When is HIV a Crime? Sexuality, Gender and Consent

HIV criminalization is difficult to justify on the grounds advanced for it: public health and moral retribution. This Article engages with a third, underexamined rationale for HIV criminalization: sexual autonomy. Nondisclosure prosecutions purport to ensure "informed consent" to sex. However, almost all other forms of sexual deception—including deceptions that may jeopardize the partner's health—are lawful; rape law expressly accommodates an expectation that men may lie to get sex from women. Neither public health nor retributive considerations adequately justify singling out HIV from other, permitted forms of sexual deception. Moreover, most HIV transmission and nondisclosure takes place between men, but a large majority of prosecutions involve men accused of nondisclosing to women. The inconsistency of HIV laws with their ostensible rationales, their arbitrary inclusions and exclusions, and the striking disparities in HIV prosecutions all tend to raise suspicion that discriminatory impulses may be at work.

Criminal laws and their implementation tend to frame HIV as a crime that matters most when it disrupts expectations that non-drug-injecting heterosexuals should be immune to anxiety about HIV. They situate HIV as fairly benign when contained within stigmatized populations such as gay men, intravenous drug users, Africans and sex workers. When HIV-positive people transgress these boundaries and cause heterosexual men and women to worry about HIV, though, this transgression is often punished as a crime, even when the behavior poses no transmission risk. HIV laws and their implementation raise concern that discriminatory fallacies about race, gender and sexuality may shape perceptions of whether, when and why HIV is a crime.

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WHEN IS HIV A CRIME? SEXUALITY, GENDER AND CONSENT

- Kim Shayo Buchanan[1]

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.[2] But should failure to do so be a crime?

Throughout the United States and Canada, courts and legislatures tend to assume that it should. In nearly every state, people with HIV have been prosecuted for failing to disclose their serostatus before having sex.[3] Between 1987 and 2005, twenty-four states passed statutes that criminalize sexual nondisclosure of HIV. 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. In most states,

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[2] See, e.g. Scott Burris & Matthew Weait, *Working Paper: Criminalisation and the Moral Responsibility for Transmission of HIV,* Working paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, 7-9 July 2011, at 3 (2012) (people living with HIV owe a "moral duty" to disclose or practise safer sex); PM 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 practicing high risk behavior in Los Angeles and Seattle,* 80 Sex. Transm. Infect. 512, 516 (2004) (most HIV-positive men recognized an "ethical responsibility" to disclose); Scott Burris et al., *Do Criminal Laws Influence* negative *HIV Risk Behavior? An Empirical Trial*, 39 Ariz. St. L.J. 467, (2007) (large majorities of HIV-positive and HIV- respondents agreed that people with HIV should disclose their serostatus before sex); 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, 1223 (2010) (65% of respondents believed that it should be illegal for an HIV-positive person to have *unprotected* sex without telling the other person of their status (the study did not ask whether it should be a crime to have *protected* sex). Canadian surveys of HIV-positive respondents found that more than 70% supported criminalization of nondisclosure before unprotected sex "at least in some circumstances": Barry D. Adam et al, *How Criminalization is affecting people living with HIV in Ontario* (2012), at http://alturl.com/r8d4q.

[3] *See generally* CENTER FOR HIV LAW & POLICY POSITIVE JUSTICE PROJECT, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES (2012) ("CHLP, ENDING AND DEFENDING"), at http://www.hivlawandpolicy.org/resources/view/564, surveying HIV-specific laws and criminal prosecutions (including nondisclosure and other HIV-specific crimes and sentence enhancements) across all US states and territories. CHLP, PROSECUTIONS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2013 (frequently updated), at http://www.hivlawandpolicy.org/resources/view/456 ("CHLP, PROSECUTIONS"); and by Zita Lazzarini et al, *Fields of Law: Evaluating the Impact of Criminal Laws on HIV Risk Behavior,* 30 J.L. Med. & Ethics 239, 250-51 (2002)).

[4] CHLP, ENDING AND DEFENDING, id., 1-2. Many states also have statutes that criminalize exposure to sexually transmissible infection (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. 2. CHLP, Prosecutions (documenting prosecution of HIV nondisclosure, biting and spittting as, *inter alia*, aggravated assault, reckless endangerment, and attempted murder).

condom use is no defense.[5] No law distinguishes lies about HIV status from situations in which the complainant simply assumed that the accused was HIV-negative. 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.[6] In general, nondisclosure complainants have not been infected: allegations of transmission appear to be rare.[7]

Although nondisclosure laws have consistently been upheld against constitutional challenges,[8] a well-established public health critique points out that HIV criminalization bears little relationship to transmission risks 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.[9] 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.[10] 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.[11]

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,[12] no state has repealed its HIV criminal law.[13] Nor do prosecutions seem to

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[5] California and requires HIV disclosure only before "unprotected" sex, defined as vaginal or anal intercourse without a condom: Cal. Health & Safety Code § 120291. See also Illinois S.B. 3673 (in force August 21, 2012). MINN. STAT. § 609.2241(1)(e) (condom use is a defense to nondisclosure).

[6] See Section I.A, infra.

[7] Trevor Hoppe surveyed every HIV-nondisclosure prosecution in Michigan between 1992 and 2010, finding that only 4 of 58 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 (2013). Carol Galletly & Zita Lazzarini surveyed every prosecution in Nashville between 2000 and 2010, finding that only three of fifteen sexual nondisclosure prosecutions (20%) involved any allegation of transmission. Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010,* 13 AIDS Behav. 2624 at 2628 Tbl. 3 (Jan. 22, 2013). See also CHLP, Prosecutions, *supra* note 3; Edwin J. Bernard, *Kafkaesque: A critical analysis of US HIV Non-disclosure, exposure and transmission cases, 2007-2009,* presented at International AIDS Society Conference 2010, http://alturl.com/397wh (of 82 HIV prosecutions identified in a 25-month period in the United States, only 7 (8.5%) involved an allegation of transmission).

[8] See, e.g. State v. Musser, 721 N.W. 2d 734, 749 (Iowa 2006); *Thomas*, 983 P.2d 245,248; Jensen, 564 N.W.2d 192, 197; *Holder*, 2003 WL 22138282 at 3-4; Gamberella, 633 S2d 595, 607 (La.App.1 1993); People v. Flynn, 1998 WL 1989782 (Mich. App.) at 5; *Turner*, 927 So. 2d 438,441; *Guevara*, 73 Cal. Rptr. 2d 421, 425

[9] See note 51, infra.

[10] See Part I.D, infra.

[11] See, e.g. Kaplan, *supra* note 8; Ari Ezra Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults,* 18 Va. J. Soc. Pol'y & L. 550 (2011)

[12] WHITE HOUSE, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 36-37 (2010), *at* http://alturl.com/5ji5q (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 testing and treatment, and may deter disclosure by increasing fears of discrimination).

[13] 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, id. In response to a 2011 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. In exchange for not opposing the bill, the ACLU of Illinois and two AIDS organizations negotiated changes that limited prosecutions to condomless anal or

be slowing down: rather, since the mid-2000s, they seem to be on the rise worldwide,[14] and there are no indications of a slowdown in the United States.[15]

The existing critique has largely neglected another influential rationale for HIV criminalization: sexual autonomy, or "informed consent."[16] If one partner is not told that the other has HIV, his or her sexual consent can be said to be invalid because it is uninformed. This reasoning, which has been adopted by the Supreme Court of Canada and assumed by many U.S. courts,[17] 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. [18]

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vaginal penetration with the specific intent to transmit HIV. Illinois S.B. 3673 (in force August 21, 2012); Ramon Gardenhire, *How Illinois' Criminal Exposure Law has Changed,* (July 27, 2012), at http://alturl.com/weiuj. See also Iowa SF 2297 (signed into law June 13, 2014), discussed infra note 199.

[14] *See, e.g.* UNAIDS BACKGROUND PAPER, CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: BACKGROUND AND LANDSCAPE, Prepared as background for the Expert Meeting on the Science and Law of Criminalisation of HIV Non-Disclosure, Exposure and Transmission, Geneva, Switzerland, 31 August-2 September 2011 at 7 (revised Feb. 2012) (United States and Canada account for "the vast majority of reported prosecutions" worldwide); Eric Mykhalovskiy and 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); Patrick O'Byrne, *Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?* 9 Sexuality Research & Soc. Pol'y 70, 70 (2012) (same); MATTHEW WEAIT, INTIMACY AND RESPONSIBILITY: THE CRIMINALISATION OF HIV TRANSMISSION (2007); Asha Persson & Christy Newman, *Making monsters: Heterosexuality, crime and race in recent Western media coverage of HIV,* 30 Sociology of Health & Illness 632, 632 (2008) (same, Australia); Sally Cameron et al, *International Trends toward the criminalization of HIV Transmission: UK, New Zealand and Canada: Laws, Cases and Response,* in Sally CAMERON & JOHN RULE, EDS., NAPWA MONOGRAPH, THE CRIMINALISATION OF HIV TRANSMISSION IN AUSTRALIA: LEGALITY, MORALITY AND REALITY 32 (2009), at http://alturl.com/gjth8 (noting that prosecutions for HIV transmission began in Scotland in 2001 and in England in 2003).

[15] 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. Hoppe; Galletly & Lazzarini (*supra* note 7 at 2628 Fig. 1) (finding a slight increasing trend between 2000 and 2010); CHLP, Prosecutions, supra note 2 (identifying 19 prosecutions in 2008, 34 in 2009, 33 in 2010, 44 in 2011, 26 in 2012, and 28 in 2013).

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

[17] See Section II.B, infra.

[18] U.S. critics of HIV criminalization have yet to substantively engage with the sexual assault 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 ELIZABETH A. SHEEHY, ED. SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE, AND WOMEN'S ACTIVISM 635, 655 (2012). See also Burris & Weait, supra note 2, at 13. Other Canadian legal scholars have criticized HIV criminalization for various reasons, but have not seriously challenged the holding of the Supreme Court of Canada in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, that nondisclosure vitiates sexual consent. See, e.g. Rebecca Cook, *Developments in Judicial Approaches to Sexual and Reproductive Health,* 21 Med. & L. 155, 161 (2002); 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 Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier*, (2011) 5:1 McGill J.L. & Health 7, 48-49, 57 (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*

Thus the first major 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 is to examine the role of race, gender and sexual inequalities in shaping legal and public perceptions about whether, when and why HIV should be treated as 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 forms of sexual coercion that conform to racialized, sexual and gender stereotypes receive disproportionate academic, judicial and administrative attention, sexual coercion that confounds stereotypical expectations is often ignored.[19] This Article suggests that a similar dynamic may be at work 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.

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 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.

Cases: Urging Caution in the Prosecution of HIV Non-Disclosure, (2011) 15:3 HIV/AIDS Pol'y & L Rev 15-23; Isabel Grant, *Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions,* (2009) 54:2 McGill L.J. 389-404; Isabel Grant, *The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV,* (2008) 31 Dal. L.J. 123-180; Sara Klemm, 519 fn 192; Carissima Mathen & Michael Plaxton, *HIV, Consent and Criminal Wrongs,* 57 Crim. L.Q. 464, 478-484 (2011); 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); athena network, *Ten reasons why criminalization of HIV exposure or transmission harms women,* 2009.

[19] See, e.g. Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. Rev. 1630 (2012); Kim Shayo Buchanan, *E-Race-ing Gender,* in MULTIDIMENSIONAL MASCULINITIES AND LAW: FEMINIST AND CRITICAL RACE APPROACHES (FRANK R. COOPER & ANN C. MCGINLEY, EDS.) (NYU Press, 2012); Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law,* 29 Yale L. & Policy Rev. 1 (2010).

Part III considers the role of race, gender and sexual hierarchies in the origins of HIV criminalization. HIV was largely ignored in 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 likely to acquire and transmit HIV—men who have sex with men—to heterosexual women, presenting a virus that is transmitted largely through male-male sex as a racialized crime that matters most when it affects heterosexual white 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 are 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 strong public health, retributive or autonomy reasons to criminalize HIV, the gendered, sexual and racial disparities that seem to pervade the theory and implementation of HIV crime point toward repeal.

Part I. Rationales for HIV Criminalization: Public Health and Moral Retribution

Arguments from moral retribution or "informed consent" 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 transmitted 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 risks of HIV is essential to evaluating arguments based on moral retribution or informed consent. This Part addresses those risks.

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 risk of transmission. Mubita, a Zambian-American, performed oral sex on an Idaho woman—an activity that cannot transmit HIV—but did not disclose.[20] He was sentenced to four years' imprisonment.[21]

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[20] Saliva cannot transmit HIV: CTR. FOR DISEASE CONTROL & PREVENTION, HIV Transmission Basics: "*Can I get HIV from being spit on or scratched by an HIV-infected person?*" http://alturl.com/3koki. Thus performance of oral sex by a person with HIV carries "little to no risk". CDC, Oral Sex and HIV Risk, http://alturl.com/f9woo.

[21] State v. Mubita, 188 P.3d 867, 882-83 (Idaho 2008).

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 undetectable levels. As a result, he was incapable of transmitting HIV.[22] Moreover, he used a condom when he had one-time sex with a new partner. This activity posed "no realistic possibility of transmission."[23] He was sentenced to twenty-five years' imprisonment.[24] 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 is no longer permitted to see his nieces and nephews.[25]

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 (MSM). At the same time, these laws tend to criminalize the conduct of HIV-positive people when their behavior causes anxiety to more privileged heterosexuals,[26] 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.

A. The Public Health Critique

Public health researchers are near unanimous in arguing that HIV should be decriminalized.[27] They contend that, by criminalizing low-risk activities such as oral sex and

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[22] See note 37, infra.

[23] R. v. Mabior, 2012 SCC 47 at para. 84 (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 notes 35 and 37-38, *infra*, and accompanying text.

[24] Saundra Young, *Imprisoned over HIV: One Man's Story,* CNN (Nov. 9, 2012), at http://alturl.com/7u5n6.

[25] 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." State v. Rhoades, 2014 WL 2619406 at 4, 8 (Iowa S.Ct., June 13, 2014).

[26] Complainants in nondisclosure cases are usually, but not invariably, women who had sex with men. See Part IV, infra. As the Rhoades prosecution demonstrates, some complainants are gay men. Like the Rhoades complainant, many of these men seem to be fairly privileged: see note 329, infra.

[27] See, e.g. Zita Lazzarini et al, *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda,* 103 Am. J. Pub. Health 1350 (2013); UNAIDS, Guidance Note, Ending Overly-Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical scientific, medical and legal considerations (2013), http://alturl.com/5i7az; Global Report: UNAIDS Report on the Global AIDS Epidemic 2012, at A7, http://alturl.com/oot8w ("Global Report"); GLOBAL COMMISSION ON HIV AND THE LAW, HIV AND THE LAW: RISKS, RIGHTS & HEALTH (2012), http://alturl.com/bh35n ("GLOBAL COMMISSION REPORT"); Mykhalovskiy & Betteridge, *supra* note 15; Burris S & Cameron E. The case against criminalization of HIV transmission. JAMA. 2008;300(5):578-81; Kaplan, *supra* note 8; Carol L. Galletly & Stephen D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws,* 32 J. L. Med. Ethics 327 (2004); UNAIDS, Brief policy: criminalization of HIV transmission (2008); National Alliance of State & Territorial AIDS Directors; and WHITE HOUSE, NATIONAL HIV/AIDS STRATEGY, *supra* note 12 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). *See also* National Alliance of State & Territorial AIDS Directors; and CHLP Positive Justice Project, Consensus Statement on the Criminalization of HIV in the United States (2013) (opposing criminalization and endorsed by, inter alia, HIV Justice Network, HIV

sex with a condom, HIV statutes contribute to "the already substantial public misunderstanding of transmission risk,"[28] encouraging mistaken fears that risk reduction strategies do not work. Most criminal nondisclosure laws punish sexual activities that pose negligible risk of transmission (e.g., penetration with a condom,[29] or receiving oral sex[30]), alongside sexual activities that cannot transmit HIV at all (e.g., performing oral sex[31]).

