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**From Sickness to Badness: The Criminalization of HIV in Michigan**

**Highlights**

1. Conceptualizes the criminalization of sickness as a form of social control
2. Analyzes application of Michigan's felony HIV disclosure statute
3. Like in 33 states, sex without disclosure is a crime in MI for HIV-infected
4. Argues law does not promote public health; it punishes badness

# From Sickness to Badness:

# The Criminalization of HIV in Michigan

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**ABSTRACT:** Sociological approaches to the social control of sickness have tended to focus on medicalization or the process through which social phenomena come to be regulated by medicine. Much less is known about how social problems historically understood as medical come to be governed by the criminal law, or what I term the "criminalization of sickness." 33 US states have enacted criminal statutes that require all HIV-positive individuals to disclose their infection before engaging in a wide range of sexual practices. Drawing on evidence from 58 felony nondisclosure convictions in Michigan (95% of all convictions between 1992-2010), I argue that the enforcement of the state's HIV disclosure law is not driven by medical concerns or public health considerations. Rather, it reflects pervasive moralizing narratives that frame HIV as a moral infection requiring interdiction and punishment.

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# From Sickness to Badness: The Criminalization of HIV in Michigan

**ABSTRACT:** *Sociological approaches to the social control of sickness have tended to focus on medicalization or the process through which social phenomena come to be regulated by medicine. Much less is known about how social problems historically understood as medical come to be governed by the criminal law, or what I term the "criminalization of sickness." Please spell out 33 US states have enacted criminal statutes that require all HIV-positive individuals to disclose their infection before engaging in a wide range of sexual practices. Drawing on evidence from 58 felony nondisclosure convictions in Michigan (95% of all convictions between 1992-2010), I argue that the enforcement of the state's HIV disclosure law is not driven by medical concerns or public health considerations. Rather, it reflects pervasive moralizing narratives that frame HIV as a moral infection requiring interdiction and punishment.*

**KEYWORDS: Please include USA as the first keyword** Social control; HIV/AIDS; criminalization; medicalization; public health; sociology of law

## INTRODUCTION

> Calling it a crime "akin to murder," Kalamazoo County Circuit Court Judge Philip D. Schaefer ordered a Kalamazoo man to spend nine months in jail for failing to tell his sexual partners he was HIV-positive. "Quite frankly there isn't a sentence long enough that I could give you that would be justice," Schaefer told [the defendant]. "You have signed a death warrant for another human being. God forbid that you ever do it again" (Ricks 2004).

While conceptual approaches to theorizing social control have varied over time (for a review, see Meier 1982), sociologists have a longstanding interest in understanding how categories of sickness are produced, regulated, and controlled. Indeed, medical sociologists coined one of their signature concepts, "medicalization," in order to describe the process through which social phenomena come to be regulated by medical authorities. Yet, while sociologists have acknowledged that medicalization could be "bidirectional and partial" (Conrad 2005:3), most research has centered on what was viewed as the usual direction of change: from "badness to sickness" (Conrad & Schneider [1980]1992 please include the page number). Much less is known about how phenomena historically controlled by medical authorities come to be governed by the criminal law, or what I term in this paper "the criminalization of sickness."

In order to conceptualize this process, I draw on a variety of sociological literatures. In the first section, I review the literature on the social control of sickness. The bulk of this work has followed in the tradition of Conrad (1975; 1979; 1992), whose groundbreaking research highlights the processes by which medical authorities come to regulate and control ever-greater domains of social life. While these insights into social control have helped to describe and analyze a wide range of social problems, I argue that they have tended to bracket analyses of how problems historically defined as medical come to be regulated by other institutions and forms of authority – including criminal law. I then review the literature on criminal laws prohibiting HIV-positive people from having sex without first disclosing their HIV-positive status. While reports suggest the reach of such laws is increasing (Bernard & Nyambe 2012), few empirical studies have examined their application.

In the second section, I report findings from an original analysis of 58 Michigan trial court cases in which defendants are convicted under the felony nondisclosure statute. Drawing on trial court transcripts, newspaper reports concerning those proceedings, and court records associated with cases convicted between 1992 (the year in which the first defendant was convicted) and 2010, I argue that legal actors employ moralizing narratives of HIV infection that serve to construct HIV as a form of badness deserving of legal intervention and, thus, social control. Because HIV-specific criminal laws deal with a problem that is conventionally understood as medical (a virus), many have presumed that such laws reflect a societal interest in promoting the public's health. However, I argue that Michigan's HIV disclosure law was not intended to promote public health; rather, it reflects the perception of the virus as a moral infection requiring regulation and punishment.

As I show, while the HIV epidemic has changed dramatically since the late 1980s when many HIV disclosure statutes were enacted, the way these cases are argued in Michigan courts has not reflected the transformations in medicine and HIV prevention. My analysis suggests that HIV disclosure laws continue to be used not to enhance public health but to control and punish populations deemed deviant.

## THE SOCIAL CONTROL OF SICKNESS: FROM "MEDICALIZATION" TO "CRIMINALIZATION":

Conrad (1979, 1992) and Conrad & replace with and Schneider ([1980]1992) have explained how medicine and its practitioners come to govern types of non-conformity once viewed as crime or sin. Conrad's theory of medical social control became encapsulated within the well-known concept, "medicalization," which was informed by both Zola's (1972) argument that medicine has come to supplant religion as the major institution of social control, as well as Freidson's (1970) pioneering work analyzing how medical professionals came to define categories of deviance as illness in order to diagnose increasing numbers of individuals as sick. In his analysis of the development of the medical category "hyperkinesis," Conrad (1975) coined the term medicalization in order to explain this very process.

