–51; Lazzarini et al., *supra* note 31, at 1350; *cf.* CHLP, ENDING AND DEFENDING, *supra* note 2, at 3 (describing types of laws in which an individual believed by public health officials to be a risk for disease transmission can be detained, even indefinitely).

48. Criminalization of low- and no-risk behaviors tend to contravene the "public health emphasis on harm reduction, which encourages people to minimize risk when risk elimination is unfeasible." Galletly & Pinkerton, *supra* note 36, at 453, 455. *See also* Burris & Cameron, *supra* note 31, at 579; Kaplan, *supra* note 3, at 1530; Mykhalovskiy & Betteridge, *supra* note 16 at 39; *cf.* CHLP, ENDING AND DEFENDING, *supra* note 2, at 3 (explaining the possibility, under certain laws, of indefinite detention for persons with HIV "based on sexual activity posing no risk of HIV transmission"). As Baggaley points out, *supra* note 38, at 1056, "practising oral sex with an HIV-infected individual considerably reduces the risk of HIV acquisition compared with that for [receptive or insertive anal sex], but does not reduce it to zero. Individuals often make sophisticated choices regarding the balance of risk and pleasure."

49. Galletly & Pinkerton, *supra* note 36, at 453, 455; Kaplan, *supra* note 3, at 1541, 1546; Mykhalovskiy & Betteridge, *supra* note 16, at 44; *see also*, CDC, HIGH-IMPACT PREVENTION: CDC'S APPROACH TO REDUCING HIV INFECTIONS IN THE UNITED STATES 3–5 (Aug. 2011), http://cdc.gov/hiv/strategy/hihp/report/pdf/NHPC_Booklet.pdf [hereinafter CDC, HIGH-IMPACT PREVENTION] (listing destigmatization, HIV testing, HAART treatment, and testing and treatment for other STIs as HIV-prevention strategies that have been "proven effective").

testing.[50] People who know they have HIV are more likely to disclose, take precautions, and receive treatment than those who have not been tested, and are much less likely than their untested counterparts to transmit HIV.[51] For example, a recent analysis estimated that the 20% of HIV-positive Americans who do not know of their infection are responsible for about half of all transmissions.[52] Public health critics also fear that HIV criminalization "may foster a false sense of security among HIV-negative persons who may choose to forgo condom use unless notified of their partners' HIV-positive status."[53]

There is no reason to assume that most, or much, HIV transmission results from nondisclosure. The public health rationale for criminalizing nondisclosure relies on a premise that HIV-negative people will not take sexual risks with partners they know to be HIV-positive. But, as public health research and the facts of HIV prosecutions show, they often do.[54] Unsur-

50. *See, e.g.*, Sean Strub, *Prosecuting HIV: Take the Test—and Risk Arrest?*, POSITIVELY AWARE, May–June 2012, at 38–39, http://s423995880.onlinehome.us/wp-content/uploads/2012/07/PA+MayJune2012.pdf. It seems unlikely, though, that the remote prospect of prosecution would actually deter testing, as HIV laws have been shown to have little effect on behavior. *See infra* note 55.

51. *See* Symington, *supra* note 20, at 653–54; Burris & Cameron, *supra* note 31, at 579; Galletly & Pinkerton, *supra* note 36, at 456; Kaplan, *supra* note 3, at 1563; *see also* Gary Marks et al., *Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States: Implications for HIV Prevention Programs*, 39 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 446, 448 (2005).

52. H. Irene Hall et al., *HIV Transmissions from Persons Living with HIV Who Are Aware and Unaware of Their Infection,* 26 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 893, 893 (2012) (finding undiagnosed persons responsible for approximately 49% of HIV transmissions in the United States).

53. Galletly & Pinkerton, *supra* note 36, at 455; *see also* Kaplan, *supra* note 3, at 1557, 1563**.**

54. Previously uninformed partners often continue to have sex, including condomless sex, after learning that the other person has HIV. *See, e.g.*, State v. Yonts, 84 S.W.3d 516, 518 (Mo. Ct. App. 2002); R. v. D.C., [2012] S.C.R. 626, 630 (Can.); R. v. Cuerrier, [1998] 2 S.C.R. 371, 416 (Can.); Kate Buchacz et al., *Sociodemographic, Behavioral, and Clinical Correlates of Inconsistent Condom Use in HIV-Serodiscordant Heterosexual Couples*, 28 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME, 289, 289, 292 (2001) (studying serodiscordant heterosexual couples who do not consistently use condoms); Teresa J. Finlayson et al., CDC, *HIV Risk, Prevention, and Testing Behaviors Among Men Who Have Sex with Men—National HIV Behavioral Surveillance System, 21 US Cities, United States, 2008*, 60 SURVEILLANCE SUMMARIES 1, 6 (2011) (finding similar rates of condomless anal sex among MSM who said their most recent partner's HIV status was positive, negative or unknown); *see also* TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING 48 (2011) (describing self-identified "bug chasers": HIV-negative gay men who seek unpro-

prisingly, these critics point out, HIV criminalization does not work: empirical studies have found that criminal laws are unlikely to increase disclosure, reduce risky behaviors, or reduce HIV transmission.[55]

Police and prosecutors might mitigate the overinclusiveness of nondisclosure laws by exercising their discretion to prosecute only when the complainant has been infected, or at least when the complainant was put at risk. They do not consistently do this, however, and several appellate courts have recently upheld convictions for performing oral sex,[56] receiving oral sex,[57] and for vaginal or anal intercourse

tected receptive anal sex with HIV-positive partners with the intention of becoming infected with HIV).

55. *See* CHLP, ENDING AND DEFENDING, *supra* note 2; GLOBAL COMMISSION REPORT, *supra* note 31, at 20, 25; NAT'L ALLIANCE OF STATE & TERRITORIAL AIDS DIRS., *supra* note 31, at 1–4; UNAIDS, POLICY BRIEF, *supra* note 31, at 4–5; Burris & Cameron, *supra* note 31, at 578–80; Galletly & Pinkerton *supra* note 36, at 458; Kaplan, *supra* note 3, at 1520, 1557, 1562–63; Lazzarini et al., *supra* note 2, at 250–51; Lazzarini et al., *supra* note 31, at 1350; *see also* Burris, *supra* note 1, at 497, 502–03 (finding that "[n]either anal nor vaginal sex without a condom was significantly associated with beliefs about whether law requires condom use"); Carol L. Galletly et al., *New Jersey's HIV-Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living with HIV,* 102 AM. J. PUB. HEALTH 2135, 2135 (2012) (finding that HIV-positive persons' knowledge of their state's criminal disclosure requirements was not associated with increased sexual abstinence, condom use, or serostatus disclosure; also finding that knowledge of the law was not associated with increased perception of stigma); Carol L. Galletly et al., *A Quantitative Study of Michigan's Criminal HIV Exposure Law*, 24 AIDS CARE 174, 174 (2012) (finding mixed impact of law); Horvath, *supra* note 1, at 1225–26 (finding that HIV-disclosure statutes did not have a deterrent effect on unprotected anal intercourse between men); Patrick O'Byrne et al., *Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-Based Gay Men's Sex Survey*, 24 J. ASS'N NURSES AIDS CARE 81, 85 (2013) (finding that some respondents who knew about nondisclosure prosecutions were more reluctant to talk with health providers about their sexual behavior, less likely to seek out testing, and more likely to have engaged in unprotected penetrative sex in the last two months); *cf.* Trevor A. Hart et al., *Partner Awareness of the Serostatus of HIV-Seropositive Men Who Have Sex with Men*, 9 AIDS & BEHAV. 155, 163 (2005) (finding relation between partner awareness of serostatus and rates of unprotected sex). *But see* Adeline Delavande et al., *Criminal Prosecution and Human Immunodeficiency Virus—Related Risky Behavior*, 53 J.L. & ECON. 741, 755–56 (2010) (finding that HIV prosecutions are associated with a reduction in the number of partners, an increase in safe sex, but also an increase in sex with prostitutes, and a reduced disclosure rate by HIV-positive persons. This study measured risk behaviors observed in 1998 against the number of prosecutions between 1986 and 2001).

56. *See, e.g.*, State v. Mubita, 188 P.3d 867, 881–83 (Idaho 2008); Shelton v. State, No. 50001, 2009 WL 1490929, at *1 (Nev. 2009); Commonwealth v. Cordoba, 902 A.2d 1280, 1289 (Pa. Super. Ct. 2006); *cf.* Hoppe, *supra* note 9, at

where a condom was used.[58] In 2006, the Iowa Supreme Court held that it was "common knowledge" that "oral sex is a well-recognized means of transmission of the HIV [*sic*],"[59] and took judicial notice of this erroneous "fact."[60] In 2009, a Michigan exotic dancer was convicted of nondisclosure after a lap dance client rubbed her vulva with his nose[61]—a form of contact which cannot transmit HIV.

Thus, public health critics contend, HIV nondisclosure is neither risky enough nor harmful enough to warrant the unique, broad, and undifferentiated criminal penalties imposed for nondisclosure.

B. LOW-STATUS VICTIMS: IV DRUG USERS, SEX WORKERS, AND MEN WHO HAVE SEX WITH MEN

Perhaps because they oppose criminalization, legal and public health critics have not pointed out that nondisclosure statutes and prosecutions are underinclusive with respect to their public health objectives in two notable ways: they tend not to punish nondisclosure to men who have sex with men (MSM) or to those who share needles to inject drugs. Status-based exemptions from HIV criminal rules raise concern that—as critical race feminists and criminal justice scholars have long recognized in rape prosecutions—the gender, sexual orientation, and social status of the complainant (much more than that of the accused) tends to shape perceptions of whether and when sex is a crime.[62]

142–43 (discussing "Eric," the first defendant convicted under Michigan's HIV disclosure statute); *Oklahoma City Man Arrested on Suspicion of 'Transmitting AIDS*,*'* NEWS OK (Aug. 27, 2009), http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100.

57. *See, e.g.*, State v. Stevens, 719 N.W.2d 547, 548 (Iowa 2006). *But see* L.A.P. v. State, 62 So. 3d 693, 694–95 (Fla. Dist. Ct. App. 2011) (reversing defendant's conviction because oral sex does not constitute sexual intercourse as required by statute).

58. *See, e.g.*, Rhoades v. State, 848 N.W.2d 22, 31, 40 (Iowa 2014); *cf.* Hoppe, *supra* note 9*,* 145–46 (discussing "Charlie").

59. *Stevens*, 719 N.W.2d at 551.

60. *Id. But see Rhoades*, 848 N.W.2d at 25 (holding that, based on the state of medicine at the time of the defendant's guilty plea in 2009, a court could not take judicial notice that anal sex with a condom could transmit HIV regardless of viral load).

61. Hoppe, *supra* note 9, at 145–46.

62. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1279–80 (1991); Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 457, 459–61 (Catharine A

One status-based exemption is sexual orientation: Florida's HIV-exposure statute has been held to require disclosure of HIV status before penile-vaginal intercourse, but not before other sexual activity, including between same-sex partners.[63] All other state disclosure mandates are facially gender-neutral. Nonetheless—despite the high-profile prosecution of Nick Rhoades—as discussed in Part IV, prosecutions seem to follow a distinctive pattern: vigorous enforcement against HIV-positive men who nondisclose to women, alongside underenforcement on behalf of HIV-negative MSM.

Another status-based exemption is needle sharing. Legislators and others who advocated criminalization of HIV doubtless believed that criminalizing nondisclosure would help prevent transmission of an incurable disease they viewed as a

MacKinnon & Reva B Siegel eds., 2004) (describing slave women's complete lack of protection against sexual exploitation in the antebellum United States); Angela Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 779 (2000); Berta Esperanza Hernández-Truyol, *Sex, Culture and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 607–09 (1997); Katharine M. Tellis & Cassia C. Spohn, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions About Simple Versus Aggravated Rape*, 36 J. CRIM. JUST. 252, 252, 260 (2008); *see also* Christopher D. Maxwell et al., *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523, 534 (2003) (citing studies indicating that 68% of black men serving prison sentences for sexual assault had white victims, even though only 15% of white sexual assault victims report that their assailant was black, and 98% of black victims report a black assailant); Elizabeth Ehrhardt Mustaine, *Social Disorganization and Unfounded Sexual Assault Case Clearances*, 28 VIOLENCE & VICTIMS 90, 96 (2013) (finding male-victim sexual assault cases 52% more likely to be deemed "unfounded" than female-victim sexual assault allegations); Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the 'Gateway to Justice,'* 48 SOC. PROBS. 206, 224 tbl.3 (2001); Melinda Tasca et al., *Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest*, 28 J. INTERPERSONAL VIOLENCE 1157, 1171 (2012) ("[V]ictims with a history of drug use, particularly in the context of prostitution, were not seen as genuine victims and were depicted as undeserving of legal protection."). *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 162–64 (1990); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1658–60 (1998).

63. *See* L.A.P. v. State, 62 So. 3d 693, 694–95 (Fla. Dist. Ct. App. 2011). *But see* State v. D.C., 114 So. 3d 440, 443 (Fla. Dist. Ct. App. 2013) (certifying conflict with *L.A.P. v. State* by interpreting a broader definition of "sexual intercourse"). The Florida Supreme Court heard argument on this issue as this Article went to press: see Reuters, *Florida Supreme Court Asked To Define "Sexual Intercourse" in HIV Case,* AL JAZEERA AMERICA (Feb. 4, 2015), http://america.aljazeera.com/articles/2015/2/4/florida-supreme-court-to-define-sex-in-hiv-case.html.

death sentence. HIV statutes, though, generally fail to criminalize nondisclosure before sharing an unsterilized needle—an activity that poses a risk of transmission "an order of magnitude higher" than high-risk sex.[64] As early as the late 1980s, legislators knew, or should have realized, that many of the criminalized behaviors could not transmit HIV. Michigan's 1988 statute, for example, is a prototypical example of HIV nondisclosure legislation (and one of the few for which legislative history is available). As part of the legislative process, the state health department provided a report advising that "sexual intercourse is a prime mode of contagion, as is the use of shared needles and syringes for intravenous drugs."[65] Nonetheless, the Michigan legislature criminalized nondisclosure before oral sex and digital penetration—and did not criminalize nondisclosure before sharing an unsterilized needle.[66]

Although around ten percent of recent transmissions are attributed to intravenous drug use,[67] only seven states and territories nominally require disclosure of HIV prior to sharing a needle or injection equipment.[68] The Center for HIV Law and

64. JACQUES PEPIN, THE ORIGINS OF AIDS 106–07 (2011); *see also* David Gisselquist et al., *Efficiency of Human Immunodeficiency Virus Transmission Through Injections and Other Medical Procedures: Evidence, Estimates, and Unfinished Business*, 27 INFECTION CONTROL AND HOSP. EPIDEMIOLOGY 944, 950 (2006) (discussing transmission via intravenous drug injection).

65. MICH. DEP'T OF PUB. HEALTH, AIDS IN MICHIGAN: A REPORT TO THE GOVERNOR AND THE LEGISLATURE, at V (Feb. 1987); *see also* Richard Green, *The Transmission of AIDS*, *in* AIDS AND THE LAW: A GUIDE TO THE PUBLIC 28, 31 (Harlon L. Dalton et al. eds., 1987).

66. *See, e.g.*, BLUE RIBBON COMMISSION ON AIDS, ACQUIRED IMMUNODEFICIENCY SYNDROME IN MICHIGAN 2 (Mar. 1988); HOUSE REPUBLICAN TASK FORCE ON AIDS, FINAL REPORT WITH RECOMMENDATIONS 10 (Mich. 1988).

67. Of 47,500 HIV infections in 2010, 2,400 were men infected through "[i]njection drug use," 1,500 were women infected this way, and 1,600 were men who reported both "[m]ale-to-male sexual contact" and intravenous drug use. CDC, ESTIMATED HIV INCIDENCE IN THE UNITED STATES, 2007–2010: HIV SURVEILLANCE SUPPLEMENTAL REP. 15 tbl.1 (2012), *available at* http://www.cdc.gov/hiv/surveillance/resources/reports/2010supp_vol17no4/pdf/hssr_vol_1_no_4.pdf#page=14.

68. *See* GA. CODE ANN. § 16-5-60(c)(2) (West 2014) (Georgia); IND. CODE §§ 16-41-7-1(c), (d) (2014) (Indiana); MO. REV. STAT. § 191.677(2)(b) (2014) (Missouri); 10A N.C. ADMIN. CODE 41A.0202(1)(b), (f), (g) (2015) (North Carolina); S.C. CODE ANN. § 44-29-145(5) (2014) (South Carolina); S.D. CODIFIED LAWS §§ 22-18-31(3), -33 (2015) (South Dakota); TENN. CODE ANN. §§ 39-13-109(a)(3), (c)(1) (2014 LexisNexis) (Tennessee); V.I. CODE ANN. tit. 14, § 888(a) (2014 LexisNexis) (Virgin Islands); IOWA CODE §§ 709C.1(2)(c), (5) (repealed 2014) (Iowa). Idaho, Illinois, Minnesota, and North Dakota criminalize sharing an unsterilized needle even if HIV status is disclosed. *See* IDAHO CODE §§ 39-

Policy (CHLP) estimates that seven other HIV statutes could be construed to allow prosecution for needle sharing.[69] There have been several prosecutions for deliberate needle-stabbings that were intended to transmit HIV, but neither the CHLP nor either of the two jurisdiction-wide studies conducted to date[70] has found a single prosecution for consensual sharing of needles or drug injection equipment.[71] In a search of Google, LexisNexis, and Westlaw, I have not found one, either.

One explanation for the dearth of needle-sharing prosecutions might be that drug possession is already illegal. Intravenous drug users are engaged in a criminal offense—drug possession—and the potential victims of their nondisclosure are fellow lawbreakers, who might hesitate to approach police with a complaint. But the same is true of prostitution. Unlike needle sharing, though, engaging in prostitution with HIV is subject to enhanced penalties in many states, and these laws are vigorously enforced.[72] In Nashville, there are more prosecutions for "aggravated prostitution" than for sexual nondisclosure between nonpaying partners.[73] Police do not wait for johns to come forward with criminal complaints: most Nashville prosecutions involved plainclothes police stings.[74] In Tennessee, as in

608(1)–(2) (2014); 170 ILL. COMP. STAT. 5/12-5.01(a)(2) (2014); MINN. STAT. § 609.2241, subdiv. 3 (2014); N.D. CENT. CODE §§ 12.1-20-17(1), (2) (2013). Kansas and the U.S. Virgin Islands criminalize sharing an unsterilized needle with the intent to transmit HIV. Act Effective 2011, ch. 136, sec. 59(a)(3), 2010 Kan. Sess. Laws; V.I. CODE ANN. tit. 14, § 888(a) (2014 LexisNexis).

69. *State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools*, CHLP, http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf (last updated Oct. 21, 2013).

70. *See supra* note 9.

71. CHLP reports one recent prosecution for consensual needle sharing, but the man was charged only after he allegedly stabbed a detective with a used needle. CHLP, PROSECUTIONS, *supra* note 2; *see also* Michelle Hunter, *Kenner Man Accused of Exposing JPSO Detective, Two Others to HIV*, TIMES-PICAYUNE (New Orleans), April 14, 2014, *available at* http://www.nola.com/crime/index.ssf/2014/04/kenner_man_accused_of_exposing.html.

72. *See generally* CHLP, ENDING AND DEFENDING, *supra* note 2 (discussing the enhanced penalties of HIV-specific statutes among various states for prostitution offenses).

73. Galletly & Lazzarini, *supra* note 9, at 2627, 2628 fig.1 (finding twenty-six arrests for "aggravated prostitution" and sixteen for sexual nondisclosure). Hoppe's Michigan study looked only at prosecutions for sexual nondisclosure: it did not consider HIV-prostitution. *See generally* Trevor Alexander Hoppe, *Disparate Risks of Conviction Under Michigan's Felony HIV Disclosure Law: An Observational Analysis of Convictions and HIV Diagnosis, 1992–2010*, 17 PUNISHMENT & SOC. 73 (2015).

74. Galletly & Lazzarini, *supra* note 9, at 2630.

other states that criminalize HIV-prostitution, HIV-prostitution is a felony regardless of transmission risk, and remains so even if the sex worker discloses her or his serostatus.[75] A majority of the Nashville prosecutions—thirteen of twenty-five—involved sex workers who agreed to perform oral sex,[76] which cannot transmit HIV.[77] Nashville is unique only in that researchers have had access to comprehensive data about prosecutions: such prosecutions have been documented in many other states, as well.[78]

At the same time, state laws and their enforcers do not aggressively punish HIV exposure or transmission when the *victims* are sex workers. Only eight states criminalize HIV-positive clients, as well as sex workers.[79] In Colorado, it is a lesser offense for an HIV-positive john to "patroniz[e] a prostitute" than for a sex worker to be HIV-positive.[80] In Nashville,

75. See HIV-prostitution statutes reproduced in CHLP, ENDING AND DEFENDING, *supra* note 2, at 218, 224; *see also* TENN. CODE ANN. § 39-13-516 (LexisNexis 2014).

76. Galletly & Lazzarini, *supra* note 9, at 2630 tbl.4. HIV-prostitution statutes also typically criminalize offering oral sex for hire while HIV-positive, regardless of disclosure or condom use. *See, e.g.*, COLO. REV. STAT. § 18-7-201.7 (LexisNexis 2014); FLA. STAT. ANN. § 796.07 (LexisNexis 2014); GA. CODE ANN. §§ 16-5-60(c)(3)–(4) (Westlaw 2014); 9 GUAM CODE ANN. § 25.10(8)–(9) (LexisNexis 2014); PA. CONS. STAT. ANN. § 5902(a.1)(4) (LexisNexis 2014); S.C. CODE ANN. § 44-29-145(2) (2014).

77. *See supra* note 23.

78. *See, e.g.*, People v. Hall, No. B190199, 2007 WL 2121912, at *3, *6 (Cal. Ct. App. July 25, 2007) (affirming a sex worker's sentence of six years for felony prostitution for agreeing to perform oral sex and intercourse on an undercover police officer); State v. Richmond, 708 So. 2d 1272, 1273, 1278 (La. Ct. App. 1998) (affirming five-year sentence of hard labor for sex worker who agreed to perform oral sex on an undercover police officer); State v. West, No. 22966, 2009 WL 4268554, slip op. at *1, *5 (Ohio App. 2d Nov. 25, 2009); CHLP, ENDING AND DEFENDING, *supra* note 2, at 25, 44, 100–01 (discussing prosecution of HIV-positive sex worker in California despite carrying condoms (2007) and of HIV-positive sex workers for offering oral sex to an undercover police officer in Florida (2007) and Louisiana (1998)); CHLP, PROSECUTIONS, *supra* note 2 (discussing prosecutions of HIV-positive sex workers for offering oral sex in Florida (June 2013), Nebraska (June 2013) and Colorado (Feb. 2011)); Michael A. Scarcella, *Woman Charged with Exposing Men to HIV*, HERALD TRIB. (Sarasota, Fla.), Oct. 10, 2007, *available at* http://www.heraldtribune.com/article/20071010/NEWS/710100460 (discussing the charges against an alleged prostitute who offered oral sex to an undercover officer).

79. CHLP, ENDING AND DEFENDING, *supra* note 2, at 18–26 (California), 27–32 (Colorado), 46–53 (Georgia), 91–95 (Kentucky), 144–47 (Nevada), 170–185 (Ohio), 194–203 (Pennsylvania), 233–37 (Utah).

80. COLO. REV. STAT. §§ 18-7-201.7(2), -1.3-401(1)(a)(v)(A) (LexisNexis 2014) (classifying HIV-prostitution as a Class 5 felony, carrying a maximum sentence of three years); *id.* §§ 18-7-205.7, -1.3-401(1)(a)(v)(A) (classifying pat-

no client has ever been prosecuted.[81] The CHLP has not identified any case in which a client was prosecuted for exposing a sex worker, although it does report a Utah prosecution in which an HIV-positive would-be john propositioned a young person who turned out not to be a sex worker.[82]

These inclusions and exclusions are incoherent from a public health perspective, but they do not seem arbitrary. They are consistent with a discriminatory intuition that HIV is tolerable when contained within low-status groups such as MSM, sex workers, and intravenous drug users, but intolerable when higher-status heterosexuals are put at risk.

C. MORAL RETRIBUTION

Although criminal law is not an effective public health strategy, it can send potent symbolic messages. HIV criminalization might be justified by "[t]he urge to punish or seek retribution."[83] Prosecution might represent "a visible political symbol of seriousness of purpose in controlling AIDS."[84]

Public health and legal critics have challenged the retributive rationale, pointing out that HIV nondisclosure is not always morally blameworthy.[85] The stigma and discrimination faced by people with HIV make disclosure risky as well as difficult, they point out, and partners could protect themselves by using condoms or engaging in safer sexual behaviors.[86]

These critics note that news reportage often conflates sex without disclosure with malicious attempt to transmit HIV.[87]

ronizing a prostitute while HIV-positive as a Class 6 felony, carrying a maximum sentence of eighteen months).

81. Galletly & Lazzarini, *supra* note 9, at 2627 tbl.2.

82. CHLP, PROSECUTIONS, *supra* note 2 (citing Erin Alberty, *Price Police Say HIV-Positive Man Solicited Sex from Teen*, SALT LAKE TRIB., June 7, 2013, *available at* http://www.sltrib.com/sltrib/news/56428611-78/mead-barnes-police-sex.html.csp).

83. Grant, *Boundaries, supra* note 20, at 154.

84. Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil* Liberties, 49 OHIO ST. L.J. 1017, 1019 (1998–89).

85. *See, e.g.*, CHLP, ENDING AND DEFENDING, *supra* note 2, at 4; GLOBAL COMMISSION REPORT, *supra* note 31, at 20; Burris & Cameron, *supra* note 31, at 579–80; Kaplan, *supra* note 3, at 1521–54.

86. *See* GLOBAL COMMISSION REPORT, *supra* note 31, at 20; WEAIT, *supra* note 16, at 34–35, 186–87; Kaplan, *supra* note 3, at 1529, 1531, 1533; Mykhalovskiy & Betteridge, *supra* note 16, at 39.

87. *See, e.g.*, GLOBAL COMMISSION REPORT, *supra* note 31, at 23; WEAIT, *supra* note 16, at 29–30; Persson & Newman, *supra* note 16, at 633–34, 641; Edwin J. Bernard, *The Evolution of Global Criminalisation Norms: The Role of the United States*, NAM, *available at* http://www.aidsmap.com/The

Reports on the most notorious prosecutions, especially those involving white women's allegations against black men, often characterize defendants as "AIDS monsters," "AIDS avengers," and "HIV predators."[88] In reality, these critics note, people who have sex without disclosure rarely set out to infect their uninformed partners. As Kathleen Sullivan and Martha Field pointed out in 1988, "[h]aving sex or sharing needles is a highly indirect modus operandi for the person whose *purpose* is to kill."[89] Edwin Bernard's review of HIV prosecutions found that substantiated cases of malicious transmission are extremely rare, and the few that have been substantiated often "do not involve sex but are equally likely to involve an individual who was not HIV-positive but who obtained HIV-infected blood elsewhere and injected it into their victim."[90] Reports of intentional sexual transmission, Bernard observes, have often turned out to be hoaxes.[91]

Nonetheless, legislators and others may equate nondisclosure with intent to transmit HIV. For example, a Tennessee legislator observed, during a 1994 legislative debate, "HIV is not spread accidentally. HIV is spread because of conduct that is basically intentional between parties, either through sexual contact or through transmission of fluids with the exception of blood transfusions . . . people engage in conduct knowingly that

-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/#ref1499470 (last visited Mar. 16, 2015).

88. *See infra* Part III.

89. Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 163 (1988) (emphasis in original).

90. Bernard, *supra* note 87, at n.1 (discussing an Illinois case in which an American man was convicted of injecting his 11-month-old son with HIV-infected blood to avoid paying child support (citing *Father Is Guilty in H.I.V. Case*, N.Y. TIMES (Dec. 6, 1998), *available at* http://www.nytimes.com/1998/12/06/us/father-is-guilty-in-hiv-case.html)); *see also* State v. Schmidt, 771 So. 2d 131, 135–42, 160 (La. Ct. App. 2000) (affirming conviction and sentence for physician who extracted HIV-infected blood from two patients and injected it into his ex-lover).

91. Edward J. Bernard, *China: Woman Accused of Intentionally Infecting 30 Men*, CRIMINAL HIV TRANSMISSION (Oct. 19, 2009), http://criminalhivtransmission.blogspot.com/2009/10/china-woman-accused-of-intentionally.html (discussing allegations that turned out to be a malicious smear against an HIV-negative woman by a vengeful ex-boyfriend); Bernard, *supra* note 87, at n.2 (citing *Porn Star Jackie Braxton Sparks Mass Panic with Hoax Claim To Have Infected 500 Men with AIDS*, DAILY MAIL (U.K.) (Jan. 19, 2010), *available at* http://www.dailymail.co.uk/news/article-1244257/Porn-star-Jackie-Braxton-sparks-mass-panic-claiming-infected-500-men-Aids.html).

puts other people at risk."[92] To address this intuition, this Section will consider the moral dynamics of nondisclosure prosecutions as they have actually occurred. Since comprehensive surveys of HIV prosecutions in the United States do not yet exist, the accounts in this Section are necessarily anecdotal and cannot claim to be representative. However, the scenarios discussed here seem common enough to raise doubt that the people charged with nondisclosure typically deserve condemnation as felons.

Many—though by no means all—prosecutions do involve defendants who grievously betrayed their partners. Some lied about their HIV status, claiming they were uninfected;[93] some even faked evidence of negative HIV test results.[94] Many had unprotected vaginal or anal sex,[95] both of which are "high-risk" behaviors for HIV transmission (although the infection risk of a single incident of unprotected penetration remains quite low[96]). Some misled partners over the course of a long-term relationship;[97] some had unprotected sex over a sustained period and

92. *HIV—Criminal Exposure—Penalties: Hearing on S.B. 2244 Before the Tenn. S. Judiciary Comm.*, 1994 Leg., 99th Sess. 4-5 (Tenn. 1994) (Statement of Sen. Jordan) (on file with author); *see also HIV—Criminal Exposure—Penalties: Hearing on S.B. 2244 Before the Tenn. S. Reg. Sess.*, 1994 Leg., 99th Sess. 4-20 (Tenn. 1994) (Statement of Sen. Rice) (on file with author) ("Evidence indicates that a small number of HIV positive victims are intent on infecting others and simply do not care enough to change their sexual behavior. These persons who attempt to transmit the virus through sexual contact, through the use of drug paraphernalia, the donation of blood, should be prepared to give up their freedom.").

93. *See, e.g.*, State v. Musser, 721 N.W.2d 734, 741 (Iowa 2006); *Man w/ HIV Gets Prison Time for Assault*, SPOKESMAN-REV. (Spokane, Wash.) (Oct. 11, 2010), http://www.spokesman.com/blogs/sirens/2010/oct/11/man-w-hiv-gets-prison-time-assault/ [hereinafter *Man w/ HIV*]; Lisa Marchesoni, *Husband Indicted for Kidnapping Domestic Violence Worker*, MURFREESBORO POST (Murfreesboro, Tenn.) (Nov. 15, 2008), http://www.murfreesboropost.com/husband-indicted-for-kidnapping-domestic-violence-worker-cms-14006.

94. *US: New York Man Faked HIV Test, Charged with Reckless Endangerment*, HIV JUSTICE NETWORK (Dec. 10, 2008), http://www.hivjustice.net/case/us-new-york-man-faked-hiv-test-charged-with-reckless-endangerment/.