Even "high risk" sexual activities, these critics point out, do not entail anything close to a probable risk of transmission.[32] 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.[33] 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.[34] Researchers have long known that correct use of condoms can reduce this risk by 95%,[35] 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

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Medicine Association, Gay and Lesbian Medical 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 American Council on Ethical and Judicial Affairs, *Ethical Issues Involved in the Growing AIDS Crisis,* 259 JAMA 1360, 1361 (1988) (AMA recommending "serious consideration" of criminalization of nondisclosure).

[28] Symington, 653. See also, e.g. Galletly & Pinkerton, *supra*; CHLP, ENDING AND DEFENDING, *supra* note 3 at 3; Kaplan, *supra* note 8 at 9, 19, 23, 36, 41-42, 47; GLOBAL COMMISSION REPORT, id. at 20, 23; Burris & Cameron, supra note 27 at 579-80; Lazzarini 1350-51.

[29] See note 35, infra, and accompanying text.

[30] The transmission risk of performing oral sex on an HIV-positive person is estimated to be "very low, but non-zero"—about 0.04%. R.F. Baggaley et al, *Systematic review of oro- genital HIV-1 transmission probabilities*. 37 Int J Epidemiol. 1255 (2008); *see also* E. Vittinghoff et al, *Per-contact risk of human immunodeficiency virus transmission between male sexual partners.* 150 Am J Epidemiol. 306 (1999).

[31] See note , supra.

[32] See, e.g. Kaplan, *supra* note 8; 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); Lazzarini, *supra* note 3; Burris & Cameron, supra note 27. The per-act probablility 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). 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. Other factors that can influence the transmissibility of HIV between two people include the 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. Pregnancy can increase a woman's susceptibility to HIV infection. Julie Fox et al, *Quantifying sexual exposure to HIV within a sero-discordant relationship: development of an algorithm,* 25 AIDS 1065 (2011); K.A. Powers, *Rethinking Heterosexual Infectivity of HIV-1: A Systematic Review and Meta-Analysis,* 8 Lancet Infect. Dis. 553 (2008).

[33] Marie-Claude Boily et al, Review: Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies, 9 Lancet Infect. Dis. 118, 122 (2009).

[34] Rebecca F. Baggaley et al, *HIV transmission risk through anal intercourse: systematic review, meta-analysis and implications for HIV prevention*, 39 Int. 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).

[35] See, e.g. Pinkerton SD, Abramson PR. Effectiveness of condoms in preventing HIV transmission. Social Science and Medicine 1997;44:1303-12 (correct use of condoms reduces per-act transmission risk by 95%); see also Weller SC, Davis-Beaty K. Condom effectiveness in reducing heterosexual HIV transmission. *Cochrane Database of Systematic Reviews* 2002, Issue 1. Art. No.: CD003255.

treatment (HAART), which has been standard HIV treatment protocol since about 1996.[36] 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.[37] Thus, after a 2008 study, the Swiss Federal Commission on HIV/AIDS concluded that an HIV-positive person with an undetectable viral load who has no other STI "cannot transmit HIV through sexual contact."[38]

Finally, although judges, prosecutors and journalists continue to characterize sexual exposure to HIV as a "death sentence,"[39] this description is no longer accurate. Since 1996, HAART has transformed HIV from a lethal disease to a chronic and manageable illness.[40] Today, people who receive HAART are likely to enjoy a near-normal lifespan and die of a cause unrelated to HIV.[41] HIV remains incurable, but AIDS is now preventable.

Public health critics also criticize HIV prosecutions for undermining public health interventions that, unlike criminalization, have been proven to reduce the spread of HIV: reducing stigma[42] and encouraging testing,[43] treatment, and safer sexual behaviors,[44]

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[36] See, e.g. Kaplan, supra note 7; 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); Cameron, *supra* note 14; Burris & Weait.

[37] Vernazza P 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.* Bulletin des médecins suisses 89 (5), 2008, English translation at http://alturl.com/8ken5. *See also* 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, 1390 (2010). Cohen MS, et al. *Prevention of HIV-1 infection with early antiretroviral therapy.* N Engl J Med 2011;365:493-505 (early treatment with HAART reduced the risk of transmission to an uninfected partner by 96%), which CDC, id., characterized 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 (January 2013). But see E. Hamlyn et al, *Plasma HIV viral rebound following protocol-indicated cessation of ART commenced in primary and chronic HIV infection.* 7 PLoS One (2012) (patient with suppressed viral load may sometimes rebound to infectious levels, increasing their risk of transmission, even though they are following the treatment regimen).

[38] Vernazza, id.

[39] Hoppe, *supra* note 7; see also, e.g. Shana Druckerman & Susan Welsh, *How women united to stop HIV-positive man,* ABC News, Sept. 11, 2011.

[40] See, e.g. GLOBAL COMMISSION REPORT, *supra* note 27, 20; Waldman, 557-61;; Antiretroviral Therapy Cohort Collaboration at 1390.

[41] See, e.g. Burris & Cameron, supra note 27; Galletly & Pinkerton; Lazzarini, *supra* note 3; Kaplan, *supra* note 8. 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).

[42] Nondisclosure laws stigmatize all people with HIV as "vectors of disease and potential criminals": Symington, 653-54; Galletly & Pinkerton, *supra* note 32, 457-58; **;** CHLP, ENDING AND DEFENDING, *supra* note 3 at 1, 3; Kaplan, *supra* note 8 at 2-3, 11, 41, 47; GLOBAL COMMISSION REPORT, *supra* note 27, at 20, 25; Burris & Cameron, supra note 27 at 579-80; Lazzarini, *Research and Policy Agenda* at 1330.

[43] Lazzarini, *supra* note 3 at 250-51; Galletly & Pinkerton, id. 457, 459; Symington, 653-54; CHLP, ENDING AND DEFENDING, *supra* note 3 at 3; Kaplan, *supra* note 8 at 46; Burris S. & Cameron E. supra note 27 at 579; Lazzarini, *Research and Policy Agenda* at 1350.

[44] 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, id. 453-55. *See also* CHLP, ENDING AND DEFENDING, *supra* note 3 at 3; Mykhalovskiy & Betteridge, *supra* note 15 at 39; Kaplan, *supra* note 8 at 14; Burris & Cameron, supra note 27 at 579**.** As Baggaley points out, *supra* note 34 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."

including mutual responsibility for risk reduction through condom use.[45] They 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."[46]

These critics object that, by criminalizing knowledge of HIV status, nondisclosure laws disincentivize testing.[47] They point out that people who know they have HIV are more likely to disclose, take precautions, and receive treatment than those who have not, and are much less likely than their untested counterparts to transmit HIV.[48] For example, a recent analysis estimated that the 20% of HIV-positive Americans who do not know of their infection are responsible for 44-59% of transmission.[49] 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.[50] Unsurprisingly, 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.[51]

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[45] Galletly & Pinkerton, id. 453-55; Kaplan, id. at 41, 46; Mykhalovskiy & Betteridge, id. See also, e.g. CDC, High-Impact Prevention: CDC's Approach to Reducing HIV Infections in the United States, 3-5 (2012), http://alturl.com/3u59d (listing destigmatization, HIV testing, HAART treatment, and testing and treatment for other STIs as HIV-prevention strategies that have been "proven effective").

[46] Galletly & Pinkerton, id. 455; Kaplan, id. at 41, 47.

[47] See, e.g. Sean Strub, *Prosecuting HIV—Take the Test and Risk Arrest?* Positively Aware, May/June 2012, at http://alturl.com/7cidj. There is little, if any, evidence that HIV prosecutions actually deter testing: rather, they seem to have little effect on behavior. See note 51, infra.

[48] See, e.g. Lazzarini, *supra* note 3, 250-51; Galletly & Pinkerton, *supra* note 32, 457, 459; Kaplan, *supra* note 8 at 29, 34, 46-47; Burris & Cameron, supra note 27 at 579; Symington, 653-54; 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. AIDS 446, 448 (2005).

[49] H.I. Hall et al, *HIV transmissions from persons living with HIV who are aware and unaware of their infection,* 26 AIDS 893 (2012); see also Kaplan, id. at 41, 47.

[50] Uninformed partners often continue to have sex, including condomless sex, after learning that the person has HIV: see, e.g. Cuerrier; R. v. D.C., 2012 SCC 45; State v. Yonts, 84 S.W.3d 516 (Mo. Ct. App. 2002); K. Buchacz et al, *Sociodemographic,behavioral and clinical correlates of inconsistent condom use in HIV-serodiscordant couples.* 28 J. Acquir Immune Defic Syndr. 289 (2001) (studying serodiscordant heterosexual couples who do not consistently use condoms); Teresa J. Finlayson et al, *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, 8 (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 (2011) (describing self-identified "bug chasers": HIV-negative gay men who seek unprotected receptive anal sex with HIV-positive partners with the intention of becoming infected with HIV).

[51] See, e.g. Lazzarini, *supra* note 3, 250-51; Burris & Cameron, supra note 27 at 578-80; Galletly & Pinkerton *supra* note 32; UNAIDS, Brief Policy, *supra*; National Alliance of State & Territorial AIDS Directors, 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; 2011. http://alturl.com/i9e5s; CHLP, ENDING AND DEFENDING, *supra* note 3 at 3, Kaplan, *supra* note 8 at 4, 41, 46-47; GLOBAL COMMISSION REPORT, *supra* note 27, 20, 25; Lazzarini, *Research and Policy Agenda* at 1350.

See also Horvath, supra note 2, 1226 (finding "no deterrent effect" of HIV-disclosure statutes on unprotected anal intercourse); Patrick O'Byrne et al, *Nondisclosure Prosecutions and HIV Prevention: Results From an Ottawa-Based Gay Men's Sex Survey,* 24 J. Ass'n of Nurses in AIDS Care 81, 85 (2013) (finding that a minority of respondents who said their awareness of nondisclosure prosecutions affected their behavior, and that these respondents reported greater reluctance to talk with health providers about their sexual behavior, less likelihood of testing, and greater frequency of unprotected anal intercourse with more partners); Carol L. Galletly et al, *New Jersey's HIV-Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status*

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,[52] receiving oral sex,[53] and for vaginal or anal intercourse where a condom was used.[54] 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*],"[55] and took judicial notice of this erroneous "fact."[56] In 2009, a Michigan exotic dancer was convicted of nondisclosure after a lap dance client rubbed her vagina with his nose[57]—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, and nondisclosure to intravenous drug users. "[T]he underinclusiveness of a [public health measure], like the overinclusiveness of such a measure, casts doubt on the sincerity of the purported objective."[58] 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

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Disclosure Behaviors of Persons Living with HIV, 102 Am. J. Pub. Health 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 Disclosure Law,* 24 AIDS Care 174 (2012) (finding mixed impact of law); Burris, supra note 2 at 497, 502-03 (finding that "Neither anal nor vaginal sex without a condom was significantly associated with beliefs about whether law requires condom use"); Trevor Hart *et al*, *Partner Awareness of the Serostatus of HIV-Seropositive Men who Have Sex with Men),* 9 AIDS and Behaviour 163 (2005); Limin Mao et al, *"Serosorting" in Casual Anal Sex of HIV-Negative Gay Men is Noteworthy and Increasing in Sydney, Australia,* 20 AIDS 1204 (2006). *But see* Adeline Delavande et al, *Criminal Prosecution and Human Immunodeficiency Virus—Related Risky Behavior,* 53 J. Law & Econ. 741 (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).

[52] See, e.g. State v. Mubita, 188 P.3d 867, 881-82, 883 (Idaho 2008); "Eric," the first prosecution in Michigan, cited in Hoppe, *Sickness to Badness,* 15-16; Shelton v. State, 2009 WL 1490929 (Nev. 2009); *Oklahoma City man arrested on suspicion of transmitting AIDS,* NEWSOK, August 27 2009, available at http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100?custom_click=rss; *Commonwealth v. Cordoba,* 902 A.2d 1280 (Pa. Super. 2006).

[53] See, e.g. State v. Stevens, 719 N.W.2d 547 (Iowa 2006); L.A.P. v. State, 60 So.2d 693 (Fl.App.2 2011).

[54] See, e.g. Rhoades; "Charlie," discussed in Hoppe, *Sickness to Badness, supra* note 7*,* 21-22.

[55] State v. Stevens, 719 N.W.2d 547, 551 (Iowa 2006)

[56] Id. But see Rhoades v. State, supra note 25 at 8, holding that, as of 2008, a court could not take judicial notice that anal sex with a condom could transmit HIV, regardless of viral load.

[57] "Jennifer," cited in Hoppe, *Sickness to Badness*, 23-24.

[58] Sullivan & Field, *supra* note 83 at 149.

of the complainant (much more than that of the accused) tends to shape perceptions of whether and when sex is a crime.[59]

The first status-based exemption is sexual orientation: Florida's HIV-exposure statute has been held to require disclosure of HIV status before heterosexual activity, but not between same-sex partners.[60] 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 against nondisclosing men who have sex with men.

The second 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 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.[61] 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 use of shared needles and syringes for intravenous drugs. ... The AIDS virus also has been found in small amount in tears and saliva, but there is no evidence of transmission from those

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[59] See, e.g. Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1441 (1991); Berta Esperanza Hernández-Truyol, *Sex, Culture and Rights: A Re/Conceptualization of Violence for the Twenty-First Century,* 60 Alb. L. Rev. 607 (1993); Angela Harris, *Gender, Violence, Race, and Criminal Justice,* 52 Stan. L. Rev. 777 (2000); Adrienne Davis, *Slavery and the Roots of Sexual Harassment,* in *Directions in Sexual Harassment* (eds. C. MacKinnon & R. Siegel) 457 (2003). "[V]ictim characteristics—particularly the victim/offender relationship—emerge as the most significant predictors of legal responses to sexual assault"; "crimes involving White victims and African American offenders . . . are treated more harshly than are crimes involving African American victims," a trend which is "particularly pronounced for sexual violence." 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* Cassia Spohn *et al*, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 Soc. Probs. 206, 224 tbl.3 (2001); Christopher D. Maxwell, Amanda L. Robinson & Lori A. Post, *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 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). Melinda Tasca et al, *Police decision making in sexual assault cases: Predictors of suspect identification and arrest,* 28 J. Interpersonal Violence 1157, 1171 (2012) ("victims 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"); E.E. Mustaine, *Social disorganization and unfounded sexual assault case clearances,* 28 Violence & Victims 90, 96 (2013) (male-victim sexual assault cases 52% more likely to be deemed "unfounded" than female-victim sexual assault allegations). *See also 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).

[60] See L.A.P. v. State, 62 So.3d 693 (Fl.App.2 2011), but see State v. D.C., 2013 WL 2359490 (Fl. App.5 May 31, 2013), discussed supra note -.