Conrad & replace with and Schneider's ([1980] 1992) original conceptualization describes medicalization in either/or terms, framing it as the process through which "categories of deviant behavior become defined as medical rather than moral problems" (p. 17). More recently, Conrad & Schneider (2005) updated their approach by arguing that medicalization can be "bidirectional and partial" (p. 5). Anspach (2011:xxii) expands on this to suggest that "ideas about bad behavior… continue to exist in popular culture alongside the medical model." Bosk (2013) argues that, while children with behavioral disorder diagnoses undergo partial

medicalization, this does not protect them from criminalization. Thus, by titling this paper "from sickness to badness," I am not suggesting that these states are mutually exclusive; rather, I am pointing to a case in which criminal justice authorities are claiming jurisdiction over a phenomenon conventionally understood in medical terms (e.g. a virus).

In this paper, I build on these contributions by examining what Timmermans and Gabe (2002) describe as the "medico-legal borderland" – or, sites of overlapping jurisdiction between medicine and the law where, at times, authorities "vie for hegemony in an attempt to redraw the borders to their advantage" (p. 507). Citing Abbott's (1988) influential work on competition for professional jurisdiction, Timmermans and Gabe call for greater attention to the intersection of medicine and crime in order to better explicate the complexities of social control. In the next section, I turn to the literature on the use of the criminal law to control sickness in order to further conceptualize this particular borderland.

***The Criminalization of Sickness***

Sociolegal scholars have a longstanding interest in analyzing how deviance becomes labeled as crime and controlled by criminal justice authorities (for a review, see Jenness 2004). Describing this transition as a "moral passage," Gusfield (1967:187) argues that "What is attacked as criminal today may be seen as sick next year and fought over as possibly legitimate by the next generation." Recent studies have examined how social movements (Jenness and Grattet 2005) and moral panics (Jenkins 1998) can contribute to the construction of categories of crime and criminalization more generally.

This paper builds on these insights by examining how criminal justice comes to control phenomena historically defined as medical. This is not entirely novel. For example, Schneider (1978) describes historical tensions in punitive and medical approaches to defining and

controlling alcohol intoxication. A wide array of sociologists has similarly analyzed punitive approaches to the crimino-legal control of mental illness, which have become particularly problematic in an era of deinstitutionalization and mass incarceration (see, for example, Erickson and Erickson 2008; Pescosolido et al. 1999; Link, Andrews, and Cullen 1992). Although sociologists have attended to the criminalization of sickness, these efforts resemble medical sociology's focus on phenomena sometimes referred to as "existential problems" whose etiologies are more readily understood as socially constructed. How "organic diseases" such as HIV come to be regulated by the criminal law is not yet well understood.

In organizing this paper in terms of "criminalization," I aim to avoid confusion with the use of civil law procedures (such as quarantine and forced treatment) to control disease. There is a vast public health law literature examining the use of civil procedures for controlling disease (see, for example, Bayer and Dupuis 1995). For a discussion of the differences between civil and criminal law for controlling sickness, see Gostin (2001:224-5). While criminal laws regulating infectious diseases do not make infection itself a crime, they do impose restrictions on the freedoms of those infected that are not imposed on others. Moreover, they codify forms of punishment for those infected who breach normative behavioral guidelines. To the extent that the criminal law is applied to only those who are infected, it is appropriate to refer to this process as the "criminalization of sickness."

***The Criminalization of HIV in the United States***

Laws in 33 states presently have HIV-specific criminal statutes on the books (Center for Disease Control and Prevention 2013). Nondisclosure prosecutions have also been reported in additional states under statutes not specific to HIV, such as attempted murder. None of the HIV-specific criminal laws requires that the complainant in the case contract HIV and most prohibit

even no or low risk sexual contact (such as oral sex or the sharing of sex toys) without disclosure (Center for HIV Law & Policy 2010). The majority of such laws in the US were enacted during the mid-1980s and early 1990s in the context of high AIDS-related mortality, a general panic about its transmission, and before life-saving medications known as antiretrovirals (ARVs) were introduced in 1996 (Burris et al. 1993; Galletly and Pinkerton 2006). While comprehensive national data on the enforcement of such laws do not exist, advocacy groups report that over 1000 HIV-positive defendants have been prosecuted under HIV-specific criminal statutes; Michigan is reported to have the fourth highest number of prosecutions of any country or territory in the world (Bernard and Nyambe 2012).

Public debates over criminal HIV disclosure laws have focused on atypical defendants accused of infecting multiple partners who are understood to be particularly vulnerable, such as the case against Nushawn Williams, a black man accused in New York of infecting nine, mostly white women and girls. Shevory (2004) argues that the media spectacle surrounding Williams' case reflected social anxieties not just about HIV, but also about race and crime more generally. Paralleling Metzl's (2010) argument that the diagnosis of schizophrenia became a tool for medical control of black men, Shevory argues that Williams' criminal case proved to be an occasion to shore up social values by linking anxieties about a deadly disease to deep-seated fears of black male sexuality and masculinity.

While Williams was not prosecuted under an HIV-specific statute, the portrayal of his case in the media reveals discursive elements central to prosecutions under HIV-specific laws: defenseless and/or undeserving victims; reckless and/or malicious HIV-positive offenders; and a debilitating and fatal disease (see Weait 2007). In an analysis of Canadian HIV exposure court cases, Adam et al. (2008) argue that the "onus of responsibility may be shifting back toward

HIV-positive people" (8). In all of these contexts, the discursive construction of a polarity between malice and vulnerability, guilt and innocence, culpability and victimhood enables reframing sexual behaviors as criminal negligence on the part of the HIV-positive partner – facilitating legal intervention and, thus, a punitive form of social control.