95. *See, e.g.*, State v. Rick, 821 N.W.2d 610, 612 (Minn. Ct. App. 2012); Meghan M. Cuniff, *HIV-Positive Teen Accused of Assault*, SPOKESMAN-REV. (Spokane, Wash.) (Oct. 13, 2010), http://www.spokesman.com/stories/2010/oct/13/hiv-positive-teen-accused-assault; John W. Goodwin, Jr., *Randal Brown Reaches Plea Deal in HIV Assault*, VINDY.COM (Mar. 2, 2012), http://66.232.150.6/news/2012/mar/02/man-who-transmitted-hiv-reaches-plea-dea/?newswatch; *Police: Fitchburg Man with HIV Put Partners at Risk*, *supra* note 94.

96. *See supra* notes 37–38 and accompanying text.

97. *See, e.g.*, Sykes v. State, 372 S.W.3d 33, 35 (Mo. Ct. App. 2012); Rhon-

infected their partners;[98] and a few impregnated their female partners without telling them they were HIV-positive, putting both woman and baby at risk of infection.[99] A few were alleged to have intentionally sought to transmit HIV.[100]

However, many nondisclosure prosecutions involve HIV-positive people who made poor choices that do not present Manichean cases of moral breach. It is not self-evident that criminal defendants like Kanay Mubita and Nick Rhoades (described in the introduction to this Part) deserve prosecution and punishment as criminals. Because their sexual activities posed no "realistic possibility of transmission of HIV,"[101] the retributive justification for prosecuting them is not readily apparent—especially in a legal culture where other sexual deceptions are

da Cook, *Man Arrested for Giving HIV to Partner*, ATLANTA J.-CONST. (Aug. 5, 2011), http://www.ajc.com/news/news/local/man-arrested-for-giving-hiv-to-partner/nQKNS/; Kevin Held, *Jermaine Johnson Charged with Spreading HIV*, KSDK.COM (Jan. 24, 2012, 12:59 PM), http://archive.ksdk.com/news/article/299200/0/Jermaine-Johnson-charged-with-spreading-HIV; Patrick Lakamp, *Man Admits Exposing 5 to HIV; Faces 1 Year in Jail*, BUFFALO NEWS (July 9, 2011), http://www.buffalonews.com/article/20110709/CITYANDREGION/307099979; Katie Thomas, *Equestrian Charged with HIV-Related Offense*, N.Y. TIMES (Apr. 11, 2010), http://www.nytimes.com/2010/04/12/sports/12hiv.html; Dino Thompson-Sarmiento, *Exclusive: "Uncle Poodle" Reveals: "My [HIV] Test Results Came Back Positive."* FENUXE (Jan. 10, 2013), http://www.fenuxe.com/2013/01/10/exclusive-honey-boo-boo-star-uncle-poodle-reveals-my-hiv-test-results-came-back-positive.

98. *See, e.g.*, State v. Tabor, 797 N.W.2d 622, at *1 (Iowa 2011) (unpublished table decision); Beth Burger, *More HIV Victims Speak Out*, CHATTANOOGA TIMES FREE PRESS (July 30, 2011), http://www.timesfreepress.com/news/news/story/2011/jul/30/more-hiv-victims-speak-out/55220; Cook, *supra* note 97; Goodwin, *supra* note 95; Held, *supra* note 97.

99. *See, e.g.*, Johnson v. State, 785 N.E.2d 1134, 1137 (Ind. Ct. App. 2003); Burger, *supra* note 98; Cook, *supra* note 97; Rachel E. Leonard, *Man Accused of Knowingly Exposing Girlfriend to HIV*, GOUPSTATE.COM (Mar. 21, 2008, 9:48 AM), http://www.goupstate.com/article/20080321/NEWS/803210376?Title=Man-accused-of-knowingly-exposing-girlfriend-to-HIV.

100. *See, e.g.*, Druckerman & Welsh, *supra* note 43; John Tuohy, *Police Say Man Put 26 Women at Risk of AIDS Through Dating Site*, KDSK.COM (Feb. 25, 2010, 10:40 AM), http://archive.ksdk.com/news/local/story.aspx?storyid=196687; M. Alex Johnson, *Michigan Man May Have Intentionally Infected Hundreds with HIV*, NBC NEWS (Dec. 30, 2011, 11:58 AM), http://usnews.nbcnews.com/_news/2011/12/30/9833291-michigan-man-may-have-intentionally-infected-hundreds-with-hiv?lite (discussing man who turned himself in to police claiming that he was HIV-positive and had "set out to intentionally infect as many people as he could").

101. *See, e.g.*, R. v. Mabior, [2012] 2 S.C.R. 586, 616 (Can.); *see also id.* at 616, 621 (reviewing scientific evidence that sex with a condom while viral load is negligible does not put partner at "significant risk" of HIV infection).

not crimes.[102] Yet prosecutions like theirs, in which the uninformed partner was put at no (or negligible) risk, are not rare.[103]

Why would people with HIV fail to disclose? The remote prospect of subsequent prosecution may be balanced by more immediate concerns about rejection or retaliation, exposure of their HIV status to others, distrust of the partner, dislike of condoms, a desire for spontaneity, hesitation to ruin the mood, fear that a partner may think the discloser is unfaithful or gay, or fear of violence.[104] Ironically, nondisclosure laws may exacerbate these barriers to disclosure: by confiding HIV status, a person may expose himself or herself to the allegation that he or she did not disclose.[105] Alison Symington questions "whether legal provisions could ever be a significant factor in decision making about safer sex 'in the heat of the moment,' particularly if alcohol, drugs, or domestic violence are involved."[106]

Thus, as Carol Galletly and Steven Pinkerton observe, the nondisclosure that prosecutors and reporters construct as "a conscious effort to deceive" may actually result from "denial,

102. *See infra* Part II.C.

103. *See, e.g.*, *supra* notes 56–61 and accompanying text; *see also* L.A.P. v. State, 62 So. 3d 693, 693–94 (Fla. Dist. Ct. App. 2011) (finding that a statute requiring HIV disclosure before "sexual intercourse" did not apply to an HIV-positive woman who did not disclose before "oral sex and digital penetration" by a man; disclosure obligations only applied to "'the penetration of the female sex organ by the male sex organ'" (quoting FLA. STAT. § 826.04 (2008))).

104. *See, e.g.*, CHLP, ENDING AND DEFENDING, *supra* note 23, at 4; GLOBAL COMMISSION REPORT, *supra* note 31, at 23; Symington, *supra* note 20, at 651; WEAIT, *supra* note 16, at 34–35; Burris & Cameron, *supra* note 31, at 580; Kaplan, *supra* note 3, at 1542; *see also* Edwin J. Bernard, *Challenges Associated with Disclosing One's HIV-Positive Status*, http://www.aidsmap.com/page/1442642 (last visited Mar. 16, 2015); Nicolas Sheon & G. Michael Crosby, *Ambivalent Tales of HIV Disclosure in San Francisco*, 58 SOC. SCI. & MED. 2105, 2116 (2004).

105. The HIV-positive person may fear that a new or untrusted partner might report him or her to police if the relationship does not work out. Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization That Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 365 (2013). For examples, see R. v. D.C. [2012] 2 S.C.R. 626, 630 (Can.) (noting complainant reported D.C.'s initial nondisclosure to police only after he was convicted of assaulting her and her son when she ended the relationship); Brook Kelly, *The Modern HIV/AIDS Epidemic and Human Rights in the United States: A Lens into Lingering Gender, Race, and Health Disparities and Cutting Edge Approaches to Justice*, 41 U. BALT. L. REV. 355, 365–66 (2012) (describing prosecution in which abusive HIV-negative ex-boyfriend filed nondisclosure charges after his HIV-positive ex-girlfriend ended the relationship and obtained a restraining order).

106. Symington, *supra* note 20, at 651.

lack of self-efficacy to disclose, or concerns over potential repercussions of disclosure."[107] The criminal law makes HIV-positive people criminals when they respond to the real constraints of their lives by reserving disclosure to partners they know and trust.

Unsurprisingly, people with HIV are much more likely to disclose their status to a long-term partner than a new or casual one. More than ninety percent of people with HIV disclose their status to long-term, intimate, or exclusive partners.[108] By contrast, they report high rates of nondisclosure—anywhere from thirty to seventy-six percent—to casual partners.[109] It would be unfair and unrealistic to call HIV-positive people criminals for having sex in a relationship that is not intimate or trusting.

Many nondisclosure prosecutions arise from sexual interactions that are exploitative or abusive. In some prosecutions, the HIV-positive partner was especially vulnerable. Sociologist Trevor Hoppe found that, of fifty-eight Michigan prosecutions that resulted in conviction, eight defendants were "described in various ways as having 'limited intelligence.'"[110] For example, "Sandra," a Michigan woman whose IQ of 72 sets her at the borderline of developmental disability,[111] was released from an adult foster care facility, and moved into what the court characterized as "a rundown motel notorious for sex work and drug use."[112] Two days later, "Sandra called and begged . . . for permission to return to the foster care home," saying that she had been having sex with another tenant at the motel.[113] The guard-

107. Galletly & Pinkerton, *supra* note 36, at 456.

108. *See* Daniel H. Ciccarone et al., *Sex Without Disclosure of Positive HIV Serostatus in a US Probability Sample of Persons Receiving Medical Care for HIV Infection*, 93 AM. J. PUB. HEALTH 949, 952 tbl.2 (2003).

109. *See infra* notes 288–368 and accompanying text.

110. Hoppe, *supra* note 9, at 143; *see also* Cameron, *supra* note 16, at 36 (discussing findings that in New Zealand, three of eight male-to-female nondisclosure accused "suffered from a diagnosed mental illness or low intellectual ability").

111. AM. PSYCHIATRIC ASS'N, Intellectual Disability Fact Sheet, *available at* http://www.psychiatry.org/file%20library/practice/dsm/dsm-5/dsm-5-intellectual-disability-fact-sheet.pdf (last visited Mar. 16, 2015) (discussing the revised diagnosis of intellectual disability, published in AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2014)).

112. Hoppe, *supra* note 9, at 142.

113. *Id.*

ian of the foster home reported her to police, and Sandra was convicted for nondisclosure.[114]

Other HIV-positive women have been convicted of nondisclosure after they ended long relationships with HIV-negative men who were abusing them. When a person with HIV leaves an abusive relationship, the ex-partner can report him or her to police for nondisclosure at the outset of the relationship.[115]

Another HIV nondiscloser, cocaine addict Kala Pierce, gave oral sex to a drug dealer in exchange for crack cocaine. Upon being told that Pierce had HIV, he helped beat her to death with a two-by-four.[116] Nondisclosers like "Sandra" and Kala Pierce (had she survived) should not be treated as criminals. Given the apparent coercion surrounding the sex they had, it is not at all clear that their nondisclosures were morally wrong.

Some—perhaps most—sex involves some degree of love, trust, affection, or at least attraction. However, as the HIV nondisclosure prosecutions demonstrate, it is not uncommon for people to have sex with partners they hardly know.[117] In such circumstances, the person with HIV cannot know whether disclosure will result in acceptance, rejection, exposure, ostracism, or violence. He or she may thus fail to disclose even when there is no obvious threat to his or her safety. For example, Donald Bogardus, like Nick Rhoades, was an Iowa man who was noninfectious because his viral load was undetectable.[118] Despite the well-publicized Rhoades prosecution, Bogardus failed to tell a one-time partner he had HIV because he was "afraid of what kind of reaction he would get."[119] He wanted to disclose, but

114. *Id.*

115. *See supra note* 105.

116. Chattmon v. State, No. 05-93-01605-CR, 1996 WL 156914, at *1 (Tex. Apr. 4, 1996).

117. *See, e.g.*, State v. Newlon, 216 S.W.3d 180, 183 (Mo. Ct. App. 2007); David MacAnally, *Prosecutor: Woman Didn't Tell Partner of HIV Status*, WTHR.COM (July 1, 2010, 3:01 PM), http://www.wthr.com/global/story.asp?s=12655922; *Man Wanted for HIV Exposure Turns Himself In*, CLARKSVILLE ONLINE (July 12, 2011), http://www.clarksvilleonline.com/2011/07/21/man-wanted-for-hiv-exposure-turns-himself-in; *Man w/ HIV*, *supra* note 93; Jennifer Mann, *2 Guilty of Risking Transmission of HIV at St. Louis Mardi Gras Party*, ST. LOUIS POST-DISPATCH (June 12, 2012), http://www.stltoday.com/news/local/crime-and-courts/guilty-of-risking-transmission-of-hiv-at-st-louis-mardi/article_33d9d61d-057e-582d-b319-894164df2710.html; Young, *supra* note 28.

118. Lindsey Moon, *Critics Address Flaws in Iowa's HIV Criminalization Law*, DAILY IOWAN (Feb. 9, 2012), http://www.dailyiowan.com/2012/02/09/Metro/26931.html.

119. *Id*.

"clammed up," because, he says, "I was afraid he was going to blab it out to everybody."[120] Bogardus says he wanted to use a condom, but the partner refused.[121] The other man did not become infected.[122] Bogardus, who was charged under Iowa's draconian HIV law but sentenced as the state legislature and courts reconsidered it, received a suspended sentence.[123] He had to register as a sex offender, and is likely to lose his job.[124]

The criminal law should not encourage HIV-negative people like Bogardus's partner to have condomless sex with strangers on the assumption that, if they were HIV-positive, they would say so. Given the general ineffectiveness of nondisclosure laws, it seems unlikely that, empirically, they would have any such effect.[125] Still, this message is normatively undesirable, and criminal sanctions should not be used to convey it.

A narrower nondisclosure law better tailored to risk and moral culpability—say, one that targeted nondisclosure only in long-term or exclusive relationships involving unprotected sex—might spare nondisclosers who do not put their partners at risk (like Kanay Mubita or Nick Rhoades), who could not safely be expected to disclose (like Sandra or Kala Pierce), or those (like Donald Bogardus) whose nondisclosures, though ethically wrong, do not warrant the threat of imprisonment or the stigma of sex offender registration. Still, such a law would criminalize some nondisclosures that are not morally blameworthy. While many long-term relationships are intimate and trusting, some involve financial or emotional dependency, or physical or sexual abuse. A partner whose unequal relationship compromises his or her ability to negotiate condom use may have good reason to fear the consequences of disclosure. The criminal law is a blunt instrument that cannot distinguish be-

120. *Id*.

121. *Id*.

122. *Id*.

123. MacKenzie Elmer & Jeff Reinitz, *'Draconian' Law May Change: Lawmakers Seek To Decriminalize HIV: Too Late for Local Man Sentenced Under Transmission Law*, WCFCOURIER.COM (Feb. 4, 2014), http://wcfcourier.com/news/local/crime-and-courts/lawmakers-seek-to-decriminalize-hiv-too-late-for-local-man/article_036c935d-107a-5fc8-9516-466e68e72f4e.html.

124. *Id.*

125. *See* Burris et al., *supra* note 1, at 472 (finding no evidence that the existence of criminal laws encourages sexual risk-taking by HIV-negative persons).

tween nondisclosures that are morally blameworthy and those that are not.[126]

Fortunately, criminal prosecution is not the only available strategy for encouraging disclosure. Disclosure is not central to public health HIV-prevention strategies, but public health workers invariably advise people with HIV to disclose their serostatus to all their partners. Public health researchers have developed non-criminal interventions that encourage disclosure without the bias and injustice involved in many nondisclosure prosecutions.[127] The Center for Disease Control and Prevention (CDC) maintains a website dedicated to "High Impact Prevention" strategies it recommends to help health departments and community-based organizations "provide the best evidence-based HIV prevention services."[128] None of these evidence-based strategies involves criminal punishment. Judges, legislators, and legal scholars may find it hard to "conceive of sex outside of law,"[129] but criminal prosecution is not the only, or the best, way to persuade people with HIV to disclose. Like other STIs less freighted with fear and stereotype, HIV can best be addressed through public health channels.

As a general rule, people with HIV should disclose their serostatus before sex. In addition to enhancing partners' ability to make informed sexual choices, disclosure may be linked to increased condom use.[130] But, given the real constraints facing HIV-positive people and the ability of partners to protect them-

126. *See infra* Part V.

127. *See, e.g.*, Seth C. Kalichman et al., *Effectiveness of an Intervention To Reduce HIV Transmission Risks in HIV-Positive People*, 21 AM. J. PREVENTIVE MED. 84, 90–91 (2001); Carla Makhlouf Obermeyer et al., *Facilitating HIV Disclosure Across Diverse Settings: A Review*, 101 AM. J. PUB. HEALTH 1011, 1018 (2011); Richard J. Wolitski et al., *Effects of a Peer-Led Behavioral Intervention To Reduce HIV Transmission and Promote Serostatus Disclosure Among HIV-Seropositive Gay and Bisexual Men*, 19 AIDS S99, S105–08 (2005); *Compendium of Evidence-Based Interventions and Best Practices for HIV Prevention–Healthy Relationships*, CDC, http://www.cdc.gov/hiv/prevention/research/compendium/rr/healthyrelationships.html (last visited Mar. 16, 2015).

128. *Effective Interventions: HIV Prevention That* Work, CDC, https://www.effectiveinterventions.org/en/Home.aspx (last visited Mar. 16, 2015).

129. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1312 (2009).

130. *See, e.g.*, Gary Marks & Nicole Crepaz, *HIV-Positive Men's Sexual Practices in the Context of Self-Disclosure of HIV Status*, 27 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 79, 79 (2001); Steven D. Pinkerton & Carol Galletly, *Reducing HIV Transmission Risk by Increasing Serostatus Disclosure: A Mathematical Modeling Analysis*, 11 AIDS BEHAV. 698 (2007).

selves by choosing safer sexual activities, the failure to fulfill this obligation should not be a crime.

II. SEXUAL AUTONOMY AND HIV DISCLOSURE

This Part presents the sexual autonomy rationale for nondisclosure prosecutions: nondisclosure violates a right of the HIV-negative partner to know whether someone has HIV before deciding whether to have sex. This vision of sexual autonomy would require that valid sexual consent be "informed," at least with respect to HIV. Under this rationale, it might not matter whether the criminalized behavior could transmit HIV, or whether the nondisclosure caused any harm. The uninformed partner has been injured simply by having sex he or she would otherwise have refused.

The sexual autonomy rationale for criminalization has been adopted by the Supreme Court of Canada and suggested by several state and federal courts in the United States. If HIV nondisclosure vitiates sexual consent, it could transform otherwise-wanted sex into a violation akin to rape. Sexual assault imposes grievous physical, dignitary, and psychic harm that warrants prosecution even if prosecution offers no utilitarian benefit.

This Article will not attempt a comprehensive assessment of what sexual autonomy requires of the criminal law. This Part argues instead that arguments based on sexual autonomy or "informed consent" cannot justify targeting HIV for criminalization when other serious diseases, and other material sexual deceptions, are not crimes.

As for a working definition of sexual autonomy, I will ask the reader to assume that the criminal law can and should protect the right of every adult to accept or refuse sex for his or her own reasons. My critique of the sexual autonomy rationale recognizes—as does sexual assault law more generally—that decisions to accept or refuse sex are not always fully informed. Criminal law does not (and cannot) ensure that sexual decisionmaking be perfectly free and perfectly informed or that every departure from that ideal be treated as a crime.

Moreover, although proponents of criminalization tend to assume that it will protect vulnerable women against deceitful HIV-positive men, this Part points out that HIV nondisclosure is not gendered in this way—and the sexual deceptions that are stereotypically associated with heterosexual men have been affirmatively decriminalized. To the extent that proponents of

criminalization hope to promote gender equality, it does not make sense to start and end with HIV.

A PARTNERS' INTEREST IN HIV DISCLOSURE

The notion that HIV nondisclosure vitiates sexual consent has considerable intuitive appeal. Nondisclosure of sexually transmissible infection can be "very scary."[131] Thus most HIV-negative people, including me, might feel betrayed to learn that a trusted spouse or sexual partner had HIV and did not tell. For many, disclosure that a partner or potential partner has HIV might be a dealbreaker: the uninformed partner might have refused sex, regardless of transmission risk. Others might have chosen different, lower-risk sexual activities had they known the partner to be HIV-positive. As Adam Plendl, the Nick Rhoades complainant, put it: "Individuals should have the choice as to whether or not they would engage with someone who is HIV positive when they are not. In this case, that choice—and what I also consider a right—was not afforded to me."[132] Plendl's intuition that people have a right to know whether potential partners are HIV-positive is appealing, and seems to be widely shared.[133] Most people would probably want to know if a current or prospective partner had HIV—although HIV might be only one of many material circumstances that could, if disclosed, affect our decisions whether to have sex.

Most nondisclosure complainants have not been physically harmed.[134] They may, however, experience fear, anger, or betrayal upon learning of the nondisclosure. An uninformed partner may feel very worried for three to six months, until he or

131. Christine Boyle, *The Judicial Construction of Sexual Assault Offences, in* CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE 136, 145 (Julian V. Roberts & Renate M. Mohr eds., 1994).

132. Young, *supra* note 28.

133. *See, e.g.*, Ciccarone et al., *supra* note 108, at 953 (arguing that sex without disclosure is always "ethically indefensible" because even if the nondisclosing partner uses a condom, "[u]nilateral risk reduction strategies . . . do not allow one's partner the opportunity of exercising informed choice about what level of risk is acceptable"); Carol L. Galletly & Steven D. Pinkerton, *Preventing HIV Transmission via HIV Exposure Laws: Applying Logic and Mathematical Modeling To Compare Statutory Approaches to Penalizing Undisclosed Exposure to HIV*, 36 J.L. MED. & ETHICS 577, 584 (2008) (acknowledging that laws that permit nondisclosure or restrict disclosure obligations to high-risk (but not low-risk) activities can "compromise partner autonomy insofar as it is the law rather than the partner that establishes when risk is great enough to warrant disclosure").

134. *See supra* note 9.

she receives a negative HIV-test that is comfortably outside the "window period" for producing antibodies detectable by the most commonly used tests.[135] Plendl, for example, felt terrified of infection despite the fact that he was not put at risk. "It was 181 days of pure fear, that six-month window when you don't know," he said.[136] Uninformed partners who are especially anxious may not be reassured by a negative HIV test, even after the window period has closed.[137]

Another harm uninformed partners might experience is the fact that they had sex that they would have refused had they known the truth. But this rationale for HIV criminalization is exceptional: in general, our laws do not treat sex by deception as a legal wrong. With narrow exceptions, sexual deception is neither a crime nor a tort.[138] Moreover, there is no evidence that a person who learns, after sex, that the partner had HIV suffers the kind of physical, psychic, or dignitary harm that often results from sexual assault.

B. NONDISCLOSURE AS SEXUAL ASSAULT

Defenders of nondisclosure prosecutions often take for granted that mandatory disclosure empowers the partner to make what courts often describe as "an informed decision" about consent to sex.[139] This involves a plausible, though inaccurate, assumption that informed partners will refuse sex, or will engage only in low- or no-risk sexual activities.[140] "Only those willing to risk HIV transmission, or who know how to

135. The most commonly used HIV tests look for HIV-specific antibodies in the blood. The "window period" between initial infection and the detectability of antibodies in a test is variable. According to the CDC, "[t]he immune system usually takes 3 to 8 weeks to make antibodies against HIV," and "[n]inety-seven percent of people will develop antibodies in the first three months." *HIV/AIDS*, *Testing*, *When Should I Get Tested?*, CDC, http://www.cdc.gov/hiv/basics/testing.html (last updated Jan. 16, 2015). "In very rare cases, it can take up to six months to develop antibodies to HIV." *Id.*

136. Young, *supra* note 28.

137. *See, e.g.*, People v. Clayton, No. 230328, 2002 WL31058331 at *1 (Mich. App. Sept. 13, 2002) (stating that after sex without disclosure, complainant was tested for HIV "about forty times").

138. See *infra* Section II.C.

139. *See, e.g.*, State v. Musser, 721 N.W. 2d 734, 749 (Iowa 2006); State v. Gamberella, 633 S.2d 595, 604 (La. App. 1 Cir. 1993); People v. Jensen, 586 N.W.2d 748, 757 (Mich. App. 1998) ("Requiring an infected person to so inform sexual partners so they can make an informed decision before engaging in sexual penetration is narrowly tailored to further [the] compelling state interest" in "discouraging the spread of HIV.").

140. *See supra* note 54.

take precautions against the virus, will accept defendant's offer of sexual contact," a Michigan appellate court predicted,[141] apparently assuming either that most HIV-negative people do not "know how to take precautions against the virus," or that they should not have to consider such precautions unless their partner tells them that he or she has HIV.[142]

1. Canada

The Supreme Court of Canada has embraced the principle that HIV nondisclosure constitutes sexual assault. Until 1998, Canadian criminal law, like the laws of many U.S. states, established that the only deceptions that vitiate sexual consent were impersonation and therapeutic fraud (e.g., the accused tricked the victim into thinking that the sexual act was a medical procedure).[143] In 1998, the Supreme Court of Canada unanimously held in *R. v. Cuerrier* that nondisclosure of HIV could vitiate the partner's consent to sexual touching, converting sexual activity that had been otherwise consensual into a sexual assault.[144]

The *Cuerrier* majority overruled a 110-year-old precedent which had established that nondisclosure of a sexually transmissible infection did not vitiate sexual consent, citing the "deadly consequences that non-disclosure of the risk of HIV infection [could] have on an unknowing victim. . . . The possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death."[145] Because a lie or omission about HIV could pose a "significant risk of serious bodily harm," it constituted a fraud that vitiates sexual consent, re-

141. *Jensen*, 586 N.W.2d at 759 n.9.

142. Similarly, television actor Lee Thompson, who plays "Uncle Poodle" on popular television show *Here Comes Honey Boo Boo*, contracted HIV from a long-term boyfriend who did not disclose his HIV status. "I later learned he had been HIV positive and was not taking medication . . . . I would have been cool with his HIV status if he had been honest. I don't have an issue with the disease. I would have known how to protect myself." Thompson-Sarmiento, *supra* note 97. HIV activist Sean Strub noted, in a blog posting: "No, Lee, you already knew how to protect yourself. You chose not to and now you're making it someone else's fault." Sean Strub, *Uncle Poodle Presses Charges, Partner Sentenced to 5 Years*, POZ BLOGS (Jan. 12, 2013, 11:02 PM), http://blogs.poz.com/sean/archives/2013/01.

143. R. v. Cuerrier, [1998] 2 S.C.R. 371, 421–23 (Can.).

144. *Id.* at 371. Use or threat of force is not an element of sexual assault under the Canadian Criminal Code. The absence of consent makes any sexual touching a sexual assault, regardless of whether force was used. Canada Criminal Code, R.S.C. 1998 §§ 265, 271, 273.1.

145. *Cuerrier*, 2 S.C.R. at 430–31.

gardless of transmission.[146] Justice Cory's majority held that sexual consent was invalid without disclosure: "The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive."[147]

Chief Justice McLachlin concurred. It seemed "right and logical" that "lying" about HIV amounted to fraud that vitiates consent.[148] Nondisclosure of HIV, unlike other sexual deceptions, changed sexual intercourse "from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death."[149] But serious sexually transmissible infection is no more or less "natural" a risk of unprotected intercourse than pregnancy is. By enlisting nature to distinguish culpable from nonculpable deception, this argument constructs at least some sex as naturally immune to sexually transmissible infection.

Ever since, nondisclosure of HIV (and, on two occasions, other sexual deceptions posing a serious risk to health[150]) has generally been prosecuted in Canada as aggravated sexual assault, punishable by life imprisonment.[151] HIV and anti-rape advocates contend that sentences are longer, and conviction rates higher, in HIV prosecutions than in other prosecutions for aggravated sexual assault[152]—that is, where the rapist "wounds, maims disfigures or endangers the life" of the victim.[153] In late 2012, the Supreme Court of Canada unanimously reaffirmed that HIV nondisclosure is aggravated sexual assault, except where there is no "significant risk of bodily harm"

146. *Id.* at 430–33. Justice Cory's majority opinion left open the question of whether the duty to disclose would arise where "careful use of condoms" might reduce risk to a level that was insignificant. *Id.* at 432.

147. *Id.* at 431.

148. *Id.* at 409 (McLachlin, C.J., concurring).

149. *Id.* at 412 (parentheses in original).

150. R. v. Jones, [2002] N.B.Q.B. 340, 340 (Can.) (acquittal for nondisclosure of hepatitis C on the basis that a transmission risk of "less than 1 percent" was not "significant"); R. v. Hutchinson, [2010] N.S.C.A. 3, 3 (Can.) (upholding sexual assault conviction of an accused who poked holes in the condom, resulting in unwanted pregnancy and abortion).

151. Grant, *Time To Rethink* Cuerrier, *supra* note 20, at 56; Mykhalovskiy & Betteridge, *supra* note 16 at 50; Symington, *supra* note 20, at 644–45.

152. Mykhalovskiy & Betteridge, *supra* note 16, at 50.

153. In Canada, sexual assault is "aggravated" when it "wounds, maims, disfigures or endangers the life" of the victim. Canada Criminal Code, § 273(1). The sentencing range is five years to life. *Id.* § 273(2).

whatsoever because the nondiscloser has an undetectable viral load *and* uses a condom.[154]

2. The United States

In the United States, where force requirements generally preclude prosecuting nondisclosure as rape, statutory and judicial language nonetheless tends to conflate HIV nondisclosure with sexual assault.

Many overbroad criminal nondisclosure statutes seem to arise from statutory conflation of nondisclosure and sexual assault. Michigan's law, for example, requires disclosure before "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another person's body, but emission of semen is not required."[155] This definition was drawn verbatim from a sexual assault statute,[156] and is commonly found in the sexual assault provisions of other states. Arkansas, Colorado, Guam, Minnesota, New Jersey, and Ohio also import their HIV-disclosure definitions from statutes banning incest or sexual assault.[157] Similarly, a Florida appel-

154. R. v. Mabior, [2012] 2 S.C.R. 584, 585 (Can.); R. v. D.C., [2012] S.C.R. 626, 637 (Can.). Grant points out that the Supreme Court's reasoning in *Mabior* deems any non-negligible risk of transmission to be "significant" enough to warrant punishment as aggravated sexual assault. Grant, *Over-Criminalization*, *supra* note 20, at 482.

155. MICH. COMP. LAWS ANN. § 333.5210 (West 2001).

156. Hoppe, *supra* note 9, at 141–42. *See* MICH. COMP. LAWS ANN. § 750.520a(o) (West 2004), defining "sexual penetration" for the purposes of sexual assault laws 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, but emission of semen is not required."

157. ARK. CODE ANN. § 5-14-123 (2006); COLO. REV. STAT. §§ 18-3-401(6), 18-3-415.5 (2014); 9 GUAM CODE ANN. § 28.10 (2014) (defining HIV-prostitution offense in these terms); MINN. STAT. § 609.2241(1)(e) (2014) (incorporating "sexual penetration" definition from MINN. STAT. § 609.341(12)); N.J. STAT. ANN. § 2C:34-5(b) (prohibiting acts of "sexual penetration" by a person with HIV without the partner's informed consent). In response to legislators' questions as to whether the New Jersey offense was applicable to women, the Assembly Judiciary Committee pointed out that "sexual penetration" is defined in § 2C:14-1 (the sexual assault section of the Code) as "vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction. The depth of insertion shall not be relevant," and applies to both men and women. *See* Assembly Judiciary Committee Statement, Senate, No. 1297--L.1997, c. 201. OHIO REV. CODE ANN. § 2903.11(B) (2011) prohibits "sexual conduct" without disclosure of HIV infection; § 2903.11(E)(4) adopts the definition of "sexual conduct" from § 2907.01 from the sexual of-

late court recently interpreted "sexual intercourse," which is undefined in the HIV-disclosure statute, by drawing upon an incest statute which defined the prohibited behavior in almost exactly the same way.[158]

The importation of such definitions into criminal disclosure mandates implies that uninformed but otherwise-consensual sex with an HIV-positive person—without transmission[159]—is a moral, psychic, and dignitary harm akin to incest or sexual assault. This questionable conflation becomes more troubling when we compare sentences for HIV nondisclosure to those for the paradigmatic violation of sexual autonomy: sexual assault. According to the U.S. Department of Justice, the median state court sentence for rape is eight years,[160] and the median sentence for "other sexual assault" (which includes forced sexual acts "not involving intercourse," as well as statutory rape[161]) is three years eight months.[162] Nashville is the only jurisdiction for which comprehensive HIV sentencing data has been published. In Nashville, sentences for nondisclosure were shorter than the national average for rape, but longer than for "other sexual assault": for "unprotected sexual exposure with alleged transmission" (5 years); unprotected sexual exposure within an ongoing relationship, no transmission alleged (8 years and 5 years); unspecified sexual act within an ongoing relationship, no transmission alleged (4 years); and unprotected sex with a

fenses section of the Code ("vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse"), with the exception of penetration with an object, unless the offender knew that the object carried his or her "bodily fluid."