[61] See, e.g. JACQUES PÉPIN, THE ORIGINS OF AIDS 106-107 (2011); 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 Hospital Epidemiology 944, 950 (2006).

sources."[62] Nonetheless, the Michigan legislature criminalized nondisclosure before oral sex and digital penetration—and did not criminalize nondisclosure before sharing an unsterilized needle.[63]

Although around ten percent of recent transmissions are attributed to intravenous drug use,[64] only seven states nominally require disclosure of HIV prior to sharing a needle or works.[65] The Center for HIV Law and Policy (CHLP) estimates that seven other HIV statutes could be construed to allow prosecution for needle sharing.[66] There have been several prosecutions for deliberate needle-stabbings that were intended to transmit HIV, but neither the Positive Justice Project nor the Nashville or Michigan study has found a single prosecution for consensual sharing of needles or drug injection equipment.[67] In a search of Google, Lexis 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, prostitution with HIV is subject to enhanced penalties in many states, and these laws are vigorously enforced.[68] In Nashville, there are more prosecutions for "aggravated prostitution" than for sexual nondisclosure between noncommercial partners.[69] Police do not wait for johns to come forward with criminal complaints: most Nashville prosecutions involved plainclothes police stings. In Tennessee as in other states that criminalize HIV-prostitution, HIV-prostitution is a crime, even if the sex worker discloses her or his serostatus, and regardless of transmission risk.[70] A majority of the Nashville

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[62] Michigan Dept. of Public Health, AIDS in Michigan: A Report to the Governor and the Legislature at 5 (February 1987)

[63] See, e.g. Blue Ribbon Committee, at 2; House Republican Task Force, at 10; CDC (1987).

[64] Of 47,500 new HIV infections in 2010, 2,400 were men infected though "injection drug use", 1,500 were women infected this way, and 1,600 were men who reported both "male-to-male sexual contact" and "intravenous drug use"). Centers for Disease Control and Prevention. Estimated HIV incidence in the United States, 2007– 2010. 17(No.4) *HIV Surveillance Supplemental Report* 15 Tbl. 1 (2012), at http://alturl.com/tnhbo ("CDC, HIV Supplemental Report 2007-2010").

[65] *See* GA. CODE ANN. §§ 16-5-60(c)(2)(West 2010); IND. CODE ANN. §§ 16-41-7-1(c), (d); Iowa Code § 709C.1(2)(c), (5); MO. REV. STAT. § 191.677 (1)(2)(b); S.C. Code Ann. § 44-29-145(5); SD § 22-18-31(3), § 22-18-33; TENN. CODE ANN. § 39-13-109(a)(3), (c)(1); V.I. CODE ANN. tit. 14, § 888(a);10A N.C. ADMIN. CODE 41A.0202(1)(b), (f), (g). Idaho, Illinois, Minnesota, North Dakota criminalize sharing an unsterilized needle even if HIV status is disclosed: IDAHO CODE ANN. § 39-608(1)-(2); Illinois Code Ann. 5/12-16.2(3)(b); MINN. STAT. § 609.2241(2)(3); N.D. CENT. CODE § 12.1-20-17(1). Kansas and the U.S. Virgin Islands criminalize sharing an unsterilized needle with the intent to transmit HIV: 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (See New Sec. 59(a)(3), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(a)(3) (West 2010)); V.I. CODE ANN. tit. 14, § 888(a), (c).

[66] CHLP, State-by-state Criminal Laws Used to Prosecute People with HIV (2012), http://www.hivlawandpolicy.org/resources/view/763

[67] CHLP, Prosecutions reports one recent prosecution for consensual needle sharing, but the man was charged only after he allegedly stabbed a detective with a used needle. Michelle Hunter, *Kenner man accused of exposing JPSO detective, two others to HIV,* Times-Picayune (April 14, 2014).

[68] See, e.g. CHLP, ENDING AND DEFENDING, *supra* note 3.

[69] Galletly & Lazzarini, *supra* note 7 at 2628 Tbl. 3 (finding 25 prosecutions for "aggravated prostitution" and fifteen for sexual nondisclosure). Hoppe's Michigan study looked only at prosecutions for sexual nondisclosure. It did not consider HIV-prostitution. See Hoppe, *Disparate Risks*.

[70] See HIV-prostitution statutes reproduced in CHLP, Ending and Defending.

prosecutions—13 of 25—involved sex workers who agreed to perform oral sex,[71] which cannot transmit HIV. 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.[72]

At the same time, state laws and their enforcement do not aggressively punish HIV exposure or transmission when the *victims* are sex workers. Only five states criminalize HIV-positive clients, as well as sex workers.[73] 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.[74] In Nashville, no client has been prosecuted;[75] the CHLP has not identified any case in which a client was prosecuted for exposing a sex worker. In the only client prosecution I have been able to find, the HIV-positive client had propositioned a victim who turned out not to be a sex worker.[76]

C. Moral culpability

Although criminal law is not an effective public health strategy, it can send potent symbolic messages. HIV criminalization might be justified by "the urge to punish or seek retribution."[77] Prosecution might represent "a visible political symbol of seriousness of purpose in controlling AIDS."[78]

Public health and legal critics have challenged the retributive rationale, arguing out that HIV nondisclosure is not always morally blameworthy.[79] The stigma and discrimination faced by people with HIV makes disclosure risky as well as difficult, they point out, and partners could protect themselves by using condoms or engaging in safer sexual behaviors.[80]

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[71] Galletly & Lazzarini, *supra* note 7 at 2628. 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; GA. CODE ANN. §§ 16-5-60(c)(3)-(4); Fla. Stat. Ann. § 796.07; S.C. Code Ann. § 44-19-145; GUAM CODE ANN. tit. 9, § 25.10(8) & (9); Pa. Cons. Stat. Ann. § 5902(A), (F).

[72] See, e.g. See, e.g. People v. Hall, 2007 WL 2121912 (sex worker sentenced to 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 (La.Ct.App. 1998) (sex worker who agreed to perform oral sex on an undercover police officer sentenced to five years at hard labor); State v. West, 2009 WL 4268554 (Oh.App.); CHLP, ENDING AND DEFENDING, *supra* note 3, at 25 (California, sex worker charged despite carrying condoms), 44 (Florida, oral sex), 95-96 (Louisiana, oral sex); CHLP, Prosecutions (prosecutions of HIV-positive sex workers for offering oral sex in in Florida (June 2013), Nebraska (June 2013) and Colorado (Feb. 2011); Michael Scarcella, *Woman Charged with Exposing Men to HIV,* HERALD TRIBUNE, Oct. 10. 2007, at BCE5 (offering oral sex).

[73] CHLP, ENDING AND DEFENDING, *supra* note 3.

[74] Colo. Rev. Stat. §18-7-201.7, §18-7-205.7 (HIV-prostitution a Class 5 felony, carrying a maxiumum sentence of three years; patronizing a prostitute while HIV-positive a Class 6 felony, carrying a maximum sentence of eighteen months, Colo. Rev. Stat. §18-1.3-401).

[75] Galletly & Lazzarini, *supra* note 7, 2627 Tbl. 2

[76] Erin Alberty, *Price police say HIV-positive man solicited sex from teen* (Salt Lake Tribune, June 7, 2013), cited in CHLP, Prosecutions.

[77] Grant, Boundaries, 154.

[78] Gostin, supra note 9 at 1019.

[79] See, e.g. GLOBAL COMMISSION REPORT, *supra* note 27, 20; CHLP, ENDING AND DEFENDING, *supra* note 3 at 3; Kaplan, *supra* note 8 at 5, 6, 9, 15, 17, 23, 24, 25, 26, 27, 29, 30, 33, 38; Burris & Cameron, supra note 27 at 579, 580

[80] See, e.g. WEAIT, id.; Kaplan, *supra* note 8; Mykhalovskiy & Betteridge, *supra* note 13; GLOBAL COMMISSION REPORT, id.

These critics note that news reportage often conflates sex without disclosure with malicious attempt to transmit HIV.[81] 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."[82] In reality, these critics point out, people who have sex without disclosure rarely set out to infect their uninformed partners. As Kathleen Sullivan and Martha Field pointed out in 1988, "Having sex or sharing needles is a highly indirect modus operandi for the person whose *purpose* is to kill."[83] 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."[84] Reports of intentional sexual transmission, Bernard observes, have often turned out to be hoaxes.[85]

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 puts other people at risk."[86] 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 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 nondisclosure accused 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;[87] some even faked evidence of negative HIV test results.[88] Many had unprotected

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[81] See, e.g. Bernard; Weait, id.; Persson & Newman; GLOBAL COMMISSION REPORT, *supra* note 27,.

[82] See Part III, infra.

[83] Kathleen Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State,* 23 Harv. C.R.-C.L. L. Rev. 139 (1988) (pages not numbered: in text btw fn 74-75), (emphasis in original).

[84] E.J. Bernard, HIV and the Criminal Law, at http://alturl.com/2i7kz, citing 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, *Father is guilty in HIV case,* New York Times, 6 December 1998. See also State v. Schmidt, 771 So. 2d 131 (La. Ct. App. 2000) (affirming conviction and sentence), writ denied, 798 So. 2d 105 (La. 2001), cert. denied,535 U.S. 905 (2002) (physician extracted HIV-infected blood from two patients and injected it into his ex-lover)

[85] Bernard, id. citing 'Porn star Jackie Braxton sparks mass panic with hoax claim to have infected 500 men with AIDS' *Daily Mail*, 19 January 2010; Bernard EJ '*China: woman accused of intentionally infecting 30 men'*, Criminal HIV Transmission, 9 October 2009." (allegations turned out to be a malicious smear against an HIV-negative woman by a vengeful ex-boyfriend).

[86] *HIV—Criminal Exposure—Penalties: Hearing on S.B. 2244 Before the Tennessee Senate Judiciary Committee*, 1994 Leg., 99th Sess. 4-5 (TN. 1994) (Statement of Jordan, Senator, TN. Senate). See also *HIV—Criminal Exposure—Penalties: Hearing on S.B. 2244 Before the Tennessee Senate Regular Session*, 1994 Leg., 99th Sess. 4-20 (TN. 1994) (Statement of Rice, Senator, TN. Senate) ("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.") **[Note to eds.: I have just received legislative history for Ohio and California, and an RA is reviewing them.]**

[87] See, e.g. State v. Musser, 721 N.W. 2d 734, 744 (Iowa 2006); The Spokesman-Review, *Man w/ HIV gets prison time for assault,* Oct. 11, 2010; Lisa Marchesoni, *Husband indicted for kidnapping domestic violence worker,* Murfreesboro Post, Nov. 15, 2008, http://goo.gl/09jy7.

vaginal or anal sex,[89] both of which are "high-risk" behaviors for HIV transmission (although the infection risk of a single incident of unprotected penetration remains quite low[90]). Some misled partners over the course of a long-term relationship;[91] some had unprotected sex over a sustained period and infected their partners,[92] and a few impregnated their female partners without telling them they were HIV-positive, putting both woman and baby at risk of infection.[93] A few were alleged to have intentionally sought to transmit HIV.[94]

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 Part I) deserve prosecution and punishment as criminals. Because their sexual activities posed no "realistic possibility of transmission of HIV,"[95] the retributive justification for prosecuting them is not readily apparent—especially in a legal culture where other sexual deceptions are not crimes.[96] Yet prosecutions like theirs, in which the uninformed partner was put at no (or negligible) risk, are not rare.[97]

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.[98] Ironically, nondisclosure laws may exacerbate these barriers to disclosure: by confiding HIV status, a person may expose him- or herself to the allegation that he or she did not disclose.[99] Alison Symington questions "whether legal provisions could ever be a significant factor in decision making about safer sex 'in the heat

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88 Topix Fitchburg, *Police: Fitchburg man with HIV put partners at risk,* Apr. 12, 2012, http://goo.gl/zq389

89 See, e.g. John W. Goodwin, *Randal Brown reaches plea deal in HIV assault,* vindy.com, March 2, 2012; *Minnesota v. Rick*, 821 N.W.2d 610 (Minn. Court of Appeals 2012); Topix Fitchburg, id.; Meghan M. Cuniff, *HIV-positive teen accused of assault,* The Spokesman-Review, Oct. 13, 2010.

90 See note 30, supra.

91 See, e.g. Thompson-Sarmiento, infra; Spokesman-Review, *Man w/HIV*; Kevin Held, *Jermaine Johnson charged with spreading HIV,* KSDK.com, Jan. 24, 2012; Rhonda Cook, *Man arrested for giving HIV to partner,* Atlanta Journal-Constitution, Aug. 5, 2011; Darryl Fortner; Darren Chiacchia; Sean Lee; Sykes v. State, 372 SW3d 33 (Mo.App. 2012)

92 See, e.g. Goodwin, supra; Held, supra; Cook, supra; Beth Burger, *More HIV victims speak out,* timesfreepress.com July 30, 2011; Lonnie Shayne Tabor

93 See, e.g. Cook, supra; Burger, id.; Rachel E. Leonard, *Man accused of knowingly exposing girlfriend to HIV,* goupstate.com, March 21, 2008; Johnson v. State, 785 N.E.2d 1134 (Ind. App. 2003).

94 See, e.g. Druckerman & Welsh, supra note 39; John Tuohy, *Police say AIDS patient put 26 women at risk,* Indiana Star Feb. 25, 2010; M. Alex Johnson, *Michigan man may have intentionally infected hundreds with HIV,* NBC News, Dec. 30, 2011 (man turned himself in to police claiming that he was HIV-positive and had "set out to intentionally infect as many people as he could").

95 See, e.g. R. v. Mabior at paras. 84, (reviewing scientific evidence that sex with a condom while viral load is negligible does not put partner at "significant risk" of HIV infection).

96 See Part II.C, infra.

97 See also, e.g. notes 52-143, supra, and accompanying text.

98 See, e.g. Symington, 651; Kaplan, *supra* note 8, 26, 34, 41; Burris & Cameron, supra note 27, 580; GLOBAL COMMISSION REPORT, *supra* note 27, 23; CHLP, ENDING AND DEFENDING, *supra* note 33-4; WEAIT, *supra* note 14; see also Galletly & Pinkerton, *Challenges Associated with Disclosing One's HIV-Positive Status*, http://www.aidsmap.com/page/1442642/#ref1190569; Sheon & Crosby, at 2116.

99 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 note , infra.

of the moment,' particularly if alcohol, drugs, or domestic violence are involved."[100]

Thus, as Carol Galletly and Stephen Pinkerton observe, the nondisclosure that prosecutors and reporters construct as "a conscious effort to deceive" may actually result from "denial, lack of self-efficacy to disclose, or concerns over potential repercussions of disclosure."[101] 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 90% of people with HIV disclose their HIV status to long-term, intimate or exclusive partners.[102] By contrast, they report high rates of nondisclosure—anywhere from 30-76%—to casual partners.[103] It would be unfair and unrealistic to criminalize sexual activity by HIV-positive people based on a presumption that they have sex (or should have sex) only after an intimate and trusting relationship has been established.