## STUDY DESIGN, SAMPLE, AND METHODS

Michigan is useful as a case for two reasons. First, it was the site of the first known conviction in the United States under an HIV-specific law in 1992. Second, its statute is characteristic of those nationwide in that features a broadly construed concept of "sexual penetration" that has enabled prosecutors to file charges in cases involving a wide range of sexual practice. To analyze the enforcement of Michigan's HIV disclosure law over time, I obtained public records of convictions from The Michigan State Police Information Center, which include the county, sentencing date, and court disposition of all convictions reported to the state. While the state did report 28 non-convictions, these data were limited to those cases in which the defendant had a prior criminal record. Because of this inherent bias, these data were excluded from the analysis. I attempted to identify the defendant in each case by reviewing local newspaper archives, searching for any mention of a case within two weeks of the sentencing date indicated in the police data. I successfully identified the defendant in 29 cases this way and in another 29 cases using county clerks' records and internet searches. As such, I identified the defendant in 95% of the known 61 convictions between 1992 and 2010.

In the 58 cases in which the defendant was identified, I ordered courtroom transcripts from the county circuit court. I obtained 145 court transcripts totaling 4,529 pages from 46 of the 58 cases. In the 12 cases for which no transcripts were available, I requested copies of other documents in the court file that detailed the basic facts of the case and relevant legal matters. For

the purposes of this analysis, I also draw on 125 local newspaper reports located through archival research, internet search engines, and electronic newspaper database queries. This research design was reviewed by a University of Michigan ethics board and determined to be exempt from review.

Upon receipt, I digitized records using a scanner and a computer outfitted with ABBY FineReader text recognition software. Once digitized, the court transcripts were read and coded by the author using ATLAS.ti qualitative analysis software. For the purposes of this analysis, I coded for framing devices employed by legal actors to justify punishing defendants. This includes public health framings (e.g. "they're a risk to public health" or "exposed another to a risk of contracting HIV") and moral framings that depart from medical science (e.g. "they're a reckless killer" and "they sentenced another to death"). I also coded for references to medical science, such as undetectable viral loads, transmission probabilities, and HIV virology.

In addition to defendant pseudonyms, I also use pseudonyms to refer to counties in this paper. County pseudonyms were generated randomly using the names of counties in Wisconsin (counties in that state follow a naming scheme similar to Michigan's).

## FINDINGS

### "RESTRAIN RECKLESS AIDS CARRIERS": THE MAKING OF A MORAL SOCIAL PROBLEM

During the 1988 legislative debates over the felony HIV disclosure provision, the House Legislative Analysis division (which produces analyses of all bills originating in the house) prepared a telling report, "Restrain Reckless AIDS Carriers," which detailed the arguments both for and against its passage. Anticipating present-day critics (Mykhalovskiy 2011; Heywood

2008; Galletly and Pinkerton 2006), the arguments against passage are based on the view that criminalizing nondisclosure is bad for public health:

> Criminalization could actually foster the spread of HIV infection by driving it underground, impeding cooperation from infected individuals both in counseling and testing and in partner notification… Imposing punitive criminal penalties on recalcitrants may reflect the frustration and fear some people feel about the AIDS epidemic, but what is needed to control the spread of HIV is effective public health initiatives, not ineffective emotional reactions (House Legislative Analysis Section 1989:4).

Rather than responding to these public health arguments in the terms presented, the report's authors respond instead by recasting the problem from one of public health to one of moral regulation and social control. Indeed, the authors even suggest that such behavior might be deserving of capital punishment if Michigan had not abolished it in 1846:

> Such reprehensible and morally repugnant behavior ought to be punished… A clear message should be sent to those people, however few in number, who recklessly and callously expose other people to a possible death sentence by engaging in sex without even informing them of the risk to which they are being exposed. Some people believe that capital punishment, were it available, would not be too strong a penalty… Imposition of felony penalties is in fact a mild punishment for such reprehensible behavior (4).

These legislative debates are important because indicate the intent of the law's framers. While public health and medical narratives might have proved to be useful in framing the perceived problem, legislators opted instead to shift the terms of the debate to moral and punitive terms.

Indeed, the bill's statutory language further evidences legislators' reliance on discourses of badness. Michigan's criminal nondisclosure statute reads:

> A person who … knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person… is guilty of a felony… "Sexual penetration" means 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 (Michigan Compiled Law [MCL] § 333.5210).

The definition of "sexual penetration" employed by legislators did not emerge out of the ether; it has a history. Rather than devising a narrow, medically appropriate definition covering only those forms of sexual activity by which HIV can be transmitted, legislators simply copied and

pasted from the 1974 criminal sexual conduct act that restructured Michigan's rape law (MCL § 750.520a). This discursive recycling suggests that legislators understood non-disclosure as analogous to rape – a social problem that, while not without public health concerns to be sure, is clearly first and foremost understood in terms of badness. As I show, cases brought under the unanimously enacted disclosure law reflect legislative intent: badness is punished, often without regard to its implications for sickness.

## "A CARRIER OF DEATH":
## SETTING NARRATIVE PRECEDENT IN MICHIGAN CASE LAW

A prosecutor in a small, remote county in Northern Michigan made national headlines when he petitioned to have the first defendant charged under Michigan's felony HIV disclosure statute extradited from New York in 1991 to face charges. The prosecutor explained that he aggressively pursued the case against "Eric," a white gay man, because he wanted "to see that [Eric] does not give any more death notices out" (Bruning 1991:2C). The case against Eric centered on the allegation that he had engaged in receptive and insertive oral sex without disclosing his HIV-status during a one-time casual sexual encounter with a 21-year-old man, "Sam." Sam went to authorities months later when Eric's ex-lover, "Tom," revealed to him that Eric was, in fact, HIV-positive (Preliminary Examination:81).

Although oral sex was generally regarded as a possible route of transmission at the time, some suspected that it was less risky than other sexual practices. Indeed, Eric's defense counsel argued that Eric had been counseled at an HIV support group "that protection was not needed for oral sex" (Motion Hearing:103). In a written brief, the judge argues that engaging in lower risk sex "does not negate culpability":

> [Eric] may have been of the opinion that oral sex is not as dangerous as receptive anal sex at the time of the alleged encounter between the complaining witness and [Eric], but that

> does not mean the statute was not violated. Such an argument, if the Defendant is found guilty, may bear upon the extent of culpability, but it does not negate culpability (21).