158. L.A.P. v. State, 62 So. 3d 693, 693–94 (Fla. Dist. Ct. App. 2011) (finding that a statute requiring HIV disclosure before "sexual intercourse" did not apply to an HIV-positive woman who did not disclose before "oral sex and digital penetration" by a man; disclosure obligations only applied to "'the penetration of the female sex organ by the male sex organ'" (quoting FLA. STAT. § 826.04 (2008))). *But see* State v. D.C., 114 So. 3d 440, 440, 443 (Fl. Dist. Ct. App. 2013) (refusing to follow *L.A.P.*, and holding that the disclosure statute applied to same-sex oral and anal sex).

159. *See supra* note 9 and accompanying text.

160. SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 6 tbl.1.3 (2009), *available at* http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

161. *Id.* at 3 tbl.1.1.

162. *Id.* at 6 tbl.1.3. Mean sentences were longer: 138 months (11.5 years) for rape and 78 months (6.5 years) for "other sexual assault."

casual sex partner (3 years)."[163] A man convicted of spattering blood on a police officer served six years.[164]

In other states, where data on actual sentences are not available, maximum sentences may indicate the value legislatures place on sexual autonomy in the context of HIV nondisclosure as opposed to sexual assault. In Iowa and Washington, the maximum sentences for nondisclosure are *longer* than for rape. In Washington, the maximum sentence for nondisclosure is twenty-six years six months,[165] compared to five years for non-aggravated rape.[166] In Iowa, the maximum sentence for HIV nondisclosure is twenty-five years,[167] compared to ten years for non-aggravated rape.[168] Moreover, it seems that Iowa courts and prosecutors routinely use the upper end of the sentencing range in nondisclosure cases involving no particularly egregious circumstances,[169] although 2014 reforms should change this practice.[170] In many other states, sentences for HIV

163. Galletly & Lazzarini, *supra* note 9, at 2629.

164. *Id.*

165. WASH. REV. CODE ANN. §§ 9.94A.510, 9.94A.515, 9A.36.011 (2014) (showing first-degree assault for nondisclosure of HIV status is a class "A" felony punishable by up to twenty-six years, six months).

166. WASH REV. CODE ANN. §§ 9.94A.510, 9.94A.515, 9A.44.060, 9A.20.021(1)(c) (showing third-degree rape is a class "C" felony punishable by up to seven years).

167. IOWA CODE §§ 709D.3, 902.9(2) (2013) (showing "criminal transmission of a contagious or infectious disease," including HIV, can be a class "B" felony punishable by up to twenty-five years).

168. *Id.* §§ 709.4, 902.9 (showing third-degree sexual abuse is a class "C" felony punishable by up to ten years).

169. *See, e.g.*, *supra* notes 25–29 and accompanying text (describing the case of Nick Rhoades, who was sentenced to 25 years' imprisonment for HIV nondisclosure, despite posing no realistic possibility of transmission); Musser v. Mapes, 854 F. Supp. 2d 652, 655 (S.D. Iowa 2012) (denying habeas corpus to a man sentenced to 50 years' imprisonment for nondisclosure to two women before consensual sex; no allegation of transmission), *aff'd*, 718 F.3d 996 (8th Cir. 2013).

170. In May 2014, as this Article went to press, Iowa revised its law. *See* IOWA CODE § 709D (2015). While HIV exposure remains a class B felony subject to twenty-five years' imprisonment, this penalty is now limited to circumstances where the risk of transmission is "substantial," where the accused had the specific intent to infect the uninformed partner, and where transmission does, in fact, occur. *Id.* The revisions also expanded criminalization to three other transmissible diseases: meningitis, hepatitis, and tuberculosis. *Id.* Where transmission of any of these diseases does not occur despite a substantial risk and despite the specific intent of the accused, or where the accused acted with "reckless disregard" for transmission and causes transmission despite a lack of specific intent, nondisclosure is a Class D felony, subject to a maximum of five years' imprisonment. *Id.* Where reckless disregard does not result in transmission, nondisclosure is a misdemeanor. *Id.*

nondisclosure are comparable to those for rape: the sentencing ranges overlap.[171] To the extent that voluntary sex without disclosure is understood to violate sexual autonomy, it must be a violation less grave than sexual assault.

Judges, like lawmakers, tend to assume that sex without HIV disclosure is sex without meaningful consent. Although U.S. courts uphold HIV nondisclosure crimes as public health measures,[172] their reasoning often invokes the right of a "partner [to] make an informed decision."[173] As the Iowa Supreme Court recently explained, "Surely it cannot be disputed that one considering having sexual intercourse with another would want to know whether the other person is infected with HIV prior to engaging in such intimate contact. Consent in the absence of such knowledge is certainly not a full and knowing consent . . . ."[174] A federal court recently suggested that sex without HIV disclosure was not fully consensual. By requiring the HIV-positive person to "give another person the option of informed consent," it held, the disclosure law "is aimed at protecting *non*-consenting persons."[175]

171. In Missouri, HIV nondisclosure is punishable by ten to thirty years' imprisonment if transmission occurs (and five to fifteen years if transmission does not occur), MO. REV. STAT. §§ 191.677.1(2); 558.011.2(1) (2014), while rape is punishable by five years to life, *id.* § 566.030.2(2). In North Dakota, nondisclosure is punishable by up to twenty years' imprisonment, while "sexual imposition" is punishable by up to ten years, and "gross sexual imposition" is normally punishable by up to twenty years, N.D. CENT. CODE §§ 12.1-32-01; 12.1-20-03, -04, -17 (2014). *See also, e.g.*, Arkansas, ARK. CODE ANN. §§ 5-4-401(a); 5-14-23; 5-14-103(c)(1) (2013) (nondisclosure: 6–30 years; rape: 10–40 years); Michigan, MICH. COMP. LAWS §§ 777.13k; 750.520d(1)(b), (2); 750.520e(1)(b), (2) (2013) (nondisclosure: up to 4 years; forced "sexual contact": up to 2 years; forced "sexual penetration": up to 15 years); and Ohio, OHIO REV. CODE §§ 2929.14(A)(1), (2); 2903.11(B), (D); 2907.02(2) (2015) (nondisclosure: 2–8 years; rape: 3–11 years).

172. *See supra* note 43 and accompanying text; M. Severson, *Omnibus AIDS Bill*, 5 GA. ST. U. L. REV. 397, 398–99 (1988) (explaining that the stated purpose of the omnibus bill which, inter alia, criminalized HIV nondisclosure, was "to protect the health of Georgia's citizenry").

173. State v. Gamberella, 633 So. 2d 595, 604 (La. Ct. App. 1993); *see also* State v. Musser, 721 N.W.2d 734, 744 (Iowa 2006) (endorsing the court's reasoning in *Gamberella*); People v. Jensen, 586 N.W.2d 748, 757 (Mich. Ct. App. 1998) ("Requiring an infected person to so inform sexual partners so they can make an informed decision before engaging in sexual penetration is narrowly tailored to further th[e] compelling state interest [of discouraging the spread of HIV].").

174. *Musser*, 721 N.W.2d at 748.

175. Musser v. Mapes, 854 F. Supp. 2d 652, 666–67 (S.D. Iowa 2012), *aff'd*, 718 F.3d 996 (8th Cir. 2013).

Civil courts have also adjudicated tort claims arising from nondisclosure or deceit with respect to HIV. In tort law, a person who knows he or she has a sexually transmissible infection owes "a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them."[176] One California appellate court has held that "consent to sexual intercourse [is] vitiated by one partner's fraudulent concealment of the risk of infection with venereal disease."[177] In contrast to criminal prosecutions, though, a tort claim requires proof that the nondisclosure resulted in physical injury.

Fear of HIV does not, on its own, ordinarily result in tort liability.[178] In contrast to the criminal context, where HIV-positive people are punished for nonrisky activities, civil courts have been skeptical of tort claims by plaintiffs who feared HIV transmission in circumstances where the transmission risk was so remote that their fears were unreasonable.[179] They have rejected claims by patients who became fearful after learning

176. Berner v. Caldwell, 543 So. 2d 686, 689 (Ala. 1989) (quoted with approval in McPherson v. McPherson, 712 A.2d 1043, 1046 (Me. 1998)); *see also, e.g.*, Meany v. Meany, 639 So. 2d 229, 235 (La. 1994) ("The duty of the infected party is either to abstain from sexual contact with others or to warn others of the infection before sexual contact."); Mussivand v. David, 544 N.E.2d 265, 270 (Ohio 1989) ("[A] person who knows, or should know, that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at the minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition."); Lockhart v. Loosen, 943 P.2d 1074, 1080 (Okla. 1997) ("If Loosen knew or should reasonably have known that she had herpes and copulated with Mr. Lockhart during a period when she was infectious, . . . she had a duty to warn him of her contagion."); Howell v. Spokane & Inland Empire Blood Bank, 818 P.2d 1056, 1059 (Wash. 1991) (stating that a duty to refrain from donating blood arose "if [the donor] knew or should have known of his seropositivity at the time of the donation").

177. Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276–77 (Ct. App. 1984); *see also* Leleux v. United States, 178 F.3d 750, 755 (5th Cir. 1999) (where a person knows he is infected with herpes, "the unwanted transmission of a venereal disease during consensual sex vitiates the consent," transforming the consensual sex into a battery).

178. The torts of negligent transmission of sexually transmitted disease and fraudulent misrepresentation both require transmission. *See* Mary G. Leary, *Tort Liability for Sexually Transmitted Disease*, 88 AM. JUR. TRIALS 153, § 10 (2003 & Supp. 2014) (listing elements, facts and circumstances that tend to establish each cause of action).

179. *See, e.g.*, Pendergist v. Pendergrass, 961 S.W.2d 919, 924 (Mo. Ct. App. 1998) (reviewing cases holding that, where plaintiff has not been infected, a claim of negligent infliction of emotional distress requires "actual exposure" to HIV).

that a dentist or surgeon had HIV.[180] Unlike prosecutions, tort claims require "a genuine basis for the fear . . . not premised on public misconceptions about AIDS."[181] A Kansas appellate court rejected a plaintiff's emotional distress claim for picking up a used condom in a hotel room on the basis that she had not experienced "actual exposure" to HIV, and her fears were unreasonable as she had tested negative four times.[182] A 1987 New York court rejected a wife's claim that she suffered "AIDS-phobia" upon discovering her husband's infidelity with men.[183] Occasionally, a state court has upheld a tort claim for negligent infliction of emotional distress for fear of HIV unaccompanied by transmission or risk.[184] In general, though, civil courts are unwilling to recognize groundless fear of HIV as a compensable harm.

C. THREE VERSIONS OF "INFORMED CONSENT"

If the criminal law aims to protect sexual autonomy by requiring that sexual consent be "informed," at least with respect to HIV, we would need to decide what information would be required for valid consent. This Section will sketch three theories of "informed consent" that might be offered to support the targeted criminalization of HIV nondisclosure. None of them adequately explains it.

180. *See, e.g.*, Kerins v. Hartley, 33 Cal. Rptr. 2d 172, 179 (Ct. App. 1994) (denying plaintiff emotional distress damages for her fear of contracting HIV from a surgeon where the probability of infection was "statistically insignificant"); Brzoska v. Olson, 668 A.2d 1355 (Del. 1995) (rejecting battery claims that were based on dentist's failure to advise patients that he was infected with HIV); Majca v. Beekil, 701 N.E.2d 1084 (Ill. 1998) (finding no cause of action for plaintiffs' fears of contracting AIDS through a normal dental procedure).

181. *Pendergist*, 961 S.W.2d at 926.

182. Reynolds v. Highland Manor, Inc., 954 P.2d 11, 15–16 (Kan. Ct. App. 1998).

183. Doe v. Doe, 519 N.Y.S.2d 595, 596 (Sup. Ct. 1987).

184. *See, e.g.*, John & Jane Roes, 985 P.2d 661, 663, 666 (Haw. 1999) (certifying question of state law as to whether airport baggage handlers who were "exposed" to HIV-infected blood when it leaked from luggage could recover damages for negligent infliction of emotional distress based on "fear of developing AIDS" without physical harm, because "a reasonable person would foreseeably be unable to cope with the mental stress engendered by an actual, direct, imminent, and potentially life-endangering threat to his or her physical safety").

i. Rape by Deception

A strong version of the "informed consent" argument might support criminalizing *all* sexual nondisclosure or deception, as long as it was material to a partner's decision to have sex. This Subsection will question this theory as a justification for singling out HIV. Part IV will return to the notion of rape-by-deception, offering reasons to be skeptical of assumptions that straight women would benefit from criminalizing male deception.

Many HIV-negative people might not want to have sex with an HIV-positive partner, regardless of whether the sex poses any risk of transmission. Under my working definition of sexual autonomy, they have a perfect right to refuse on that basis (or, indeed, on any basis that others might feel is discriminatory). Even if the refusal is based on fear, stigma, or misconception, the HIV-positive person has no right to have sex with the refuser. Arguably, then, the law should protect sexual autonomy by punishing the person who withholds or lies about her or his serostatus, knowing there's a good chance it would be a dealbreaker. The rape-by-deception argument, though, returns us to retributive questions: if criminalization is independent of any health risk, it is not clear why nondisclosure of HIV should be a crime while nondisclosure of other foreseeable dealbreakers is not.

Where there is no risk of transmission, HIV nondisclosure is comparable to nondisclosure of any noninfectious health condition, like a cancer diagnosis, that might have changed a partner's mind. A person with a diagnosis of Stage IV cancer might well fail to disclose it to a new or casual partner, as Mubita and Rhoades did.[185] Like theirs, this person's nondisclosure would hide no risk to the health of the uninformed partner. The rape-by-deception version of "informed consent" might assert that the uninformed partner was harmed by having sex she or he would have rejected had she or he known the truth. Yet nondisclosure of cancer is not a crime, nor should it be. If criminal laws were to single out nondisclosure of cancer as a crime while permitting almost all other sexual deceptions, we might fairly suspect that unfounded fears and stigma were at work.

The greatest difficulty with the rape-by-deception argument for HIV criminalization is that criminal law does not, in

185. *See supra* notes 22–26 and accompanying text.

general, require that sexual consent be "informed."[186] In general, criminal law takes a *caveat emptor* approach to sexual deception. "As a rule, it is not a crime to obtain sex by deception."[187] It is not a crime to deceive another into sex by misrepresenting one's age, health, fertility, wealth, ethnicity, employment, feelings, intentions, fidelity, marital status, or almost any other factor that might have materially changed the partner's decision to have sex.[188] Decker and Baroni conclude, in a recent fifty-state survey of sexual assault laws: "Use of deception is [a] tolerated mechanism for achieving sex."[189]

The exceptions to this general rule are extremely limited. There are two main instances in which many—though not all—states treat nonforcible sex-by-deception as a crime: impersonation of a husband (but generally not a boyfriend[190]), and therapeutic fraud.[191] There is little case law interpreting these offenses, however,[192] and even in the few states that purport to

186. *See* John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1133, 1146 (2011).

187. David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 457 (2000).

188. *See id.* at 457, 460–75; Decker & Baroni, *supra* note 186, at 1132–41; Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 70 (1998).

189. Decker & Baroni, *supra* note 186, at 1167; *see also* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 101, 112 (1998); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013).

190. *See* People v. Morales, 150 Cal. Rptr. 3d 920 (Ct. App. 2013) (reversing conviction and remanding for a new trial where the accused had sex with the victim by impersonating the victim's boyfriend; the original 1872 statute criminalized nonforcible sex as rape when it was obtained by impersonating a spouse, but not by impersonating a boyfriend; the California legislature has since reformed the law); Suliveres v. Commonwealth, 865 N.E.2d 1086 (Mass. 2007) (concluding that "[f]raudulently obtaining consent to sexual intercourse does not constitute rape as defined in [the Massachusetts] statute," and acquitting the defendant who had impersonated the victim's boyfriend); People v. Hough, 607 N.Y.S.2d 884 (Crim. Ct. 1994) (holding that the defendant did not commit sexual misconduct when he tricked the victim into having sex by impersonating her boyfriend). *But see* State v. Mitchell, No. M1996-00008-CCA-R3-CD, 1999 WL 559930, at *6 (Tenn. Crim. App. July 30, 1999) (convicting the defendant of rape by fraud for impersonating victims' boyfriends and noting that "[t]he rape statute is clear on its face that a person commits a . . . felony when he or she engages in sexual penetration that is accomplished by fraud").

191. *See* Decker & Baroni, *supra* note 186, at 1135–40; Rubenfeld, *supra* note 189, at 1397–98.

192. *See* Decker & Baroni, *supra* note 186, at 1146.

criminalize sexual deception outside these two categories,[193] prosecutions are rare.[194] Decker and Baroni found no prosecutions for mere nondisclosure of (or lying about) an important fact that might have changed the complainant's mind. Rather, sex-by-deception prosecutions invariably involved either impersonation, therapeutic deceit, or an abuse of power.[195]

Even where consent is obtained by impersonation or by therapeutic deceit, courts do not consistently treat sex by deception as a crime.[196] Courts in California, New York, and Massachusetts have acquitted boyfriend-impersonators on the basis that, in the absence of a statutory prohibition, impersonation could not fulfill the force requirement for a rape conviction. "[I]ntercourse where consent is achieved by fraud does not constitute rape," explained the Massachusetts Supreme Court.[197]

193. *See id.* at 1140–41. Three states retain the once-ubiquitous crime of seduction, which criminalizes a man's use of a false promise of marriage to obtain sex from a previously chaste woman or girl, but it is no longer used. *See* MISS. CODE ANN. § 97-29-55 (2014); OKLA. STAT. tit. 21, § 1120 (2014); S.C. CODE ANN. § 16-15-50 (2014); Bryden, *supra* note 187, at 459 ("Although a number of the old [seduction] laws are still on the books, successful prosecutions are now virtually unheard-of."); Melissa Murray, *Marriage As Punishment*, 112 COLUM. L. REV. 1, 38 (2012) ("[S]eduction statutes were in desuetude by the 1950s . . . .").

194. Decker & Baroni, *supra* note 186, at 1146–47 (concluding that "either deception provisions are not being prosecuted, prosecutions of these provisions are uniformly resulting in acquittals, or convictions based on these provisions are never appealed").

195. *Id.* at 1141–46 (describing sex-by-deception prosecutions).

196. *See, e.g.*, Boro v. Superior Ct., 210 Cal. Rptr. 122 (Ct. App. 1985) (defendant called the victim, pretending to be a doctor, telling her she had a dangerous blood disease that could only be cured by expensive, painful surgery or by having sex with a donor who had been injected with curative serum; he then had sex with her, claiming to be the donor; defendant was acquitted because the fraud was in the inducement, not in the factum); Tony Rizzo, *Case Shows Need for Rape Law Change, Prosecutors Say; Judge Drops Felony Charges in Incident That Didn't Involve Force*, KAN. CITY STAR, July 29, 1995, at C2 (explaining sexual assault charges dismissed for absence of "force or fear" elements; Kansas subsequently amended its statute to criminalize therapeutic fraud). In two future articles, I argue that such conduct should be recognized as sexual assault: not because it is deceptive, but because it is coercive. Kim Shayo Buchanan, *Rape by Fraud*, U. TORONTO L.J. (forthcoming); Kim Shayo Buchanan, *Deception, Coercion, and Rape* (forthcoming) (on file with author).

197. Suliveres v. Commonwealth, 865 N.E.2d 1086, 1089 (Mass. 2007); *see also, e.g.*, People v. Morales, 150 Cal. Rptr. 3d 920, 929 (Ct. App. 2013) (holding "reluctantly" that "a person who accomplishes sexual intercourse by impersonating someone other than a married victim's spouse is not guilty" of rape under California law; the legislature later reformed the law); People v. Hough, 607 N.Y.S.2d 884 (Crim. Ct. 1994) (acquitting accused who imperson-

Relying on this permissive jurisprudence of sexual deception, contemporary state courts have also rejected rape charges for other blameworthy forms of sexual deceit such as therapeutic fraud[198] and abuses of trust by persons in authority.[199] This jurisprudence offers what Canadian Chief Justice Beverley McLachlin has justifiably criticized as a "crabbed view of consent and fraud."[200] The objective of this Part is not to defend this "crabbed view" of sexual consent, but to make the more limited point that sexual autonomy cannot explain the criminalization of HIV nondisclosure when almost all other material sexual deceptions are lawful.

As Jed Rubenfeld points out, a rape law whose primary objective was to vindicate sexual autonomy "would not limit rape-by-deception cases to the two old scenarios," husband impersonation and therapeutic fraud.[201] Why, then, is sexual deception criminalized in these two cases, and not in others? Anne Coughlin has advanced the most persuasive explanation: these rules developed in the nineteenth century, when most nonmarital sex was punishable as a crime.[202] These two deceptions tended to exonerate a blameless woman who had engaged in an act of fornication or adultery only because of an "exculpatory mistake of fact"[203]—she had been tricked into believing that the act was nonsexual or that the partner was her husband. Any other mistaken belief the woman held—for example, a mistake as to her partner's status, feelings, intentions, or health—would be irrelevant to her guilt with respect to the crime of adultery or fornication.[204] Accordingly, other deceptions did not affect a man's (or woman's) liability for unlawful sex.

ated victim's boyfriend because he did not use force, and expressing doubt that husband impersonation vitiates sexual consent).

198. *See supra* note 191.

199. *See, e.g.*, State v. Thompson, 792 P.2d 1103 (Mont. 1990) (acquitting high school teacher of rape because no force was used; he coerced her into sex by saying she would not graduate if she did not have sex with him); Commonwealth v. Mlinarich, 542 A.2d 1335 (Pa. 1988) (per curiam) (acquitting adult guardian of 14-year-old girl of rape after he told her she would be sent to juvenile detention if she did not comply).

200. R. v. Mabior, [2012] 2 S.C.R. 584, 604 (Can.).

201. Rubenfeld, *supra* note 189, at 1395–98 (noting that "American sex law today appear[s] to be animated by" sexual autonomy, but explaining that "this picture of American sex law can't account for" limiting rape-by-deception cases to the two historical exceptions).

202. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 32, 38 (1998).

203. *Id.* at 32 (that is, the woman "neither knew nor should have known that her conduct was of the forbidden character").

204. *Id.* at 32–33.

If this is the rationale for these exceptions, it is obviously irrelevant today. Despite their archaic logic, though, I would not argue husband impersonation or therapeutic fraud should be legalized. Because these rules are longstanding, would-be sexual deceivers are on notice that such lies are prohibited. Unlike most other sexual deceptions (including HIV nondisclosure), impersonation and therapeutic fraud are always morally blameworthy, and they will often be coercive.[205] Philosophical consistency does not seem to be a compelling reason to decriminalize such reprehensible deceptions.

While courts often hold that force requirements tie their hands with respect to blameworthy and coercive sexual deceptions by heterosexual men, they have nonetheless managed to convict when faced with allegations that a transgender man or boy failed to disclose his (female) biological sex. Israeli scholar Aeyal Gross documents four such prosecutions in the United States, the United Kingdom and Israel, all of which resulted in criminal conviction.[206] More recently, in 2013, the English Court of Appeal held that deceit as to gender—that is, presenting one's gender in a way that does not correspond to biological sex—can vititate sexual consent. It upheld the conviction of a transgender teenager for "assault by penetration" because he failed to disclose that he was, in the Court's view, a girl.[207] Aeyal Gross contends that, by declaring that such nondisclosure vitiates sexual consent, courts privilege complainants' identity as heterosexuals, protecting them against "nonvoluntary and undesired homosexuality."[208] As another British

205. *See supra* notes 188–191 and accompanying text.

206. Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderland*, 32 HARV. J.L. & GENDER 165 (2009) (discussing four such prosecutions in the United States, United Kingdom, and Israel, all of which resulted in a criminal conviction).

207. McNally v. R., [2013] EWCA Crim 1051 at para. 11 (Eng. C.A.) (explaining that the accused, who, it appears from the decision, is biologically female, presented himself as a boy named Scott, and wore male clothing with a "strap-on dildo" underneath. The complainant had sex with him several times; the relationship ended when the complainant's mother "confronted" the accused "about really being a girl." It is not entirely clear whether the complainant realized that the accused was not a cisgender boy: "Although one or two answers might be said to be equivocal, she said that she did not know that 'Scott' was a girl.").

208. Gross, *supra* note 206, at 190. *See, e.g.*, *McNally,* [2013] EWCA Crim 1051 at paras. 11, 26 ("[The complainant] considered herself heterosexual and had consented to the sexual acts because she believed she was engaging in them with a boy called Scott. . . . She chose to have sexual encounters with a

trial court put it, "[y]ou have called into question [the complainants'] whole sexual identity, and I suspect both those girls would rather have been actually raped by some young man than have happened to them what you did."[209]

If HIV prosecutions purport to vindicate an interest that sexual consent be fully informed, we must ask why expanded criminal protection of this interest would be limited to nondisclosures about HIV and transgender identity. In the absence of persuasive justifications for singling out these nondisclosures, we must ask whether heterosexist gender norms might inform a jurisprudence that affirmatively permits the kinds of sexual deception that are stereotypically associated with heterosexual men,[210] while punishing sexual deception by transfolk and people with HIV who violate conventional expectations of heterosexual privilege.

2. Undisclosed Health Risks

Where the sexual activity does pose a significant risk of transmission, HIV nondisclosure is distinguishable from most other sexual deceptions: it withholds information that might affect the health of the uninformed partner. But in general, our criminal laws do not penalize sexual deceptions that can jeopardize health. Nondisclosure of other sexually transmissible infections is generally not a crime. Neither is contraceptive fraud. These deceptions are not even torts, unless they result in physical harm.

a. HIV and other dangerous infections

Some scholars argue that nondisclosure of HIV (or certain other STIs) constitutes an extraordinary form of sexual deception that should vitiate sexual consent because of the risk to the health of the uninformed partner.[211] Because HIV can be fa-

boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the complainant's deception.").

209. *Id.* at 207–08 (quoting R v. Saunders, (1991) (Doncaster Crown Ct.) (unpublished, available from the Cornell Library)).

210. See *infra* Part IV.E.

211. *See* SCHULHOFER, *supra* note 189, at 158–59; Boyle, *supra* note 131, at 146 ("At least the law of sexual assault should cover lies such as denials of infectious disease or defrauding a prostitute into providing sexual services. This would be respectful of physical and economic autonomy."); Mathen & Plaxton, *supra* note 20, at 471–72, 482–84 n.84; *cf.* Bryden, *supra* note 187, at 474 (noting that most survey respondents "want[ed] to criminalize sexual deception only when some additional element of culpability [was] present," such as "deliberately creat[ing] a risk of venereal disease").

tal, many commentators characterize HIV nondisclosure or deceit as "life-threatening."[212] Often, such arguments rely on an exaggerated perception of the likelihood that a single act of sex would lead to infection and inevitable premature death.[213] Carissima Mathen and Michael Plaxton, for example, argue that HIV nondisclosure, unlike all other sexual deceptions, "assume[s] the worthlessness of [the partner's] other life plans,"[214] and "effectively denies that one's partner has any *meaningful* autonomy in *any* sphere, not just in the instant sexual context."[215]

The fact that HIV can be deadly does not distinguish it from other communicable infections that are generally not criminalized. If the potentially lethal consequences of HIV are to justify its criminalization, we might expect to see criminal interventions aimed at other infections which, like HIV, can be lethal if untreated.[216] Other potentially deadly communicable diseases, such as hepatitis, human papillomavirus (HPV), or tuberculosis, are not subject to the fear and stigma associated with HIV, and are not in practice treated as crimes.

Some states criminalize transmission of, or exposure to, other sexually transmissible infections (STIs), but the offenses are generally misdemeanors and are rarely prosecuted.[217] No

212. *See, e.g.*, SCHULHOFER, *supra* note 189, at 158 (describing HIV nondisclosure as the misrepresentation of a "significant health risk[]"); Boyle, *supra* note 131, at 145–46; Mathen & Plaxton, *supra* note 20, at 483–84 n.84.

213. *See supra* notes 36–42 and accompanying text.

214. Mathen & Plaxton, *supra* note 20, at 484 n.84.

215. *Id.* at 483 (emphasis in original).

216. *See, e.g.*, Jason Clayworth, *Bill To Align Iowa Crimes of HIV Transmission with Similar Laws Clears Senate Subcommittee*, DES MOINES REG. (Feb. 22, 2012), http://blogs.desmoinesregister.com/dmr/index.php/2012/02/22/bill-to-align-iowa-crimes-of-hiv-transmission-with-similar-laws-clears-senate-subcommittee (arguing that separating out HIV in criminal statutes "'adds to the stigma that goes along with HIV because we single this disease out for some reason and treat it differently than similarly serious diseases'" (quoting Randy Mayer of the Iowa Department of Public Health)); *cf.* Burris & Cameron, *supra* note 31, at 579 ("Every day, millions of individuals have unprotected sex with partners they must assume might be infected. . . . [C]onduct that seems normal to many—ie, sex without protection despite the presence of risk—exposes those who have HIV to severe criminal penalties, including life imprisonment."); McArthur, *supra* note 40, at 732–33 ("[I]t is no longer clear that HIV infections are inevitably fatal. . . . Individuals who pass along a treatable form of the virus do less harm than they did when states initially enacted HIV-specific legislation." (citation omitted)).

217. *See supra* note 4; *see also, e.g.*, FLA. STAT. §§ 384.24(1), (2), 384.34 (2014) (nondisclosure of "chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia,

other STI has been singled out for targeted felony prosecution. Hepatitis, for example, is about as common as HIV, but is easier to transmit. Like HIV, hepatitis is incurable, generally treatable, and sometimes fatal.[218] Nonetheless, of twenty-four state laws that criminalize nondisclosure of HIV, only five also nominally criminalize nondisclosure of hepatitis.[219] In one of these states, Tennessee, HIV nondisclosure is a felony punishable by three to fifteen years' imprisonment, while nondisclosure of hepatitis B or C is a misdemeanor subject only to fine or restitution.[220] Although I have not found any studies of hepatitis disclosure, it seems unlikely that people are much more like-

nongonococcal urethritis (NGU), pelvic inflammatory disease (PID)/acute salpingitis, or syphilis" is a first-degree misdemeanor, but nondisclosure of HIV is a first- or third-degree felony).

218. Hepatitis A, B, and C can all be sexually transmitted. *Viral Hepatitis Surveillance – United States, 2010*, CDC, http://www.cdc.gov/hepatitis/Statistics/Commentary.htm (last updated May 24, 2013). The prevalence of hepatitis is comparable to (but greater than) that of HIV. The CDC estimates that 800,000–1.4 million people are chronically infected with hepatitis B alone, and 2.7–3.9 million are chronically infected with hepatitis C. *Id.* Chronic infection with hepatitis A does not occur. *Statistics and Surveillance*, CDC, http://www.cdc.gov/hepatitis/Statistics/index.htm (last updated Aug. 28, 2014) [hereinafter CDC, *Statistics and Surveillance*]. The CDC estimates that 29.1–33.5% of Americans have ever been infected with hepatitis A, 4.3–5.6% have ever been infected with hepatitis B, and 1.3–1.9% have ever been infected with hepatitis C. *Disease Burden from Viral Hepatitis A, B, and C in the United States*, CDC, http://www.cdc.gov/hepatitis/PDFs/disease_burden.pdf [hereinafter CDC, *Disease Burden*].