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 58 Michigan prosecutions that resulted in conviction, eight defendants were "described in various ways as having 'limited intelligence.'"[104] For example, "Sandra," a Michigan woman whose IQ of 72 sets her at the borderline of developmental disability,[105] 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." 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. The guardian of the foster home reported her to police, and Sandra was convicted for nondisclosure.[106]

Other HIV-positive women have been convicted of nondisclosure after they ended years-long relationships with HIV-negative men who were abusing them. When the relationships end, the abusive ex-partner can report them to police for nondisclosure at the outset of the relationship.[107]

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, the defendant helped beat her to death with a two-by-four.[108] 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

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[100] Symington, id.
[101] Galletly & Pinkerton, *Conflicting Messages*.
[102] See note 268, infra.
[103] See notes 263-340, infra, and accompanying text.
[104] Hoppe, *From Sickness to Badness,* 16. See also Cameron, *supra* note 14 at 36 (in New Zealand, three of five male-to-female nondisclosure accused "suffered from a diagnosed mental illness or low intellectual ability").
[105] American Psychiatric Association, Fact Sheet: "Intellectual Disability," 2013 (citing DSM-V).
[106] Hoppe, Sickness to Badness, 14.
[107] See, e.g. e.g. R. v. D.C. (complainant reported D.C.'s nondisclosure to police only after he was convicted of assaulting D.C. and her son); "Shannon of South Carolina", cited in 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)
[108] Chattmon v. State, No. 05-93-01605-CR, 1996 Tex. App. LEXIS 1329, at *1 (Apr. 4, 1996).

uncommon for people to have sex with partners they hardly know.[109] 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 non-infectious because his viral load was undetectable. 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." He wanted to disclose, but "clammed up," because, he says, "I was afraid he was going to blab it to everybody."[110] Bogardus says he wanted to use a condom, but the partner refused. The other man did not become infected. Bogardus now faces up to 25 years' imprisonment and lifetime registration as a sex offender.

The criminal law should not encourage HIV-negative people like Bogardus' 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.[111] Still, this message is normatively undesirable, and criminal sanctions should not be used to convey it.

A narrower nondisclosure law more 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 David Bogardus) whose nondisclosures, though ethically wrong, do not warrant imprisonment and 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 between nondisclosures that are morally blameworthy and those that are not.

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.[112] Public health researchers have developed non-criminal interventions that encourage disclosure without the bias and injustice involved in many nondisclosure prosecutions.[113] The CDC maintains a website dedicated to "High Impact Prevention"

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[109] See, e.g. Young, *supra* note 24; Kerry Lynn Hanson, http://goo.gl/LaVmY; Zuriel Roush http://goo.gl/PHlns; Joseph Daundry, http://bit.ly/q6Vpyt; *State v. Newlon*, 216 S.W.3d 180 (MO Court of Appeals, 2007); Heather Tatro, http://goo.gl/VLWbI.

[110] Lindsey Moon, *Critics Address Flaws in Iowa's HIV criminalization law,* The Daily Iowan, Feb. 9, 2012, http://alturl.com/nw5jk.

[111] See generally notes -, supra. Burris, supra note 1 at 472, found no evidence that the existence of criminal laws encourages sexual risktaking by HIV-negative persons.

[112] See note 147, infra.

[113] See, e.g. Carla Makhlouf Obermeyer et al, Facilitating HIV Disclosure Across Diverse Settings: A Review, 101 Am.J. Pub. Health 1011 (2011); Kalichman SC et al., Effectiveness of an intervention to reduce HIV transmission risks in HIV-positive people. *American Journal of Preventive Medicine.* 2001;21: 84-92. CDC, Compendium of Evidence-Based HIV Behavioral Interventions, Risk Reduction Chapter, "Healthy Relationships", at http://alturl.com/kvjgh; Wolitski, RJ (2005). "Effects of a peer-led behavioral intervention to reduce HIV transmission and promote serostatus disclosure among HIV-seropositive gay and bisexual men". *AIDS (London) (0269-9370)*, 19, p. S99.

strategies it recommends to help health departments and community-based organizations "provide the best evidence-based HIV prevention services."[114] None of these evidence-based strategies involves criminalization. Judges, legislators and legal scholars may find it hard to "conceive of sex outside of law,"[115] 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.[116] But, given the real constraints facing HIV-positive people and the ability of partners to protect themselves by choosing safer sexual activities, the failure to fulfil this obligation should not be a crime.

Part 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, to be valid, sexual consent must 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 resulted in any harm. The uninformed partner has been harmed 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 transforms otherwise-consensual 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 and critics of criminalization tend to assume that it will benefit vulnerable women against infection by 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

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[114] CDC, Effective Interventions: HIV Prevention that Works (2012), at http://alturl.com/rv8wm.
[115] Melissa Murray, *Strange Bedfellows,* 1312.
[116] See, e.g. Steven D. Pinkerton & Carol Galletly, *Reducing HIV Transmission Risk by Increasing Serostatus Disclosure,* 11 AIDS Behav. 698 (2007); G. Marks and N. Crepaz, "HIV-Positive Men's Sexual Practices in the Context of Self-Disclosure of HIV Status," 27 *Journal of Acquired Immune Deficiency Syndromes* 27 79 (2001).

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 transmitted infection can be "very scary."[117] 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: if they had known, they 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."[118] Plendl's intuition that people have a right to know whether potential partners are HIV-positive is appealing, and seems to be widely shared.[119] 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, if disclosed, might affect the decision whether to have sex.

Most nondisclosure complainants have not been physically harmed.[120] 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 she receives a negative HIV-test that is comfortably outside the "window period" for producing antibodies detectable by the most commonly used tests.[121] 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.[122] Uninformed partners who are especially anxious may not be reassured by a negative HIV test, even after the window period has closed.[123]

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[117] Christine Boyle, *The Judicial Construction of Sexual Assault Offences,* in Julian V. Roberts & Renate M. Mohr, eds. Confronting Sexual Assault: A Decade of Legal and Social Change 136, 145 (1994).

[118] Young, supra.

[119] See, e.g. Daniel H. Ciccarone et al., *Sex without disclosure of positive HIV serostatus in a U.S. probability sample of persons receiving medical care for HIV infection.* 93 Journal of Public Health, 949 at 953 (2003) (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 (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.")

[120] See note 7, supra.

[121] 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, "most people will develop detectable antibodies within 2 to 8 weeks (the average is 25 days)," and 97% of people will develop antibodies within three months. "In very rare circumstances, it can take up to six months to develop antibodies to HIV." CDC, Testing Basics for Consumers, "How long after a possible exposure should I get tested for HIV?" http://alturl.com/eh6mu.

[122] Young, supra.

[123] See, e.g. See, e.g. WKBN Firstnews, Man Gets Jail Time for Withholding HIV Status from Wife, http://alturl.com/x6gcp (quoting deceived wife as saying "It's like going through hell, literally knowing that

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. 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 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.[124] This involves a plausible, though inaccurate, assumption that informed partners will refuse sex, or will engage only in low- or no-risk sexual activities.[125] "Only those willing to risk HIV transmission, or who know how to take precautions against the virus, will accept defendant's offer of sexual contact," a Michigan appellate court predicted,[126] 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.[127]

i. 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 US states, established that the only deceptions that vitiate sexual consent were impersonation and therapeutic fraud (i.e., the accused tricked the victim into thinking that the sexual act was a medical procedure).[128] 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.[129]

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you can get a positive result or a negative result," and as saying that she would "have to spend the next nine years getting tested for HIV"); People v. Clayton, 2002 WL31058331 at 1 (Mich.App.) (after sex without nondisclosure, complainant was tested for HIV "about forty times").

[124] See, e.g. Musser, 744; Gamberella, 604; 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");

[125] See note 50, supra.

[126] Jensen, 464 n9. See also Gamberella; Musser

[127] 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." Dino Thompson-Sarmiento, *Exclusive: Honey Boo Boo Star "Uncle Poodle" Reveals: "My [HIV] test results came back positive."* Fenuxe magazine, 10 January 2013, at http://alturl.com/t69sc. 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." Strub, supra.

[128] R. v. Cuerrier, [1998] 2 S.C.R. 371, paras. 97-104.

[129] R. v. Cuerrier [1998], 2 S.C.R. 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. Canadian Criminal Code, ss. 265, 271, 273.1.

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 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."[130] Because a lie or omission about HIV could pose a "serious risk of significant harm," it constituted a fraud that vitiates sexual consent, regardless of transmission.[131] 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."[132]

Chief Justice McLachlin concurred. It seemed "right and logical"[133] that "lying" about HIV amounted to fraud that vitiates consent. 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."[134] But serious sexually transmitted 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 transmitted infection.

Ever since, nondisclosure of HIV (and, on two occasions, other sexual deceptions posing a serious risk to health[135]) has generally been prosecuted in Canada as aggravated sexual assault.[136] HIV and anti-rape advocates contend that sentences are longer, and conviction rates higher, in HIV prosecutions than in prosecutions for aggravated sexual assault[137]—that is, where the rapist "wounds, maims disfigures or endangers the life" of the victim.[138] In late 2012, the Supreme Court of Canada unanimously reaffirmed that HIV nondisclosure vitiates sexual consent, except where there is no "significant risk of bodily harm" because the accused has an undetectable viral load *and* uses a condom.[139]

ii. The United States

In the United States, where force requirements generally preclude equating nondisclosure with rape, statutory and judicial language nonetheless tends to conflate HIV nondisclosure with sexual assault. The overinclusiveness of criminal disclosure statutes may arise from statutory conflation of nondisclosure and sexual assault.

Michigan's law, for example, requires nondisclosure 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

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[130] Cuerrier, paras. 123, 126.
[131] Cuerrier, paras. 125-129. 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. para. 129.
[132] Cuerrier, para. 127.
[133] Cuerrier, para. 66 (McLachlin C.J., concurring).
[134] Cuerrier, para. 72 (McLachlin C.J., concurring).
[135] R. v. Jones, (2002) N.B.Q.B. 340 (acquittal for nondisclosure of hepatitis C); R. v. Hutchinson, (2010) N.S. C.A. 3 (accused poked holes in his condom, resulting in unwanted pregnancy and abortion).
[136] Grant, Rethink Cuerrier; Symington; Mykhalovskiy & Betteridge, *supra* note 13 at 50.
[137] Mykhalovskiy & Betteridge, *supra* note 13, id.
[138] In Canada, sexual assault is "aggravated" when it "wounds, maims, disfigures or endangers the life" of the victim. Canada Criminal Code, s.273(1). The sentencing range is five years to life. Id. s.273(2).
[139] R. v. Mabior, 2012 SCC 47; R. v. D.C., 2012 SCC 45.

emission of semen is not required."[140] This definition was drawn verbatim from a sexual assault statute,[141] 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.[142] Similarly, a Florida appellate court recently interpreted "sexual intercourse," which is undefined in the HIV-disclosure statute, by drawing upon an incest statute which defined the prohibited incest in almost exactly the same way.[143]

The importation of such definitions into criminal disclosure mandates implies that uninformed but otherwise-consensual sex with an HIV-positive person—without transmission[144]—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, and the median sentence for "other sexual assault" (which includes forced sexual acts "not involving intercourse," as well as statutory rape[145]) is three years eight months.[146] 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,

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140 MCL §333.5210

141 Hoppe, *Sickness to Badness*. See MCL §750.520a(r), 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."

142 ARK. CODE. ANN. § 5-14-123 (2006); Colo. COLO. REV. STAT. § 18-3-415.5, 18-3-401.6 (defining HIV-prostitution offense in these terms); GUAM CODE ANN. tit. 9, §§ 28.10; Minn. Stat. § 609.2241(1)(e), incorporating "sexual penetration" definition from Minn. Stat. § 609.341(12); N.J. STAT. ANN. § 2C: 34-5(b) prohibits acts of "sexual penetration" by a person with HIV without the partner's informed consent. In response to legislators' questions as to whether this offense was applicable to women, the Assembly Judiciary Committee pointed out that "sexual penetration" is defined in N.J.S. 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 Comittee Statement, Senate, No. 1297--L.1997, c. 201. OHIO REV. CODE ANN. § 2903.11(B) prohibits "sexual conduct" without disclosure of HIV infection; § 2903.11(E)(4) adopts the definition of "sexual conduct" from §2907.01 from the sexual offenses 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".

143 L.A.P. v. State, 62 So.3d 693 (Fl.App.2 2011) (finding that a statute requiring HIV disclosure before "sexual intercourse" did not apply to an HIV-positive woman who nondisclosed 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, however slight; emission of semen is not required") But see State v. D.C., 2013 WL 2359490 (Fl. App.5 May 31, 2013) (refusing to follow L.A.P., holding that the disclosure statute applied to same-sex oral and anal sex).

144 See note 7, supra.

145 Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables* at 3 Tbl. 1.1 (2011), at http://alturl.com/m69ux.

146 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".

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 casual sex partner (3 years)."[147] A man convicted of spattering blood on a police officer served six years.[148]

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 seven years nine months to 26.5 years,[149] compared to five years for non-aggravated rape;[150] in Iowa, the maximum sentence for HIV nondisclosure is 25 years,[151] compared to ten years for non-aggravated rape.[152] 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.[153] In many other states, sentences for HIV nondisclosure are comparable to those for rape: the sentencing ranges overlap.[154] 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 US courts uphold HIV nondisclosure crimes as public health measures,[155] their reasoning often invokes the right of a "partner [to] make an informed decision."[156] As the Iowa Supreme Court recently explained, "Surely it cannot be disputed that one considering having sexual intercourse with another would want to know

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[147] Galletly & Lazzarini, *supra* note 7 at 2629.
[148] Id.
[149] 93-318 months: WASH. REV. CODE ANN. §§ 9.94A.510.
[150] Wash Rev. Code Ann. §9A.44.060, 9a.20.021(1)(c) (third degree rape)
[151] IOWA CODE § 902.9(2)
[152] Iowa Code §§ 709.4, 902.9
[153] See, e.g. notes 22-25, *supra* and 110, *infra*, and accompanying text; Musser v. Mapes, 854 F.Supp.2d 852 (S.D. Iowa 2012) (50-year sentence for man convicted of nondisclosure to two women before consensual sex; no allegation of transmission). In May 2014, as this Article went to press, Iowa revised its law. While HIV exposure remains a class B felony subject to 25 years' imprisonment, this penalty is now limited to circumstances where the risk of transmission is "substantial," and where the accused had the specific intent to infect the uninformed partner. The revisions also expanded criminalization to two other transmissible diseases: meningitis and hepatitis. Where transmission does not occur, or where the accused acted with "reckless disregard" for transmission, nondisclosure is not a Class D felony, subject to a maximum of five years' imprisonment. Where reckless disregard does not result in transmission, nondisclosure is a misdemeanor. Iowa Senate File 2297 (signed into law May 30, 2014).
[154] In Missouri, HIV nondisclosure is punishable by ten to thirty years' imprisonment, while rape is punishable by five years to life: MO. REV. STAT. §§ 191.677(2), 558.011(1), Mo. Rev. Stat. § 566.030. In North Dakota, nondisclosure is punishable by up to twenty years' imprisonment, while sexual assault is punishable by six to twenty years: N.D. CENT. CODE §12.1-32-01(2); N.D. Cent. Code § 12.1-20-04, 35-50-2-5. *See also, e.g.* Arkansas (nondisclosure: 6-30 years, rape: 10-40 years) Michigan (nondisclosure: up to 4 years; forced "sexual contact": up to 2 years; forced "sexual penetration: up to 15 years); Ohio (nondisclosure: 2-8 years; rape: 3-11 years): ARK. CODE ANN. § 5-4-401(a)(2) See Ark.C.A. §§5-14-103(c)(1), 5-4-401(a)(1); MICH. COMP. LAWS ANN. § 777.13k; Mich. Comp. Laws. Ann. § 750.520e(2); OHIO REV. CODE ANN. §2929.14(A)(2);Ohio R.C. §§2907.02(2), 2929.14(A)(1).
[155] See note -, supra. See also M. Severson, *Omnibus AIDS Bill*, 5 Ga. St.U.L. Rev. 397, 398-399 (1988) (the stated purpose of the omnibus bill that, inter alia, criminalized HIV nondisclosure, was to "protect the health of Georgia's citizenry").
[156] Gamberella, 633 S2d 595, 604 (La.App.1 1993), endorsed in Musser, 744. See also 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 this compelling state interest" in "discouraging the spread of HIV")

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 ..."[157] 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."[158]

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."[159] 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."[160] In contrast to criminal prosecutions, though, tort liability requires proof that the nondisclosure resulted in physical injury.