In the Court's view, engaging in low-risk sex might result in milder treatment at sentencing – but it does not foreclose a conviction under the law.

In the wake of a lengthy, widely publicized extradition process, as well as a judicial ruling that Eric's medical records were unlawfully obtained and thus inadmissible, criticism of the case against Eric began to mount (Kellogg 1991). The AIDS Coalition to Unleash Power (ACT UP) raised $25,000 to free Eric on bail, and the American Civil Liberties Union provided Eric with counsel with the intention of challenging the statute's constitutionality. But Eric's resolve to see the case to trial and through a potentially lengthy appeal process had waned. When the prosecutor offered Eric a deal to minimize jail time by pleading no contest, Eric acquiesced and was sentenced to one year in jail and five years' probation.

Eric's conviction is important for several reasons. First, while there was not yet a consensus in 1992 as to whether oral sex was considered safe, HIV prevention campaigns by 1995 had begun promoting it as "safer sex" (National Library of Medicine n.d.). While the CDC assigns precise statistical odds for vaginal and anal sex from 5 in 10,000 for insertive, condomless vaginal intercourse to 50 in 10,000 for receptive, condomless anal intercourse, they simply note that "HIV transmission through oral sex has been documented, but rare. Accurate estimates of risk are not available" (n.p.). Yet, five additional defendants were convicted for engaging in oral sex without first disclosing in 1993, 1996, 2001, 2002, and 2004. More generally, Eric's conviction paved the way for future nondisclosure prosecutions. While he was the sole defendant convicted in the four year period after the law's 1989 enactment, 14 defendants were convicted under the disclosure law during the four year period following Eric's conviction. A prescient media report published the day Eric was convicted cited a number of

investigations across the state that "have proceeded quietly in the wings as authorities carefully followed the progress [of Eric's case]" (Hogan and Murphy 1992:A1).

The case against "Sandra," a 32-year old white woman, was among the cases cited in the report. She was described as having an IQ "above the level considered developmentally disabled" (Walsh 1992:2A). In court, it was revealed that her IQ was 72, which was in fact barely above the clinical threshold for a diagnosis of disability of 70 identified in the *Diagnostic and Statistical Manual of Mental Disorders* (First, Frances, and Pincus 2004:373). After reports surfaced that she was having sex without disclosing her HIV-positive status, local health officials sought to have Sandra quarantined under the provisions of the state's "health threat to others" statute that allows officials to confine an individual deemed to be a threat to public health (MCL § 333.5207). The prosecutor reported to media outlets that "he also will review potential criminal sanctions" (Walsh 1992:2A).

Not long after her civil confinement ended, Sandra again found herself in legal jeopardy. After frequent complaints to her legal guardian about the foster care home in which she resided, Sandra was allowed to move into what was characterized in court as a rundown motel notorious for sex work and drug use (Jury Trial Vol. II:203). Only two days later, Sandra called and begged him for permission to return to the foster care home. She reported that she had been having sex with another tenant, a fact that her guardian then reported to the police.

Sandra's case was tried by jury in 1995. The prosecutor opened his case against Sandra by framing her as a "carrier of death" who needed to be locked up:

> She had been told and discussed with her repeatedly that she should not have sex with another person unless she first told them of her HIV status. It was a condition that was made clear to her that… could in fact kill another individual, another human being. The facts will show… that she knew that she was literally a carrier of death in this situation… It is the facts of this case, that the disease was a fatal one, that in fact she passed it onto another person (Jury Trial Vol. I:74).

While these statements prompted a sustained defense objection preventing the prosecutor from making similarly inflammatory comments again, the image of a "carrier of death" had already been planted in jurors' minds, as had the prosecutor's false assertion that she had "passed" the disease onto the complainant (who did not contract HIV).

Although the prosecutor only needed to prove that Sandra had engaged in "sexual penetration" without first disclosing her HIV-status, he laid out his case by framing Sandra as "a person acting out of self—self- fulfillment, someone that wanted to satisfy her own sexual desires" (Jury Trial Vol. III:392). Switching to the first person and deploying a rough grammatical style, the prosecutor decried that Sandra did not tell her partners she was positive "because that means that he won't keep comin' back to give me more sex and to satisfy my sexual desires" (392). She needed to be punished not just because she had not disclosed her status, but because she was a selfish "carrier of death" – a menace to the community.

The jury found Sandra guilty. At sentencing, the judge declared that her irresponsibility while "carrying a deadly weapon" warranted taking her "out of circulation":

> She is carrying a deadly weapon with her and… she could go around killing people by her lack of concern…. I think she has a feeble understanding of how dangerous she can be in a public setting such as that in which she was placed by her so-called guardian… I feel that, for the protection of our community, that I have to take [Sandra] out of circulation. (Sentencing: 6-9).

The judge sentenced her to 32 months in prison.

Just as Eric's case paved the way for future prosecutions of oral sex, Sandra's case resonates with seven future convictions involving defendants described in various ways as having "limited intelligence" in 1993, 1995, 1998, 2000, 2001, 2002, and 2003. More generally, the discursive dimensions of both Sandra and Eric's cases echo throughout future cases. For an overview of the cases analyzed, see Table 1 (note that three cases sentenced simultaneously are combined for a total of 43 cases for which there were transcripts available). As the data make

clear, the specter of the homicidal HIV-positive menace spreading death looms over the adjudication of HIV nondisclosure cases long after effective treatments became available. In what follows, I describe a series of typical cases in greater detail.