The most recent CDC estimate for HIV prevalence (from 2010) indicates that about 1,145,500 people age thirteen and over are currently living with HIV. *Statistics Overview*, CDC, http://www.cdc.gov/hiv/statistics/basics/index.html (last updated Nov. 10, 2014) [hereinafter CDC, *Statistics Overview*] ("HIV Prevalence Estimate"). This represents about 0.6% of the U.S. population. *See* GLOBAL COMMISSION REPORT, *supra* note 31.

The incidence of hepatitis is likewise comparable to HIV (but greater). The CDC estimates that approximately 50,000 Americans are newly infected with HIV every year. *See* CDC, *Statistics Overview*, *supra* ("HIV Incidence Estimate"). The CDC estimates for 2010 estimate about 21,800 new infections with hepatitis B, and 11,400 new infections with hepatitis C in the same year, for a total of about 33,200 new hepatitis B and C infections in one fairly typical year. *See* CDC, *Statistics and Surveillance*, *supra*. While vaccines are available for hepatitis A and B, there is no vaccine against hepatitis C, the most dangerous and least treatable strain. CDC, *Hepatitis FAQs for the Public*, http://www.cdc.gov/hepatitis/c/cfaq.htm#cFAQ71 (last updated Dec. 4, 2014).

219. *See* IND. CODE ANN. §§ 16-41-7-1 (1993); IOWA CODE § 709D.3 (2014) (criminalizing nondisclosure of HIV, hepatitis, and meningitis); MISS. CODE ANN. § 97-27-14 (2004); TENN. CODE ANN. § 39-13-109 (1994); VA. CODE ANN. § 18.2-67.4:1(B) (2004).

220. *See* TENN. CODE ANN. §§ 39-13-109(e)(1)-(2), 40-35-111(b)(3).

ly to volunteer their hepatitis diagnosis to casual partners than they are to disclose HIV. Yet if prosecutions have occurred, they seem to be extremely rare: the CHLP has not identified any prosecutions for hepatitis nondisclosure in the United States.[221] My search of Google, Lexis, and Westlaw has not turned up a hepatitis nondisclosure prosecution, either.[222]

Human papillomavirus (HPV) is another STI that can, if untreated, lead to death. Nearly all cases of cervical cancer result from sexual transmission of HPV.[223] It also causes fatal cancers of the head, neck, and anogenital region.[224] Today, HPV causes about 12,000 cases of cervical cancer and nearly 16,000 other genital, anal, and oropharyngeal cancers every year.[225] HPV is much more common than HIV: the CDC estimates that "nearly all sexually-active men and women will get [at least one type of HPV] at some point in their lives."[226] About 79 million Americans are currently infected, with about 14 million new infections every year.[227]

As with HIV, illness and death from untreated HPV infection are largely preventable through screening and timely treatment.[228] Governmental and public health responses to

221. CHLP's fifty-state survey finds no prosecutions for hepatitis nondisclosure in the context of consensual sex, and only a handful of prosecutions for violent or nonsexual exposure. CHLP, ENDING AND DEFENDING, *supra* note 2. Another CHLP publication points out that "[h]erpes simplex virus type 2 (HSV-2) and human papilloma virus (HPV) are more prevalent than HIV. Gonorrhea and HPV are far more easily transmissible than HIV during unprotected sexual activity. Like HIV, HSV-2 is not curable. Potential consequences of HPV, gonorrhea, and HSV- 2 include cancer, pelvic inflammatory disease, infertility, and infant death." CHLP, CHART: HIV, STIS AND RELATIVE RISKS IN THE UNITED STATES (2011), *available at* http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Infectious%20Disease%20Comparative%20Risk%20Table%20-%20U.pdf.

222. *See infra* note 522 and accompanying text (discussing the one hepatitis prosecution that has been brought in Canada).

223. *See Genital HPV Infection - Fact Sheet 1*, CDC, http://www.cdc.gov/STD/HPV/STDFact-HPV.htm (last updated Mar. 20, 2014) [hereinafter CDC, *HPV Fact Sheet 1*].

224. *See Human Papillomavirus*, WHO (Sept. 3, 2010), http://www.who.int/immunization/topics/hpv/en.

225. *See How Many Cancers Are Linked with HPV Each Year?*, CDC, http://www.cdc.gov/cancer/hpv/statistics/cases.htm (last updated June 23, 2014) (estimating that HPV causes 3,000 vulvar cancers, 700 vaginal cancers, 1,000 penile cancers, 2,800 anal cancers in women, 1,500 anal cancers in men, 2,400 oropharyngeal cancers in women, and 10,000 oropharyngeal cancers in men).

226. CDC, *HPV Fact Sheet 1*, *supra* note 223.

227. *See id.*

228. *See id.* (estimating that of the 12,000 cervical cancers and nearly

HPV offer a striking contrast to the criminalization of HIV. No state punishes HPV transmission as a felony, nor is criminalization part of governmental HPV-prevention strategies. Instead, global, national, and state HPV-prevention initiatives promote screening (Pap smears), early treatment of cancerous and precancerous lesions, and, most recently, vaccination of young people before they become sexually active.[229] These noncriminal interventions have been remarkably effective. Until about 40 years ago, cervical cancer was the leading cause of cancer death among women in the United States;[230] in 2010, the most recent year for which statistics are available, about 4,000 women died from cervical cancer.[231] Moreover, HPV prevalence has decreased 56% among young women 15 to 19 years old since the 2006 introduction of an HPV vaccine for 11-year-old girls.[232]

HIV is, of course, much more lethal than HPV, and there is no vaccine.[233] Nonetheless, because HPV is so much more com-

16,000 other cancers associated with HPV, "about 21,000 . . . could be prevented [with] vaccine[s]"); WHO, WHO GUIDANCE NOTE: COMPREHENSIVE CERVICAL CANCER PREVENTION AND CONTROL: A HEALTHIER FUTURE FOR GIRLS AND WOMEN 7 (2013), *available at* http://apps.who.int/iris/bitstream/10665/78128/3/9789241505147_eng.pdf ("Early detection and treatment of precancerous lesions can prevent the majority of cervical cancers.").

229. *See id.* at 2–7 (advocating screening and vaccination, and documenting their effectiveness); *Gynecologic Cancers*, CDC, http://www.cdc.gov/cancer/cervical/basic_info/screening.htm (last updated Mar. 7, 2014) (advocating universal Pap screening for women aged 21–65); *Human Papillomavirus (HPV)*, CDC, http://www.cdc.gov/hpv/prevention.html (last updated Jan. 22, 2015) (advocating HPV vaccination for males and females).

230. The introduction of widespread cervical cancer screening in the 1970s greatly reduced illnesses and deaths resulting from HPV infection. *See* NATIONAL INSTITUTES OF HEALTH, CONSENSUS DEVELOPMENT CONFERENCE STATEMENT: CERVICAL CANCER, (Apr. 1–3, 1996), *available at* http://consensus.nih.gov/1996/1996cervicalcancer102html.htm; *Cervical Cancer Statistics*, CDC, http://www.cdc.gov/cancer/cervical/statistics (last updated Sept. 2, 2014) [hereinafter CDC, *Cervical Cancer Statistics*].

231. Four thousand and ninety-two women died from cervical cancer in the United States in 2010. *See* CDC, *Cervical Cancer Statistics*, *supra* note 230. By contrast, the CDC records 8,369 deaths from HIV in 2010. Sherry L. Murphy et al., *Deaths: Final Data for 2010*, 61 NAT'L VITAL STAT. REP. 1, 37 (2013), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_04.pdf.

232. *See* Lauri E. Markowitz et al., *Reduction in Human Papillomavirus (HPV) Prevalence Among Young Women Following HPV Vaccine Introduction in the United States, National Health and Nutrition Examination Surveys, 2003-2010,* 208 J. INFECTIOUS DISEASES 385, 385 (2013) (finding a 56% reduction in the prevalence of the HPV types targeted by the vaccine among girls aged 14–19 within four years of the vaccine's introduction).

233. More than forty strains of HPV have been identified; most of them are not associated with cancer. *Information About the Human Papillomavirus*

mon, it kills more women than HIV does: in 2010, 2,270 women died of AIDS,[234] compared to 4,092 who died of cervical cancer.[235] Hepatitis kills more Americans every year than HIV does.[236] Governments and legislators have generally chosen nonpunitive approaches to deal with these infections. The success of noncriminal harm reduction approaches to HPV—and HIV[237]—suggests that public health critics are right to contend that criminal punishment is not necessary to protect public health.[238]

Finally, nonsexual infectious diseases, such as tuberculosis, meningitis, measles, pertussis and SARS (severe acute respiratory syndrome), can also be life-threatening—and, unlike HIV, they can be transmitted through the air.[239] Like hepatitis and HPV, they are generally not criminalized. In recent years, several well-publicized outbreaks of deadly vaccine-preventable diseases have led to the hospitalization of hundreds of people, and to several infant deaths.[240] The CDC has traced these outbreaks to "groups of unvaccinated people" who contract these

(HPV), WEBMD, http://www.webmd.com/sexual-conditions/hpv-genital-warts/hpv-virus-information-about-human-papillomavirus (last visited Mar. 16, 2015). Most HPV-related cancers are attributed to only two strains: HPV 16 and HPV 18. *Id.*

234. *See* Murphy, *supra* note 231 at 47. HIV killed 8,369 people in total; most were men. *Id.*

235. *See supra* note 231.

236. The CDC attributes 3,000 yearly deaths to chronic liver disease associated with hepatitis B, and 12,000 yearly deaths to chronic liver disease associated with hepatitis C, for a total of 15,000 yearly deaths. *See* CDC, *Disease Burden*, *supra* note 218. The CDC estimates that, in 2011, 13,834 people died (of any cause) while they had a diagnosis of AIDS. *HIV in the United States: At a Glance*, CDC, http://www.cdc.gov/hiv/statistics/basics/ataglance.html (last updated Nov. 25, 2014).

237. *See* CDC, HIGH-IMPACT PREVENTION, *supra* note 49.

238. *See* Burris & Cameron, *supra* note 31; Galletly & Pinkerton, *supra* note 36; Lazzarini, *supra* note 31; Mykhalovskiy & Betteridge, *supra* note 16 at 50–51.

239. *See* WHO, TUBERCULOSIS AND AIR TRAVEL: GUIDELINES FOR PREVENTION AND CONTROL 2 (2008), *available at* http://www.who.int/tb/publications/2008/WHO_HTM_TB_2008.399_eng.pdf ("Airborne and droplet-borne diseases that are potentially transmissible on board aircraft include TB, influenza, meningococcal disease, measles and SARS.").

240. *See, e.g.*, CDC, 2013 FINAL PERTUSSIS SURVEILLANCE REPORT, *available at* http://www.cdc.gov/pertussis/downloads/pertuss-surv-report-2013.pdf (reporting 13 infant deaths from pertussis in 2012-13); CDC, MEASLES CASES AND OUTBREAKS, *available at* http://www.cdc.gov/measles/cases-outbreaks.html (documenting 644 cases in 2014 and 127 cases in a single multistate outbreak in 2015, all resulting from "spread in communities with groups of unvaccinated people").

viruses and transmit them to others who have not been or cannot be vaccinated.[241] Unlike people with HIV, though, vaccine refusers (who are often wealthy and well-educated[242]) have never been prosecuted for exposure or transmission of pertussis or measles. Rather, nearly every state authorizes nonmedical reasons for parents to refuse to vaccinate their children.[243]

Some public health tuberculosis-prevention programs provide for quarantine as a last resort for recalcitrant patients who refuse to take treatment, but they do not provide for prosecution.[244] A number of air passengers have boarded commercial flights to or within the United States after having been diagnosed with "highly infectious" tuberculosis, without advising passengers or airline staff.[245] Two of them carried multi-drug-resistant strains, which are notoriously difficult to treat.[246] At least two of them infected nearby passengers or crew.[247] These nondisclosers are dealt with through quarantine laws and do-not-fly lists. They have not been prosecuted.[248]

241. *Id.* People with certain health conditions, and very young infants, cannot be vaccinated against pertussis or measles. *Id.*

242. *See* Amanda Paulson, *Measles Outbreak: Why Do Some Parents Choose Not To Vaccinate?*, CSMONITOR.COM (Feb. 3, 2015), http://www.csmonitor.com/USA/Society/2015/0203/Measles-outbreak-Why-do-some-parents-choose-not-to-vaccinate-video (characterizing vaccine-refusing parents as "affluent, educated, [and] focused on a natural lifestyle," and quoting an expert urging that vaccination campaigns "maintain [these parents'] goodwill . . . listen to their concerns and engage in meaningful dialogue").

243. All states mandate the vaccination of schoolchildren; 48 of 50 states protect a religious exemption to the mandate; 20 of 50 states allow a nonreligious "personal" or "philosophical" objection. State Legislatures Magazine, *Calling the Shots*, NCSL.ORG (Feb. 2, 2015), http://www.ncsl.org/bookstore/state-legislatures-magazine/trends-february-2015.aspx.

244. *See, e.g.*, M. Rose Gasner et al., *The Use of Legal Action in New York City To Ensure Treatment of Tuberculosis*, 340 NEW ENG. J. MED. 359, 359 (1999); Sullivan & Field, *supra* note 89, at 139–40.

245. WHO, TUBERCULOSIS AND AIR TRAVEL, *supra*, note 239, at 3; *see also, e.g.*, *Lawyer Infected with Tuberculosis Apologizes to Airline Passengers*, N. Y. TIMES (June 1, 2007), http://www.nytimes.com/2007/06/01/"world/americas/01iht-health.3.5960013.html [hereinafter *Lawyer Apologizes*]; *Tuberculosis Patient Flies Despite Being on Banned List*, CNN (Jan. 13, 2010), http://www.cnn.com/2010/HEALTH/01/12/tuberculosis.flight/index.html [hereinafter *TB Patient Flies*].

246. *See* WHO, TUBERCULOSIS AND AIR TRAVEL, *supra* note 239, at 3.

247. *See id*.

248. *See Lawyer Apologizes*, *supra* note 245; *TB Patient Flies*, *supra* note 245.

b. Contraceptive fraud

The lies and omissions that give rise to contraceptive fraud claims—"I've had a vasectomy" or "I'm on the Pill"—can result in a pregnancy that is unplanned and unwanted by the deceived partner. If the pregnancy is carried to term, this deception can transform the life of the uninformed partner. If the uninformed partner is a woman, such deceptions can also jeopardize her health.[249] Yet civil courts recognize that, in the exercise of their sexual autonomy through sex and relationships, adults take risks that their partners may deceive and betray them in ways that matter very much. Rather than protect people against the risks of heterosexual sex, civil courts have been reluctant to intervene. Contraceptive fraud is rarely a tort, and never a crime.

Courts tend to take a critical perspective on contraceptive-fraud claims, asking questions that are notably absent from opinions in HIV-nondisclosure cases. While nondisclosure laws treat the partners' failure to discuss HIV as a criminal wrong committed by the HIV-positive partner, civil courts do not typically accept that failure to discuss birth control constitutes a misrepresentation by one partner. For example, when a man failed to mention his vasectomy to a woman who said she would never have slept with him had she known about it, a Massachusetts appellate court found no egregious wrongdoing: "[W]hen the parties became sexually intimate, they did not discuss any methods of birth control," it pointed out.[250] Even if the defendant had deliberately misled the plaintiff by not mentioning the vasectomy, the court held, his conduct did not "rise to the 'high order of reckless ruthlessness or deliberate malevolence' required for a showing of conduct that is 'intolerable.'"[251]

Judicial opinions in contraceptive fraud tort claims also tend to note that plaintiffs could have taken steps to protect themselves. While a woman's false representation that she was taking "the Pill" did not "fully effectuate and respect" a male plaintiff's choices with respect to procreation, a New York appellate court noted that if he cared that much about preventing

249. As the Supreme Court has observed in *Roe v. Wade* (and in *Casey v. Planned Parenthood*, 505 U.S. 833 (1992)), unplanned pregnancy can force upon the person a "distressful life and future." 410 U.S. 113, 153 (1973). It can also cause life-threatening health problems. *See, e.g.*, Barbara A. v. John G., 145 Cal. App. 3d 369, 375 (Ct. App. 1983).

250. Conley v. Romeri, 806 N.E.2d 933, 935 (Mass. App. Ct. 2004).

251. *Id.* at 938.

conception, he could have used a condom. Her deception, the court observed, "in no way limited his [own] right to use contraception."[252] Criminal laws, by contrast, punish nondisclosure whether or not a complainant used (or refused to use) condoms.

In tort claims, nondisclosure about STI or contraception is not actionable unless it results in physical harm: sexually transmissible infection, reproductive injury, or abortion.[253] Voluntary sex that the partner would otherwise have refused does not count. Some of the public policy considerations underlying this rule are inapposite to HIV: civil courts are rightly skeptical of male plaintiffs who might "attempt[] to circumvent [their] child support obligations"[254] by claiming that their ex-girlfriends said they were on the Pill, and they express legitimate concern that allowing damages for contraceptive fraud would contravene the best interests of the unwanted child.[255] These courts also hold, though, that it would be inappropriate for the judiciary to supervise promises exchanged among consenting adults—even if they lie to each other about important sexual matters. As a California appellate court put it, "certain sexual conduct and interpersonal decisions are, on public policy grounds, outside the realm of tort liability."[256]

For example, a California appellate court held that a woman who falsely claimed she was taking the Pill "may have lied and betrayed the personal confidence reposed in her" by her boyfriend, who became a father against his will. Nonetheless, the court held, "the circumstances and the highly intimate na-

252. L. Pamela P. v. Frank S., 499 N.E.2d 713, 716 (Ill. App. Ct. 1983).

253. *See, e.g.*, Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Ct. App. 1984) (regarding unfaithful husband's transmission of herpes to uninformed wife); *Barbara A.*, 145 Cal. App. 3d at 373 (involving man's representation that he was infertile, which led to ectopic (tubal) pregnancy that left the woman infertile); McPherson v. McPherson, 712 A.2d 1043, 1045 (Me. 1998); Doe v. Johnson, 817 F. Supp. 1382, 1389 (W.D. Mich. 1993); Carsanaro v. Colvin, 716 S.E.2d 40 (N.C. Ct. App. 2011) (upholding husband's tort action for negligent infliction of emotional distress against wife's nonmarital lover for transmitting herpes to him via her); In re Alice D. v. William M., 113 Misc. 2d 940 (N.Y. Civ. Ct. 1982) (involving pregnancy and abortion resulting from man's false claim that he was sterile); Hamblen v. Davidson, 50 S.W.3d 433, 438 (Tenn. Ct. App. 2000) ("[A]ll the jurisdictions which have considered the issue.").

254. Wallis v. Smith, 22 P.3d 682, 683 (N.M. Ct. App. 2001).

255. *See Barbara A.*, 145 Cal. App. 3d at 378–79.

256. Perry v. Atkinson, 195 Cal. App. 3d 14, 19 (Ct. App. 1987) (rejecting cause of action for fraud and deceit where woman had an unwanted abortion in reliance on her lover's false promise that he would impregnate her the following year); *accord* Richard P. v. Superior Court, 202 Cal. App. 3d 1089, 1095 (Ct. App. 1988).

ture of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor."[257] It characterized the ex-boyfriend's claim as "asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct,"[258] holding that the court should not intrude upon "matters affecting the individual's right to privacy."[259] In rejecting another man's claim for negligent infliction of emotional distress after a former lover told him she was pregnant, another California court held in 2005 that such a complaint merely "depict[s] the . . . aftermath that all too often follows casual sexual encounters and failed romances. . . . For the court to intervene in such personal matters, there must be some conduct by the defendant that is particularly egregious, *which causes serious injury to the plaintiff*."[260] Anxiety about unwanted pregnancy does not count.

iii. Informed Consent: The Medical Model

A third version of "informed consent" that might be offered to justify HIV criminalization could be based on a medical model. Tort law and rules of professional conduct require that physicians and other health care providers inform patients of the risks and benefits of every procedure so that the patient may exercise "intelligent" or "informed" consent to the treatment. A physician who fails to do so breaches his or her duty of care, and may face tort liability or professional sanctions.

Unlike the absolute duty imposed by most criminal HIV statutes, the physician's duty to disclose does not extend to every conceivable risk, no matter how remote. It is a duty to make the "reasonable disclosure" that "a reasonable medical practitioner would make under the same or similar circumstances."[261] Even if the physician fails to disclose material risks, an underinformed patient has no cause of action unless, among other requirements, the medical treatment caused harm to the

257. Stephen K. v. Roni L., 105 Cal. App. 3d 640, 643 (Ct. App. 1980).

258. *Id.* at 644–45.

259. *Id.* at 645.

260. Starr v. Woolf, No. CO47594, 2005 WL 1532369, at *6 (Cal. Ct. App. June 30, 2005) (emphasis added); *see also Richard P.*, 202 Cal. App. 3d at 1094 ("Unlike the present case, both of those cases involved *physical injury* to the plaintiff and had no potential for harming innocent children.").

261. *See, e.g.*, W. M. Moldoff, *Malpractice: The Physician's Duty To Inform Patient of Nature and Hazards of Disease or Treatment*, 79 A.L.R.2D 1028, § 2 (originally published in 1961).

patient (or a reasonable patient, if fully informed, would have refused the treatment).[262] This duty does not extend to risks that are extremely unlikely, purely speculative, or nonexistent.

Some patients would no doubt refuse any treatment by an HIV-positive health care provider, regardless of any risk of transmission. Nonetheless, "informed consent" does not ordinarily require the HIV-positive physician to disclose his or her serostatus to the patient. Rather, the American Medical Association recommends that the HIV-positive health care provider simply abstain from "any activity that creates a significant risk of transmission."[263] If there is no transmission risk, there is no obligation to disclose. The existence of "significant risk" is not a judgment left to the patient. Rather, the physician, in consultation with a committee comprised of other physicians with expertise in HIV and knowledge of the physician's medical condition, determines which procedures pose a "significant" transmission risk.[264]

The disclosure obligation imposed by HIV criminal laws is not analogous to physicians' duty to ensure that their patients' consent is fully informed. Unlike medical interactions, the social relationships and interactions leading to first sex do not ordinarily involve explicit discussion of the risks and benefits of sexual activity. Often, the people are drunk.[265] They may, but do not invariably, discuss STI or pregnancy before first sex.[266] Unlike physicians, people with HIV must disclose even when the prospect of transmission is remote or nonexistent. If they fail to disclose their HIV status, they are criminals even if their conduct caused no harm and posed no appreciable risk.

262. *See id.*

263. *Opinion 9.131 - HIV-Infected Patients and Physicians*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/"opinion9131.page (last updated June 1998).

264. *See id.*; *see also* AM. MED. ASS'N, H-20.912 GUIDANCE FOR HIV-INFECTED PHYSICIANS AND OTHER HEALTH CARE WORKERS 7 (2008), *available at* http://hr.med.sc.edu/Employee_Health_Policies.doc. The Guidance permits the HIV-positive physician to perform an "exposure-prone procedure" only with the permission of the committee *and* the informed consent of the patient. *Id.*

265. *See, e.g.*, Mary McFarlane et al., *Women, the Internet, and Sexually Transmitted Infections*, 13 J. WOMEN'S HEALTH 689, 691 (2004) (noting 46.3–55.4% of (self-selected) female respondents said they were drunk or otherwise intoxicated during first sex with a new partner).

266. *See id.* (noting 60–62.4% of female respondents said they had discussed HIV or STIs with new partners, that is, about 40% of female respondents said they had never discussed HIV or STIs with a new partner).

D. SEXUAL AUTONOMY AND GENDER EQUALITY

Advocates of HIV criminalization often draw upon feminist insights and gendered intuitions. Since the 1970s, an influential feminist critique of rape law "has bred sensitivity to coercion, and skepticism of consent, in conditions of gender subordination."[267] This feminist critique expanded the impoverished view of women's autonomy embedded in pre-reform rape law, which, among other problems, traditionally measured women's virtue by their chastity, suspected rape complainants of lying, required corroboration of women's evidence, condoned considerable use of force and coercion against women, and enforced racial hierarchies while leaving women largely unprotected against sexual assault by men they knew.[268] Feminist challenges to these and other subordinating aspects of traditional rape law greatly expanded legal and cultural notions about who the perpetrators and victims of sexual assault might be, and expanded the kinds of sexual coercion that could be recognized as crimes. Feminist-inspired rape law reform promoted sexual autonomy and gender equality by criminalizing sexual behaviors which had been tolerated or defined away by traditional rape law, including marital rape, acquaintance rape, the sexual assault of men and boys, and the rape of intoxicated or unchaste women.[269] As Jennifer Hendricks has observed, "feminists should regret neither their underlying critique of consent and choice nor their efforts to honor the ways in which women suffer."[270]

If HIV nondisclosure is understood as a kind of sexual assault, its criminalization might seem to promote gender equality just as earlier rape law reforms did.[271] But feminists should

267. Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1198 (2010).

268. *See, e.g.*, Coughlin, *supra* note 202, at 38. *See generally* SUSAN ESTRICH, REAL RAPE 70, 102–03 (1987) [hereinafter ESTRICH, REAL RAPE]; CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 145–46, 175–77 (1989); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) [hereinafter Estrich, *Rape*].

269. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); ESTRICH, REAL RAPE, *supra* note 268; MACKINNON, *supra* note 268; Estrich, *Rape*, *supra* note 268.

270. Jennifer S. Hendricks, *Converging Trajectories: Interest Convergence, Justice Kennedy, and Jeannie Suk's "The Trajectory of Trauma*,*"* 110 COLUM. L. REV. SIDEBAR 63, 71 (2010).

271. *See, e.g.*, Mary Fan, *Decentralizing STD Surveillance: Toward Better Informed Sexual Consent*, 12 YALE J. HEALTH POL'Y L. & ETHICS 1, 15 (2012) (arguing that nondisclosure vitiates sexual consent); Grant, *Boundaries*, *supra*

not uncritically assume that every expansion of criminal liability for sex will promote gender equality.[272] HIV criminalization is especially ill-suited to promote equality or benefit women: the perception that it might rests on inaccurate gendered assumptions that conflate nondisclosure with sexual assault.

The sexual autonomy argument for HIV criminalization often relies on an unexamined assumption that nondisclosers will be men, and uninformed partners will be women.[273] In *Cuerrier*, for example, the Supreme Court of Canada took for granted that HIV deception was typically a heterosexual act, explicitly "assum[ing] that it will more often be the man who lies," and that the deceived partner would be a woman.[274] Legal arguments in favor of HIV criminalization typically invoke scenarios of male deception and female vulnerability—especially the notorious case of Nushawn Williams, a young black man accused of infecting thirteen young women and girls, most of them white, in Jamestown, New York, in 1997.[275] Criminalization, these advocates hope, will protect women against infection by unfaithful or bisexual men.[276]

This heteronormative frame for HIV criminalization tends to deflect the victim-blaming that pervades public discourse about HIV among gay men, positioning nondisclosure complainants as innocent victims who are acting in accordance with conventional expectations of female heterosexuality and sexual passivity: they submitted to sex with men without asking many questions. At the same time, the imagined male-to-

note 20, at 159; Mathen & Plaxton, *supra* note 20, at 481 (arguing that because HIV nondisclosure "objectif[ies]" women, it is "closely bound up with the gendered nature of the offence" of "sexual assault" (internal quotation marks omitted)).

272. *See generally* Aya Gruber, *Rape, Feminism and the War on Crime*, 84 WASH. L. REV. 581 (2009).

273. It is extremely unlikely that HIV nondisclosure is gendered in this way. *See infra* Part IV.B.

274. R. v. Cuerrier, [1998] 2 S.C.R. 371, 434 (Can.).

275. *See* Mona Markus, *A Treatment For the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV. 847, 848–51 (1999); Elisabeth Van Vliet, *Law, Medicine, HIV and Women: Constructions of Guilt and Innocence*, 1 HEALTH L.J. 191, 198–201 (1993); Leslie Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 823–25 (2004); *see also infra* notes 305–318, 334.

276. *See, e.g.*, GLOBAL COMMISSION REPORT, *supra* note 31, at 77–85; Mathen & Plaxton, *supra* note 20, at 464. *See generally* SCHULHOFER, *supra* note 189.

female dynamics of sexual nondisclosure apparently make HIV transmission look and feel more like a sex crime.

Highlighting the reality that unprotected vaginal sex more readily transmits HIV from man to woman than from woman to man, these critics deduce a need for criminal protections to shield women from HIV nondisclosure—without recognizing that women's higher rates of heterosexual infection may also expose them to prosecution as nondisclosers.[277] By conflating HIV nondisclosure with sexual assault, the gendered sexual autonomy argument distills from the biological reality that women can become infected through unprotected vaginal intercourse "the chilling moral that AIDS [is] primarily a man's disease transmitted to women through sexual violence."[278]

Feminist scholars observe that physical or sexual abuse, cultural norms, or economic dependence may prevent HIV-negative women from asking their partners about STIs or insisting on condom use. Despite her concerns that homophobia and racism may shape nondisclosure prosecutions, for example, Isabel Grant has defended criminalization because "the pervasive sex inequality that exists in heterosexual relationships" makes it "unrealistic" to assume that women can insist on condom use or refuse sex with male partners[279]:

> [HIV transmission] raises many issues unique to women because of their relative powerlessness in their sexual lives compared to men. Women may not be in a position to insist on condom use. Women in abusive relationships, women involved in prostitution, young women, and women living in poverty and/or social isolation may all have particular difficulties in insisting on condom use. . . . [T]his subordination 'inhibits women's capacity to protect themselves from exposure to HIV.' Thus, the reality for women may be that they cannot always take the best precautions available to prevent transmission of HIV/AIDS; rather they must rely on their male partners to cooperate.[280]

But there is no reason to presume that, in an abusive relationship, the HIV-negative partner will be the woman.[281] Given that women comprise two-thirds of heterosexuals infected with

277. *See, e.g.*, Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of Disease and Its Legal Regulation*, 3 TEX. J. WOMEN & L. 7, 43–45 (1994); *see also* Grant, *Boundaries*, *supra* note 20, at 159.

278. James Miller, *African Immigrant Damnation Syndrome: The Case of Charles Ssenyonga,* 2 SEXUALITY RES. & SOC. POL'Y 31, 37 (2005).

279. Grant, *Boundaries*, *supra* note 20, at 160.

280. *Id.* at 159 (footnote omitted). *See also generally* Mathen & Plaxton, *supra* note 20; Van Vliet, *supra* note 275, at 199–200.

281. See MacKinnon & Crompton, *supra* note 20, at 448.

HIV,[282] it seems more likely that the infected person in a serodiscordant[283] heterosexual partnership will be the woman. Where an HIV-positive woman (or man) is in an abusive relationship, or is financially or otherwise dependent on a partner, or is imprisoned, undocumented, or otherwise vulnerable, she may find it extremely difficult to disclose her HIV status.[284] Yet HIV disclosure laws make her a criminal. As noted in Part I.C, prosecutions and convictions of such women are not unusual.[285]

Moreover, HIV nondisclosure is not gendered in the way that feminist proponents of criminalization have assumed. It is not typically something men do to women. In the United States as in other Western countries, most people diagnosed with HIV are men who have sex with men.[286] Furthermore, a substantial body of public health research on HIV nondisclosure finds little, if any, variation by gender or sexual orientation. To the extent that gender differences are found at all, they tend to indicate higher rates of nondisclosure between MSM than between men and women.[287] These studies find that HIV-positive people (of all genders and sexual orientations) overwhelmingly disclose their serostatus to long-term or emotionally intimate partners, and often nondisclose to new or casual ones.[288] Researchers

282. *See infra* note 451.