Fear of HIV does not, on its own, ordinarily result in tort liability.[161] 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.[162] They have rejected claims by patients who became fearful after learning that a dentist or surgeon had HIV.[163] Unlike prosecutions, tort claims require "a genuine basis for the fear ... not premised on public misconceptions about AIDS."[164] 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.[165] A 1987 New York court rejected a wife's claim that she suffered "AIDS phobia" upon discovering her husband's infidelity with men.[166] Occasionally, a state court has upheld a tort claim for negligent infliction of emotional distress for fear of HIV unaccompanied by transmission or risk.[167] In general,

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[157] Musser, at 748.

[158] Musser v. Mapes, 854 F.Supp.2d 852, 666-67 (S.D. Iowa 2012) (emphasis in original).

[159] see, e.g. Berner v. Caldwell, 543 So.2d 686, 689 (Ala. 1989), quoted with approval in McPherson v. McPherson, para. 9; *Meany v. Meany,* 639 So.2d at 235; *Mussivand v. David,* 544 N.E.2d at 270; *Lockhart v. Loosen,* 943 P.2d 1074, 1080 (Okla.1997); *Howell v. Spokane & Inland Empire Blood Bk.,* 117 Wash.2d 619, 818 P.2d 1056, 1059 (1991).

[160] Kathleen K., 276-77. See also Leleux v. U.S., 178 F.3d 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).

[161] The torts of negligent transmission of sexually transmitted disease and fraudulent misrepresentation both require transmission. See generally, e.g. Mary G. Leary, *Tort Liability for Sexually Transmitted Disease,* 88 Am.Jur. Trials 153, §10 (updated 2013).

[162] See, e.g. Pendergist v. Pendergass, 961 SW2d 919, 924 (Mo.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)

[163] See, e.g. Majca v. Beekil, 183 Ill. 2d 407 (Ill. 1998) (no cause of action for fear of contracting AIDS through normal dental procedure); *Brzoska v. Olson,* 668 A.2d 1355 (Del.1995) (rejecting battery claims based on dentist's failure to advise patients that he was infected with HIV); Kerins v. Hartley, 33 Cal.Rptr.2d 172, 179 (Cal. 1994) (no emotional distress damages for fear of contracting HIV from surgeon where probability of infection was "statistically insignificant")

[164] Pendergist v. Pendergrass, at 926.

[165] Reynolds v. Hyland Manor, 954 P.2d 11 (1998);

[166] Doe v. Doe, 519 NYS 2d 595 (Kings Cty Sup Ct 1987)

[167] See, e.g. John & Jane Roes, 91 Hawai'i 470, 475 (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

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.

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 justification for the targeted criminalization of HIV. Part IV will offer a more fundamental challenge to the rape-by-deception argument, offering reasons to be skeptical of gendered arguments that sexual deception should always or often be a crime.

Many HIV-negative people might not want to have sex with an HIV-positive partner, regardless of whether the sex posed 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 partner 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 the reason for criminalization is independent of any health risk, it is not clear why nondisclosure of HIV should be punished as a crime when nondisclosure of other foreseeable dealbreakers is not.

Where there is no risk of transmission, HIV nondisclosure is comparable to nondisclosure of any non-infectious health condition that might have changed a partner's mind, such as a cancer diagnosis. 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. 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 s/he would have rejected had s/he known the truth. Yet nondisclosure of cancer is not a crime, nor should it be. Furthermore, if criminal laws were to single out nondisclosure of cancer as a crime while permitting almost all other forms of sexual deception, such a law would unfairly stigmatize people with cancer.

The greatest difficulty with the rape-by-deception argument for HIV criminalization, though, is that criminal law does not, in general, require that sexual consent be

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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").

"informed."[168] 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."[169] 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.[170] Decker and Baroni conclude, in a recent fifty-state survey of sexual assault laws: "Use of deception is [a] tolerated mechanism for achieving sex."[171]

The exceptions to this general rule are extremely limited. There are only two instances in which many—though not all—states treat nonforcible sex-by-deception as a crime: impersonation of a husband (but not a boyfriend[172]), and therapeutic fraud.[173] In the few states that purport to criminalize sexual deception outside these two categories,[174] prosecutions are rare.[175] 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 deception, or an abuse of power.[176]

Even where consent is obtained by impersonation or by therapeutic deceit, courts do not consistently treat sex by deception as a crime.[177] 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.[178]

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[168] John F. Decker & Peter J. 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, 1134, 1146 (2011).
[169] David Bryden, *Redefining Rape,* 3 Buff. Crim. L. Rev. 317, 457
[170] Decker & Baroni; Bryden; Estrich, *Real Rape*; Patricia J. Falk, *Rape by Fraud and Rape by Coercion,* , 70 (1998).
[171] Decker & Baroni, 1167; see also STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998); Jed Rubenfeld, *The Rule of Rape-by-Deception and the Myth of Sexual Autonomy,* Yale L.J. (2013)
[172] See *People v. Morales,* Docket B233796 CA App.2 (Jan. 4, 2013) (acquitting accused who had sex with the victim by impersonating the victim's boyfriend; 1873 statute criminalized non-forcible sex as rape when it was obtained by impersonating a spouse, but not by impersonating a boyfriend); Suliveres v. Commonwealth (Mass.2007); People v. Hough (NY 1.Crim. 1994).
[173] Rubenfeld; Decker & Baroni.
[174] Decker & Baroni, 1146-47. 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: Miss. Code Ann. § 97-29-55; S.C. Code 1976 § 16-15-50; Okla. Stat. tit. 21 § 1120 (2010); Murray, 38; Bryden, 459.
[175] Decker & Baroni, id. (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").
[176] Id. (describing sex-by-deception prosecutions).
[177] See, e.g. Boro v. Superior Ct., 163 Cal. App.3d 1224 (1985) (defendant called victim, pretending to be a doctor, telling her she had a fatal 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; then had sex with her claiming to be the donor. Acquitted as 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, Kansas City Star, July 29, 1995, at C2. (sexual assault charges dismissed for absence of "force or fear" elements; Kansas subsequently amended its statute to criminalize therapeutic fraud).
[178] Suliveres v. Commonwealth, 865 N.E.2d 1086, 1089 (Mass. 2007). See also, e.g. *People v. Morales,* Docket B233796 (CA App.2, Jan. 4, 2013) (calling for legislative reform to criminalize impersonation of unmarried partners as well as spouses); People v. Hough, 607 N.Y.S.2d 884 (NY 1st Dist.Crim. 1994) (acquitting accused

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[179] and abuses of trust by persons in authority.[180] This jurisprudence offers what Canadian Chief Justice Beverly McLachlin has justifiably criticized as a "crabbed view of consent and fraud."[181] 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."[182] 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.[183] 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"[184]—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.[185] Accordingly, other deceptions did not affect a man's (or woman's) liability for unlawful sex.

This rationale 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.[186] 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 failed to disclose his (female) biological sex.[187] Aeyal Gross contends that, by finding that such nondisclosure vitiates sexual consent, courts privilege complainants' identity as heterosexuals, protecting

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

[179] See supra note 173.

[180] 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. Milnarich, 518 Pa. 247 (Pa. 1988) (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).

[181] Mabior, para. 47.

[182] Rubenfeld

[183] Anne M. Coughlin, *Sex and Guilt,* 84 Va. L. Rev. 1, 32, 38 (1998).

[184] Coughlin, 32 (that is, the woman "neither knew nor should have known that her conduct was of the forbidden character").

[185] Coughlin, id. 33.

[186] See note 168, supra.

[187] See Aeyal Gross, *Gender Outlaws before the Law: The Courts of the Borderland,* 32 Harv. J. Gender & L. 165 (2009) (discussing seven such prosecutions in the United States, United Kingdom and Israel, all of which resulted in criminal conviction).

them against "non-voluntary and undesired homosexuality."[188] As one British trial court put it, "You 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."[189]

If HIV prosecutions purport to vindicate an interest that sexual consent be fully informed, we must ask why expanded criminal protections of this interest, beyond the two historic exceptions, would be limited to nondisclosures about HIV and transgender status. 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,[190] while punishing sexual deception by transfolk and people with HIV who violate conventional expectations of heterosexual privilege.

ii. 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. However, our criminal laws do not, in general, penalize sexual deceptions that can jeopardize health. Contraceptive fraud and nondisclosure of other sexually transmissible infections are generally not crimes. They 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.[191] Because HIV can be fatal, many commentators characterize HIV nondisclosure or deceit as "life-threatening."[192] 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.[193] 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,"[194] and "effectively denies that one's partner has any *meaningful* autonomy in *any* sphere, not just in the instant sexual context."[195]

The fact that HIV can be deadly, though, 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.[196] Other potentially deadly communicable diseases, such as hepatitis, human papillomavirus (HPV),

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[188] Gross, 190.
[189] R. v. Saunders (Doncaster Crown Ct., 1991), quoted in Gross, 208-09.
[190] See Section IV.E, infra.
[191] Schulhofer, 158; Bryden, 474; Boyle; see also Mathen & Plaxton; Grant
[192] Boyle, id. 146; Schulhofer; Mathen & Plaxton.
[193] See notes 32-38, supra, and accompanying text.
[194] Mathen & Plaxton, 484 n84.
[195] Mathen & Plaxton, 483 (emphasis in original).
[196] See, e.g. Burris & Cameron; McArthur, supra note 36 at 732-33.

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 transmitted infections (STIs), but the offenses are generally misdemeanors and are rarely prosecuted.[197] No 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.[198] Nonetheless, of twenty-four state laws that criminalize nondisclosure of HIV, only five also nominally criminalize nondisclosure of hepatitis.[199] 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.[200] Although I have not found any studies of hepatitis disclosure, it seems unlikely that people are much more likely 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 Center for HIV Law & Policy has not identified any prosecutions for hepatitis nondisclosure in the United States.[201] My search of Google, Lexis and Westlaw has not turned up a hepatitis nondisclosure prosecution, either.[202]

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[197] Supra note 4. See, e.g. Fla. Stat. Ann. § 384.24(1), (2), 384.34 (nondisclosure of "chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, 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). In Iowa, *transmission* of hepatitis or tuberculosis is a misdemeanor, while HIV nondisclosure is a felony, regardless of transmission. Jason Clayworth, *Bill to Align Iowa Crimes of HIV transmission with similar laws clears Senate subcommittee,* Des Moines Register, Feb. 22, 2012, http://alturl.com/htdgo.

[198] Hepatitis A, B and C can all be sexually transmitted: CDC, Viral Hepatitis Surveillance 2010, Introduction, at http://alturl.com/zp6mn. The prevalence of hepatitis is comparable (but greater) than that of HIV. The CDC estimates that 804,000-1.4 million people are chronically infected with hepatitis B alone, and 3.2 million are chronically infected with hepatitis C: Id., "Background". (Chronic infection with hepatitis A does not occur: CDC, Viral Hepatitis Statistics and Surveillance, "Disease Burden from Hepatitis A, B and C in the United States," at http://alturl.com/zdi36.) 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. Id.

The most recent CDC estimate for HIV prevalence (from 2009) indicates that about 1,148,000 people age 13 and over are currently living with HIV. CDC, Basic Statistics, "HIV Prevalence Estimate" and "HIV Incidence Estimate," at http://alturl.com/xk6ie. This represents about 0.6% of the US population: Global Report, at A7.

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. "HIV Incidence Estimate," id.. CDC estimates for 2010 (the most recent available) estimate about 38,000 new infections with hepatitis B, and 17,000 new infections with hepatitis C in the same year, for a total of about 55,000 new hepatitis B and C infections in one fairly typical year: "Disease Burden from Hepatitis," id. 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.

[199] IND. CODE ANN. §§ 16-41-7-1; MISS. CODE ANN. § 97-27-14; TENN. CODE ANN. § 39-13-109; VA. CODE ANN. § 18.2-67.4:1(B); Iowa SF 2297 (June 2014), see note 153, supra (criminalizing nondisclosure of HIV, hepatitis and meningitis).

[200] TENN. CODE ANN. §§ 39-13-109(3)(1)-(2), 40-35-111(b)(3).

[201] The CHLP's 50-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 3. Another CHLP publication points out that "Herpes simplex virus type 2 (HSV-2) and human papilloma virus (HPV) are more prevalent than HIV. Gonorrhoea and HPV are far more easily transmissible than HIV during unprotected sexual activity. Like HIV, HSV-2 is not curable. Potential consequences of HPV, gonorrhoea, and HSV- 2 include cancer, pelvic inflammatory disease, infertility, and infant death." CHART: HIV, STIS AND RELATIVE RISKS IN THE UNITED STATES (2011), at

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.[203] It also causes fatal cancers of the head, neck and anogenital region.[204] Today, HPV causes about 12,000 cases of cervical cancer and nearly 16,000 other genital, anal and oropharyngeal cancers every year.[205] 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."[206] About 79 million Americans are currently infected, with about 14 million new infections every year.[207]

As with HIV, illness and death from untreated HPV infection are largely preventable through screening and timely treatment.[208] Governmental and public health responses to 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.[209] These non-criminal 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;[210] in 2009, the most recent year for which statistics are available, fewer than 4,000 women died from cervical cancer.[211] 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.[212]

HIV is, of course, much more lethal than HPV is,[213] and there is no vaccine.

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http://www.hivlawandpolicy.org/resources/view/681.

202 See note 482, infra, and accompanying text (discussing the one hepatitis prosecution that has been brought in Canada).

203 CDC, Genital HPV infection Fact Sheet 1 (2013), http://alturl.com/7qdc9.

204 World Health Organization, Human Papilloma Virus (2010) at http://alturl.com/2ckh6.

205 CDC, Genital HPV infection Fact Sheet 1 (2013) (estimating that HPV causes 2,100 vulvar cancers, 500 vaginal cancers, 600 penile cancers, 2,800 anal cancers in women, 1,500 anal cancers in men, 1,700 oropharyngeal cancers in women, and 6,700 oropharyngeal cancers in men).

206 CDC, Genital HPV infection Fact Sheet 1.

207 CDC, Genital HPV infection—Fact Sheet.

208 CDC, Genital HPV Infection Fact Sheet (estimating that of the 12,000 cervical cancers and nearly 16,000 other cancers associated with HPV, "about 21,000 ... are potentially preventable with vaccines"); World Health Organization, Guidance Note: Comprehensive Cervical Cancer Prevention and Control: A Healthier Future for Girls and Women at 7 (2013), http://alturl.com/7hypp ("Early detection and treatment of precancerous lesions can prevent the majority of cervical cancers. ")

209 World Health Organization, id. 52-55 (advocating screening and vaccination, and documenting their effectiveness); CDC, "Gynecologic Cancers: Cervical Cancer Screening," (advocating universal Pap screening for women aged 21-65), http://alturl.com/ovmu7; CDC, "Human Papillomavirus (HPV): Prevention" (advocating HPV vaccination for males and females), http://alturl.com/8ot5v.