## "DEATH TO INNOCENT THIRD PARTIES": THE PERSISTENCE OF DEATH NARRATIVES, POST-ARVS

In 1999, Tim was accused of not telling a new roommate that he was HIV-positive before they engaged in oral and anal sex. According to testimony, the complainant in the case did not ask Tim, a 34-year old white gay man, about his HIV-status until the following day. When the defendant revealed his HIV-status, the complainant "basically freak[ed]", returned home, found the defendant's HIV medication, and went to a hospital where he was prescribed post-exposure prophylaxis to reduce his risk of infection. Hospital attendants also performed a rape kit and encouraged the complainant to contact the police, suggesting that either the staff or the complainant interpreted his experience as a form of sexual assault (Jury Trial Vol. I:143). Tim was subsequently charged; he pled not guilty and exercised his right to trial by jury.

With a signed confession on the record, there was little room for the defense to argue the facts. Instead, the defense countered the prosecution's claim that Tim had exposed the complainant to "that deadly virus" (141) by arguing that Tim's viral load (or, the amount of virus in his blood) was "undetectable" and thus the risk of transmission was low. While recently published data suggest that HIV treatments can reduce the risk of heterosexual transmission by 96% by reducing viral load (Cohen 2011), nearly a decade would pass after Tim's trial before any major scientific statement on the subject (Vernazza et al. 2008) – although many had long suspected this to be the case (see, for example, Smith & Van de Ven 2001:18).

The prosecution argued that, undetectable or not, the defendant was still obliged to

disclose: "It doesn't matter how positive — how much positive they are… It's like saying, 'Well, I'm only a little bit pregnant.' I mean, you're either pregnant or you're not pregnant." (Jury Trial Vol. II:138). Quoting from a Michigan Court of Appeals decision, *People v. Jensen (On Remand)* (1998), which affirmed the HIV disclosure law's constitutionality, the prosecutor argued that not disclosing one's HIV status leads to "death to innocent third parties."

> If you know you have AIDS or you know you have HIV and you don't disclose, well, what does that achieve? "Only further dissemination of a lethal, incurable disease, in order to gratify the sexual or other physical pleasure of the already-infected individual." And I am reading off of something here because I don't want to get the words wrong… "Indeed, the probable results accompanying the nondisclosure are fairly predictable: Death to innocent third parties" (139-140).

In only four of the 58 cases did the complainant(s) allege to have contracted HIV from the defendant. Yet, in order to frame nondisclosure as a moral, criminal problem, prosecutors and judges continue to deploy analogies to murder and death sentences throughout the study period. If the cases had proceeded on medical, instead of moral, grounds, it would have been much more difficult to establish harm or criminal negligence.

Indeed, legal actors did not appear to feel constrained by medical evidence. For example, while Tim's complainant testified that he did not contract HIV from Tim, Tim was treated as if he had at sentencing. When a felony defendant in Michigan is sentenced, the judge completes a spreadsheet containing an assortment of variables that assigns levels of "badness" to the crime. Higher scores result in higher penalties. In Tim's case, the prosecutor argued that the offense variable (OV) for "physical injury to a victim" (MCL § 777.33) should be scored at 25 points, defined as "life threatening or permanent incapacitating injury occurred to a victim." Despite defense objections, the judge agreed. "I cannot think of anything more life-threatening" (Sentencing: 6). The judge sentenced Tim to 58 months to 15 years in prison, scolding him for his "callous disregard for life" (10).

Of course, many HIV tests do have a "window period" of up to six months between an exposure and the ability for the test to detect an infection – although the CDC (2010) reports that 97% of people will develop detectable antibodies within three months after exposure. Yet, prosecutors and judges sometimes invoked the possibility of infection in order to justify harsher punishment in cases where the window period had clearly lapsed. For example, none of the four women who accused Jackson, a 32-year old white man in Green Lake County, of not disclosing had tested positive when he was sentenced eight months after the last alleged encounter. Yet, the prosecutor argued that "they're not out of the woods yet. They still may come down with this fatal disease" (Sentencing:22). The judge agreed, sentencing Jackson to 30 to 48 months in prison. "You have impacted, as [the prosecutor] has indicated, you know, potentially given four others a life sentence and that's something this Court cannot overlook" (Sentencing:24).

In other cases, the virus itself was viewed as a weapon. Lilly, a 54-year old heterosexual white woman, was convicted in both Wood and Lincoln counties in 2010 for not disclosing her status to the same male partner. In one of those counties, the judge and prosecutor debated whether they should score the offense variable marked for "aggravated use of a weapon" (MCL § 777.31) at 20 points, defined as "the victim was subjected or exposed to a harmful biological substance, harmful biological device" (ibid.):

> Judge: Any comment, [prosecutor], on OV two? That's like the use of a weapon…. Do you think it fits?
>
> Prosecutor: I looked at that and I think it does. I looked up the definition of the harmful biological device… Yeah, it says it means a bacteria, virus or other micro-organism or toxic substance derived from or produced from an organism that can be used to cause death, injury or disease in humans, animals or plants. So I do think that that fits (Sentencing:13).

Echoing a controversial case that same year in which an HIV-positive Michigan man was charged under a law intended to combat bioterrorism for biting a neighbor (Stanglin 2010),

judges in Lincoln County and Wood County agreed that the scoring was appropriate. The Wood county prosecutor argued, "If we want to talk about aggravated use, the fact that she continued to have sexual relations… each time, placing him in risk of loss of his life, I think it's an appropriate scoring" (Sentencing: 7-8). Lilly was sentenced to 11 months in jail in Lincoln County and 17 to 48 months in prison in Wood County.