283. A serodiscordant relationship has one HIV-positive and one HIV-negative partner. *See* Raymond A. Smith, *Couples*, BODY (1998), http://www.thebody.com/content/art14009.html.

284. Symington, *supra* note 20, at 653.

285. *See supra* notes 110–116 and accompanying text.

286. According to CDC estimates, about 56.8% (652,300 of 1,148,240) of all Americans diagnosed with HIV are men who have sex with men: 592,100 whose infection is attributed to male-male sex, and 60,200 who have also injected drugs. CDC, HIV SURVEILLANCE REPORT, SUPPLEMENTAL REPORT, MONITORING SELECTED NATIONAL HIV PREVENTION AND CARE OBJECTIVES BY USING HIV SURVEILLANCE DATA—UNITED STATES AND 6 U.S. DEPENDENT AREAS—2010, at 22 (June 2012), *available at* http://www.cdc.gov/hiv/pdf/statistics_2010_HIV_Surveillance_Report_vol_17_no_3.pdf.

287. Ciccarone, *supra* note 108, at 952; *see also* Saramona M. Przybyla et al., *Serostatus Disclosure to Sexual Partners Among People Living with HIV: Examining the Roles of Partner Characteristics and Stigma*, 25 AIDS CARE 566 (2013) (finding that 86% of heterosexual men, 85% of heterosexual women, and 69% of MSM enrolled in a safer sex intervention program had disclosed their HIV status to all sexual partners in the past three months).

288. *See, e.g.* Ciccarone, *supra* note 108, at 951 (finding that "[f]ive percent of women reported not disclosing their HIV-positive status in serodiscordant exclusive partnerships, compared with 1% to 2% of all men," while men's nondisclosure usually occurred in the context of casual sex); Allison G. Dempsey et al., *Patterns of Disclosure Among Youth Who Are HIV-Positive: A Multistate Study*, 50 J. ADOLESCENT HEALTH 315, 315–17 (2012) (finding that 40% of re-

have documented high rates of self-reported nondisclosure among men who have sex with men,[289] men who have sex with both men and women,[290] and among heterosexual women and men.[291] (Sexual transmission of HIV between women is rare.[292])

This research reveals that men are no more likely to nondisclose in heterosexual partnerships than women are; there is some evidence that—perhaps because of the gender dynamics identified by Grant and others—women may be more likely than gay or straight men to nondisclose in an exclusive relationship.[293]

Although HIV nondisclosure seems to occur mainly among MSM, the vulnerability of heterosexual women plays an outsized role in judicial, legislative, and academic rationales for criminalizing it. Supporters of HIV criminalization do not ex-

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spondents aged 16–24 reported nondisclosure to at least one partner in the past three months, regardless of gender, ethnicity or sexual orientation); Tara McKay & Matt G. Mutchler, *The Effect of Partner Sex: Nondisclosure of HIV Status to Male and Female Partners Among Men Who Have Sex with Men and Women (MSMW)*, 15 AIDS BEHAV. 1140, 1149 (2011) (finding that the predicted probability of nondisclosure was 75–76% for casual partners and 34–36% for primary partners, regardless of sex or sexual orientation).

Some studies have found that "[n]ot discussing HIV status and not knowing a partner's HIV status were particularly common in the casual partnerships of the [MSM] surveyed." Finlayson, *supra* note 54, at 8 (finding 53% of the survey respondents who reported having had sex with a casual (male) partner in the past twelve months did not know that partner's HIV status; 19% of men said they did not know the HIV status of their main (male) partner); *see also* Horvath, *supra* note 1, at 1226; McKay & Mutchler, *supra*, at 1149 (finding evidence of a "Don't ask, don't tell" norm among casual partners, and to a lesser degree among primary partners, regardless of whether the partnerships were same-sex or different-sex); Jeffrey T. Parsons et al., *Consistent, Inconsistent, and Non-disclosure to Casual Sexual Partners Among HIV-Seropositive Gay and Bisexual Men*, 19 AIDS S87, S87; Sheon & Crosby, *supra* note 104, at 2105.

289. Ciccarone, *supra* note 108, at 952; Finlayson, *supra* note 54, at 8; Horvath, *supra* note 1, at 1226; Parsons, *supra* note 288, at S87; Sheon & Crosby, *supra* note 104, at 2105 (noting that HIV-positive MSM perceived a community-wide shift toward nondisclosure to casual partners, and that they saw no point in disclosing to casual partners since they assumed such men to be HIV-positive).

290. McKay & Mutchler, *supra* note 288, at 1148 (finding HIV-positive "MSMW disclosed their HIV status before sex to slightly more than half of all partners and never disclosed their HIV status to one-third of partners").

291. Miriam R. Chacko et al., *Understanding Partner Notification (Patient Self-Referral Method) by Young Women,* 13 J. PEDIATRIC ADOLESCENT GYNECOLOGY 27, 30 (2000); Ciccarone, *supra* note 108, at 951–52.

292. Shirley K. Chan et al., *Likely Female-to-Female Sexual Transmission of HIV—Texas, 2012,* 63 MORBIDITY & MORTALITY WKLY. REP. 209 (2014).

293. *See* Ciccarone, *supra* note 288.

plain why the presumptive power dynamics of heterosexual relationships should govern the legal response to a virus that is typically and stereotypically associated with gay men. The heavy reliance on male-to-female transmission in pro-criminalization rationales raises questions about why this transmission dyad should matter to criminal law in a way that male-to-male nondisclosure apparently does not.

Although the underlying behavior—nondisclosure of HIV—does not seem to vary by gender in the ways some feminists predict, it seems that prosecutions do.[294] Thus, although HIV criminal laws are unlikely to advance sexual autonomy or gender equality in any systematic way, their implementation is consistent with an assumption that HIV exposure and transmission matter most when they escape from gay communities to threaten heterosexual women and men.

III. INNOCENT VICTIMS AND AIDS MONSTERS: THE RACE AND GENDER OF HIV CRIME

Public health, moral retribution, and sexual autonomy offer little reason to single out HIV for criminal punishment. Moreover, criminalization diverges from these rationales in ways that suggest that HIV seems most invidious when it affects heterosexuals who are acting in accordance with conventional gender expectations. Gendered, racial, and homophobic bias are notorious throughout the enforcement of criminal law, from drug possession to rape and the death penalty. The role of such biases in HIV criminalization may run deeper, shaping not only the enforcement of criminal laws (discussed in Part IV) but also perceptions about whether, when, and why HIV should be treated as a crime.

Since the beginning of the epidemic, HIV has been associated with stigmatized groups of people: sex workers, drug users, Africans and Haitians, and especially gay men.[295] The original name applied to the mysterious constellation of symptoms

294. *See infra* Part IV.A.

295. PAUL FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME 2 (1992) (noting tendency in the United States to blame Haitians as the source of AIDS); AIDS AND THE LAW (Harlon L. Dalton et al. eds., 1987), *cited in* Sanchez v. Lagoudakis, 581 N.W.2d 257, 269 (Mich. 1998) (listing risk groups for HIV); WEAIT, *supra* note 16, at 143; Robert C. Gallo, *A Reflection on HIV/AIDS Research After 25 Years,* 3 RETROVIROLOGY 72, 72 (2006) (dating this coinage to 1982); Paula A. Treichler, *AIDS, Homophobia, and Biomedical Discourse: An Epidemic of Signification*, 43 AIDS: CULTURAL ANALYSIS 31, 44 (1987).

was "Gay-Related Immune Disorder," or GRID.[296] Although this acronym was abandoned as soon as the other three (presumptively heterosexual) "risk group[s]" were identified,[297] HIV/AIDS was often described in popular discourse as a "gay plague."[298]

An extensive body of critical scholarship documents the early cultural and media production of HIV/AIDS as "a disease of the 'other', making possible the idea that infection was linked to identities located outside the 'mainstream'; outside 'proper' heterosexuality."[299] As Matthew Weait notes in his landmark study of HIV criminalization, the homophobic association of AIDS and HIV with sexually stigmatized people and practices "allowed AIDS to be understood as self-inflicted . . . reinforc[ing] the idea that AIDS was a punishment for morally wrong conduct. "[300] As Weait and many other scholars have observed, the racialized, moralistic, and homophobic framing of HIV marked it as a disease whose rightful victims were marked by sexual and racial stigma.[301] By contrast, hemophiliacs, children born to HIV-positive mothers, and heterosexual women who had sex with bisexual men or male intravenous drug users were often described in the news media as "innocent victims."[302] Women infected through heterosexual sex, in par-

296. WEAIT, *supra* note 16, at 141.

297. *Id.* at 143; *see, e.g.*, Steven Eisenstadt, *The HIV Infected Health Care Worker: The New AIDS Scapegoat,* 44 RUTGERS L. REV. 301, 302 n.3 (1992) (discussing a 1988 survey in which twenty percent of respondents believed that people with HIV "got their rightful due," and a 1990 survey in which fewer than half of respondents said they thought people who got HIV "through homosexual conduct, illicit intravenous drug use, or sexual relations with an IV drug user" deserved compassion).

298. WEAIT, *supra* note 16, at 143 (describing the tabloid media as embracing this phrase with "vile abandon").

299. *See, e.g.*, *id.* at 120–46 (summarizing this scholarship); Persson & Newman, *supra* note 16, at 632.

300. WEAIT, *supra* note 16, at 142.

301. The African origin of HIV and its association with Haitians, Africans, and others of African descent resonated with existing stereotypes of black people as hypersexual, irresponsible, ape-like, and perpetrators of sex crimes against white women. THOMAS SHEVORY, NOTORIOUS H.I.V.: THE MEDIA SPECTACLE OF NUSHAWN WILLIAMS 11–13 (2004); *see also* Grant, *Boundaries*, *supra* note 20, at 154–55; Persson & Newman *supra* note 16, at 633–34.

302. Persson & Newman, *supra* note 16, at 637; *see, e.g.*, CATHY J. COHEN, THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS 166–67 (1999) (discussing the media portrayal of black women as "innocent victims" of heterosexual transmission); SHEVORY, *supra* note 301, at 17 (describing media portrayal of Nushawn Williams as "a pied piper who used drugs to attract and corrupt the innocent teenagers of Jamestown"); WEAIT, *supra* note 16, at 143; Russell K. Robinson, *Racing the Closet*, 61 STAN.

ticular, were and are often portrayed in the media as "innocent victims of men's betrayal."[303] This discourse tended to construct "proper"[304] (white, gender-conforming) heterosexuality as an identity that is, or ought to be, protected against HIV.[305]

The first high-profile media coverage of an alleged HIV transmitter occurred in 1987. A CDC report, publicized by a bestselling book, identified Gaëtan Dugas, a handsome and promiscuous Québécois flight attendant, as "Patient Zero": the man who brought HIV to the United States in the early 1980s.[306] These claims were later debunked—the men whose infection was blamed on Dugas were almost certainly infected long before they met him, and HIV was present in the United States before Dugas became active in the mid-1970s[307]—but, at the time, media coverage of the Patient Zero story was sensationalistic and intense.[308] News reports emphasized that "Mr.

L. REV. 1463, 1464–65 (2009) (criticizing media characterization of black men "on the 'down low'" as "dangerous black men" whose deceit threatens "innocent wives and girlfriends").

303. Persson & Newman, *supra* note 16, at 637.

304. *Id.* at 632.

305. WEAIT, *supra* note 16, at 142–43; Persson & Newman, *supra* note 16, at 634.

306. This claim was advanced in RANDY SHILTS, AND THE BAND PLAYED ON 128–40 (1987), and discussed in many media outlets, including the *New York Times* and the *New York Review of Books*. *See* Christopher Lehmann-Haupt, *Books of the Times: And the Band Played On*, N.Y. TIMES, Oct. 26, 1987, at C20; Andrew Moss, Letter to the Editor, *In Response to 'AIDS Without End,' from the August 18, 1988 Issue,* N.Y. REV. BOOKS, Dec. 8, 1988, *available at* http://www.nybooks.com/articles/archives/1988/dec/08. The "Patient Zero" story was based on a study by Darrow and Auerbach, but the study did not give this characterization of the results. *See* David M. Auerbach et al., *Cluster of Cases of the Acquired Immune Deficiency Syndrome: Patients Linked by Sexual Contact*, 76 AM. J. MED. 487, 487–92 (1984).

307. *See, e.g.*, M. Thomas P. Gilbert et al., *The Emergence of HIV/AIDS in the Americas and Beyond*, 104 PROC. NAT'L ACAD. SCI. 18566, 18566–70 (2007) (documenting HIV in the United States between 1969 and 1981); Moss, *supra* note 306. *See generally* PEPIN, *supra* note 64 (tracing the origins of HIV from chimpanzee hunting and butchering in early twentieth-century Congo through unhygienic midcentury Western-sponsored vaccination campaigns throughout Africa to Haiti in the 1960s to the United States in the 1970s). For an accessible summary of this history, see *Patient Zero*, RADIOLAB (Nov. 15, 2011), http://www.radiolab.org/story/169879-patient-zero.

308. *See supra* note 306; *see, e.g.*, Lehmann-Haupt, *supra* note 306 (claiming to have "identified the man who first brought AIDS to the United States, one Gaëtan Dugas, a sexually voracious French-Canadian airline steward known to have frequented homosexual bathhouses across the country"); Randy Shilts, *Patient Zero: Wherever Gaëtan Dugas Paused, Gay Men Began To Sicken and Die*, CHI. TRIB., Nov. 1, 1987, at D1; Nicholas Wade, *Editorial Notebook: AIDS in Harsh Review*, N.Y. TIMES, Nov. 10, 1987, at A34 (discussing

Dugas used his good looks and French-Canadian accent to lure handsome American men, even after he was diagnosed with AIDS in 1980."[309] He was depicted as a callous man who did not care whether he transmitted HIV[310] and was even alleged to have delighted in telling men he had AIDS *after* bathhouse sex.[311] (The book's editor has since acknowledged that the Patient Zero story was a salacious "literary device" designed to attract readers to a book whose main objective was to challenge the Reagan Administration's longstanding indifference to the deaths of thousands of gay men.[312]) Despite the misleading coverage, Dugas's sexual behavior was never described as "rape," nor were his sexual partners depicted as "innocent." In the 1980s, widespread knowledge of the risk to gay men did not give rise to a wave of HIV criminalization. Rather, many conservatives called for quarantine (or, memorably, tattooing[313]) of people with HIV, and several states enacted quarantine laws.[314]

In the United States as in every Anglo-American jurisdiction, the first high-profile HIV prosecution accused a black man of infecting white women. In 1997, NuShawn Williams, a nineteen-year-old black drug dealer from Brooklyn, became the center of a media firestorm. Williams slept with many young wom-

"the horrifying case of the late Gaëtan Dugas" and how the book, SHILTS, *supra* note 306, "graphically describes the gay bathhouses, their extreme sexual practices, the cruel deaths of those wracked by AIDS, and gay leaders' stubborn opposition to closing the houses down").

309. *Canadian Said To Have Had Key Role in Spread of AIDS*, N.Y. TIMES, Oct. 7, 1987, at B7.

310. *See* SHILTS, *supra* note 306. After a physician told him to abstain from sex, Dugas is reported to have replied, "Nobody's proven to me that you can spread cancer . . . . Somebody gave this thing to me[.] I'm not going to give up sex." *Id.*

311. SHILTS, *supra* note 306, at 165 ("'I've got gay cancer,' he'd say. 'I'm going to die and so are you.'").

312. Don Sapatkin, *AIDS 'Patient Zero' Was a Publicity Strategy, Scholar Writes*, PHILA. INQUIRER (Apr. 23, 2013), http://articles.philly.com/2013-04-23/entertainment/38738614_1_aids-policy-flight-attendant-randy-shilts (citing Michael Denney).

313. William F. Buckley, Jr., *Crucial Steps in Combating the Aids Epidemic: Identify All the Carriers,* N.Y. TIMES (Mar. 18, 1986), https://www.nytimes.com/books/00/07/16/specials/buckley-aids.html (calling for persons with HIV to be "tatooed [*sic*] in the upper forearm, to protect common-needle users, and on the buttocks, to prevent the victimization of other homosexuals"); William F. Buckley, Jr., *Killers At Large*, NAT'L REV., Feb. 19, 2005, at 54 (reiterating this call).

314. Gostin, *supra* note 84, at 1019; Sullivan & Field, *supra* note 89, at 144–45 (describing AIDS and HIV quarantine measures passed or proposed in 1986–87).

en and teenage girls in Jamestown, New York, both before and after he received a diagnosis of HIV. Most of them were white. The county health commissioner disclosed Williams' identity to the press, declaring that Williams had "damaged hundreds and hundreds of lives" at a time when "there were only nine positive individuals associated with [Williams] and perhaps half of those had been infected before he was told he was positive."[315] Although the young women said the sex had been consensual, media reports characterized Williams as a "rapist" and "sexual predator" who "preyed on school girls," a "monster" and "would-be serial killer" who "purposely infected dozens of teens with HIV."[316] The county health commissioner declared, "He's not a monster . . . . We have the devil here."[317]

Similar racialized media panics accompanied the first high-profile HIV prosecutions in Canada, the United Kingdom, Australia, and New Zealand. In each country, the first HIV prosecution involved an African immigrant man accused of infecting native-born white women.[318] As Matthew Weait observes, media coverage of these prosecutions in the United Kingdom framed the men as "assassins and predators who, with their black counterparts in other (predominantly non-black) parts of the world figure as insatiable and archetypal threats to innocent,

315. JoAnn Wypijewski, *The Secret Sharer: Sex, Race, and Denial in an American Small Town*, HARPER'S, July 1, 1998, at 35, 49. In the end, it turned out that thirteen young women who had slept with him tested positive for HIV; tests cannot determine whether they had gotten HIV from him or from someone else, nor could they determine who infected whom. SHEVORY, *supra* note 301, at 14–15 (noting that "some of the infected women were drug users and had multiple partners, making it virtually impossible to point the finger at Williams with certainty").

316. SHEVORY, *supra* note 301, at 16–21. Shevory points out that an arguably more sensational 1996 case, in which thirty women who had slept with the accused tested positive for HIV, and one of them shot and killed him, received little attention in the media. *Id.* at 20. All his uninformed partners were black. *Id.*

317. Wypijewski, *supra* note 315, at 38; *see also* Markus, *supra* note 275, at 847–49 (characterizing Williams' sexual activity as "a killing spree" against "kids").

318. *See, e.g.*, WEAIT, *supra* note 16, at 27–29, 138–40; Cameron et al., *supra* note 16, at 36 (noting that the first New Zealand prosecution involved Peter Mwai, a Kenyan man accused of infecting New Zealand women); Miller, *supra* note 278, at 31–50 (documenting the racialized moral panic over allegations that Charles Ssenyonga, a Ugandan immigrant, had infected three white women); Persson & Newman, *supra* note 14, at 634–35 (noting that, although multiple HIV prosecutions occurred in Australia during 2000–2005, the only prosecution covered by *The Sydney Morning Herald* involved an African male immigrant who had had sex with a white woman).

white, and 'native' femininity."[319] Sociologists Asha Persson and Christy Newman, too, note overtones of black sexual threat to white women in Australian media coverage of HIV prosecutions in the 1990s and 2000s.[320] James Miller notes a similar dynamic in Canada.[321]

In the United States, criminalization of HIV has often followed intensive media coverage of allegations of heterosexual transmission. Florida, the first state to pass HIV-specific criminal legislation,[322] did so in response to widely publicized allegations that an HIV-positive woman had been working as a prostitute.[323] Missouri, likewise, expanded its HIV law in response to statewide publicity of allegations that Darnell "Boss Man" McGee, a black St. Louis drug dealer, had infected many black women and teenage girls.[324]

Unlike the "Patient Zero" allegations against Gaëtan Dugas, the intense nationwide coverage of the Nushawn Williams case was followed by a wave of criminalization. Between 1997 and 1999, California, Colorado, Florida, Iowa, Missouri, New Jersey, Ohio, Pennsylvania, and Washington all passed legislation to create new HIV crimes, or to make existing ones more punitive. Many state legislators invoked Williams as they introduced these bills.[325] In New York, for example, Williams was mentioned in repeated (but unsuccessful) legislative attempts to pass punitive HIV laws.[326] In Florida, state legislators "cited Williams as they revised the Florida criminal code to make knowing transmission (or attempted transmission) of

319. WEAIT, *supra* note 16, at 140.

320. Persson & Newman, *supra* note 16, at 636.

321. Miller, *supra* note 278, at 31.

322. *See* J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws That Criminalize Potential HIV Exposure in the United States*, 18 AIDS Behav. 997, 999, 1000 fig.1 (2014).

323. *See* Robert Craig Waters, *Florida's Omnibus AIDS Act of 1988*, 16 FLA. ST. U. L. REV. 441, 511 (1988).

324. *See* MALCOLM GLADWELL, THE TIPPING POINT 20–21 (2000); David P. Niemeier, *The Criminal Transmission of AIDS: A Critical Examination of Missouri's HIV-Specific Statute*, 45 ST. LOUIS U. L.J. 667, 688–89 (2001); Adam Nossiter, *Man Knowingly Exposed 62 Women to AIDS Virus*, N.Y. TIMES, Apr. 19, 1997, at 7; *HIV-Infected Man Preyed on Girls Before His Murder*, ASSOCIATED PRESS, Apr. 12, 1997, *available at* ProQuest, Doc. No. 418332244.

325. Wolf & Vezina, *supra* note 275, at 844.

326. Wypijewski, *supra* note 315, 38–39. The New York legislature did not expressly criminalize nondisclosure, but only revised its health law to require notification of public health officials and sexual contacts when a person tests positive for HIV. SHEVORY, *supra* note 301, at 2.

HIV a class I felony punishable by up to thirty years in prison."[327]

Although legislative history is not readily available for most states' nondisclosure laws, the available evidence suggests that, as the Global Commission has observed worldwide, the proponents of HIV criminalization hope that nondisclosure laws will "protect women, especially monogamous wives, from the risk of HIV infection by male sexual partners."[328] In Michigan, for example, the House Republican Task Force recommended the broad HIV nondisclosure law that passed in 1998.[329] The Task Force report expressed concern that some people with HIV might show the "wanton disregard for the safety of sexual partners" that had recently been attributed to Gaëtan Dugas.[330] Although Dugas's partners had all been men, the Task Force expressed particular concern that bisexual men might pass HIV to their trusting wives.[331] "[M]any times at-risk individuals are unaware," the Task Force observed, citing a study indicating that "80 percent of the wives of bisexual men (a high-risk group) were unaware of their spouses' bisexuality."[332] Citing the case of a woman who gave birth to an HIV-positive baby after being unknowingly infected by a husband who had hidden his drug use from her, the report asked, "How common is this woman's plight? . . . If marital partners can fail to inform their spouses of their infection and continue to practice unprotected sex, how much more likely is this to occur when the sexual encounter takes place outside the confines of marriage?"[333] In other states for which detailed legislative history can be obtained (California, Tennessee, and Georgia), legislators also seemed to envision that the victims of HIV nondisclosure would be female and the perpetrators male.[334] Ohioan

327. SHEVORY, *supra* note 301, at 2.

328. GLOBAL COMMISSION REPORT, *supra* note 31, at 23.

329. HOUSE REPUBLICAN TASK FORCE ON AIDS, *supra* note 66, at 17.

330. *Id.* at 17.

331. *Id.* at 17.

332. *Id.* at 17 (parentheses in original).

333. *Id.* at 19.

334. During the California legislative debate over its nondisclosure statute, legislators discussed only examples of male-to-female transmission, invoking heterosexual male nondisclosers including Nushawn Williams, Hank Bishoff, William Lucas Barker, and Forrest Jones. The transcripts indicate no mention of male-to-male nondisclosure or transmission: 1998 chaptered law 1001 (S.B. 705), creating H&S Code 120291 (on file with author); *see also, e.g.*, *HIV—Criminal Exposure—Penalties: Hearing on H.B. 1686 Before the Tenn. Judiciary Comm.*, 1994 Leg., 99th Sess. 2–3 (Tenn. 1994) (statement of Peroulas-

legislators seem to have been an exception: like other state legislators, they invoked Nushawn Williams and Darnell McGee, but they also mentioned several cases of male-to-male nondisclosure.[335]

Similarly, in the Supreme Court of Canada's 2012 *Mabior* decision, Chief Justice McLachlin's majority opinion asked, rhetorically: "Should the trusting wife who does not ask a direct question as to HIV status of her partner be placed in a worse position than the casual date who does?"[336] "Is there a good reason for compelling disclosure to one's wife but not to a casual date?"[337] This gendered language suggests that lawmakers saw criminalization as a way to protect women who conform to conventional norms of heterosexual passivity. Like the legislators of Michigan, California, Tennessee, and Georgia, the Supreme Court of Canada expressed no concern about HIV transmission or nondisclosure by women, or between men.

Criminal nondisclosure laws enact an underexamined intuition that (faithful) heterosexuals should not ordinarily have to worry about HIV. This assumption was also built into recent federal HIV policy: the Bush Administration's 2005 Plan for Treatment and Prevention of HIV/AIDS Abroad (known by its acronym, PEPFAR), for example, required abstinence-promotion programs that recommended condom use only to "high-risk populations," defined as "prostitutes, sexually active discordant couples substance abusers, and others."[338] PEPFAR-funded programs touted an "ABC" approach to HIV prevention that would promote *A*bstinence before marriage, *B*eing faithful within marriage, and *C*ondom use only for "those who are in-

Draper, Member, Tenn. H.R.) (on file with author) (stating that, since the only existing HIV criminal law targeted prostitutes, who were "classically . . . female," the new nondisclosure bill would help "individuals who fall through the cracks" by "addressing this [new crime] to females" as victims). The official Georgia legislative history summarizes the legislative discussion of Georgia's 1988 omnibus AIDS bill. It uses gender-neutral language throughout, except when discussing perpetrators of the new crime of HIV nondisclosure, for which the perpetrators were invariably described as "he." *Selected 1988 Georgia Legislation*, 5 GA. ST. U. L. REV. 173, 408–10 (1988).

335. The legislators also invoked two cases involving male-to-male nondisclosure: James Russel and Tony Valenzuela (on file with author).

336. R. v. Mabior, [2012] 2 S.C.R. 584, 610 (Can.).

337. *Id.* at 613.

338. OFFICE OF THE U.S. GLOBAL AIDS COORDINATOR, THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF: U.S. FIVE-YEAR GLOBAL HIV/AIDS STRATEGY 27 (2004).

fected or who are unable to avoid high-risk behaviors."[339] This approach to prevention declared that non-sex-working, non-drug-injecting heterosexuals need not use condoms unless they have been told that their partners are HIV-positive. While a restrictive approach to condom use may have been welcome to straight couples who did not want to use condoms, it is alleged to have derailed Uganda's early success in suppressing HIV transmission.[340]

Fortunately, the Obama Administration has abandoned the abstinence-based PEPFAR strategy.[341] The stereotype that heterosexuals are, or should be, immune to HIV remains visible, though, in contemporary academic discourse about the risk posed to heterosexuals by men who have sex with both men and women (variously characterized as "bisexuals," men "on the down low," or, more neutrally, MSMW). Since the early days of the HIV crisis, Kenji Yoshino notes, "nonmonogamy associated with bisexuals has been connected to HIV infection, with bisexual 'promiscuity' acting as a bridge (phantasmatically if not actually) between the 'infected' gay population and the 'uninfected' straight population."[342] As Russell Robinson has observed, sensationalistic media coverage of black men "on the down low" frames closeted black MSMW in particular as an infectious threat to their "innocent wives and girlfriends."[343] The stigmatization of HIV-positive black MSMW as "bridges" might increase risky behaviors, as they may hesitate to suggest condoms or disclose their HIV status for fear their female partners will suspect they are gay.[344]

339. *Id.* at 29; *accord* Jonathan Cohen & Tony Tate, *The Less They Know, the Better: Abstinence-Only HIV/AIDS Programs in Uganda*, 14 REPROD. HEALTH MATTERS 174, 177 (2006).

340. Cohen & Tate, *supra* note 339, at 177–78; *see also* GLOBAL COMMISSION REPORT, *supra* note 31, at 45 (discussing a proposed "draconian Anti-Homosexuality Bill" as an impediment to Uganda's HIV prevention measures).

341. *See generally* WHITE HOUSE OFFICE OF NAT'L AIDS POL'Y, *supra* note 14 (presenting a strategy that relies on a combination of different approaches, including condom use).

342. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 363 (2000).

343. Robinson, *supra* note 302, at 1465, 1471, 1474 n.41.

344. *See, e.g.*, Nina T. Harawa et al., *Perceptions Towards Condom Use, Sexual Activity, and HIV Disclosure Among HIV-Positive African American Men Who Have Sex with Men: Implications for Heterosexual Transmission*, 83 J. URB. HEALTH 682, 687–91 (2006); Matt G. Mutchler, *Psychosocial Correlates of Unprotected Sex Without Disclosure of HIV-Positivity Among African-*

The CDC has expressed skepticism about "media attention [to] men on the down low and HIV/AIDS [that] has focused on the concept of a transmission bridge between bisexual men and heterosexual women,"[345] questioning whether MSMW are infected in higher proportions or put more people at risk than other groups might. Nonetheless, public health research continues to investigate the role of HIV-positive MSMW as "bridges" or "vectors" who might transfer HIV from the high-prevalence population of MSM to the lower-prevalence population of heterosexual-identified women.[346] Researchers addressing the HIV risks posed by the sexual activity of MSMW express urgent concern about the potential threat they may pose to heterosexual women[347] (and, sometimes, the women's other

American, Latino, and White Men Who Have Sex with Men and Women, 37 ARCHIVES SEXUAL BEHAV. 736, 743 (2008).

345. *'Down Low': What Is It?*, WEBMD, http://www.webmd.com/sex-relationships/what-is-down-low (last modified Apr. 12, 2006); *accord Myth: HIV/AIDS Rate Among Black Women Traced to 'Down Low' Black Men*, NPR (Oct. 28, 2009, 12:00 PM), http://www.npr.org/templates/story/story.php?storyId=114237523 (interviewing Dr. Kevin Fenton, Director of the CDC National Center for HIV/AIDS, Viral Hepatitis, and STD and TB Prevention, who attributed sexual transmission of HIV to black women largely to male partners that inject drugs or have "multiple [hetero]sexual partners," with bisexual black men accounting for "a smaller proportion" than these other risk factors, and pointed out that only two percent of black men are estimated to be "bisexually active").

346. *See, e.g.*, Karolynn Siegel et al., *Sexual Behaviors of Non-Gay Identified Non-Disclosing Men Who Have Sex with Men and Women*, 37 ARCHIVES SEXUAL BEHAV. 720, 720–21, 732 (2008) (summarizing research on the role of MSMW as "bridges" or "vectors" of transmission). Moreover, popular and academic concern about non-gay identified, non-disclosing MSMW tends to focus disproportionately on black men and Latinos "on the down low." *Id.* at 721 (noting in that "the existing research on non-gay identified MSMW is limited by its exclusive focus on African American and Latino men" (citation omitted)). For a critique of this discourse, see Robinson, *supra* note 302, at 1469–500.