210 The introduction of widespread cervical cancer screening in the 1970s greatly reduced illnesses and deaths resulting from HPV infection. National Institutes of Health. Cervical Cancer. *NIH Consensus Statement.* 1996;14(1):1–38; CDC, Cervical Cancer Statistics, http://alturl.com/yugjr.

211 3,939 women died from cervical cancer in the United States in 2010: id. By contrast, the CDC records 8,369 deaths from HIV in 2010: Sherry L. Murphy et al, *Deaths: Final Data for 2010,* 61 National Vital Statistics Report, (2013) at 87 Tbl. 10.

212 L.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 (2013) (finding 56% reduction in prevalence of the HPV types targeted by the vaccine among girls aged 14-19 within four years of vaccine's introduction).

213 More than 40 strains of HPV have been identified; most of them are not associated with cancer. Most HPV-related cancers are attributed to only two strains: HPV 16 and HPV 18.

Nonetheless, because HPV is so much more common, it kills more women than HIV does: in 2010, 2,270 women died of AIDS,[214] compared to 3,909 who died of cervical cancer.[215] Hepatitis kills nearly as many Americans every year as HIV does.[216] Governments and legislators have generally chosen noncriminal approaches to deal with these infections. The success of noncriminal harm reduction approaches to HPV—and HIV[217]—suggest that public health critics are right to contend that criminal punishment is not necessary to protect public health.[218]

Finally, nonsexual infectious diseases, such as tuberculosis, meningitis and SARS (severe acute respiratory syndrome), can also be life-threatening—and, unlike HIV, they are can be transmitted through the air.[219] Like hepatitis and HPV, they are generally not criminalized. 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.[220] 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.[221] Two of them carried multi-drug-resistant strains, which are notoriously difficult to treat.[222] At least two of them infected nearby passengers or crew.[223] These nondisclosers are dealt with through quarantine laws and do-not-fly lists. They have not been prosecuted.[224]

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 jeopardize her health.[225] 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

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[214] Murphy, supra note 211 at 97 Table 12. HIV killed 8,369 people in total; most were men. Id.
[215] See note 211, supra.
[216] 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. Id. The CDC estimates that, in 2009, 18,234 people died (of any cause) while they had a diagnosis of AIDS. CDC, Basic Statistics, "Deaths of Persons with an AIDS Diagnosis," http://alturl.com/jriy4.
[217] See CDC, HIGH-IMPACT PREVENTION, supra note 45.
[218] Burris & Cameron, supra note 27; Lazzarini, *Research and Policy Agenda*; Mykhalovskiy & Betteridge, *supra* note 13 at 50-51; Galletly & Pinkerton, *supra* note 32.
[219] See World Health Organization, The WHO Guidelines on Tuberculosis and air travel, 2008 at 2 (2008) ("Airborne and droplet-borne diseases that are potentially transmissible on board aircraft include TB, influenza, meningococcal disease, measles and SARS.").
[220] 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 83, 139-40.
[221] WHO, Tuberculosis and Air Travel, 3d ed. 2-3 (2008), at http://alturl.com/rov8v. See also, e.g. New York Times, Lawyer infected with tuberculosis apologizes to airline passengers, June 1, 2007; CNN, Tuberculosis patient flies despite being on banned list, January 13, 2010, at http://alturl.com/9jr5y.
[222] Id. 3.
[223] Id. 3.
[224] New York Times, *Lawyer apologizes*; CNN, *TB patient flies*.
[225] As the Supreme Court has observed in Roe v. Wade and in Casey v. Planned Parenthood, unplanned pregnancy can force upon the person a "distressful life and future." It can also cause life-threatening health problems: see, e.g. Barbara A. v. John G., 145 Cal. App. 3d 369 (1984).

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 prosecutions. 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,"[226] it pointed out. 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.'"[227]

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, the court held that if he cared that much about preventing conception, he could have used a condom. Her deception, the New York court pointed out, "in no way limited his right to use contraception [himself]."[228] 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 transmitted infection, reproductive injury, or abortion.[229] 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 "attempt to circumvent [their] child support obligations"[230] 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.[231] 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

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[226] Conley v. Romeri, 806 N.E.2d 933, 936 (Mass. App. 2004).
[227] Conley v. Romeri, 938.
[228] L. Pamela P. v. Frank S., 59 N.Y.2d 1, 5.
[229] See, e.g. McPherson v. McPherson, 712 A.2d 1043, 1045 (1998) (citing cases); *Hamblen v. Davidson* (Tenn.Ct.App.2000) 50 S.W.3d 433, 438 ["all the jurisdictions which have considered the issue"]; *Doe v. Johnson* (W.D.Mich.1993) 817 F.Supp. 1382, 1389 [citing cases]; Carsanaro v. Colvin, 716 S.E.2d 40 (N.C.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); Barbara A. (man's representation that he was infertile, led to ectopic (tubal) pregnancy that left the woman infertile); Kathleen K. v. Robert B., 150 CAL. APP.3D 992 (1984) (unfaithful husband transmitted herpes to uninformed wife); Alice D. v. William M., 113 Misc. 2d 940 (NYC Civ.Ct. 1982) (pregnancy and abortion resulting from man's false claim that he was sterile);
[230] Wallis v. Smith, 22 P.3d 682, 683 (N.M. App. 2001).
[231] See Barbara A., 378-79.

put it, "certain sexual conduct and interpersonal decisions are, on public policy grounds, outside the realm of tort liability."[232]

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 nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor."[233] 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,"[234] holding that the court should not intrude upon "matters affecting the individual's right to privacy."[235] 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."[236] "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*."[237] 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 might be based on a medical model: tort law and rules of professional conduct require physicians and other health care providers to 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 be liable for medical malpractice.

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."[238] 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 patient (or a reasonable patient, if fully informed, would have refused the treatment).[239] This duty does not extend to risks that are nonexistent or purely speculative.

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.

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[232] Perry v. Atkinson, 195 Cal.App.3d 14, 19 (Cal. 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); Richard P. v. Super. Ct., 202 Cal. App.3d 1089, 1095 (1988).
[233] Stephen K. v. Roni L., 105 Cal.App.3d 640, 543 (Cal.App.2 1980).
[234] Stephen K. v. Roni L., 644-45.
[235] Stephen K. v. Roni L., 645.
[236] Starr v. Woolf, 2005 WL 1532369 at 6.
[237] Starr v. Woolf, at 6; see also Richard P. ("Unlike the present case, both of those cases involved *physical injury* to the plaintiff and had no potential for harming innocent children.")
[238] 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. 1028, §2 (updated 2013)
[239] Id.

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."[240] 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's discretion. Rather, the physician, in consultation with a committee comprised of other physicians with expertise in HIV and knowledge of the physician's medical condition,[241] determines which procedures pose a "significant" transmission risk.

The disclosure obligation imposed by HIV criminal laws is not analogous to physicians' duty to ensure that their patients' consent is fully informed. 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 posed no appreciable risk.

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."[242] 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.[243] 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, as well as expanding the kinds of sexual coercion that could be recognized as crimes. Rape law reform enhanced the sexual autonomy of women, men and children who were underprotected by traditional rape law. 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."[244]

Nonetheless, feminists should not uncritically assume that every expansion of criminal liability for sex will promote gender equality.[245] HIV criminalization is especially ill-suited to promote equality or benefit women: the perception that it would 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

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[240] American Medical Association, Opinion 9.131: HIV-Infected Patients and Physicians, updated June 1998.
[241] Id. See also American Medical Association, H-20.912 *Guidance for HIV-Infected Physicians and Other Health Care Workers,* Policies Related to Physician Health (updated Feb. 2011), at http://alturl.com/qrufs. The 2011 *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.
[242] Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse,* 110 Colum. L. Rev. 1193, 1198 (2010).
[243] See, e.g. Coughlin, 38; Estrich, Real Rape; Estrich, Rape; Catharine MacKinnon, Toward a Feminist Theory of the State (1989) at 145-46, 175-77.
[244] Hendricks, 71.
[245] *See generally* Aya Gruber, *Rape, Feminism and the War on Crime,* 84 Wash. L. Rev. 581 (2009).

women.[246] 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.[247] 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 white women and girls in Jamestown, New York in 1997.[248] Criminalization, these advocates hope, will protect women against infection by unfaithful or bisexual men.[249]

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 gender norms of heterosexuality and sexual passivity: they submitted to sex with men without asking many questions. At the same time, the imagined male-to-female dynamics of sexual nondisclosure apparently make HIV transmission look and feel more like a sexual 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.[250] 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."[251] Rape law reform promoted sexual autonomy and gender equality by criminalizing sexual behaviors which had been broadly tolerated at traditional rape law, including marital rape, acquaintance rape and rape of intoxicated or unchaste women.[252] If HIV nondisclosure is framed as a kind of sexual assault, its criminalization might seem to promote gender equality just as rape law reform did.[253]

Feminist scholars observe that physical or sexual abuse, cultural norms or economic dependence may prevent HIV-negative women from asking their husbands about sexually transmitted infections or insisting on condom use. Despite her concerns that homophobia and racism may shape nondisclosure prosecutions, for example, Isabel Grant contends that "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:[254]

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[246] It is extremely unlikely that HIV nondisclosure is gendered in this way: see Part IV.B, infra.
[247] Cuerrier, para. 134.
[248] See notes 282-295, infra; 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).; Markus; Elisabeth Van Vliet, Law, Medicine, HIV and Women: Constructions of Guilt and Innocence, 1 Health L.J. 191, 198-201 (1993).
[249] See, e.g. Global Report, supra at 20; Mathen & Plaxton; Schulhofer
[250] See, e.g. Mary Ane Bobinski, *Women and HIV: A Gender-based Analysis of Disease and its Legal Regulation,* 3 Tex. J. Women & L. 7, 43-45 (1994); Grant, infra note 255 and accompanying text.
[251] James Miller, *African Immigrant Damnation Syndrome: The Case of Charles Ssenyonga,* 2 Sexuality Res. & Soc. Pol'y 31, 37 (2005).
[252] See generally Estrich; Susan Brownmiller, Against Our Will: Men, Women and Rape (1975); MacKinnon.
[253] See, e.g. Grant, Boundaries, at 159; Mathen & Plaxton, 481 (arguing that because HIV nondisclosure "objectif[ies]" women, it is "closely bound up with the gendered nature of the offence" of "sexual assault"); Mary Fan, *Decentralizing STD Surveillance: Toward Better Informed Sexual Consent,* 12 Yale J. Health Pol'y, Law & Ethics 1, 15 (2012) (arguing that nondisclosure vitiates sexual consent).
[254] Grant, Boundaries, 160; see also Mathen & Plaxton; Van Vliet, 199-200.

> [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. ... this 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.[255]

But there is no reason to presume that, in an abusive relationship, the HIV-negative partner will be the woman.[256] Given that women comprise two thirds of heterosexuals infected with HIV,[257] it seems more likely that the infected person in a serodiscordant[258] 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.[259] Yet HIV disclosure laws make her a criminal. As noted in Part I.C, prosecutions and convictions of such women are not unusual.[260]

Moreover, HIV nondisclosure is not gendered in the way that feminist proponents of criminalization have assumed. HIV nondisclosure 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.[261] 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.[262] 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.[263] Researchers have documented high rates of self-reported nondisclosure

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255 Grant, Boundaries, 159 (footnote omitted).
256 See Mackinnon & Crompton.
257 See notes 420, infra.
258 A serodiscordant relationship has one HIV-positive and one HIV-negative partner.
259 Symington, 653.
260 See notes 104-108, supra, and accompanying text.
261 According to CDC estimates, about 55.6% (523,300 of 940,600) of all Americans diagnosed with HIV are men who have sex with men: 468,600 whose infection is attributed to male-male sex, and 60,200 MSM 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, Part A, 22 Tbl. 5a (2012) ("CDC, HIV Surveillance Report 2010") at http://alturl.com/7bz57.
262 Ciccarone, 952; see also 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).
263 See, e.g., notes 268-376, infra. See also Tara McKay and 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)*, AIDS Behav (2011) 15:1140, 1149 (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); Allison G. Dempsey et al, *Patterns of Disclosure Among Youth Who are HIV-positive,* J. Adolesc Health. 2012 March; 50(3): 315–317. doi:10.1016/j.jadohealth.2011.06.003 (finding that 40% of respondents aged 16-24 reported nondisclosure to at

among men who have sex with men,[264] men who have sex with both men and women,[265] and among heterosexual women and men.[266] (Sexual transmission of HIV between women is rare.[267])

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.[268]

Finally, the fact that HIV is transmitted more easily from man to woman than the reverse does not explain disproportionate academic or legislative concern for straight women at the expense of MSM. Men's relatively lower risks of *heterosexual* transmission do not explain why male *same-sex* sexual transmission—by far the most common means of HIV transmission[269]—deserves less concern. Moreover, although the abusive dynamics identified by Grant and others in heterosexual relationships are often real, they are hardly universal, and they are not unique to heterosexual relationships. Women's participation in condomless sex can be, but is not always, the result of exploitation by men. Straight women, like men, often agree to, prefer, or insist upon condomless penetration without requiring an STI test first.[270]

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

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least one partner in the past three months, regardless of gender, ethnicity or sexual orientation). Teresa J. Finlayson, *supra* note 50 ("Not discussing HIV status and not knowing a partner's HIV status were particularly common in the casual partnerships of the [MSM] surveyed."). For example, 53% of the survey respondents who reported having had sex with a casual (male) partner in the past 12 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 2, 1226; JT Parsons et al, *Consistent, Inconsistent, and Non-disclosure to casual sexual partners among HIV-seropositive gay and bisexual men,* cite; Sheon & Crosby, *Ambivalent tales of HIV disclosure in San Francisco,* 58 Social Science & Medicine 2105 (2004); McKay & Mutchler, 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).

[264] Ciccarone; Finlayson, id.; Horvath, id.; Parsons, id.; Sheon & Crosby, id. (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).

[265] McKay & Mutchler, 1148 (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);

[266] Ciccarone; Miriam R. Chacko et al., *Understanding Partner Notification (Patient Self-Referral Method) by Young Women,* 13 J. Pediatric Adolescent Gynecology 27, 30 (2000)

[267] Shirley K. Chan et al, *Likely Female-to-Female Sexual Transmission of HIV—Texas, 2012,* 63 CDC Morbidity & Mortality Weekly Report 209 (2014).

[268] Ciccarone, 951 ("Five 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.

[269] See notes 360-362, infra, and accompanying text.

[270] D.C. Bell et al, *The HIV transmission gradient: relationship patterns of protection.* 11 AIDS Behav. 789 (2007); A. Michelle Corbett et al, *A little thing called love: Condom use among high-risk primary heterosexual couples,* 41 Perspect. Sexual Reprod. Health 218 (2009) (heterosexual men and women preferred not to use condoms in loving sexual relationships; nonuse of condoms signals love, trust and intimacy).

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.[271] 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.