While references to the risk of death from HIV were more common, analogies to homicide continued well into the study period. Peter, a 52-year-old white gay man, was convicted in Barron County in 2004 after being accused of not disclosing his HIV status to a casual male sex partner before engaging in receptive anal intercourse. At sentencing, Peter told the court that he was unaware that the law existed and that he thought using a condom was sufficient. Unsympathetic, the judge pointed to the risk of killing his partner:

> Peter: I had no idea that the law even existed, and I know that ignorance is not a justification of it but I did what I thought I was supposed to do. We did it safely and I thought that was the way it was supposed to be done
>
> Judge: It never occurred to you that you might kill the man?
>
> Peter: I was recently diagnosed. I mean we practiced safe sex which is basically the only thing you can do.
>
> Judge: Well, I guess if you knew what you had when you did this there's always a huge risk that you could infect somebody with a horrible disease. (Sentencing: 4-5).

Notably, like the vast majority of these cases, Peter's partner did not contract HIV. The case was unusual, however, in that Peter was extremely ill during both of his appearances in court. While he was sentenced to probation, he was arrested for violating its terms a year later after allegedly failing to attend his doctor's appointments to receive HIV treatment – a violation that may have resulted in his incarceration. Peter, however, was not incarcerated; he died just days before he was to be sentenced for not seeing his doctor (*The Gazette* 2005:n.p.).

## "THAT'S NOT IN THE STATUTE":

## THE IRRELEVANCE OF SICKNESS IN THE FACE OF BADNESS

Charlie, a 41 year-old black man, was convicted in 2001 of not disclosing his HIV status to a woman with whom he had sex after they had smoked crack together one evening. The complainant initially told the police that she was "the victim of a carjacking, and a kidnaping by two unknown black men" (Sentencing:17), but she later admitted that she had gone willingly to the defendant's house seeking drugs and sex. Charlie admitted to having sex without disclosing his status, but claimed that he believed he had abided by the law by wearing a condom.

Given Charlie's admission, his defense attorney attempted to mitigate his client's culpability on medical grounds. Noting that Charlie had used a condom and that his viral load was undetectable, the attorney pleaded with the judge to consider that his client was not "in full-blown AIDS status and going about knowingly infecting people" (21). The prosecutor disagreed, arguing that the statute does not require proof of risk:

> The fact that the argument is being made that [the defendant] thought that he was adequately protecting the Complainant, because he was wearing a condom. Well, that's not in the statute. It doesn't say if you wear a condom it's only a misdemeanor or–-or anything like that (Sentencing: 16).

The judge came close to acknowledging the relevance of medical risk, but only in order to dismiss defense claims that Charlie's use of a condom mitigated his culpability: even when using a condom, the judge ruled that the risk of transmission was "overwhelming" (25). "You don't need a statute to tell you that this is behavior which is just absolutely reprehensible" (25). Arguing that Charlie "did manipulate and take advantage of the victim" (26), the judge sentenced him to 28 to 72 months in prison.

The scientific literature, however, suggests that the risk might have been less than "overwhelming." In their review, Davis and Weller (1999) estimate condoms to be 87% effective at preventing heterosexual HIV transmission (Davis & Weller 1999), while Leynaert, Downs,

and Vincenzi (1998) estimate the per-incidence risk of male-to-female vaginal transmission *without a condom* to be roughly 1 in 1000 (1998). Thus, the theoretical risk of transmission during condom-protected vaginal intercourse could be crudely estimated to be 1 in 7,500. While not available at the time, accounting for recently published figures showing that treatment reduces the risk of heterosexual transmission by 96% would further shrink the estimate to roughly 1 in 190,000 – a risk so low as to be negligible. Under such circumstances, it would seem difficult if not impossible to justify punishment based solely on medical grounds.

While there were many cases in which the level of risk was arguably small to negligible, some readers might contend that any level of risk would be sufficient grounds for criminal intervention. Thus, to argue that the application of Michigan's HIV disclosure law has no basis in medical science, the most persuasive example would be a case in which the complainant was exposed to no risk at all. Such is the case against Jennifer, a 23-year old white woman arrested in Richland County in 2009 after police raided the strip club where she was employed. The prosecutor justified the raid by describing the club as a "dangerous common nuisance due to ongoing drug activity, prostitution and repeated acts of lewd behavior" (Mumford 2009). Initially charging Jennifer with prostitution and drug-related offenses, the prosecutor tacked on felony HIV disclosure charges after it was discovered that she was HIV-positive. In order to minimize time spent in jail, Jennifer accepted a plea deal. During an otherwise routine plea hearing, the detective testified as to exactly what transpired between Jennifer and her client, a confidential informant, which yielded the HIV charges:

> Prosecutor: Let me focus you particularly on a situation involving a penetration with his nose or nasal area of his face.
>
> Detective: He would pay her twenty dollars a song for a lap dance, and on this occasion she was topless, she began dancing, started grinding on him, trying to arouse his penis. At one point she exposed her vagina area to him and placed it on the tip of his nose and began grinding on his nose with her vagina.

> Prosecutor: Did the confidential informant indicate that his nose actually went inside or penetrated her vaginal area?
>
> Detective: Yes, it did (Plea:12-13).

There are many conceivable pathways for HIV to be transmitted during intimate contact; nasal-vaginal penetration is not among them. Yet, at sentencing, the prosecutor alleged that Jennifer's actions "clearly threatened the health and safety of specific individuals as well as the general public. The disease she carried is terminal" (Sentencing:3). Jennifer was sentenced to five months in jail and will be labeled a felon for the rest of her life.

Cases like Charlie's and Jennifer's that involve no risk or extremely low risk of HIV transmission confirm my argument that the disclosure law is a tool wielded to control and punish badness. While legislators would surely claim to be concerned with sickness and the public's health more generally, the HIV disclosure law they devised is not primarily concerned with controlling sickness, promoting public health, or protecting the public from medical harm. In the words of Charlie's prosecutor, "that's not in the statute."