347. *See, e.g.*, Susan Y. Chu et al., *AIDS in Bisexual Men in the United States: Epidemiology and Transmission to Women*, 82 AM. J. PUB. HEALTH 220, 220, 223–24 (1992); Harawa et al., *supra* note 344, at 687–91; J. P. Montgomery et al., *The Extent of Bisexual Behaviour in HIV-Infected Men and Implications for Transmission to Their Female Sex Partners*, 15 AIDS CARE 829, 829–30, 832–33 (2003); Robinson, *supra* note 302, at 1465, 1471; Amy Rock Wohl et al., *HIV Risk Behaviors Among African American Men in Los Angeles County Who Self-Identify As Heterosexual*, 31 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 354, 355–56 (2002); *cf.* Gregorio Millett et al., *Focusing "Down Low": Bisexual Black Men, HIV Risk and Heterosexual Transmission*, 97 J. NAT'L MED. ASS'N 52S (2005) (investigating the risk of HIV infection that black MSMW might pose to black heterosexual women, finding lower-risk behaviors among closeted MSMW than among heterosexual black men, and calling for investigation of the contribution of exclusively heterosexual black men to black women's rate of infection).

male partners).[348] They typically express little or no concern that HIV-positive MSMW might also infect their male partners,[349] even where they find that such men report more high-risk behavior with men than they do with women.[350]

Prosecution lends itself to the heterosexist but still influential logic of HIV "innocence" and guilt.[351] This logic is also racialized. Popular speculation about the African origins of HIV reinforced existing stereotypes of Africans and black people as hypersexual and closer to subhuman apes, and thus sexually deviant even if heterosexual.[352] In keeping with the sensationalized stories of black-on-white victimization that initiated public discourse about HIV criminalization, prosecutions in Anglo-American jurisdictions tend overwhelmingly to involve heterosexual, rather than same-sex, interactions; defendants are disproportionately African immigrant men, and nondisclosure complainants are disproportionately white women.[353] Some HIV advocates suspect that U.S. prosecutions may follow a similar

348. *Id.*; *see also, e.g.*, SHEVORY, *supra* note 301, at 13–15.

349. *Id.*; *see also supra* text accompanying notes 318–320.

350. *See, e.g.*, Mutchler et al., *supra* note 344, at 739, 740 tbl.1 (finding that black, white and Latino HIV-positive MSMW reported higher rates of unprotected intercourse without disclosure to male partners than to female partners: 47% reported unprotected anal sex without disclosure with a male partner, while only 28% reported unprotected vaginal or anal sex without disclosure with a female partner). This finding was not discussed in the article. Instead, the authors expressed concern that "African-American and Latina females may be particularly vulnerable to HIV infection because their . . . MSMW's [male] partners are more likely to identify as heterosexual, which may contribute to less communication about sex with male partners." *Id.* at 745.

351. Grant, *Boundaries*, *supra* note 20, at 154 ("The desire for retribution overshadows the complexity of the relationships involved in these cases, portraying the accused as an evil predator and (usually) the complainant as the innocent prey.").

352. SHEVORY, *supra* note 301, at 11–13; Miller, *supra* note 278, at 44–45; *see also* Phillip Atriba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292 (2008) (finding that the "Black-ape association" influences "judgments in criminal justice contexts").

353. *See, e.g.*, WEAIT, *supra* note 16, at 146 (United Kingdom); Cameron et al., *supra* note 16, at 15, 35–36 (Australia and New Zealand); Miller, *supra* note 278, at 32 (Canada); Mykhalovskiy & Betteridge, *supra* note 16, at 44–45 (Canada); Persson & Newman, *supra* note 16, at 633 (Australia); *see also* GLOBAL NETWORK OF PEOPLE LIVING WITH HIV, THE GLOBAL CRIMINALISATION SCAN REPORT 2010, at 16–17 (2010), *available at* http://www.hivpolicy.org/Library/HPP001825.pdf (noting that "in numerous countries," including Denmark, Norway, the UK, Australia, and New Zealand, African immigrants and "men of African descent" are overrepresented as the accused in HIV criminal prosecutions).

pattern.[354] In Nashville and Michigan, African-American men and women are heavily represented as accused in prosecutions for heterosexual nondisclosure, although it is not clear that their representation is disproportionate.[355] Black men are notably underrepresented as accused in same-sex nondisclosure prosecutions.[356] The Nashville and Michigan studies provide no

354. *See, e.g.*, Luke Baumgarten, *The Sick and the Damned*, INLANDER (Oct. 2, 2012), http://www.inlander.com/spokane/the-sick-and-the-damned/Content?oid=2139357 (quoting David P. Lee, former chair of Washington state's Advisory Panel on HIV/AIDS, as suggesting that racial disparities in HIV prosecutions "probably inflam[e] racial passions—black men having sex with white women," and reporting Trevor Hoppe as finding that, in Michigan, white MSM "account for 40 percent of people with HIV, but only account for 15 percent" of HIV accused, while straight black men comprise 14 percent of people with HIV, but almost 41 percent of HIV arrests); Mark D. Fefer, *HIV: Criminal Intent,* SEATTLE WEEKLY NEWS (Oct. 9, 2006), http://www.seattleweekly.com/2004-12-01/news/hiv-criminal-intent ("According to Seattle Weekly research, about half the defendants in recent HIV prosecutions across the country were black men. (Locally, it's two out of the three.)"); *see also* Strub, *supra* note 50, at 42 (stating that racism is "inextricably linked" with HIV criminalization).

355. In both Tennessee and Michigan, the CDC estimates that about 61–62% of people diagnosed with HIV are black. The CDC estimates that, in Tennessee in 2011, 921 adults and adolescents were diagnosed with HIV, of whom about 61% were black and 33% were white. OFFICE OF THE DIR., NAT'L CTR. FOR HIV/AIDS, VIRAL HEPATITIS, STD, & TB PREVENTION, CDC, CS2382532-47, TENNESSEE: 2013 STATE PROFILE (2013), *available at* http://www.cdc.gov/nchhstp/stateprofiles/pdf/Tennessee_profile.pdf. In Michigan in 2011, the CDC estimates that 793 adults and adolescents were diagnosed with HIV, of whom about 62% were black and 29% were white. OFFICE OF THE DIR., NAT'L CTR. FOR HIV/AIDS, VIRAL HEPATITIS, STD, & TB PREVENTION, CDC, CS2382532-26, MICHIGAN: 2013 STATE PROFILE (2013), *available at* http://www.cdc.gov/nchhstp/stateprofiles/pdf/Michigan_profile.pdf. Of twenty-six Michigan convictions for male-to-female nondisclosure, fifteen involved black accused. Hoppe, *supra* note 73, at 84 tbl.4, 85 tbl.5. In Nashville, six of eight male-to-female nondisclosure prosecutions involved black accused. Galletly & Lazzarini, *supra* note 9, at 2627 tbl.2. Some studies suggest that black or Latino men may be more likely to nondisclose than white men. Mutchler, *supra* note 344, at 739; Kathleen Sullivan, *Male Self-Disclosure of HIV-Positive Serostatus to Sex Partners: A Review of the Literature*, 16 J. ASS'N NURSES AIDS CARE 33 (2005).

356. Galletly & Lazzarini, *supra* note 9, at 2627 tbl.2 (reporting that all Nashville MSM prosecutions involved white accused); Hoppe, *supra* note 73, at 85 tbl.5 (ten of fourteen MSM prosecutions involved white accused, while three accused were black and one was "other"); *see also* Mykhalovskiy & Betteridge, *supra* note 16, at 41–42 (finding a majority of white accused in male-male nondisclosure prosecutions in Canada). Although systematic evidence of complainants' race, life experience, and socioeconomic status is not available, it seems reasonable to expect that men who report same-sex nondisclosure to police might be unusually enfranchised: these are men who do not expect police to mistreat or humiliate them, are not afraid to come out, and who expect police to take their complaints seriously. Anecdotal evidence suggests that

information about the race of complainants that might further illuminate the racial dynamics of nondisclosure prosecutions in the United States.

As Kathleen Sullivan and Martha Field cautioned in 1988, the unpopularity of the groups most affected by HIV—gay men, intravenous drug users, and racial minorities—should raise suspicion that calls for quarantine and criminalization "may not be motivated solely by public safety concerns."[357] "Many in positions of power will not fear a law they think themselves and their kind immune to, nor will they empathize with those less powerful groups to whom the law will predictably apply. If AIDS primarily afflicted mainstream groups such as white heterosexuals," Sullivan and Field predicted, "quarantine and criminalization would not be discussed so lightly."[358]

Sullivan and Field predicted that HIV crimes would be selectively deployed to harass and persecute gay men.[359] Heterosexual prosecutions would merely be incidental.[360] Part IV of this Article will show that the demographics of HIV criminalization tend to support Sullivan and Field's concern that sexual, racial, and criminal stigma might shape HIV criminalization—but not in the way they foresaw.

IV. THE GENDER OF HIV PROSECUTION

To the extent HIV nondisclosure implicates any legally defensible interest in health, autonomy, or moral retribution, it should be protected equally for people of all genders, regardless

some male complainants do fit this description. *See, e.g.*, Marsha Melnichak, *Plendl: I Want To Be Who I Want To Be*, LE MARS DAILY SENTINEL (June 23, 2004), http://www.lemarssentinel.com/story/1071117.html (Adam Plendl, the Nick Rhoades complainant, appears to be a handsome, blond, blue-eyed white man. He describes his experience of coming out in high school: his principal "was really great with dealing with me on harassment issues. I would take names and whatever and he would deal with the issues. It got a lot better than I thought it was going to at first."); Thompson-Sarmiento, *supra* note 97 (describing a complainant who is a well-known star of a successful television series).

357. Sullivan & Field, *supra* note 89, at 150.

358. *Id.*

359. *Id.* at 189–91; *see also* Gostin, *supra* note 84, at 1045, 1055, 1058 (noting the creation of sexual offenses invites intrusion into the private lives of gay men); WEAIT, *supra* note 16, at 141–45 (describing the relationship between gay men, HIV, and risk).

360. "To be sure, if AIDS transmission were criminalized, some enforcement against heterosexual AIDS transmitters would likely take place, but that fact would not itself negate the point about discrimination against gay men." Sullivan & Field, *supra* note 89, at 190.

of their sexual orientation. This Part will highlight disparities between the apparent demographics of HIV prosecutions and the presumptive demographics of HIV nondisclosure. While data on prosecutions are incomplete, they raise concern that the criminal law may respond to HIV as a crime that matters most when it affects expectations of non-drug-injecting heterosexuals to immunity from anxiety about HIV. The demographics of nondisclosure prosecutions suggest that gendered and homophobic AIDS stigma may shape whether and when sexual partners, police, prosecutors, and juries think that HIV nondisclosure is a crime.

Although complete prosecution data is unavailable for the United States, it seems that HIV prosecutions are not very common.[361] Even in the countries with the highest per-capita rates of prosecution for HIV exposure or transmission, far less than one percent of people with HIV have been prosecuted.[362] The rarity of HIV prosecutions, though, does not counsel complacency about the meaning or effects of such laws. As the Supreme Court observed in *Lawrence v. Texas*, a criminal law that is rarely enforced may nonetheless stigmatize the people whose behavior is criminalized, serving as a governmental "invitation to discrimination . . . both in the public and in the private spheres."[363] Moreover, as Alexandra Natapoff has argued, when underenforcement of criminal laws tends to track race and class status, it may reflect governmental indifference or disdain toward "the poor, racial minorities, and the otherwise politically vulnerable."[364] Such concerns are especially acute in HIV criminalization, where laws seem to be underenforced with regard to low-status victims—gay men, sex workers, drug users, and racial minorities—even when they have been infected.[365] At the same time, HIV crimes seem to be overenforced with regard

361. *See* GLOBAL NETWORK OF PEOPLE LIVING WITH HIV, *supra* note 353, at 12 (estimating more than 300 prosecutions, 0.25 per 1,000 HIV-positive people, in the United States).

362. *See id.* For example, in New Zealand, the most aggressive per-capita prosecutor of HIV in the Anglo-American legal world, there had been only six prosecutions as of 2010 (4.29 per 1,000 people with HIV). *Id.* In Canada, there had been sixty-three prosecutions (0.86 per 1,000). *Id.* In Sweden, the prosecution rate is 6.12 per 1,000. *Id.*

363. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

364. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1719 (2006).

365. *See supra* Part I.B.

to higher-status victims such as heterosexuals, police officers, and johns who have not been harmed or even put at risk.

This Part identifies the apparent gender disparities in HIV prosecutions, and considers several potential explanations for them. It seems likely that straight women may be more likely than MSM to report HIV nondisclosure to police. The apparent gender bias in reporting, though, does not alleviate concerns that discriminatory status hierarchies may influence criminal HIV laws and their enforcement. Any such reporting bias might be consistent with widespread gendered and homophobic intuitions that HIV nondisclosure is a crime when a man does it to a woman, but is relatively benign when the uninformed partner is an MSM.

A. DEMOGRAPHICS OF NONDISCLOSURE PROSECUTIONS

As discussed above, public health research on HIV nondisclosure suggests that it is commonplace, regardless of gender or sexual orientation.[366] While people with HIV tend overwhelmingly to disclose their status to exclusive, primary, and long-term partners,[367] several researchers have suggested that nondisclosure to casual partners may be the norm, whether the partners are of the same or different sex.[368] Thus one might predict that the demographics of HIV prosecutions might roughly resemble the demographics of the HIV-positive population. The available evidence suggests that they do not.

Across the Western world, prosecutions for HIV exposure and transmission follow a distinctive gender pattern: in each country, prosecutions typically involve female complainants and male accused, even though MSM are the population most affected by HIV.[369] For example, in Canada, where nearly half of people living with HIV are MSM,[370] 72% of prosecutions have

366. *See supra* notes 287–291 and accompanying text.

367. *See supra* note 288 and accompanying text.

368. *Id*.

369. In Canada, the United States, the United Kingdom, Australia, New Zealand, Europe, and Central Asia, cases of heterosexual transmission and exposure are over-represented in criminal prosecutions. GLOBAL NETWORK OF PEOPLE LIVING WITH HIV, *supra* note 330, at 16–17.

370. In Canada, 46.7% of people living with HIV are MSM. PUBLIC HEALTH AGENCY OF CANADA, SUMMARY: ESTIMATES OF HIV PREVALENCE AND INCIDENCE IN CANADA 1 (2011), *available at* http://www.phac-aspc.gc.ca/aids-sida/publication/survreport/estimat2011-eng.php. On the other hand, 32.5% of Canadians living with HIV were infected through heterosexual contact (14.9% from HIV-endemic countries, and 17.6% from non-endemic countries). *Id.* Of HIV diagnoses attributed to heterosexual sex, about 55.2% (n=170) were men

accused men of nondisclosing to women.[371] In New Zealand, where MSM comprise 83% of people living with HIV, five of eight prosecutions involved female complainants and male accused.[372] In England and Wales, where MSM comprise 43.5% of people living with HIV,[373] sixteen HIV prosecutions involved female complainants and male accused, while only three involved MSM.[374] In Scotland, all four HIV prosecutions have involved female complainants and male accused.[375] In Australia, where 86% of people diagnosed with HIV are MSM,[376] 54% of prosecutions involved female complainants.[377]

Large-scale, comprehensive nationwide studies of HIV prosecutions have yet to be conducted in the United States. American HIV advocates believe that most nondisclosure prosecutions involve women who allege nondisclosure by male former partners.[378] The only U.S. jurisdictions for which comprehensive prosecution data are available—Nashville and

44.8% (n=138) were women. PUBLIC HEALTH AGENCY OF CANADA, HIV AND AIDS IN CANADA: SURVEILLANCE REPORT TO DECEMBER 31ST, 2011, at 19 (2012), *available at* http://www.catie.ca/sites/default/files/PHAC_HIV-AIDS_2011%20Report_Eng-Fr.pdf.

371. *See* Mykhalovskiy & Betteridge, *supra* note 16, at 40 (noting that 74 of 103 prosecutions involved men accused of nondisclosure to women).

372. Cameron et al., *supra* note 16, at 36.

373. Of 73,400 people living with a HIV diagnosis in the United Kingdom, 31,900 (43.5%) are MSM, while 51.1% were infected by heterosexual sex. HEALTH PROTECTION AGENCY, *supra* note 45, at 6. Notably, 23,100 (31.5%) are women infected through heterosexual sex (15,900 African-born women and 7,200 women not born in Africa) and 14,400 (19.6%) are men infected through heterosexual sex (7,600 African-born, and 6,800 non-African-born). *Id.*

374. NAT, CRIMINAL PROSECUTION CASE TABLE 1–2 (2013), *available at* http://www.nat.org.uk/media/Files/Policy/2013/Criminal%20prosecution%20case%20table%20-%20March2013.pdf.

375. *Id.* at 4.

376. THE KIRBY INSTITUTE, HIV, VIRAL HEPATITIS AND SEXUALLY TRANSMISSIBLE INFECTIONS IN AUSTRALIA: ANNUAL SURVEILLANCE REPORT 11 (2012).

377. *Guide to Australian HIV Laws and Policies for Healthcare Professionals: Criminal Law*, AUSTRALASIAN SOC'Y HIV MED., http://www.ashm.org.au/HIVLegal/Default.asp?publicationID=2&SectionID=342 (last updated Dec. 10, 2013) (noting twenty of thirty-seven prosecutions involved female complainants and male accused).

378. Interview with Catherine Hanssens, Executive Director, Center for HIV Law and Policy; *see also* Strub, *supra* note 50, at 39 ("Heterosexual men of color are the most likely to be prosecuted."); Fefer, *supra* note 354 (quoting Lambda Legal attorney Jonathan Givner as saying "[t]he demographics of the prosecutions do not match the demographics of the epidemic," and asserting that in Washington and nationwide, "HIV prosecutions are almost exclusively directed at men victimizing women and occur mainly outside the major cities where HIV is most concentrated").

Michigan—tend to support their observations: while most people with HIV are MSM, most prosecutions involve men accused of nondisclosure to women.

Of the approximately 940,600 living Americans who have been diagnosed with HIV, the CDC estimates that about 18% are women infected through heterosexual sex.[379] Nonetheless, in Nashville and Michigan, women alleging sexual nondisclosure by men account for a majority of nondisclosure prosecutions and convictions. In Nashville, eight of fifteen prosecutions—about 53.3%—alleged male nondisclosure to women.[380] The Michigan study counted convictions rather than prosecutions.[381] It found a similar gender disparity. Most convictions—twenty-six of fifty-one, or 51.0%—involved male nondisclosure to women.[382]

In the United States, MSM comprise a majority of the HIV-diagnosed population—about 57%.[383] In Nashville and Michigan, MSM accounted for less than 30% of prosecutions: three of fifteen prosecutions (20%) in Nashville,[384] and fourteen of fifty-one (27.5%) in Michigan.[385]

The table below presents the gender disparity in graphic form. Because the number of prosecutions in each jurisdiction is small and the gender disparities are similar, I have combined the data about known prosecutions in both Nashville and Michigan. However, the reader should be aware that the prosecution figures presented in this chart oversimplify the findings by adding prosecutions in Nashville to convictions in Michigan (although almost all known Michigan prosecutions resulted in conviction[386]).

379. CDC, HIV SURVEILLANCE REPORT, *supra* note 286, at 22. The CDC estimates 207,100 women are in the transmission category "heterosexual contact," of which it estimates 36,400 are undiagnosed. *Id.* The 170,700 women who have been diagnosed with HIV comprise 18.1% of the HIV-diagnosed population. *Id.*

380. Galletly & Lazzarini, *supra* note 9, at 2627.

381. Prosecutions in Michigan overwhelmingly resulted in conviction, but the Michigan study did not analyze the prosecutions that did not. *See* Hoppe, *supra* note 73, at 79–80.

382. *Id.* at 82, 84.

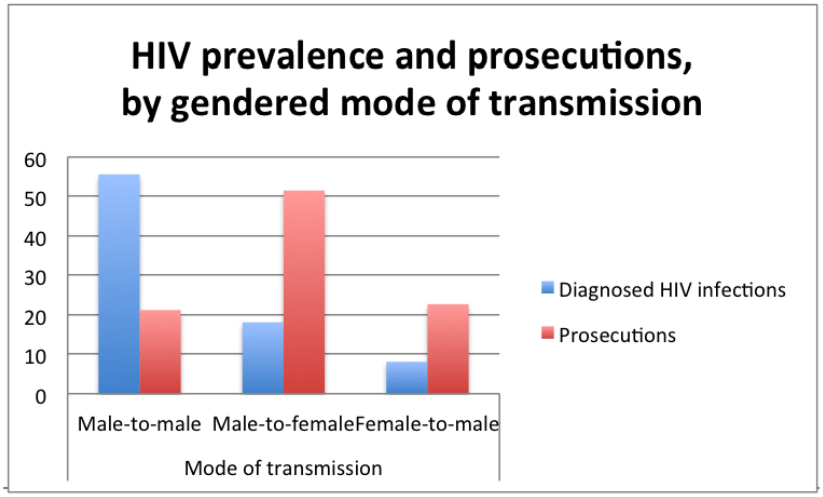
383. *See supra* note 286.

384. Galletly & Lazzarini, *supra* note 9, at 2627.

385. Hoppe, *supra* note 73, at 82, 84.

386. *Id.* at 79–80.

Table 1.[387]



If we use HIV incidence (recent transmissions of HIV), rather than prevalence, as a comparator,[388] the gender disparity is similar, but starker. Men who have sex with men constitute a large and increasing majority of new HIV infections, while the proportion of women infected by men has decreased slightly since the early 2000s.[389] In 2010, the most recent year for which incidence statistics are available, 66% of new diagnoses were attributed to sex between men;[390] less than 17% were women

387. CDC, *supra* note 286, at 22; Galletly & Lazzarini, *supra* note 9, at 2627; Hoppe, *supra* note 73, at 82, 84.

388. There is little reason to suppose that most, or even much, HIV transmission actually involves nondisclosure. As noted *supra* note 52 and accompanying text, the people most likely to transmit HIV are those who do not know they are infected and thus could not be guilty of nondisclosure. Transmission by a person who knows s/he has HIV does not necessarily indicate nondisclosure: as noted *supra* note 54, it is not uncommon for people to knowingly have unprotected sex with an HIV-positive partner.

389. *See* CDC, *supra* note 67, at 4.

390. The CDC attributes 29,800 of 47,500 new HIV infections (about 62.7% of the total) to male-male sex. CDC, *supra* note 67, at 15. Another 1,600 new infections occurred in men who had used intravenous drugs and had sex with other men (a category it counts separately from non-IV-using MSM). *Id.* Thus 66.1% of new HIV infections have occurred among men who have sex with men.

infected by sex with men;[391] and less than 9% were men infected by sex with women.[392]

In Canada, male-to-male prosecutions may be increasing: Eric Mykhalovskiy found a marked increase in male-male prosecutions in Canada since 2009.[393] It seems plausible that reductions in societal homophobia might benefit male nondisclosure complainants who have had sex with men.[394] On the other hand, the United Kingdom has apparently seen no male-male prosecution since 2007.[395]

Because the numbers are so small, it is difficult to discern whether men alleging nondisclosure by HIV-positive women are overrepresented in nondisclosure prosecutions. If they are, the disparity does not seem to be as glaring: men infected through sex with women comprise about 8% of persons diagnosed with HIV,[396] but men alleging nondisclosure by women account for 22.7% of the prosecutions or convictions in Nashville and Michigan combined.[397] There are roughly seven times as many MSM diagnosed with HIV than there are heterosexual men infected by women,[398] but in Nashville and Michigan, the number of prosecutions was almost equal. Of 66 prosecutions, fifteen (four in Nashville and eleven in Michigan) alleged female-to-male nondisclosure, compared to seventeen prosecutions (three in Nashville and fourteen in Michigan) alleging nondisclosure between men.

391. Women whose infection is attributed to heterosexual sex represented 8,000 of 47,500 new HIV infections in 2010. *Id.*

392. Of 47,500 new HIV infections in 2010, the CDC attributes 4,100 (8.6%) to men's sex with women. *Id.*

393. Mykhalovskiy & Betteridge, *supra* note 16, at 40–41 ("[C]ases may be increasing among . . . MSM"). *But see* NAT, *supra* note 374, at 1–2 (finding no male-male prosecutions in England and Wales since 2007).

394. Marc Spindelman argues that gay men's low reporting rates for HIV transmission and other "sexual harm" reinforce societal devaluation of gay men as victims of sexual violence. Marc Spindelman, *Sexuality's Law*, 24 COLUM. J. GENDER & L. 87, 226 (2013).

395. *See* NAT, *supra* note 374, at 1–2.

396. The CDC estimates 100,600 men have been infected through "heterosexual contact," of which it estimates 24,500 are undiagnosed. CDC, HIV SURVEILLANCE REPORT *supra* note 286, at 22. The remaining 76,100 men comprise 8.1% of the HIV-diagnosed population. *Id.*

397. *See* Galletly & Lazzarini, *supra* note 9, at 2627 (noting four of fifteen nondisclosure prosecutions alleged female-to-male nondisclosure); Hoppe, *supra* note 73, at 82, 84 (finding eleven of fifty-one nondisclosure convictions involve female accused and male complainants).

398. *See supra* notes 286, 396.

Disparities found in Nashville and Michigan cannot in themselves establish conclusive evidence of a nationwide pattern, but there is reason to take them seriously. Carol Galletly and Zita Lazzarini (in Nashville) and Trevor Hoppe (in Michigan) obtained access to court records of every prosecution that had taken place in their respective jurisdictions since prosecutions began, so the gender disparities found in those places are real. The disparities are substantial, they are consistent across jurisdictions, and advocates think they are typical. If male-male nondisclosure prosecutions were more frequent, across the United States, than the Nashville and Michigan studies suggest, we might expect that the HIV advocacy groups that track (and oppose) such prosecutions would hear about more of them.[399] But the gender pattern of cases identified by the CHLP is similar to those found in Michigan and Nashville.[400] It is possible (though it seems unlikely) that prosecutions in other U.S. jurisdictions might follow a gender pattern completely unlike that found in Nashville, Michigan, and all other Anglo-American jurisdictions, but there is no evidence pointing in this direction. I am aware of no jurisdiction in which a majority or plurality of prosecutions for HIV nondisclosure involve men who had sex with men.[401]

B. GENDERED PROSECUTION DISPARITIES: WHY?

HIV can be a frightening illness: it can be life-threatening, and the stigma associated with it only makes it scarier. A person who learns that he or she has had sex with someone who did not disclose his or her HIV infection might feel fear, outrage, betrayal, concern, compassion, or some combination of these feelings, depending on the circumstances and the relationship. The prospect of illness and the fear of death are likely to be as terrifying to a gay man (or a non-gay-identified MSM) as to a heterosexual. Thus, if HIV transmission or exposure en-

399. *See, e.g.*, CHLP, ENDING AND DEFENDING, *supra* note 2; Strub, *supra* note 50, at 39 ("Heterosexual men of color are the most likely to be prosecuted.").

400. CHLP, PROSECUTIONS, *supra* note 2 (noting that as of July 3, 2014, of ninety-one prosecutions for non-assaultive nondisclosure identified between 2008 and 2014 for which the gender of nondiscloser and complainant was ascertainable, sixty-five involved female complainants and male accused, nine involved male complainants and female accused, and in seventeen prosecutions, both complainant and accused were male).

401. *See, e.g.*, GLOBAL NETWORK OF PEOPLE LIVING WITH HIV, *supra* note 353, at 13–20, 36–37; UNAIDS, GUIDANCE NOTE, *supra* note 31, at 7.

gages an interest in sexual autonomy, this interest would presumptively apply equally to gay and straight-identified complainants.[402] Why, then, would prosecutions so overwhelmingly involve male accused and female complainants, and why would so few of them involve men who had had same-sex sex?

This gender disparity might result if HIV-positive men nearly always withheld their serostatus from women, and nearly always disclosed it to other men. Sally Cameron and her coinvestigators, for example, suggest that "men have manipulated particular heterosexist power dynamics and have been particularly deceitful and exploitative, particularly in cases involving long-term relationships and sex with young women and girls."[403] The available public health research, though, does not suggest that nondisclosure varies by gender in this way.[404]

The fact that HIV is transmitted more easily from man to woman than the reverse cannot explain straight women's overrepresentation as nondisclosure complainants. First, as mentioned above, prosecutions address disclosure, not transmission. Moreover, men's relatively lower risks of *heterosexual* transmission (compared to women) cannot explain why male-to-male sexual transmission—by far the most common mode of HIV transmission[405]—would seldom be prosecuted. Moreover, although the abusive dynamics identified by Grant and others in heterosexual relationships[406] are too often real, they are hardly universal, and they are not unique to heterosexual relationships. Abuse and exploitation can occur in same-sex as well as heterosexual relationships, and straight women can have unprotected or uninformed sex for reasons other than coercion by men. Straight women, like straight and gay men, often agree to, prefer, or insist upon condomless penetration without requiring an STI test first.[407]

402. *See, e.g.*, Lawrence v. Texas, 538 U.S. 558, 574 ("Persons in a homosexual relationship may seek [sexual] autonomy . . . just as heterosexual persons do.").

403. Cameron et al., *supra* note 16, at 42.

404. *See supra* notes 287–291 and accompanying text.

405. *See supra* notes 390–392 and accompanying text.

406. *See supra* note 280 and accompanying text.

407. *See* D.C. Bell et al., *The HIV Transmission Gradient: Relationship Patterns of Protection*, 11 AIDS BEHAV. 789, 804–05 (2007); A. Michelle Corbett et al., *A Little Thing Called Love: Condom Use Among High-Risk Primary Heterosexual Couples*, 41 PERSP. SEXUAL REPROD. HEALTH 218, 222–23 (2009) (heterosexual men and women preferred not to use condoms in loving sexual relationships; nonuse of condoms signals love, trust and intimacy); *see also*

The apparent overrepresentation of women as complainants, and the apparent underrepresentation of MSM, does not necessarily indicate bias among hospital workers, police, or prosecutors, though. It seems that most nondisclosure prosecutions originate with a criminal complaint by an uninformed partner.[408] To the extent that nondisclosure prosecutions are driven by victim-initiated complaints, nonreporting by MSM probably accounts for much of their underrepresentation as victims (and accused) in such cases. A recent UNAIDS background paper estimated that "the vast majority of cases – in the US and all other high-income countries – originate from people (primarily heterosexual women) who turn to law enforcement after they have ended a relationship."[409]

Uninformed female partners may be more likely to report nondisclosure to police than uninformed men are. Some studies suggest that, when women test positive for HIV, they may be more likely than men to react by blaming their ex-partners.[410] To the extent that prosecutions associate nondisclosure with sexual assault, women may be more likely than men to "recognize themselves as victims, to make complaints, and to have their complaints acted on by police investigators."[411]

Moreover, given the intense media coverage of high-profile prosecutions for male nondisclosure to women, it is hardly surprising that a heterosexual woman who learns that a partner was infected might be more likely to "think of . . . [herself] as having been wronged and to turn to the criminal law for 'justice', or that the widespread reporting of one successful prosecution should lead to others being brought."[412] Correspondingly,

MacFarlane, *supra* notes 265–266, at 693 (discussing STIs and partners found online).

408. *See* UNAIDS, *supra* note 16, at 26; Hoppe, *supra* note 73, at 89 (in Michigan, enforcement of the disclosure law is "largely through complainant reports").

409. UNAIDS, *supra* note 16, at 26 (parentheses in original).

410. *See, e.g.*, Pamina M. Gorbach et al., *To Notify or Not To Notify: STD Patients' Perspectives of Partner Notification in Seattle*, 27 SEXUALLY TRANSMITTED DISEASES 193, 199 (2000); *cf.* Chacko, *supra* note 291, at 30 (noting that thirty-one percent of the adolescent females who notified their partners that they had been diagnosed with a venereal disease did so in an accusatory manner).

411. Mykhalovskiy & Betteridge, *supra* note 16, at 44; *see also* CAMERON & RULE, *supra* note 16, at 42 (speculating that "heterosexual populations have failed to adopt the 'mutual responsibility' ethos embedded in safer sex messages, because women may more readily identify as victims in heterosexual relations"); Grant, *Time To Rethink* Cuerrier, *supra* note 20, at 54.

412. WEAIT, *supra* note 16, at 146.

men who learn that a male sexual partner had HIV might be less likely than other uninformed partners either to feel that they are victims of a crime, or to report it to police.