Part 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 is seen as 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 through rape and the death penalty. The role of such biases in HIV criminalization may run deeper, shaping not only the enforcement of the 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.[272] The original name applied to the mysterious constellation of symptoms was "gay-related immune disorder," or GRID.[273] Although this acronym was abandoned as soon as the other three other (presumptively heterosexual) "risk groups" were identified,[274] HIV/AIDS was often described in popular discourse as a "gay plague."[275]

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."[276] 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."[277] As Weait and many other scholars have observed, the racialized, moralistic and homophobic framing of HIV marked it as a disease whose rightful victims

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[271] See Part IV.A, infra.
[272] Robert C. Gallo, *A reflection on HIV/AIDS research after 25 years,* 3 Retrovirology 72, 72 (2006) (dating this coinage to 1982); WEAIT, *supra* note 14 at 143; Paula A. Treichler, AIDS, Homophobia, and Biomedical Discourse: An Epidemic of Signification: 43 AIDS: Cultural Analysis 31, 44 (1987); Paul Farmer, AIDS and Accusation: Haiti and the Geography of Blame 2 (1993) (noting tendency in United States to blame Haitians as the source of AIDS); CDC, AIDS and the Law-A Guide to the Public, p. 31, (Yale University Press, 1987) [get original], cited in Sanchez v. Lagoudakis, 581 NW 2d 257, 269 (Mich. 1998) (listing "risk groups" for HIV).
[273] Gallo, id.
[274] WEAIT, *supra* note 14, 144. See, e.g. Steven Eisenstadt, *The New AIDS Scapegoat,* 44 Rutgers L. Rev. 301, 302 n3 (1992) (discussing a 1988 survey in which 20% 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 "through homosexual conduct, illicit intravenous drug use, or sexual relations with an IV drug user" deserved compassion).
[275] Weait, id., describes the tabloid media as embracing this phrase with "vile abandon."
[276] See, e.g. Persson & Newman, *at* 632 (2008); Weait, id., cite (summarizing this scholarship).
[277] WEAIT, *supra* note 14, 142.

were marked by sexual and racial stigma.[278] 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."[279] Women infected through heterosexual sex, in particular, were and are often portrayed in the media as "innocent victims of men's betrayal."[280] This discourse tended to construct "proper"[281] (white, gender-conforming) heterosexuality as an identity that is, or ought to be, protected against HIV.[282]

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.[283] 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[284]—but, at the time, media coverage of the Patient Zero story was sensationalistic and intense.[285] News reports emphasized that "Mr. Dugas used his good looks and French-Canadian accent to lure handsome American men, even after he was diagnosed with AIDS in 1980."[286] He

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[278] 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 as perpetrators of sex crimes against white women. THOMAS SHEVORY, NOTORIOUS H.I.V.: THE MEDIA SPECTACLE OF NUSHAWN WILLIAMS 11-13 (2004). See also Persson & Newman; Grant, Boundaries of the Criminal Law, 154-55.

[279] Persson & Newman, 637. See also, e.g. Shevory, id. 17 (media portrayal of Nushawn Williams as "a pied piper who used drugs to attract and corrupt the innocent teenagers of Jamestown"); CATHY J. COHEN, THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS 166-67 (1999) (media portrayal of black women as "innocent victims" of heterosexual transmission); Russell Robinson, Racing the Closet, 1465 (media characterization of black men "on the down low" as "dangerous black men" whose deceit threatened "innocent wives and girlfriends"); WEAIT, *supra* note 14.

[280] Persson & Newman, id.

[281] Persson & Newman, 632

[282] WEAIT, *supra* note 14, 142-43; Persson & Newman, 634.

[283] This claim was advanced in RANDY SHILTS, AND THE BAND PLAYED ON (1987) and discussed in many media outlets, including the New York Times, the New York Review of Books, and JAMA. The "Patient Zero" story was based on a study by Darrow & Auerbach, but they rejected this characterization of the results: D.M. Auerbach, W.W. Darrow, H.W. Jaffe, and J.W. Curran. Cluster of cases of the acquired immune deficiency syndrome. Patients linked by sexual contact (*The American Journal of Medicine*, No. 76, 1984, pp. 487–492).

[284] See, e.g. Andrew Moss, Letter to the Editor, *In response to 'AIDS Without End,' from the August 18, 1988 issue,* New York Review of Books, Dec. 8, 1988); M.Thomas P. Gilbert et al, *The Emergence of HIV/AIDS in the Americas and Beyond,* 104 Proceedings of the National Academy of Sciences 18566 (2007) (documenting HIV in the United States between 1969 and 1981); PÉPIN, *supra* (2012) (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 Radiolab, *Patient Zero,* Season 10, Episode 4, Nov. 15, 2011.

[285] See note 283, supra, and, e.g. Chicago Tribune, *Patient Zero: Wherever Gaëtan Dugas Paused, Gay Men Began to Sicken and Die* (November 1, 1987); Books of the Times, *And the Band Played On,* NY Times Oct. 26, 1987) (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."); Nicholas Wade, *Editorial Notebook: AIDS in Harsh Review,* November 10, 1987) ("the horrifying case of the late Gaëtan Dugas" "The book 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.");

[286] AP, *Canadian Said to have Played Key Role in Spread of AIDS,* NY Times, October 7, 1987

was depicted as a callous man who did not care whether he transmitted HIV[287] and was even alleged to have delighted in telling men he had AIDS *after* bathhouse sex.[288] (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.[289]) Despite the misleading coverage, Dugas' 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[290]) of people with HIV, and several states enacted quarantine laws.[291]

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 women 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 public, declaring that Williams had "damaged hundreds and hundreds of lives" at a time when, journalist JoAnn Wypijewsi points out, "there were only nine positive individuals associated with [Williams] and perhaps half of those had been infected before he was told he was positive."[292] Although the women said the sex had been consensual and many of his sexual contacts had occurred before he was told he had HIV, 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."[293] The county health commissioner declared, "He's not a monster ... we have the Devil here."[294]

Similar racialized media panics accompanied the first high-profile HIV prosecutions in Canada, the UK, Australia and New Zealand. In each country, the first HIV prosecution

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[287] Chicago Tribune, supra (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.")
[288] SHILTS ("I've got gay cancer," he'd say. "I'm going to die, and so are you.")
[289] Michael Denneny, quoted in Don Sapatkin, *AIDS "Patient Zero" was a publicity strategy, scholar writes,* Philadelphia Inquirer, April 23, 2013.
[290] William F. Buckley, Jr., *Crucial steps in combating the AIDS epidemic: Identify all the carriers,* New York Times, March 18, 1986 (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: AIDS Carriers and their Victims* National Review, Feb. 19, 2005 (reiterating this call).
[291] Sullivan & Field, *supra* note 83 at 144-145 (describing HIV-quarantine measures passed or proposed in 1986-1987); Gostin, *supra* note 78 at 1019.
[292] Joanna Wypijewski, *The Secret Sharer: Sex, Race and Denial in an American Small Town* (Harper's, July 1, 1998), 49. In the end, it turned out that thirteen young women who had slept with him tested positive 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 278, 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").
[293] Shevory, id. 16-20. Shevory points out that an arguably more sensational 1996 case, in which 30 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. All his uninformed partners were black. Id. 20.
[294] Wypijewski, *supra* note 292, 38; see also, e.g. Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws,* 23 Nova L. Rev. 847, 848-49 (1999) (characterizing Williams' sexual activity as "murder" of "kids");

involved an African immigrant man accused of infecting native-born white women.[295] 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 [Western] parts of the world figure as insatiable and archetypal threats to innocent, white and 'native' femininity."[296] 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.[297] James Miller notes a similar dynamic in Canada.[298]

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, did so in response to widely publicized allegations that an HIV-positive woman had been working as a prostitute.[299] 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 young black women and teenage girls.[300]

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.[301] In New York, for example, Williams was mentioned in repeated (but unsuccessful) legislative attempts to pass punitive HIV laws.[302] In Florida, state legislators "cited Williams as they revised the Florida criminal code to make knowing transmission (or attempted transmission) of HIV a class 1 felony punishable by up to thirty years in prison."[303]

Although legislative history is not readily available for nondisclosure laws in most states, 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."[304] In Michigan, for example, the House Republican Task Force

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[295] See, e.g. WEAIT, *supra* note 14, 27-29, 138-140; Bickerstaff, E. (2007) HIV and the media in the UK, *Impact 12,* February, National AIDS Trust, United Kingdom at 8 (noting that allegations of heterosexual transmission by African men were "singled out for hostile attention" in the UK press; Miller (documenting the racialized moral panic over allegations that Charles Ssenyonga, a Ugandan immigrant, had infected three white women); Persson & Newman, 634 (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); Cameron, *supra* note 14 at 36 (first New Zealand prosecution involved Peter Mwai, a Kenyan man accused of infecting New Zealand women)
[296] WEAIT, *supra* note 14, 140.
[297] Persson & Newman, 636.
[298] Miller, supra.
[299] Waters, *Florida's Omnibus AIDS Act of 1988,* 16 Fl. St. L. Rev. 441, 511 (1988).
[300] David P. Niemeyer, 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 the AIDS Virus,* New York Times (April 19, 1997); Malcolm Gladwell, The Tipping Point: How Little Things can Make a Big Difference, ch.1; SHEVORY, *supra* note 278, 20.
[301] Wolf & Vezina, 844.
[302] Wypijewski, *supra* note 292, 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 278, 2.
[303] Shevory, id. 2.
[304] GLOBAL COMMISSION REPORT, *supra* note 27, 23.

recommended the broad HIV nondisclosure law that passed in 1998.[305] 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. Although Dugas' partners had all been men, the Task Force expressed particular concern that bisexual men might pass HIV to their trusting wives. "[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."[306] 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?"[307] In other states for which legislative history can be obtained, legislators also seemed to envision that the victims of HIV nondisclosure would be female and the perpetrators male.[308]

Similarly, in the Supreme Court of Canada's seminal 1998 *Cuerrier* decision, Justice Cory'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?"[309] "Is there a good reason for compelling disclosure to one's wife but not to a casual date?"[310] This expressly gendered language suggests that lawmakers saw criminalization as a way to protect women who conformed to conventional norms of heterosexual passivity. Neither the Michigan House Republican Task Force nor the Supreme Court of Canada expressed any 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 has also been 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 (where only one partner is HIV positive), substance abusers, and others."[311] PEPFAR-funded programs touted an "ABC" approach to HIV prevention that would promote **A**bstinence before marriage, **B**e faithful within married couples, and **C**ondom use only for "those who are

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[305] House Republican Report, Recommendation 25 at 17.
[306] House Republican Task Force, 17 (parentheses in original).
[307] Id. 19.
[308] See, e.g. *HIV—Criminal Exposure—Penalties: Hearing on H.B. 1686 Before the Tennessee Judiciary Committee*, 1994 Leg., 99th Sess. 3-2 (TN. 1994) (Statement of Peroulas-Draper, Member, TN. House of Representatives) (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": Peach Sheets, *Health: Omnibus AIDS Bill,* 5 Ga. St. U. L. Rev. 397, 408-410 (1988).
[309] R. v. Mabior, para. 65.
[310] See also id. para. 78.
[311] Office of the United States Global AIDS Coordinator (OGAC), *The President's Emergency Plan for AIDS Relief: U.S. Five-Year Global HIV/AIDS Strategy* (Washington, D.C.: United States Department of State, 2004), p. 27.

infected or who are unable to avoid high-risk behaviors."[312] 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 men who did not want to use condoms with their wives or girlfriends, it is alleged to have derailed Uganda's early successes in reducing HIV transmission.[313]

Fortunately, the Obama Administration has abandoned the abstinence-based PEPFAR strategy.[314] 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."[315] 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."[316] 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.[317]

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,"[318] questioning whether men who have sex with men and women 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.[319]

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312 OGAC, 29; Jonathan Cohen and Tony Tate, The Less They Know, the Better: Abstinence-Only HIV/AIDS Programs in Uganda (2005)

313 Cohen, The Less They Know; GLOBAL COMMISSION REPORT, *supra* note 27, 45.

314 See generally WHITE HOUSE, NATIONAL HIV/AIDS STRATEGY*supra* note 12.

315 Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure,* 52 Stan. L. Rev. 353, 363 (2000) (parentheses in original).

316 Robinson, 1465, 1740 n41, 1471

317 See, e.g. 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 (2006); Matt G. Mutchler, *Psychosocial correlates of unprotected sex without disclosure of HIV-positivity among African-American, Latino, and white men who have sex with men and women,* 37 Arch. Sex. Behav. 736, 743 (2008).

318 CDC, Questions and Answers: Men on the Down Low, "What are the sexual risk factors associated with being on the down low?" http://www.cdc.gov/hiv/topics/aa/resources/qa/downlow.htm; NPR, *Myth: HIV/AIDS rate among black women traced to "down low" black men* (Oct. 28, 2009), at http://alturl.com/pyjr3 (interviewee Dr. Kevin Fenton, Director of the CDC National Center for HIV/AIDS, Viral Hepatitis, and STD and TB Prevention, attributed sexual transmission of HIV to black women largely to male partners who inject drugs or have "multiple [hetero]sexual partners," with bisexual black men accounting for "a smaller proportion" than these other risk factors, and pointing out that only 2% of black men are estimated to be "bisexually active").

319 See, e.g. Karolynn Siegel et al, *Sexual behaviors of non-gay-identified non-disclosing men who have sex with men and women,* 37 Arch. Sex. Behav. 720, 720-21, 732 (2008) (summarizing research on 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." (Siegel, id. 721 (noting in 2008 that "the existing research on non-gay identified MSMW is limited by its exclusive focus on

Researchers addressing the HIV risks posed by sexual activity by MSMW express urgent concern about the potential threat they may pose to heterosexual women[320] (and, sometimes, the women's other male partners[321]). They typically express little or no concern that HIV-positive MSMW might also infect their male partners,[322] even where they find that such men report more high-risk behavior with men than they do with women.[323]

Prosecution lends itself to the heterosexist but still influential logic of HIV "innocence" and guilt.[324] 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.[325] 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.[326] Some HIV advocates suspect that US prosecutions may follow a similar pattern.[327] In Nashville and Michigan, African-American men and women

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African American and Latino men" (citations omitted). For a critique of this discourse, see Russell Robinson, *Racing the Closet*).

320 See, e.g. id.; 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 (2006); JP Montgomery et al, *The extent of bisexual behaviour in HIV-infected men and implications for transmission to their female sex partners.* AIDS Care. 2003;15:829–837; Chu SY et al, *AIDS in bisexual men in the United States: epidemiology and transmission to women.* Am J Public Health. 1992;82:220–224. Wohl AR et al, *HIV risk behaviors among African American men in Los Angeles County who self-identify as heterosexual.* J Acquir Immune Defic Syndr. 2002;31:354–360; Gregorio Millett et al., *Focusing "Down Low": Bisexual Black Men, HIV Risk and Heterosexual Transmission,* J. Nat'l Med. Ass'n, July 2005 (investigating HIV risk 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 contribution of exclusively heterosexual black men to black women's rates of infection).

321 See, e.g. SHEVORY, *supra* note 278, 13-15;

322 See notes 299-301, id.

323 See, e.g. Siegel; Mutchler, *Psychosocial Correlates,* at 740 Tbl 1, 745 (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, compared to only 28% reporting unprotected vaginal or anal sex without disclosure with a female partner. This finding was not discussed in the article, nor did the authors provide any assessment of its statistical significance. 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.").

324 Grant, Boundaries of the Criminal Law, 154 (noting that "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").

325 Miller; SHEVORY, *supra* note 278; Philip A. Goff, et al, *Not yet human: Implicit knowledge, historical dehumanization, and contemporary consequences.* 94 J. Personality and Soc. Psych. 292-306 (2008).