As the data in Table 1 show, the trends described in this paper are persistent over time. In nearly half of all cases analyzed, legal actors explicitly analogized HIV or HIV nondisclosure to death: HIV was described as a death sentence in 5 cases; nondisclosure was compared to murder in 4 cases; and nondisclosure was described as exposing the victim to a risk of death in 11 cases. In the bulk of the remaining cases, judges and prosecutors simply proceeded through the hearings mechanically, without saying much more than asking the defendant if he or she is guilty and imposing a sentence. In fact, in only one case did a prosecutor or judge actually describe HIV as a manageable or chronic disease. In the case against Reginald in 2002, the judge told the defendant that "I want you to take the kind of medication that they are developing now that will take care of AIDS. They have new medications coming out that apparently are having a positive

effect. And I hope that helps you" (Sentencing:9). Thus, it was a rare occurrence in these cases for judges or prosecutors to describe HIV as anything but a terminal disease.

## CONCLUSION

Controlling the spread of HIV is a laudable goal. However, Michigan's HIV disclosure law is not primarily aimed at achieving this goal. Rather that controlling HIV as a virus, I have argued that Michigan's HIV disclosure law serves to control HIV as a moral infection deserving of interdiction and punishment. Legal actors indicate that HIV infection is a death sentence, that it is a deadly weapon, and that HIV-positive people are homicidal threats. In some cases, they do so to justify the defendant's conviction. In other cases, they do so to justify more severe punishment at sentencing. As I have shown, these powerful narratives are persistent, despite effective therapies that have transformed HIV from a terminal illness to a chronic disease and despite the fact that the vast majority of defendants are not accused of transmitting the virus. Indeed, defendants are convicted for not disclosing even when their alleged sexual conduct did not pose a significant epidemiological risk of transmission – suggesting that primary motivation for these laws is moral retribution and control.

However, retribution is not the only possible justification for these statutes. Astute readers will have noticed judges at times justifying the incarceration of defendants for the good of public safety, or what criminologists would call an "incapacitation" argument. An example of this would be when the judge told Sandra that she needed to be "taken out of circulation" for the good of the community. Although not described in this analysis, these arguments were observed in 10 cases (half the time overlapping with analogies of death; half the time existing on their own). Although it is beyond the scope of this article, future studies might explore such alternative justifications for enforcing HIV-specific criminal laws.

Even in cases when judges relied primarily on public safety arguments, however, medical evidence was rarely invoked in the adjudication of these cases. Social control theories help to explain why this is so. While medicalization explains how particular phenomena come to be diagnosed, treated, and controlled by medical authorities, criminalization explains how particular phenomena come to be legally codified, punished, and controlled under the law. In the case of HIV disclosure laws, social control helps explain how legal systems render legible social phenomena that might seem to exceed their purview; disease is not an immediately obvious site for criminalization. Thus, in order for the legal system to expand its mandate and to intervene, what was typically constructed as a medical phenomenon must be recast in legal terms: blame must be assigned and victimhood must be established. As I have shown, this is often achieved in Michigan trial courts by framing HIV as a deadly disease and HIV-positive defendants who fail to disclose as murderers and/or as exposing others to a risk of death.

While more research is necessary to understand how this process works in other cases, these findings reflect the problematics that emerge when particular phenomena become defined and governed by multiple forms of authority. In the case presented in this analysis, medical evidence on HIV risk did not prove influential to criminal justice authorities tasked with adjudicating felony HIV disclosure cases. The illegibility of medical evidence in the courtroom reflects the divergent epistemic assumptions that undergird law and medicine: whereas the law is presumed to assign culpability, promote justice, and impose due punishment, medicine is presumed to remain neutral, promote health, and offer treatment. What serves as compelling evidence on one side of the medico-legal borderland is not necessarily legible on the other.

To be clear: I am not suggesting that there is some ontological “truth” underlying HIV that sociologists should be able to uncover, nor am I suggesting that badness and sickness are

preordained polarities within which legislators and public health officials must situate their work. Rather, I argue that the institutions and their actors (re)produce these competing discursive frameworks through their efforts to exert control over social life. Yet, despite the fact that many working in the field of HIV prevention will know well that HIV has always been chased by badness, most arguments against the use of HIV-specific criminal laws have largely been framed in terms of sickness: they're bad for public health; they decrease testing; they deter people from disclosing. These arguments are not persuasive in a court of law because the discursive grounds on which the law operates are fundamentally different. Releasing HIV from the clutches of the criminal law will require engaging with the law in terms that are institutionally legible.

Of course, not all forms of sickness are equally likely to come under the control of the criminal law. Perhaps not surprisingly, sexually transmitted diseases have borne the brunt of such efforts historically (Brandt 1987). Arizona representatives, for example, recently attempted to criminalize exposure to a variety of STIs including gonorrhea without first disclosing infection (Peick 2013). That sexually transmitted diseases are particularly vulnerable to legal intervention – despite a myriad of other communicable diseases with undesirable clinical outcomes – suggests that the criminalization of sickness and sex are linked. As these findings suggest, stigma serves to lubricate the moral passage from sickness to badness.

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**Table 1. Persistence of Death Narratives in 43 HIV Nondisclosure Cases with Transcripts Available, Sorted by Year**