On the other hand, the perception that HIV nondisclosure harms women more grievously than it harms MSM is probably not limited to the complainants themselves. Evidence of the origin of such prosecutions is necessarily anecdotal, but many HIV prosecutions start when public health or social workers report HIV-positive patients to police when they believe that their patients are disregarding public health advice to use condoms and disclose their status before sex.[413] Other prosecutions have originated when health workers urged patients who sought testing to call the police.[414] Moreover, some HIV prosecutions seem to have been initiated by police during routine traffic stops or other law enforcement unrelated to HIV.[415] To the extent that government actors urge or initiate prosecutions, they may be implicated in the gender disparity.

413. *See, e.g.*, Trevor Hoppe, *Controlling Sex in the Name of "Public Health": Social Control and Michigan HIV Law*, 60 SOC. PROBS. 27, 36–38, 42 (2013) (documenting that Michigan public health authorities investigate anonymous allegations that patients are having sex without disclosure, require that they sign forms acknowledging that they have been told to disclose and use condoms and acknowledging that they may be prosecuted if they fail to obey, and refer intransigent patients to police); *see also* State v. Mahan, 971 S.W.2d 307, 309–11 (Mo. 1998) (en banc) (describing public health interventions similar to those described by Hoppe); UNAIDS, *supra* note 16, at 23 (citing "evidence from the United States that some public health departments . . . are using fear of prosecution (sometimes based on an inaccurate characterisation of the law) to prevent people with HIV from unprotected sex, even with the informed consent of partners"); SHEVORY, *supra* note 301, 1–2, 100–02 (health authorities initiated Nushawn Williams's prosecution); Hoppe, *supra* note 9, at 142 (describing how the prosecution of "Sandra" began after her guardian reported her to police for having undisclosed sex).

414. The Nick Rhoades prosecution began when his uninformed partner, Adam Plendl, sought prophylactic treatment. "According the police report . . . the hospital called police." Young, *supra* note 28; *see also, e.g.*, Thompson-Sarmiento, *supra* note 97 (explaining that Lee Thompson pursued charges against his boyfriend only after receiving advice to do so).

415. *See, e.g.*, *Man Convicted on AIDS Case Arrested on Sex Charge*, JOLIET HERALD NEWS (Apr. 21, 2011), http://heraldnews.suntimes.com/news/4941274-418/man-convicted-on-aidscase-arrested-on-sex-charge.html (explaining that police found HIV medication while searching a car and disclosed a man's HIV infection to his partner, who was in the car); Todd Heywood, *Police Officer Releases HIV Status of Suspect to His Ex-girlfriend*, BETWEEN LINES, Dec. 2, 2010, at 10 (describing a traffic stop in which a man who was pulled over and arrested for driving with a suspended license told the state trooper he had HIV and needed access to his medications; the trooper told his ex-girlfriend, and she pressed nondisclosure charges).

Several commentators suggest that, because HIV prevalence is much higher within "gay communities" than among heterosexuals, MSM may be aware of a considerable risk that their partners may have HIV even if they do not disclose.[416] Mykhalovskiy and Betteridge contend that, because gay men are aware that their partners may be HIV-positive, and because safer sex is "common, if not normative" among gay men, "within gay communities, HIV disclosure is not routinely expected or demanded."[417] Other commentators claim that "much of the gay community holds that everyone is responsible to protect themselves because anyone could be infected, . . . [an] ethic [that] may not apply equally in heterosexual communities."[418] Marc Spindelman goes further, arguing that gay men may have internalized a misguided "ideology of sexual freedom," grounded in queer theory, that valorizes sexual risk-taking and disregards sexual injuries suffered by gay men.[419] Men who see themselves and their community in any of these ways might be less likely than straight-identified women or men to feel that a crime has been committed if they learn that a sexual partner did not disclose HIV-positive status before sex.

Gay cultural norms, though, are unlikely to fully account for the relative rarity of prosecutions for HIV nondisclosure between men. Firstly, not all gay-identified men agree that HIV disclosure should be optional: many of them believe that all people with HIV owe an obligation to disclose their serostatus before sex.[420] Certainly, gay men who report their partners' nondisclosure to police see themselves as victims of a sexual crime.

416. Ciccarone et al., *supra* note 108, at 952 (suggesting that "public health messages urging gay men to 'act as if every partner is HIV positive' may have contributed to norms that make disclosure optional").

417. Mykhalovskiy & Betteridge, *supra* note 16, at 43–44.

418. Symington, *supra* note 20, at 660; *see also* Hoppe, *supra* note 73, at 86–87 (noting that HIV prevention messages targeting the gay community encourage individuals to protect themselves).

419. Spindelman, *supra* note 394, at 98.

420. BARRY D. ADAM ET AL., ONTARIO HIV TREATMENT NETWORK, HOW CRIMINALIZATION IS AFFECTING PEOPLE LIVING WITH HIV IN ONTARIO 18 (2012); Mykhalovskiy & Betteridge, *supra* note 16, 44 (noting that "[g]ay men are heterogeneous in their views on the legal and moral duty of HIV disclosure"); *see also* Horvath et al., *supra* note 1, at 1224 (indicating that sixty-five percent of MSM respondents think HIV nondisclosure should be illegal before *unprotected* sex).

Secondly, most MSM are not gay: about two thirds of MSM are not gay-identified.[421] Young, low-income black and Latino men, in particular, may not identify themselves or their partners with "gay" identity and culture, which they and others may associate with affluent white gay men.[422] Nonwhite MSM are also overrepresented among recent HIV infections.[423] It is by no means clear that the (contested) cultural norm condoning nondisclosure that some commentators attribute to "gay communities" is shared by non-gay-identified MSM.

The reasons MSM might not report cannot be assumed to be idiosyncratic or benign. Even if a man thinks his male partner's HIV nondisclosure was a crime, he might hesitate to contact police for fear of a homophobic or racist reception,[424] or because he fears the consequences of revealing his same-sex sexual activity.[425]

If, as seems likely, prosecution disparities are driven mainly by reporting bias rather than by official misconduct, they should still give us pause. Feminists and others concerned about justice should be concerned when the "law on the books" appears to be facially neutral, even as the "law in action" is targeted by gender or race.[426] A facially neutral nondisclosure law is not necessarily benign if legislators, police, health work-

421. Anjani Chandra et al., *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data from the 2006–2008 National Survey of Family Growth*, 36 NAT'L HEALTH STAT. REP., No. 36, at 26 tbl.9, 27 tbl.10, 30 tbl.13 (2011) (finding that 4.3% of men report same-sex sex during the past year, 5.2% report ever having had same-sex sex, but only 1.7% identify as "gay"); GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 5 (2011) ("[A]dults are two to three times more likely to say that they are attracted to individuals of the same-sex or have had same-sex sexual experiences than they are to self-identify as LBG [lesbian, gay man or bisexual].").

422. *See* Robinson, *supra* note 302.

423. CDC, *supra* note 67, at 1, 8 (noting of new infections among MSM, fifty-five percent were young black men age 13–24).

424. Hoppe, *supra* note 73, at 86; Mykhalovskiy & Betteridge, *supra* note 16, at 44. In Australia, Cameron et al. found "anecdotal evidence of the police not taking complaints from gay men as seriously as from heterosexual women." Cameron et al., *supra* note 16, 45–46 n.48.

425. *See, e.g.*, Robinson, *supra* note 302, at 1496 (citing structural constraints on ability of low-income minority men to come out as gay).

426. *See generally* ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–46 (1997) (describing how the discriminatory purpose doctrine permits facially neutral acts that reinforce gender and race hierarchies).

ers, and most other people understand it to apply primarily to heterosexual women. Furthermore, to the extent that media reporting affects public perceptions of who a typical nondisclosure complainant would be, the apparent gender disparity may be self-perpetuating even if it is entirely unintentional.

The demographics of nondisclosure prosecutions are consistent with an assumption—whether by law enforcement, the Florida courts,[427] or by uninformed partners themselves—that it is mainly heterosexuals who are wronged when their partners fail to disclose HIV-positive serostatus. Whether it is because of how others see them, how they see themselves and their partners, or how they expect the police to react to them, MSM seem to be grossly underrepresented in nondisclosure prosecutions, and intravenous drug users—in the few states that require needle-sharing disclosure—seem hardly to be represented at all.

C. WHAT ABOUT HETEROSEXUAL MEN?

The apparent overrepresentation of men who had sex with women as nondisclosure accused might seem curious, in light of early predictions that gay men would be targeted for prosecution.[428] Enforcement of other nonviolent sex crimes, such as sodomy, prostitution, and public sex, does not typically target heterosexual men for arrest while sparing gay men.[429] It seems unlikely that heterosexual men constitute a legally subordinated or disfavored group in the context of consensual sex.[430]

Men who are prosecuted for nondisclosure to women, though, are not necessarily exclusively heterosexual. If they are heterosexual, others who know of their serostatus may not see them that way. The bare fact of HIV infection may give rise to suspicion that a straight-identified man has been having sex with men.[431] Prosecutors sometimes suggest, whether in good

427. *See supra* note 158 and accompanying text.

428. *See supra* notes 359–360 and accompanying text.

429. This generalization, obviously, does not apply to crimes of sexual coercion that were long defined by male sexual victimization of (chaste) females, such as traditional rape law, statutory rape, and the crime of seduction. *See, e.g.*, Buchanan, *Engendering Rape*, *supra* note 21, at 1640–41 (defining the prototypical sexual assault case to involve a man aggressor and female victim).

430. *See* Robert Wyrod, *Masculinity and the Persistence of AIDS Stigma*, 13 CULTURE, HEALTH & SEXUALITY 443, 445 (2011).

431. *See, e.g.*, Harawa et al., *supra* note 344, at 690–91 (the stigmatization of HIV-positive black MSMW as "bridges" may increase risk behaviors, as they

faith or for tactical reasons, that men who nondisclose to women may be bisexual.[432]

Given the stereotypical characterization of bisexual men or men "on the down low" as deceitful "bridges" who spread HIV to heterosexual populations,[433] and widespread denial that unprotected heterosexual sex is high-risk,[434] it is conceivable that complainants, public health workers, or criminal justice actors may suspect HIV-positive men of being bisexual "vectors" of infection, regardless of their actual sexual history.[435]

Meanwhile, though heterosexual nondisclosure seems to be prosecuted more vigorously than its same-sex counterpart, it does not seem that nondisclosure laws are enforced as aggressively on behalf of male victims of women's nondisclosure as for female victims of men's nondisclosure.[436] Prosecutions tend to construct HIV nondisclosure as a crime of sexual victimization; as I have shown in previous work, conventional understandings of sexual coercion tend to presume that perpetrators are male and victims are female, an expectation that can obscure sexual victimization that does not conform to this pattern.[437] Heterosexual men fit uneasily into the stereotypical role of sex-crime victim, and nondisclosure prosecutions do not tend to construct them that way.

On the other hand, state laws also criminalize HIV-positive people for nonrisky behaviors—sex work[438] and biting or spit-

hesitate to suggest condoms or disclose their HIV status for fear their female partners will suspect they are gay); Mutchler et al., *supra* note 344, at 743 (same); *see also* Miller, *supra* note 278, at 42–43 (noting that a sensational Canadian bestseller suggested, with little evidence, that Charles Ssenyonga, a Ugandan-Canadian man alleged to have infected many white Canadian women without disclosing his HIV status, was actually gay).

432. One Michigan court, for example, upheld the behavior of a prosecutor in a man-woman nondisclosure case who "implied that [the accused] . . . was [a] homosexual," pointing out that the accused had attended a physician visit with a man, and asking him "whether he made a comment to a third person about intending to infect every woman in Pontiac with HIV." People v. Flynn, No. 199753, 1998 WL 1989782, at *2 (Mich. Ct. App. Sept. 25, 1998).

433. *See supra* notes 346–349 and accompanying text.

434. *See supra* Part III.

435. *See* Robinson, *supra* note 302, at 1523; Yoshino, *supra* note 342, at 423–26.

436. *See supra* notes 396–397.

437. Buchanan, *Engendering Rape*, *supra* note 21, at 1640–41; *see also* Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 42–43 (arguing that in men's jails and prisons, sexual victimization emasculates victims in the eyes of other men).

438. Although sex work may involve high-risk sexual behavior such as

ting—that could cause anxiety to men who are behaving as conventional gender expectations might predict. Since biting and spitting cannot transmit HIV,[439] there is no reason to punish biting or spitting any more severely if the biter or spitter is HIV-positive. Nonetheless, such prosecutions are commonplace.[440] In Nashville, the number of HIV prosecutions for biting or spitting was comparable to the number of prosecutions for sexual nondisclosure.[441] Of eleven "HIV exposure" prosecutions in Nashville for spitting, biting, or flinging blood, ten of the victims were police officers. While nine out of these ten cases occurred before 2007,[442] other evidence does not suggest a similar recent decline nationwide.[443] Since such prosecutions serve no plausible interest in public health, the additional penalty imposed on biters and spitters who are HIV-positive appears to serve no purpose other than protection of a dignitary interest of law enforcement officers in not being made to worry about HIV.

Prosecutions of HIV-positive sex workers are similarly unrelated to transmission risk: as mentioned above, many such prosecutions involve acts that cannot transmit HIV.[444] Felony HIV-prostitution is a crime even if the sex worker discloses his or her status.[445] HIV-positive sex workers have been prosecuted even though they were carrying condoms.[446] As Galletly and Lazzarini point out, prosecutions for such commercial sexual

condomless penetration, prosecutions of sex workers depend only on their HIV status. Condom use is not a defense to any HIV-prostitution crime, and many of the prosecutions involve no risk of transmission. *See supra* notes 76–78 and accompanying text.

439. *See, e.g.*, *HIV Transmission Risk*, CDC, http://www.cdc.gov/hiv/policies/law/risk.html (last updated July 1, 2014) (characterizing risk from biting as "negligible"). Thirteen states have laws that specifically criminalize biting, spitting or throwing blood while HIV-positive: CHLP, *supra* note 69.

440. *See, e.g.*, CHLP, PROSECUTIONS, *supra* note 2 (finding that of 130 HIV prosecutions identified by CHLP since May 2010, twenty-seven alleged biting or spitting).

441. Galletly & Lazzarini, *supra* note 9, at 2626–27 (finding eleven biting, spitting, scratching, and flinging blood prosecutions (of which ten victims were police officers) and eight male-to-female sexual nondisclosure prosecutions).

442. Note that the decline was not statistically significant. *Id.* at 2627.

443. *See id.* at 2634; *see, e.g.*, State v. Schroeder, No. E2010–01210–CCA–R3–CD, 2011 WL 208078, at *1 (Tenn. Crim. App. Jan. 13, 2011) (prosecuting defendant for biting hospital employee).

444. *See supra* Part I.C.

445. *See* CHLP, ENDING AND DEFENDING, *supra* note 2, at 31.

446. *See, e.g.*, People v. Hall, No. B190199, 2007 WL 2121912, at *1–2 (Cal. Ct. App. July 25, 2007).

activities "[do] not appear to be based on either actual risk or evidence of intent to harm."[447]

Furthermore, police in many U.S. jurisdictions reportedly treat possession of multiple condoms as evidence that a suspect is a prostitute, thereby discouraging sex workers from carrying and using them.[448] To the extent that they are punished for carrying condoms, the vigorous prosecution of HIV-positive sex workers suggests that criminalization might in effect protect an interest of (presumptively male) clients in having condomless commercial sex without anxiety about HIV. This interest, like the interest in freedom from (unfounded) worry that saliva will transmit HIV, is not worthy of protection by the criminal law.

D. SEXUAL ORIENTATION AND PERCEIVED HIV RISK

A final explanation for the gender disparity in HIV prosecutions might be that gay and straight sexual actors might assess their HIV risk differently. Learning that a partner has HIV could come as a greater shock to a heterosexual than to a MSM. There is no doubt that, in North America, HIV prevalence is much higher among men who have sex with men than it is among most heterosexual men and women.[449] A majority of

447. Galletly & Lazzarini, *supra* note 9, at 2632.

448. *See, e.g.*, Jim Dwyer, *Giving Away, Then Seizing, Condoms*, N.Y. TIMES, Apr. 25, 2012, at A18 (reporting that New York police confiscated and destroyed condoms from people they suspected of being sex workers); Megan McLemore, *Distributing, Then Confiscating, Condoms* N.Y. TIMES, July 16, 2012, at A17 (reporting that many of the women she "interviewed told us they were afraid to carry the number of condoms they needed, and some — about 5 percent — told us they had unprotected sex with clients as a result"); *Sex Workers at Risk*, HUM. RTS. WATCH (July 19, 2012), *available at* http://www.hrw.org/node/108771 (reporting on police and prosecutorial use of condoms as evidence of prostitution in New York City, Washington, D.C., Los Angeles and San Francisco, and finding that "despite millions of dollars spent on promoting and distributing condoms as an effective method of HIV prevention, groups most at risk of infection—sex workers, transgender women, and lesbian, gay, bisexual, and transgender (LGBT) youth—are afraid to carry them and therefore engage in sex without protection as a result of police harassment"). Moreover, the HRW report found that it was disproportionately female and transgender sex workers who were harassed for carrying condoms; one outreach worker noted that he had "never had any young men afraid to take condoms." *Id.* at 5.

449. The Centers for Disease Control (CDC) does not estimate the prevalence among heterosexual as opposed to gay-identified communities, presumably because of the difficulty identifying them. Nonetheless, it declares that MSM are "the population most severely affected by HIV." CDC FACT SHEET, HIV AMONG GAY, BISEXUAL AND OTHER MEN WHO HAVE SEX WITH MEN 1 (Sept. 2013) [hereinafter CDC, HIV AMONG MEN], *available at* http://www.cdc.gov/hiv/pdf/risk_HIV_among_AA_Gay_other.pdf. In the United Kingdom,

people living with HIV are MSM, but this proportion is not overwhelming: the most recent CDC prevalence data indicate that 56.8% of the 1.15 million Americans living with HIV are men infected through same-sex sex.[450] About 42.7% of the HIV-positive population is non-MSM: about 18% are women infected through sex with men, about 8.7% are men infected through sex with women, and another 15.9% are men and women whose infection is attributed to injection drug use without any male-male sexual contact.[451]

Given the statistical and stereotypic association between HIV and gay identity, some heterosexuals might believe (sincerely, albeit inaccurately) that it is safe to assume that potential partners do not have HIV unless they say so. Such a heterosexual might feel that an HIV-positive partner who fails to disclose has wronged him or her by exposing him or her to a much higher risk than he or she might have foreseen. By this reasoning, heterosexuals—and the health workers, police officers, and prosecutors who interact with them—might fairly believe they are wronged by HIV nondisclosure in a way that MSM are not. The heterosexual, unlike the gay man, was exposed to risk that he or she did not subjectively foresee.

The risk-perception argument, though superficially plausible, is misguided on a number of levels. If it relies on unbiased assessments about statistical prevalence, we might ask why the same intuition does not seem to extend to complainants who had sex with HIV-positive black or African partners. Infection rates among African-Americans are considerably higher than among other American racialized groups.[452] One might argue,

where heterosexual transmission is more common than in the United States, the public health agency estimates HIV prevalence to be 1.5 per 1,000 for the entire U.K. population (1 in 666); among MSM, 47 per 1,000; among heterosexual African women, 1 in 51; among heterosexual African men, 1 in 26. ADAMMA AGHAIZU ET AL., HIV IN THE UNITED KINGDOM 2013 REPORT 4, 7 (Pub. Health Eng., 2013).

450. Estimating about 1,148,200 Americans currently living with HIV, the CDC attributes the infection of about 592,100 people living with HIV or AIDS to male-male sex; another 60,200 people with HIV report both male-male sex and injection drug use. These two groups of men comprise about 56.8% of all people living with HIV. CDC, HIV SURVEILLANCE REPORT, *supra* note 286, at 22 tbl.5a.

451. The infections of 100,600 men (8.7% of the total) and 207,100 women (18.0% of the total) are attributed to "heterosexual contact"; 70,200 (6.1%) are women whose infection is attributed to "injection drug use"; and 113,200 (9.8%) are men who report "injection drug use," but no sex with men. *Id.*

452. African Americans comprise twelve percent of the U.S. population, but forty-four percent of new HIV diagnoses. Prevalence among black Americans

then, that the statistical and stereotypic association between HIV and black or African origin puts anyone, of any race, on notice of a higher risk that a black or African partner might have HIV. Yet white women who had sex with nondisclosing black men are the prototypical complainants in HIV nondisclosure cases.[453] If prosecution disparities reflect a judgment that nondisclosure is less wrongful among MSM and more wrongful when a black man does it to a white woman, that judgment is not the product of unbiased risk assessment based on group prevalence. It also cannot explain why sex workers would be punished for having HIV: it cannot be seriously argued that the clients of sex workers would be surprised to learn that a sex worker could have HIV (or any other STI).

If prevalence-based risk perception were taken seriously as a justification for differential HIV prosecutions, it would imply that an HIV-positive man should be prosecuted for nondisclosing to a female partner, but not for nondisclosing to a man; an HIV-negative woman could file a complaint if a white man nondisclosed to her, but not if a black man did; an HIV-positive john might be punished, but an HIV-positive sex worker could not be. While group-based risk assessment cannot explain our contradictory laws and practices with respect to HIV crime, they remain consistent with my status-based theory of HIV crime: an inchoate expectation that heterosexual (white) men and women are entitled to assume their partners are HIV-negative in a way that MSM (of any race) are not.

Group-based risk assessment is no more relevant to public health than it is to morality. The race or gender of the participants does not affect the risk of a particular sexual activity. Anal sex is riskier than vaginal sex, but they are both classified as high-risk. In any case, many heterosexuals engage in anal sex.[454] Since HIV can be transmitted to and by men and women of any racial background, race or gender distinctions based on differential prevalence rates seem indeterminate (How large must a prevalence disparity be to put a partner on notice of el-

is eight times higher than among whites. CDC, HIV AMONG AFRICAN AMERICANS 1 (2014), *available at* http://www.cdc.gov/hiv/pdf/risk_HIV_AfricanAmericans.pdf.

453. *See supra* notes 316–323.

454. *See, e.g.*, Chandra, *supra* note 421, at 1 (providing that thirty-six percent of women and forty-four percent of men say they have had anal sex with a heterosexual partner).

evated HIV risk? How are the relevant groups defined?), and, if explicit, might be unconstitutional.[455]

The most important difficulty with the risk-perception argument for privileging heterosexual complainants is that, if a heterosexual believes that unprotected heterosex poses no risk of HIV transmission, that belief is unreasonable. HIV transmission among non-drug-injecting heterosexuals is much less common than among non-drug-injecting MSM, but it is not vanishingly rare. More than 300,000 Americans currently living with HIV (100,600 men and 207,100 women) were infected by heterosexual sex without any history of male-male sex or injection drug use.[456] While this group is a very small percentage of the adult population—roughly one out of every 770 American adults[457]—there are hundreds of thousands of heterosexuals who, under this assumption, might be imagined to face no appreciable risk of encountering (or having) HIV. A presumption that heterosexuals need not take precautions against HIV would not have served such people, or their partners, well.

Not only is there no way for a heterosexual (or anyone else) to know whether a prospective partner is infected, there is no way for him or her to know that the prospective partner is straight. A person may know that she or he is exclusively heterosexual and has never shared a needle, but cannot safely as-

455. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (endorsing Justice O'Connor's Equal Protection analysis as "tenable"). Governmental gender classifications are quasi-suspect, and can be justified only where the gender classification bears a "substantial" relationship to an "important" governmental objective. United States v. Virginia 518 U.S. 515, 524 (1996); Craig v. Boren 429 U.S. 190, 211 (1976). Although biological differences between men and women can justify gender classifications, *see, e.g.*, Nguyen v. INS, 533 U.S. 53, 53 (2001), HIV can be transmitted both by and to men and women, so any relevant "biological difference" is not obvious. A presumption that nondisclosure is more invidious based on HIV prevalence among heterosexuals as opposed to MSM might be based on overbroad statistical generalizations of the kind the Court has previously disapproved. *Virginia*, 518 U.S. at 516; *Boren*, 429 U.S. at 199. Even if this distinction is based on sexual orientation rather than gender, it is almost certainly subject to a level of scrutiny more exacting than traditional rational basis review. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013); *Lawrence*, 539 U.S. at 593 (O'Connor, concurring); Romer v. Evans, 517 U.S. 620, 620 (1996).

456. *See supra* note 421 and accompanying text.

457. While CDC estimates HIV prevalence for the U.S. population aged thirteen and older, no equivalent age-based census data were available. The 2010 U.S. Census estimated that the total U.S. population of persons age sixteen or older was 243,275,505. LINDSAY M. HOWDEN & JULIE A. MEYER, AGE AND SEX COMPOSITION: 2010, at 2 tbl.2 (U.S. Census Bureau, 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.

sume the same of a prospective or current sexual partner. Many men who have sex with men do not tell all their women partners.[458] Moreover, even if the heterosexual is right in guessing that his or her prospective partner is also straight, and that he or she has never had male-male sex or shared a needle, there is no reason to assume that all his or her partners (and all *their* partners) share the same sexual and drug use history. There is no way to assess the HIV risk profile of a person by looking at (or talking to) them. If it were possible to distinguish people at risk of HIV from others, sexual transmission of HIV would seldom occur.

Furthermore, whether dealing with an initial attraction or a long-term love, people tend to put their best foot forward, and to see potential romantic partners in an idealized light. "Few people know the whole truth about those with whom they have sex, at least at first."[459] Many of us might imagine that we would not be especially attracted to a person we thought was likely to have HIV; we also might not be especially attracted to a person we thought had a history of injection drug use, or—if we are heterosexual women—to a man we thought had had sex with men. If we are attracted to someone, we might not think them likely to engage in stigmatizing behaviors or likely to harbor stigmatized diseases. Heterosexuals, like gay men and everybody else, are simply unable to make confident assessments of the likelihood that a partner might have HIV, whether based on population-level statistics or on our guesses at an individual's history of risk behavior.

If nondisclosure laws worked to increase disclosure, they would not necessarily help straight women (or anyone else) know whether their partners were infected. About 18% of people living with HIV are unaware of their infection and therefore could not disclose it no matter what the law required.[460] Heterosexual-identified men are overrepresented among this group.[461] The likelihood that a non-drug-injecting heterosexual might

458. *See supra* note 288 (discussing MSMW); *see also* GATES, *supra* note 421, at 5 tbl.4 ("[A]dults are two to three times more likely to say that they are attracted to individuals of the same sex or have had same-sex sexual experiences than they are to self-identify as LGB.").

459. Rubenfeld, *supra* note 189, at 1416.

460. CDC, HIV SURVEILLANCE REPORT, *supra* note 286, at 22 tbl.5a (estimating that about 207,600 Americans do not know they have HIV).

461. 11.8% of people living with undiagnosed HIV are men infected by sex with women, compared to 8.7% of those who know of their diagnosis. *Id.*

encounter an HIV-positive partner is lower than that of a gay-identified man, but it cannot be assumed to be zero.

While non-drug-using heterosexuals might prefer to believe that our sexual partners present no risk of HIV infection unless they say so, this assumption is not realistic. If enacted into law, this assumption might put heterosexuals at increased risk of infection by encouraging misguided complacency. Moreover, if many heterosexuals have this expectation, it is not based on an objective assessment of HIV prevalence but on inaccurate (albeit good-faith) stereotype-based assessments of sexual risk. The law should not punish people for violating an unreasonable expectation of heterosexual immunity, however sincerely it might be held.

Fortunately, the heterosexual—or anyone else—who wishes to bring his or her HIV risk as close as possible to zero has a far more effective strategy than relying on partners to disclose infections they may not know they have: he or she can use a condom. In the unlikely event that the partner of unknown status has HIV, use of a condom cuts the risk to negligible levels.[462] Yet heterosexuals—like other people—routinely have sex without using a condom, even with new partners, nonexclusive partners, and sex workers. This does not necessarily mean they are sanguine about the prospect of conceiving a child or contracting an STI from these partners. Many people trade pleasure in the moment against what they deem to be a small-enough risk of an unwanted consequence. They choose to take a risk of pregnancy, STI, or HIV transmission, however likely or remote they may believe these outcomes to be.

In most states, HIV nondisclosure statutes treat *any* undisclosed risk of HIV transmission, however remote, as legally intolerable. Unprotected heterosex also carries other notorious risks. Even if a heterosexual believes that HIV is a statistical impossibility among his or her pool of potential sexual partners (by assuming, unreasonably, that a potential partner's HIV risk can be divined from his or her gender, appearance, and outward behavior), he or she must realize that unprotected vaginal intercourse with a woman of reproductive age carries a risk of pregnancy, and that unprotected oral, vaginal, or anal sex can transmit other serious STIs, such as hepatitis and HPV, whose consequences, if untreated, can also be fatal. As discussed in

462. *See supra* note 33.

Part II, though, nondisclosure that affects these risks is generally not a crime.

Most people, gay or straight, would probably want to know that a person has HIV before deciding about sex. But HIV nondisclosure does not make the uninformed partner feel he or she *has* to have sex. The uninformed partner remains free to accept or refuse, albeit with imperfect information. Sexual autonomy does not require criminal punishment of one who betrays or disappoints a sexual partner. Sexual autonomy does not require that sexual activity be free from unwanted risks or consequences. It does not require that people be punished for failing to conform to the unreasonably optimistic risk assessments of their partners. Rather, sexual risk-taking is an exercise of sexual autonomy.

E. GENDER, INTIMACY AND SEXUAL DECEPTION

We should be even more concerned about the selective criminalization of HIV when we consider that the criminal law of sexual deception is itself deeply gendered and heteronormative. Rape law's *caveat emptor* approach to sexual deception condones a heterosexist expectation that men, as sexual initiators, will press reticent women for sex—and that the law should not punish men for using deception to get it. Criminal laws have been deliberately reformed to accommodate this cultural expectation: during the mid-twentieth century, almost every state abolished the crime of seduction—a man's false promise of marriage to persuade a chaste woman to submit to sex—alongside the "heartbalm" torts (such as criminal conversation and alienation of affections). A large part of the stated rationale for such abolition was to protect unmarried, sexually active heterosexual men against extortion by unscrupulous female "gold-diggers" seeking money or marriage.[463]

Several feminist and pro-feminist legal commentators have argued that women's true sexual autonomy requires that all sex-by-deception should be treated as a crime.[464] Like advocates

463. *See generally* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 446 (1993) ("Images of 'gold diggers' and other sexual schemers were a staple of the legislative campaigns in the 1930s to abolish the common law seduction tort."); Murray, *Marriage As Punishment*, *supra* note 193, at 38 ("[F]or many critics, it appeared that those most in need of law's protection were men, who, because of civil and criminal seduction laws, could be tricked and duped by scheming women.").

464. *See, e.g.*, ESTRICH, REAL RAPE, *supra* note 268, at 102–03;

of HIV criminalization, these scholars generally proceed from the premise that criminalizing sex-by-deception would benefit (heterosexual) women at the expense of deceitful men.[465] Noting that current laws permit "a man [to] do things to get a woman's agreement to sex that would be illegal were he to take her money in the same way,"[466] they argue that the minimal protections accorded to deceived sexual partners reflect the low value placed on women's sexual autonomy when balanced against what Stephen Schulhofer calls a legally protected "interest that seems of overriding importance, especially to men: the freedom to seek sex with any potential partner who might be interested or even reluctant but persuadable, in one way or another."[467]

Several of these commentators adopt a view of sexual autonomy by which women's equality requires that sex take place in an emotionally intimate relationship.[468] Martha Chamallas

SCHULHOFER, *supra* note 189, at 154, 274, 276 (stating that, if a man's promise of marriage was "fraudulent from the outset," the woman's sexual autonomy is compromised since "the injury to the woman is not the loss of the economic value of the marriage but the indignity of a sexual experience accepted under false pretenses"); Boyle, *supra* note 131, at 146; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct,* 61 S. CAL. L. REV. 777, 780 (1988) ("Detailed attention is given to recent feminist-inspired legal reforms in the law of rape and sexual harassment, and in tort law governing deception in sexual relationships."); Decker & Baroni, *supra* note 186 at 1167–68; Estrich, *Rape*, *supra* note 268, at 1120; Falk, *supra* note 188, at 141; Larson, *supra* note 463, at 414; Mathen & Plaxton, *supra* note 20, at 478–84; Jacqueline Smyrnick, *Challenging the Use of Fraud To Get Into Bed After* Suliveres v. Commonwealth*—A Call for Legislative Reform,* 43 NEW ENG. L. REV. 321, 322–23, 330–31 (2009); *see also* R. v. Cuerrier, [1998] 2 S.C.R. 371, 380–91 (Can.) (L'Heureux-Dubé J., concurring).

465. *See, e.g.*, *Cuerrier*, 2 S.C.R. at 434 (L'Heureux-Dubé J., concurring); ESTRICH, REAL RAPE, *supra* note 268, at 103; SCHULHOFER, *supra* note 189, at 152–59; Chamallas, *supra* note 464, at 813; Decker & Baroni, *supra* note 186, at 1168–69; Estrich, *Rape, supra* note 268, at 1120, 1182.

466. *E.g.*, Larson, *supra* note 463, at 412. She argues, though, for creation of a tort, not a crime, to address this "dignitary" disparity. *Id.* at 404, 416; *see also Cuerrier*, 2 S.C.R. at 430; ESTRICH, REAL RAPE, *supra* note 268; SCHULHOFER, *supra* note 189, at 154–55; Decker & Baroni, *supra* note 186 at 1167–68; Falk, *supra* note 188, at 141, 154–55; Mathen & Plaxton, *supra* note 20, at 485 (advocating that the standard for criminal liability for sexual fraud should be lower than that for commercial fraud).

467. SCHULHOFER, *supra* note 189, at 276–77.

468. *See, e.g.*, Chamallas, *supra* note 464, at 783–84 (explaining that the "paramount goal" of a feminist, "egalitarian view" of sexual relationships would promote "noncoercive sexual relationships." "Good sex," which the law should foster, "ha[s] as [its] objective only sexual pleasure or emotional intimacy . . . [it] is noninstrumental conduct . . . . Sex used for more external purposes, such as financial gain, prestige, or power, is . . . exploitive and immoral, regardless of whether the parties have engaged voluntarily in the encounter,"

argued that "it is only in the last few years women have been bold enough to assert that they have a legal right to expect honesty from men in sexual relationships."[469] Likewise, Decker and Baroni argue that criminalizing sex by deception would protect the "sexual integrity of women."[470] "Sexual activity," they contend, "is one of the most intimate encounters people engage in . . . . [T]olerance [of sex by deception] promotes an unseemly status quo in our social fabric that denigrates the most intimate of relationships."[471] In *Cuerrier*, Justice Cory held that "a certain amount of trust and confidence exists in any intimate relationship . . . the act of intercourse is usually far more than the mere manifestation of the drive to reproduce. It can be the culminating demonstration of love, admiration and respect. It is the most intimate of physical relations."[472] To the extent that criminal law might be used to enforce these ideals, any casual or exploitative sexual encounter that does not involve mutual love and respect could be punished as rape (possibly mutual rape).[473]

In contrast to their embrace of informed-consent rationales for HIV nondisclosure, courts and lawmakers have not been re-

and should be prohibited by law); *see also* ELAINE CRAIG, TROUBLING SEX 79 (2012) (arguing that legal recognition of "sexual integrity" requires "a concern with how people treat each other sexually," but questioning *Cuerrier* in light of "developments in knowledge regarding the rates of transmission and regarding the treatment protocol for HIV"); Larson, *supra* note 463, at 438 (arguing creation of a tort of sexual fraud "would advance feminist ends [and] that creating and supporting expectations of fairness and honesty between sexual partners would increase the quality (and perhaps even the quantity) of sexual interaction"); Mathen & Plaxton, *supra* note 20, at 481 (arguing that the HIV nondiscloser's crime is that he "has *used* the victim's body for his own sexual pleasure. He has treated the victim simply as an object for his enjoyment, rather than as an autonomous being in her own right, with her own ends and feelings that deserve respect").

469. Chamallas, *supra* note 464, at 813.

470. *See, e.g.*, Decker & Baroni, supra note 186, at 1168–69.

471. *Id.* at 1168; *see also, e.g.*, Smyrnick, *supra* note 464, at 334 (arguing that criminalizing sex-by-fraud would protect the "sexual integrity" of victims); *see also* Bradford Bigler, Comment, *Sexually Provoked: Recognizing Sexual Misrepresentation As Adequate Provocation*, 53 UCLA L. REV. 783, 803 (2006) ("Consensual sex brings with it an element of reciprocity and trust.").

472. R. v. Cuerrier, [1998] 2 S.C.R. 371, 428, 430–31 (Can.) (quoting Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Ct. App. 1984)).

473. Taking this argument to an extreme, Bradford Bigler argues that, because all sexual interactions involve "reciprocity and trust," an uninformed sexual partner is like a married person who discovers a spouse's infidelity: s/he should enjoy a defense of provocation if s/he kills a partner who failed to disclose HIV or another "less dangerous sexually transmitted disease, such as herpes." Bigler, *supra* note 471, at 803.

ceptive to the argument that deception vitiates sexual consent more generally. The rape-by-deception argument fails in the face of an assumption—one apparently so commonsensical as not to require citation—that it is common, benign, and normal for men to lie to women to get sex. Because male-to-female lying is so normal, many courts and commentators assert, it must not be a crime.

For example, the *Cuerrier* majority rejected the rape-by-deception argument out of hand.[474] Proceeding from the assumption that "it will more often be the man who lies,"[475] Justice Cory's majority offered a number of examples of sexual deception that self-evidently "lack[ed] the character of reprehensible criminal acts."[476] A man might lie to a woman about his age, or about "the position of responsibility held by him in a company; or the level of his salary; or the degree of his wealth; or that he would never look at or consider another sexual partner; or as to the extent of his affection for the other party; or as to his sexual prowess."[477] To treat such lies as "serious criminal offence[s]," the Court asserted, would "trivialize" sexual assault.[478] The Court declared that such lies should not be criminalized without explaining why: "The lies were immoral and reprehensible but should they result in a conviction for a serious criminal offence? I trust not."[479]

Defenders of the *caveat emptor* approach invoke a number of common-sense scenarios to demonstrate that sexual deception "does not betoken the same depravity and disregard of social norms" that commercial fraud does, and so should not be a crime.[480] Almost all these scenarios involve men lying to get sex from women. For example, "a man promises a woman a fur coat

474. In a concurrence, Justice L'Heureux-Dubé advocated the criminalization of sexual deception, if "the dishonest act in question induced [a partner] to consent to the ensuing physical act, whether or not that act was particularly risky and dangerous." R. v. Cuerrier, 2 S.C.R. at 388.

475. *Id.* at 434 (holding that "its consequences would be the same if it were the woman").

476. *Id.* at 433–34.

477. *Id.* at 434.

478. *Id.* at 434–35.

479. *Id*. at 434.

480. Bryden, *supra* note 187, at 462 n.505 (quoting Herbert Wechsler comment in MODEL PENAL CODE COMMENTARIES, PART II §§ 210.0-213.6, 393–94 (1980)); *see also* Dan Subotnik, *"Sue Me, Sue Me, What Can You Do to Me? I Love You" A Disquisition on Law, Sex, and Talk*, 47 FLA. L. REV 311, 343 (1995).

in exchange for sexual intercourse," and fails to deliver;[481] a man has sex with a prostitute and refuses to pay;[482] "Ted" lies to "Sally" about his infidelity to her;[483] "a married man . . . pretends to be single and has sex with a single woman";[484] or a man promises love or marriage to get sex.[485] These deceptions, they claim, are "the common misrepresentations of dating and courtship"[486]: "lies about love, commitment, marital status, and fidelity."[487] Because "[g]irls are taught by their parents to be suspicious of the blandishments of suitors,"[488] Richard Posner argues, women should rely on "self-protection" rather than criminal remedies.[489]

These commentators offer no evidence that such lies are either as common or as harmless as they assume them to be. They simply appeal to what they assume is a shared sense of the way heterosexual relationships are, and should be. This assumption forms a notorious part of the sexual double standard.[490]

There are sound, gender-neutral reasons to defend *caveat emptor* as a general rule with respect to sexual deception[491]: these aren't them. Defenders of the *caveat emptor* rule have rightly pointed out that people may not know how they really feel or what they want; that people's feelings can change, in good faith; that people put their best foot forward toward new and ongoing partners, so that sexual deception might resemble "commercial puffery"; and that, before and during a relation-

481. *Cuerrier*, 2 S.C.R. at 403, 410 (McLachlin, C.J. concurring).

482. Bryden, *supra* note 187, at 466–67.

483. *Id.* at 463; *see also* SCHULHOFER, *supra* note 189, at 156–57; Subotnik, *supra* note 480, at 356.

484. Bryden, *supra* note 187, at 464.

485. *See, e.g.*, *id.* at 462 n.505.

486. RICHARD POSNER, SEX AND REASON 393 (1992).

487. Bryden, *supra* note 187, at 468; *see also* SCHULHOFER, *supra* note 189, at 155. Dan Subotnik argues that deception is not only "pervasive," but "socially purposive." Subotnik, *supra* note 480, at 348. "[A] healthy, livable human lifetime of relationships with others is . . . inconceivable without deception." *Id.* at 343 (citing DAVID NYBERG, THE VARNISHED TRUTH 2 (1998)).

488. POSNER, *supra* note 486, at 393.

489. *Id.* at 393: *see also* Bryden, *supra* note 172, at 465.

490. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 960–61 n.19 (1984); Anna Stubblefield, *Contraceptive Risk-Taking and Norms of Chastity*, 27 J. SOC. PHIL. 81 (1996); Keith Thomas, *The Double Standard,* 20 J. HIST. IDEAS 195 (1959).

491. For a less gendered defense of the legality of sex-by-deception, see Rubenfeld, *supra* note 189.

ship, partners tend to see each other in an idealized light.[492] Because people routinely have sex with others they do not know very well, they inevitably fill in gaps in their knowledge of the partner with idealized speculation about what the partner is really like. This makes it particularly inadvisable to criminalize nondisclosures alongside overt lies. Furthermore, after a bad breakup, a person may view the ex-partner and the relationship in a harsh light, so that any nondisclosure or previously undisclosed fact might look, in retrospect, like a malicious betrayal.[493] These objections are sound, but do not fully capture the practical and normative difficulties with criminalizing all nondisclosures that might be material to sexual consent.

Arguments in favor of criminalizing sex by deception generally start by analogy to commercial fraud: the criminal law tolerates lies to get sex that would be crimes if used to get money.[494] This analogy is misguided. Sexual consent is not like consent in contract. Moreover, the presumptions about full information and rational decisionmaking that underpin the law of contracts—whose empirical validity is questionable in many contractual contexts[495]—are inapposite to sexual decisionmaking.

A is free to refuse sex with B for all kinds of reasons that might be invalid as reasons to refuse to enter a contract: because B is the wrong gender, or the wrong race, or the wrong religion; because B is annoying, too tall, too short, too fat, or too poor; because B doesn't smell right, or is a terrible driver; because B is married, or single, or divorced; because B is a Republican (or a Democrat); because B has a foot fetish, which turns A off; because B is epileptic and A believes, wrongly, that epilepsy is sexually transmissible. No matter how arbitrary, irrational, mistaken, or discriminatory A's beliefs are, the law rightly protects no right of B to require A to have sex with her.

When it comes to sex, B cannot necessarily foresee what disclosures might be material to A. The law should not enforce private bias by punishing B as a criminal for failing to live up

492. *See, e.g.*, Bryden, *supra* note 187; Rubenfeld, *supra* note 189; Subotnik, *supra* note 480.

493. Bryden, *supra* note 187.

494. *See, e.g.*, SCHULHOFER, *supra* note 189; Chamallas, *supra* note 464; Estrich, *Rape*, *supra* note 268.

495. The field of behavioral economics explores the ways in which irrational psychological motivations affect economic behavior. *See, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2007).

to A's unstated preferences (or her stated ones), which will, quite legitimately, be idiosyncratic, arbitrary, and discriminatory. Perhaps the law could enumerate a list of deceptions that would count as presumptively material. It is not clear how lawmakers could come up with such a list, other than appealing to intuition and common sense (as the proponents and critics of sexual *caveat emptor* do). The list might create a presumption that deceptions with respect to, say, gender, fidelity, marital status and STIs would be material. (We might ask, then, why the law has been reformed to criminalize nondisclosures about gender and HIV, and to decriminalize misrepresentations about marriage.) But there are people who do not mind, or even prefer, that a sexual partner be married to someone else. There are people for whom gender is not a dealbreaker in sexual attraction. There are "bug chasers" who prefer a partner with HIV, and there are people who engage in casual unprotected sex without inquiring about STI status.[496]

If we take the strong version of sexual autonomy seriously, though, we cannot prescribe an objective list of omissions or deceptions that presumptively vitiate consent: the essence of sexual autonomy is that each person gets to decide, on his or her own terms, what matters to him or her in sexual decisionmaking. Each person can accept or refuse sex for his or her own reasons—no matter how trivial or misguided those reasons might seem to others.

In any case, many deceptions that are material to sexual consent should not be crimes, an argument I expand on in two current works in progress.[497] As this Section does not purport to offer a comprehensive analysis of sexual autonomy, I will offer a single example of sexual nondisclosure to raise questions about the normative desirability of criminalizing every sexual nondisclosure that might affect sexual consent. Like the scholars who argue for and against sexual *caveat emptor*, I appeal here to the reader's life experience and moral intuition. Unlike the heteronormative scripts imagined by defenders and critics of the *caveat emptor* rule, the scenario offered here is easy to imagine among people of any gender. To challenge conventional assumptions about sexual deception, though, I will describe the nondiscloser as a woman:

496. *See* DEAN, *supra* note 54.

497. Kim Shayo Buchanan, *Rape by Fraud* (under submission, on file with author); Kim Shayo Buchanan, *Deception, Coercion, and Rape* (manuscript, on file with author).

> A and B are on their second date. A, who is 35 years old, was diagnosed with gonorrhea ten years ago. She took a course of antibiotics, and was completely cured. She does not mention this. After a very pleasant dinner, the two have sex for the first time.

If A disclosed her prior STI to B on the second date, there's a good chance there'd be no sex, and no third date. B might be turned off by the fact that A had had gonorrhea—or by the fact that it is socially inappropriate to discuss such matters on the second date.

Imagine that A and B continue dating, and fall in love. After four months, A discloses her secret, which is shameful to her. B might not feel betrayed that A had not revealed this earlier—even though B might not have pursued the relationship had A disclosed it on the second date. B might understand that A doesn't share sensitive, embarrassing truths with people she barely knows. B might feel honored that, by sharing this information, A is signaling deep trust in B. B might be happy that their relationship has grown close enough that the two of them can share secrets that they would never disclose to a casual date. Now let's suppose that, after a couple of years together, A and B break up. Did A rape B repeatedly during the early months of their relationship? What if, before that second-date sex, B had asked A whether she'd ever had an STI, and A had lied? Should her falsehood be a crime?

Sex often entails emotional intimacy, but it doesn't always. Sometimes sex comes before emotional intimacy. Sometimes sex builds emotional intimacy. Sometimes the intimacy never materializes, or was never intended. Sex may be casual, or commercial. Sometimes the partners don't trust each other. A rule that mandates complete disclosure of every unflattering detail about oneself prior to first sexual intimacy would be impossible to administer or enforce. Moreover, as a normative matter, it wouldn't be desirable. Criminal law cannot mandate emotional intimacy; where it exists, it builds over time. Couples build trust by taking emotional and sexual risks.[498] Emotional intimacy entails sharing aspects of oneself—including aspects

498. People who think they are HIV-negative are much less likely to use condoms with primary or established partners than with partners who are new, casual, or secondary. "The duration of a relationship does not have to be lengthy before condom use decreases, sometimes only a month or less. Attempting to protect oneself from HIV infection during sex between committed partners can be viewed as a sign of mistrust or an accusation of infidelity." Bell, *supra* note 407, at 801 (citations omitted); *see also* Corbett, *supra* note 407.

of the self that might, if shared, lead to blame, shame, or rejection. Self-disclosure is never complete, even in the most intimate of relationships.

The *caveat emptor* approach leaves almost all sexual deception to be dealt with outside the courts, through social or public health sanctions. My support of this position may seem dissonant with well-established feminist criticisms of how traditional public-private distinctions in criminal law maintained gender hierarchies, leaving women largely unprotected against domestic and sexual violence.[499] But this Article does not argue for complete privatization of HIV disclosure. Rather, governments should address HIV the way we do other communicable diseases—through public health interventions, rather than criminal prosecution. Like most sexual deception, HIV nondisclosure need not be criminalized: it is not a violent crime, and there is little reason (other than the evidence-free stereotypes advanced in academic debate over the *caveat emptor* rule) to believe that lack of candor in sexual relationships systematically reinforces gender hierarchy the way sexual assault and domestic violence do. It is likely that conventional gender expectations might shape the facts people choose to share, withhold, or lie about to potential partners (e.g., men might pretend to be more sexually experienced than they are, while women might pretend to be less so[500]). But the selective criminalization of sexual nondisclosure by HIV-positive people (and transgender men[501]) gives every reason to fear that a criminal mandate of universal sexual candor would be designed and enforced in invidious and discriminatory ways.

By enacting a presumption that all sex should entail the degree of intimacy, trust, and self-disclosure associated with the idealized marriage, HIV disclosure laws mandate such intimacy, making it a crime for an HIV-positive person to have sex when his or her relationship falls short of this standard. Where the relationship is intimate, people with HIV are very

499. *See generally, e.g.*, Reva B. Siegel, *"The Rule of Love": Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Estrich, *Rape*, *supra* note 268, at 1177.

500. *See, e.g.*, Terri Fisher, *Gender Roles and Pressure To Be Truthful: The Bogus Pipeline Modifies Gender Differences in Sexual But Not Non-Sexual Behavior*, 68 SEX ROLES 401, 411–12 (2013) (finding that when respondents thought their answers were being monitored by a lie detector female respondents reported *more* sexual partners than males did).

501. *See supra* notes 206–209 and accompanying text.

likely to disclose their serostatus.[502] But casual, exploitative, and abusive relationships are commonplace. Poverty, abuse, homophobia, and gender inequality structure the HIV vulnerability of groups such as MSM, married poor African women, sex workers, poor people, and racial minorities.[503] Such people are more likely to be stigmatized, closeted, isolated, or financially dependent on their partners, making it much more difficult for them to negotiate condom use or, if they are HIV-positive, to disclose their serostatus.[504]

HIV disclosure mandates illustrate the danger of extending the supposedly sacred bonds of love—and its attendant obligations—to all consensual sexual activity. As Katherine Franke and Melissa Murray have cautioned, treating all sexual relationships as if they were loving and intimate leaves no legitimate space for sex that does not fit the quasi-marital mold, and exposes nonconforming sexual actors to criminal scrutiny and punishment.[505]

Even in relationships that are long-term and emotionally intimate, there are many ways in which a trusted spouse or sexual partner might betray us. Even a beloved spouse or partner might fail to tell the whole truth about his or her fidelity, feelings, sexuality, or health. The most egregious of deceivers might misrepresent his or her identity.[506] Our society deals with

502. *See supra* note 288.

503. *See, e.g.*, *HIV Among Women*, CDC, http://www.cdc.gov/HIV/risk/gender/women/facts/index.html (last updated Mar. 6, 2014) ("Women who have been sexually abused may be more likely than women with no abuse history to engage in sexual behaviors like exchanging sex for drugs, having multiple partners, or having sex with a partner who is physically abusive when asked to use a condom."); CDC, HIV AMONG MEN, *supra* note 449 ("Homophobia, stigma, and discrimination may place gay men at risk for multiple physical and mental health problems and affect whether they seek and are able to obtain high-quality health services."); *see also* GLOBAL COMMISSION REPORT, *supra* note 31, at 21 (noting that HIV prosecutions exacerbate the vulnerability of populations such as HIV-positive women, MSM, transgender people, drug users, and sex workers).

504. *See, e.g.*, GLOBAL COMMISSION REPORT, *supra* note 31, at 20–26; Jane K. Stoever, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1172–77 (2009) (noting that HIV-positive women are subject to abuse, threats to expose their serostatus, and partners who often accuse them of infidelity and beat them if they suggest condom use).

505. *See generally* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004); Murray, *supra* note 193.

506. *See, e.g.*, Abby Goodnough, *Impersonator To Go on Trial for Kidnapping*, N.Y. TIMES (May 25, 2009), http://www.nytimes.com/2009/05/26/us/26rockefeller.html (describing how a man impersonated a Rockefeller, married

such betrayals through social or public health sanctions. In general, they are not crimes.

V. POLICY IMPLICATIONS: RATCHET UP OR DOWN?

Public health research offers no reason to expect that HIV criminalization would increase disclosure or reduce sexual risktaking. Criminalization of nondisclosure could plausibly be defended as a normative message that nondisclosure is wrong, or as a symbolic attempt to change our cultural norms toward greater transparency and self-disclosure in sexual interactions. Yet these justifications are not typically used to criminalize nondisclosure of other, equally dangerous diseases, or other, equally material sexual deceptions. The selection of HIV as a vehicle for these symbolic messages does not seem arbitrary. The moral salience of HIV in criminal law cannot be separated from the homophobia, racism, and gender stereotyping that shape exaggerated fears and moral judgments about AIDS and HIV in the broader society.

One way to address the discriminatory HIV exceptionalism[507] that characterizes our current criminal regime might be to "ratchet up,"[508] criminalizing all other potentially deadly infections or material sexual nondisclosures. Feminist-inspired reforms to the laws of sexual assault and statutory rape have rightly adopted a ratchet-up solution to rape law reform. For example, state legislatures have almost universally replaced gendered statutory rape laws with gender-neutral rules, at least nominally protecting male and female youth against sexual exploitation by perpetrators of any gender. Similarly, the intractable race and gender inequalities that pervade rape prosecutions do not counsel that sexual assault should be decriminalized. Instead, feminists argue that criminal justice actors should treat the sexual assault of low-status

a businesswoman, and had a child with her). Impersonation is generally criminalized only in specific circumstances, such as fraud or false identification to police. *See, e.g.*, MASS. GEN. LAWS. ch. 266, § 37E (2010) (impersonation criminalized only when "intent to defraud"); N.Y. PENAL LAW § 190.25 (2008) (impersonation criminalized only with "intent to obtain a benefit or to injure or defraud"). Impersonation to get sex is not a crime. *See supra* Part II.C.

507. A useful definition of HIV "exceptionalism" is the notion that this virus "requires a response above and beyond 'normal' health interventions." Julia H. Smith & Alan Whiteside, *The History of AIDS Exceptionalism,* 13 J. INT'L AIDS SOC'Y 47 (2010).

508. *See* Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129 (2014) (highlighting the choice between "ratcheting up" and "ratcheting down" as a solution to inequality).

victims as the serious crime that it is.[509] Unlike HIV nondisclosure, though, sexual assault is coercive and is always morally blameworthy. Victims of sexual assault typically suffer serious physical, psychic, and dignitary harms. Sexual assault should be a crime regardless of whether enforcement is discriminatory or whether criminalization works as a deterrent.

HIV nondisclosure, by contrast, falls into a gray area. While some nondisclosures warrant moral condemnation, prosecutions seem to be quite common in the absence of risk, harm, or grievous wrongdoing. There is no evidence that otherwise-consensual sex without HIV disclosure often causes the kind of physical, psychic, or dignitary harm associated with sexual assault. Unlike rape, sex without disclosure is not categorically harmful (at least in any way that distinguishes HIV from other diseases or deceptions). In these circumstances, concerns about the discriminatory application of an ineffective law point toward ratcheting down—decriminalization—rather than ratcheting up.

Several commentators have suggested that HIV criminal laws should be adjusted to better fit their moral and public health objectives by, for example, restricting criminal liability to activities that pose a high risk of transmission, or are intended to transmit HIV.[510] HIV prosecutions for oral sex, digital manipulation, and biting and spitting could, and should, be stopped. HIV-positive sex workers could, and should, be held to the same disclosure standards as all other people with HIV. Criminal liability could, and should, be restricted to cases in which the nondiscloser had specific intent to infect the uninformed partner (not just intent to have unprotected sex).[511] While such changes would represent an improvement over the current status quo, no state has adopted all of them.[512]

509. *See, e.g.*, Crenshaw, *supra* note 62; Hernández-Truyol, *supra* note 62; Elizabeth Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996).

510. *See, e.g.*, Pinkerton & Galletly, *supra* note 31 (recommending this approach); Kaplan, *supra* note 3 (same); GLOBAL COMMISSION REPORT, *supra* note 31 (same); Mykhalovskiy & Betteridge, *supra* note 16 (same); UNAIDS, GUIDANCE NOTE, *supra* note 31, at 2–4.

511. *See* UNAIDS, GUIDANCE NOTE, *supra* note 31, at 2–4.

512. California and Illinois have made many of these changes, see notes 6 and 15, *supra*. But, like many other states, they subject sex workers to enhanced penalties even where they disclose their status or their activities pose no risk of transmission. See CAL. HEALTH & SAFETY CODE § 120291 (2012); CAL. PENAL CODE § 647F (2012); CHLP, ENDING AND DEFENDING, *supra* note

Furthermore, the experience of other Anglo-American jurisdictions suggests that such reforms would be unlikely to disrupt the gender disparities of HIV prosecution. For example, in the United Kingdom, nondisclosers can be prosecuted only if they transmit HIV.[513] Nonetheless, gender disparities there resemble those seen in the United States and Canada, which punish nondisclosure regardless of transmission.[514]

Another reform might address HIV exceptionalism by expanding criminal liability to other life-threatening sexually transmissible infections. Four U.S. states nominally criminalize nondisclosure of hepatitis, but these laws seem rarely, if ever, to be enforced.[515] In Canada, likewise, nondisclosers can be prosecuted for any STI—or contraceptive deception[516]—that poses a "significant risk of serious bodily harm."[517] Between 1989 and 2010, Canada saw at least 122 prosecutions for HIV nondisclosure; of these, seventy-eight percent resulted in conviction.[518] In that time, there has been only one prosecution for nondisclosure of hepatitis.[519] While the Supreme Court recently affirmed that an HIV transmission risk of 1 in 10,000[520] was a "realistic possibility" of transmission that could support conviction for aggravated sexual assault,[521] the judge in the hepatitis

2, at 60–68 (discussing Illinois prosecutions of sex workers in the absence of risky activity).

513. *See generally* WEAIT, *supra* note 16.

514. *See supra* notes 369–377 and accompanying text.

515. *See supra* notes 217–221 and accompanying text.

516. The Supreme Court of Canada recently held that condom sabotage that deceived a woman into unplanned pregnancy was a fraud that vitiated sexual consent, converting otherwise consensual sex into sexual assault. R. v. Hutchinson, [2014] 1 S.C.R. 346 (Can.). The majority held that deceiving a man into unplanned pregnancy would not vitiate sexual consent because it did not pose any risk of "significant bodily harm." *Id.* at 76–77. Contraceptive fraud is not a crime if the deceived partner cannot become pregnant.

517. R. v. D.C., [2012] 2 S.C.R. 626 (Can.); R. v. Mabior, [2012] 2 S.C.R. 584 (Can.); R. v. Cuerrier, [1998] 2 S.C.R. 371 (Can.).

518. Mykhalovskiy & Betteridge, *supra* note 16, at 36, 46. The Global Criminalisation Scan reports 146 prosecutions in Canada as of September 2014. *Canada*, GLOBAL CRIMINALISATION REPORT, http://criminalisation.gnpplus.net/country/canada (last updated Sept. 30, 2014).

519. R. v. Jones, [2002] NBQB 340 (Can.).

520. Grant, *Over-Criminalization*, *supra* note 20, at 63–64 (summarizing evidence before the Court in *Mabior*).

521. *See Mabior*, [2014] 2 S.C.R. at 621–23 (finding that undetectable viral load did not eliminate "realistic possibility" of transmission). The only evidence it cited, Myron S. Cohen et al., *Prevention of HIV-1 with Early Antiretroviral Therapy*, 365 NEW ENG. J. MED. 494, 499 (2011), found that the risk of transmission with suppressed viral load was 0.1 per 100 person-years.

C prosecution acquitted because a transmission risk of "less than 1 percent" was not "significant."[522] Meanwhile, the gender dynamics of Canadian nondisclosure prosecutions resemble those seen in the United States and elsewhere.

The consistency of gender disparities across a variety of criminal approaches to HIV exposure and transmission suggest that the discriminatory social meaning of such laws is not an unfortunate epiphenomenon, but the essence of HIV criminalization. Reforms that tailor legal requirements to medical realities cannot transcend this difficulty. Law reforms that criminalize other STIs seem in practice to serve as window dressing. The criminalization of a broader swath of sexual deceptions might address the discriminatory social meaning of HIV criminalization, but the absence of political will to do so suggests, again, that HIV crimes enforce a particularized stigma.

The available evidence gives little reason to hope that legislative and law enforcement choices would be immune to HIV exceptionalism or the discriminatory intuitions by which complainants, police, prosecutors, lawmakers, and triers of fact seem to understand HIV as most criminal when it poses a threat to heterosexual women. It is hard to imagine requiring a legislature to enact, or police and prosecutors to more vigorously enforce, laws requiring disclosure to drug users, sex workers, or MSM—especially when potential complainants may hesitate to come forward.

Nondisclosure of HIV is not a sexual assault. The uninformed partner is not made to feel she or he *has* to have sex. We should not create status crimes that send people to prison, label them sex offenders, and undermine effective public health interventions to make a dubious moral point. HIV laws are demonstrably ineffective with respect to their public health goals. The denunciatory value of HIV prosecution is questionable, given that most victims suffer no physical harm, some are exposed to no risk, and many accused do not deserve moral condemnation. Whether they punish nondisclosure, prostitution, biting, or spitting, HIV-targeted criminal laws are unnecessary, discriminatory, and harmful. They should be repealed.

522. *Jones*, [2002] N.B.Q.B. at 340 (acquittal for nondisclosure of hepatitis C on the basis that a transmission risk of "less than 1 percent" was not "significant").

CONCLUSION

We should be very concerned about the selective criminalization of sexual activity by stigmatized people when there is no distinctive moral, public health, or sexual autonomy reason to do it. There is every reason for concern that HIV criminalization fits more closely with homophobic, racialized, and gendered valuation of complainants than with any legitimate concern about morality, sexual autonomy, or public health. HIV was not treated as rape when AIDS was understood to be a "gay plague" that might bypass heterosexuals. Widespread adoption of HIV criminal laws followed high-profile cases of transmission to white women by black men. Legislators said that their intention was to protect heterosexually partnered women against deceitful bisexual men. In law and in the media, male-to-female nondisclosure is often characterized as a form of rape—but sentences can be as long or longer than for forcible sexual assault, raising doubt that HIV laws have much to do with the physical integrity or sexual autonomy of victims.

The design and implementation of HIV criminal laws is consistent with these troubling origins: nondisclosure to heterosexual women seems to elicit punitive responses from legislators, prosecutors, and complainants in a way that male-to-male nondisclosure does not. Nondisclosure to other stigmatized individuals, such as sex workers and needle sharers, is rarely a crime, and seems hardly ever to be prosecuted, even when transmission has occurred. Meanwhile, prosecutions continue to target HIV-positive sex workers and detainees who bite or spit on police officers, even when their actions pose no risk of transmission.

In action, HIV criminalization seems to protect an inchoate expectation that heterosexuals should be immune to anxiety about HIV—even when they engage in casual, unprotected, or commercial sex. This is not an interest in sexual autonomy. It is not an interest that criminal law should protect, evenhandedly or at all. Far from promoting any legitimate interest in public health or sexual autonomy, nondisclosure prosecutions reinforce invidious gendered, sexual, and racial hierarchies in ways that we ought to reject.