| Name | County | Race | Gender | Age | Partner | Year | Sentence Type and Minimum | Transmission Alleged? | Examples of Death Narratives |
|---|---|---|---|---|---|---|---|---|---|
| Eric | Forest | W | M | 29 | M | 1992 | Jail – 12 mo. | | Prosecutor: "I'd like to see that [Eric] does not give any more death notices out." |
| Adam | Marinette | W | M | 25 | F | 1993 | Prison – 24 mo. | | |
| Terrance | Sauk | B | M | 45 | F | 1993 | Prison – 32 mo. | | |
| Aaron | Ozaukee | W | M | 30 | F | 1995 | Prison – 24 mo. | | Prosecutor: "But now we have the other case, which he knows that he has got a very dangerous disease. Yet he has chosen to have sex with another woman and not told her. He may have sentenced her to death, also." |
| Jason | Jefferson | W | M | 34 | M | 1995 | Prison – 24 mo. | ✓ | |
| Maria | Door | L | F | 29 | M | 1995 | Jail – 12 mo. | | Prosecutor: "Quite frankly, I don't know what's wrong with the state legislature in only making this a four-year offense. This conduct is life threatening to other people." |
| Sandra | Portage | W | F | 33 | M | 1995 | Prison – 32 mo. | | Prosecutor: "The facts will show in this case however that despite the fact that she knew that she was literally a carrier of death in this situation…" |
| Andrew | Washburn | B | M | 24 | F | 1996 | Prison – 32 mo. | | Judge: "I would suggest that, given the impact of the potential death, that most people are kind of anxious to find out what the story is in connection with it...." |
| Susan | Grant | W | F | 37 | M | 1996 | Prison – 32 mo. | | |
| John | Rock | B | M | 35 | F | 1999 | Prison – 48 mo. | | Judge: "It seems appropriate that this offense variable should be scored… where there is a high probability of transmitting a fatal disease to an unknown victim." |
| Darnell | Jefferson | B | M | 42 | F | 2000 | Prison – 12 mo. | | |
| Lynette | Iron | W | F | 27 | M | 2000 | Jail – 3 mo. | | |
| Tim | Washburn | W | M | 34 | M | 2000 | Prison – 58 mo. | | Prosecutor: " If you -- if you know you have AIDS… and you don't disclose, well, what does that achieve? 'Only further dissemination of a lethal, incurable disease, in order to gratify the sexual or other physical pleasure of the already-infected individual.'" |
| Charlie | Ozaukee | B | M | 41 | F | 2001 | Prison – 28 mo. | | |
| Lynette | Iron | W | F | 29 | M | 2001 | Prison – 32 mo. | | |
| Mark | Iowa | L | M | 44 | F | 2001 | Jail – 9 mo. | | |
| Sam | Barron | W | M | 39 | F | 2001 | Prison – 24 mo. | | Judge: "You're a person who has continued to endanger life of others without apparently too much concern about your activities…" |
| Thomas | Pierce | B | M | 40 | F | 2001 | Prison – 12 mo. | ✓ | Prosecutor: "You're saying even though [she] knew you were HIV positive, she wanted to have sex with you and was willing to expose herself to the risk of catching HIV and possibly death?" |
| Xavier | Rusk | W | M | 29 | M | 2001 | Jail – 1.5 mo. | | |
| Xavier | Rusk | W | M | 29 | M | 2001 | Jail – 1.5 mo. | | |
| Reginald | Dunn | B | M | 33 | F | 2002 | Prison – 16 mo. | | |
| William | Price | W | M | 45 | M | 2002 | Prison – 32 mo. | | |
| Lynn | Portage | W | F | 33 | M | 2003 | Jail – 6 mo. | | |
| Edgar | Grant | W | M | 43 | M | 2004 | Prison – 12 mo. | | |
| Greg | Iowa | W | M | 33 | M | 2004 | Jail – 3 mo. | | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Maurice | Rock | B | M | 42 | F | 2004 | Jail – 9 mo. | | Judge: " Having unprotected sex with another person while you've got AIDS and you're not informing them. That's akin to murder. You have signed a death warrant…" |
| Peter | Barron | W | M | 52 | M | 2004 | Probation | | Judge: "It never occurred to you that you might kill the man?" |
| Roselyn | Vernon | B | F | 30 | M | 2004 | Probation | | |
| Kevin | Jefferson | W | M | 27 | F | 2005 | Jail – 6 mo. | | |
| Letsego | Oconto | B | M | 37 | F | 2005 | Jail – 9 mo. | | Judge: "By having unconsented sexual intercourse, you may indeed be doing your best to infect or lead someone to death ultimately." |
| Tyler | Grant | B | M | 38 | M | 2006 | Prison – 12 mo. | | |
| Derrick | Grant | B | M | 57 | F | 2007 | Probation | | |
| Jay | Vernon | B | M | 38 | F | 2007 | Prison – 60 mo. | ✓ | Judge: "Even if someone can live 20 years now with that disease, if you're 20 years old to die at an age 40 is an unseemly quick death... " |
| Jermaine | Ashland | B | M | 43 | M | 2007 | Prison – 14 mo. | | |
| Christina | Rock | W | F | 36 | M | 2008 | Jail – 68 days | | |
| Alex | Rock | W | M | 25 | F | 2009 | Jail – 2 mo. | | Judge: " It's a disease that can be passed from one person to another. That means it can be potentially fatal to them. " |
| Benjamin | Burnett | L | M | 21 | F | 2009 | Jail – 9 mo. | | Prosecutor: "When you talk about rape, you talk about murder, this ranks right up there. I can't believe that this is a four year offense and we've got zero to nine guidelines." |
| Jackson | Gr. Lake | W | M | 32 | F | 2009 | Prison – 30 mo. | | Prosecutor: "Because as I think they'll tell you, they're not out of the woods yet. They still may come down with this fatal disease." |
| Jennifer | Richland | W | F | 23 | F | 2009 | Jail – 5 mo. | | Prosecutor: "The disease she carried is terminal, and the way it's sent and that is through sexual activity, and that's exactly what she engaged in with unknowing patrons." |
| Newt | Florence | W | M | 41 | F | 2009 | Prison – 36 mo. | | Judge: "This is a tragedy; and, again, people's lives are at risk." |
| Newt | Lincoln | W | M | 42 | F | 2009 | Prison – 96 mo. | | |
| Lilly | Wood | W | F | 54 | M | 2010 | Prison – 17 mo. | | |
| Lilly | Ashland | W | F | 54 | M | 2010 | Jail – 11 mo. | | Prosecutor: "[A] harmful biological device... means a bacteria, virus or other micro-organism or toxic substance derived from or produced from an organism that can be used to cause death, injury or disease in humans, animals or plants. So I do think that that fits." |