326 See, e.g. WEAIT, *supra* note 14 at 146; Miller; Persson & Newman, 633 (Australia); Mykhalovskiy & Betteridge, *supra* note 13 at 44-45 (Canada); Cameron, *supra* note 14, 15, 36 (Australia); Australasian Society for HIV Medicine ("ASHM"), Guide to Australian HIV Laws and Policies for Healthcare Professionals, "Criminal Law," at http://alturl.com/q5di6 (Australia). See also GNP+, 2010 GLOBAL CRIMINALISATION SCAN REPORT, at 16, 17 (2010), http://alturl.com/amr5o ("in numerous countries," including Denmark, Norway, the UK, Australia and New Zealand, African immigrants and "men of African descent" are overrepresented as HIV accused).

327 See, e.g. Luke Baumgarten, *The Sick and the Damned,* The Inlander (Oct. 2, 2012) http://alturl.com/5y6vt (quoting David Lee, chair of Washington state Advisory Panel on HIV/AIDS, suggesting that HIV prosecutions "probably inflam[e] racial passions—black men having sex with white women," and quoting

are heavily represented as accused in prosecutions for heterosexual nondisclosure, although it is not clear that their representation is disproportionate.[328] Black men are notably underrepresented as accused in same-sex nondisclosure prosecutions.[329] The Nashville and Michigan studies provide no 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."[330] "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."[331]

Sullivan and Field predicted that HIV crimes would be selectively deployed to harass and persecute gay men.[332] Heterosexual prosecutions would merely be incidental.[333] Part IV of this Article will show that the demographics of HIV criminalization tend to support

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Trevor Hoppe as saying that, in Michigan, white MSM account for 40% of people with HIV but 14% of HIV accused, while straight black men comprise 14% of people with HIV, but 41% of accused); Mark D. Fefer, *HIV: Criminal Intent,* Seattle Weekly News, Oct. 9, 2006 ("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 e.g. Strub, *supra* note 47.

[328] In both Tennessee and Michigan, the CDC estimates that about 58-59% of people diagnosed with HIV are black. The CDC estimates (as of 2009) that, in Tennessee, about 58% of people diagnosed with HIV (8,818 of 15,265) are black, and another 38% (5,838) are white. In Michigan, it estimates that about 59% of people diagnosed with HIV (7,979 of 13,642) In Michigan, about 59% (7,949 of 13,642) of people diagnosed with HIV are black and about 35% (4,771) are white. CDC, NCHHSTP Atlas, http://alturl.com/gmum6. In Michigan, 15 of 26 convictions for male-to-female nondisclosure, 15 involved black accused: Trevor Hoppe, *Disparate risks of conviction under Michigan's felony HIV disclosure law: An observational analysis of convictions and HIV diagnoses, 1992-2010* (under review, on file with author).

Punishment & Soc. Tbl. 5. In Nashville, six of eight male-to-female nondisclosure prosecutions involved black accused: Galletly & Lazzarini, *supra* note 7, 2627 Tbl. 2.

Some studies suggest that black or Latino men may be more likely to nondisclose than white or Latino men are: Mohammed & Kissinger (2006); Stein et al. (1998), cited in Kathleen Sullivan, *Male Self-disclosure of HIV-positive serostatus to sex partners: A review of the literature,* 16 J. Ass'n of Nurses in AIDS Care 33 (2005); Mutchler, supra at 739.

[329] Galletly & Lazzarini, *supra* note 7 Tbl. 2 (all Nashville MSM prosecutions involved white accused); Hoppe, *Disparate risks*, Tbl. 5 (10 of 14 MSM prosecutions involved white accused. Three accused were black and one was "other"). *See also* Mykhalovskiy & Betteridge, *supra* note 13 at 41-42 (finding no black 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 some gay complainants do fit this description: see, e.g. Thompson-Sarmiento, *supra* (complainant is a well-known star of a successful television series); Marsha Melnichak, *Plendl: I Want to Be Who I Want to Be,* Le Mars Daily Sentinel (June 23, 2004) http://alturl.com/3os4o.

[330] Sullivan & Field, *supra* note 83, 150.

[331] Id.

[332] Sullivan & Field, *supra* note 83, 189-191; see also See also Gostin; WEAIT, *supra* note 14.

[333] "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, id. 190.

Sullivan and Field's concern that sexual, racial and criminal stigma might shape HIV criminalization—but not in the way they foresaw.

Part IV. The Gender of HIV Crime

To the extent HIV nondisclosure implicates any legally defensible interest in health, autonomy or moral retribution, it should be protected equally for men and women, regardless 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.[334] 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.[335] 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 ... in both the public and private spheres."[336] 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."[337] 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. At the same time, HIV crimes seem to be overenforced with regard 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 that concerns 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 a MSM.

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[334] GLOBAL CRIMINALISATION SCAN, *supra* note 326 at 12 Tbl. 1 (estimating more than 300 prosecutions (0.25 per 1,000 HIV-positive people) in the United States).

[335] 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). In Canada, there had been 63 prosecutions (0.86 per 1,000): GLOBAL CRIMINALISATION SCAN, id. In Sweden, the prosecution rate is 6.12 per 1,000: Id.

[336] Lawrence v. Texas, 539 U.S. 558, 577 (2003).

[337] Alexandra Natapoff, *Underenforcement,* 75 FORDHAM L. REV. 1715, 1719 (2006).

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.[338] While people with HIV tend overwhelmingly to disclose their status to exclusive, primary and long-term partners,[339] several researchers have suggested that nondisclosure to casual partners may be the norm, whether the partners are of the same or different sex.[340] 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.[341] For example, in Canada, where nearly half of people living with HIV are MSM,[342] 72% of prosecutions have accused men of nondisclosing to women.[343] In New Zealand, where MSM comprise 83% of people living with HIV, five of eight prosecutions involved female complainants and male accused.[344] In England and Wales, where MSM comprise 47.5% of people living with HIV,[345] 16 HIV prosecutions involved female complainants and male accused, while only three involved MSM.[346] In Scotland, all four HIV prosecutions have involved female complainants and male accused.[347] In Australia, where 86% of people diagnosed with HIV are MSM,[348] 53% of prosecutions involved female complainants.[349]

Large-scale, comprehensive nationwide studies of HIV prosecutions have yet to be conducted in the United States. American HIV advocates believe that most nondisclosure

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[338] See notes 261-262, supra, and accompanying text.
[339] Id.
[340] Sheon & Crosby (same-sex male partners); McKay & Mutchler, 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)
[341] In Canada, the US, the UK, Australia, New Zealand, Europe and Central Asia, "cases of heterosexual transmission and exposure are over-represented in criminal prosecutions." Global Criminalisation Scan, at 16, 17.
[342] In Canada, 46.7% of people living with HIV are MSM. 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). Public Health Agency of Canada, Summary: Estimates of HIV Prevalence and Incidence in Canada, 2011, at http://alturl.com/rui86. Of HIV diagnoses attributed to heterosexual sex, about 55.2% (n=170) were men 44.8% (n=138) were women: Public Health Agency of Canada, At a Glance: HIV and AIDS in Canada: Surveillance Report to December 31st, 2011, Tbls. 4A, 4B at http://alturl.com/tk45h.
[343] Mykhalovskiy & Betteridge, *supra* note 13 at 40 (74 of 103 prosecutions involved men accused of nondisclosure to women).
[344] Cameron, *supra* note 14, at 36.
[345] Of 73,400 people living with a HIV diagnosis in the UK, 31,900 (47.5%) are MSM, while 51.1% were infected by heterosexual sex. 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 (7600 African-born, and 6,800 non-African-born). Health Protection Agency. HIV in the United Kingdom: 2012 Report. London: Health Protection Services, Colindale. November 2012. at 6 Fig. 2.
[346] NAT, England and Wales: Table of Cases of People Charged with Grievous Bodily Harm under Section 20 http://alturl.com/b4ci6.
[347] Id., "Scotland".
[348] The Kirby Institute. HIV, viral hepatitis and sexually transmissible infections in Australia Annual Surveillance Report at 11 (2012)
[349] ASHM, supra note 326 (17 of 32 prosecutions involved female complainants and male accused).

prosecutions involve women who allege nondisclosure by male former partners.[350] The only US jurisdictions for which comprehensive prosecution data are available—Nashville and Michigan—tend to support their suspicion: 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.[351] 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.[352] The Michigan study counted convictions rather than prosecutions.[353] It found a similar gender disparity. Most convictions—26 of 51, or 51.0%—involved male nondisclosure to women.[354]

In the United States, MSM comprise a majority of the HIV-diagnosed population—about 56%.[355] In Nashville and Michigan, MSM accounted for less than 30% of prosecutions: three of fifteen prosecutions (20%) in Nashville,[356] and fourteen of 51 (27.5%) in Michigan.[357]

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[358]).

Table 1.

[350] Personal communication with Catherine Hanssens, Executive Director, Center for HIV Law and Policy; see also, e.g. Fefer, supra note 327 (quoting Lambda Legal attorney Jonathan Givner as saying "The 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"); Strub, *Prosecuting HIV* ("Heterosexual men of color are the most likely to be prosecuted").

[351] The CDC estimates 207,100 women in the transmission category "heterosexual contact," of which it estimates 36,400 are undiagnosed. The 170,700 women who have been diagnosed with HIV comprise 18.1% of the HIV-diagnosed population. CDC, HIV Surveillance Report 2010

[352] Galletly & Lazzarini, *supra* note 7 at 2627 Tbl. 2.

[353] Prosecutions in Michigan overwhelmingly resulted in conviction, but the Michigan study did not analyze the prosecutions that did not: see Hoppe, *Disparate risks*.

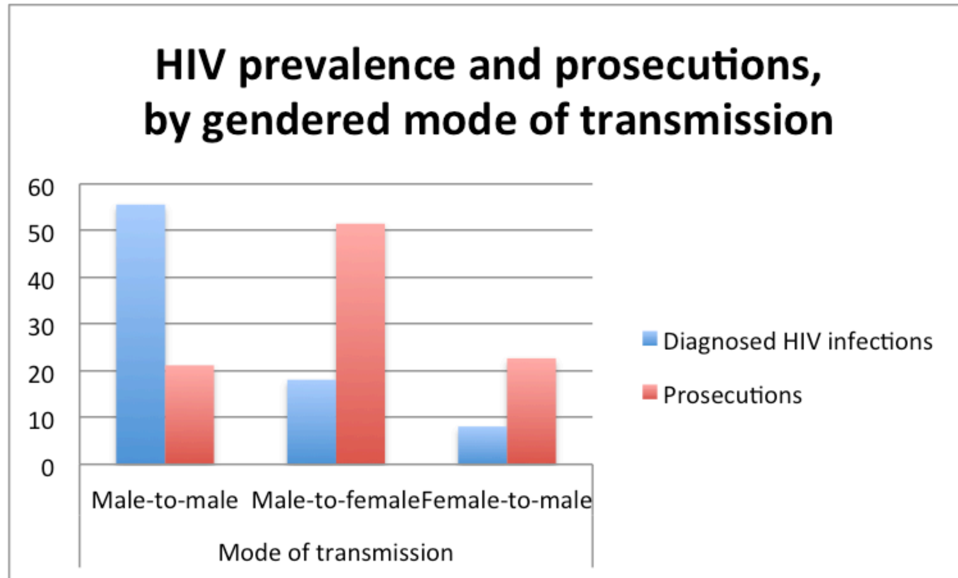
[354] Hoppe, id. Tbls. 2, 4.

[355] See note 261, supra.

[356] Galletly & Lazzarini, *supra* note 7, 2627 Tbl. 2.

[357] 26 of 51 Michigan prosecutions and eight of fifteen Nashville prosecutions involved female complainants and male accused. Hoppe, *Disparate risks*; Galletly & Lazzarini, *supra* note 7 at 2627.

[358] Hoppe, *Disparate risks*.



Sources: Galletly & Lazzarini, *supra* note 7; Hoppe; CDC, HIV SURVEILLANCE REPORT, *supra* note 261 at 22 Tbl. 5a.

If we use HIV incidence (recent transmissions of HIV), rather than prevalence, as a comparator,[359] 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. In 2010, the most recent year for which incidence statistics are available, 66% of new diagnoses were attributed to sex between men;[360] less than 17% were women infected by sex with men;[361] and less than 9% were men infected by sex with women.[362]

In Canada, male-to-male prosecutions may be increasing: Eric Mykhalovskiy found a marked increase in male-male prosecutions in Canada since 2009.[363] It seems plausible that reductions in societal homophobia might benefit male nondisclosure complainants who have

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[359] There is little reason to suppose that most, or even much, HIV transmission actually involves nondisclosure. As noted supra note -, 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 infra note -, it is not uncommon for people to knowingly have unprotected sex with an HIV-positive partner.

[360] The CDC attributes 29,800 of 47,500 new HIV infections (about 62.7% of the total) to male-male sex. 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). Thus 66.1% of new HIV infections have occurred among men who have sex with men. CDC, HIV Supplemental Report 2007-2010, 15 Tbl. 1.

[361] Women whose infection is attributed to heterosexual sex represented 8,000 of 47,500 new HIV infections in 2010. CDC, HIV Supplemental Report 2007-2010, 15 Tbl. 1.

[362] Of 47,500 new HIV infections in 2010, the CDC attributes 4,100 (8.6%) to men's sex with women. CDC, HIV Supplemental Report 2007-2010, 15 Tbl. 1.

[363] Mykhalovskiy & Betteridge, *supra* note 13 at 40-41 ("cases may be increasing among … MSM"); but see NAT, supra (finding no male-male prosecutions in England and Wales since 2007).

had sex with men.[364] On the other hand, the United Kingdom has apparently seen no male-male prosecution since 2007.[365]

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 large: men infected through sex with women comprise about 8% of persons diagnosed with HIV,[366] but men alleging nondisclosure by women account for 22.7% of the prosecutions or convictions in Nashville and Michigan combined.[367] There are roughly seven times as many MSM diagnosed with HIV than there are heterosexual men infected by women,[368] 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.

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 those places are real.[369] 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.[370] But the gender pattern of cases identified by the Center for HIV Law and Policy is similar to those found in Michigan and Nashville.[371] 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.[372]

B. Gendered prosecution disparities: Why?

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364 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: *Sexuality's Law,* 24 Colum. J. Gender & L. 87 (2013).
365 NAT, supra.
366 The CDC estimates 100,600 men have been infected through "heterosexual contact," of which it estimates 24,500 are undiagnosed. The remaining 76,100 men comprise 8.1% of the HIV-diagnosed population.
367 See Hoppe, *Disparate risks,* Tbls. 2, 4 (11 of 51 nondisclosure convictions involve female accused and male complainants); Galletly & Lazzarini, *supra* note 7 at 2627 (4 of 15 nondisclosure prosecutions alleged female-to-male nondisclosure).
368 See notes 261 and 366, supra.
369 , however, only analyzed the prosecutions that led to conviction: *Disparate risks*.
370 See, e.g. CHLP, ENDING AND DEFENDING, *supra* note 3; Sean Strub, Executive Director of the Sero Project, reports: "Heterosexual men of color are the most likely to be prosecuted." *Prosecuting HIV: Take the Test—and Risk Arrest?* positivelyaware.com (May-June 2012), http://s423995880.onlinehome.us/wp-content/uploads/2012/07/PA+MayJune2012.pdf.
371 CHLP, Prosecutions (of 91 prosecutions for non-assaultive nondisclosure identified between 2008 and 2014 for which the gender of nondiscloser and complainant was ascertainable, 65 involved female complainants and male accused, 9 involved male complainants and female accused. In 17 prosecutions, both complainant and accused were male). [updated July 3, 2014]
372 See, e.g. UNAIDS, Guidance Note, Ending Overly-Broad Criminalisation, supra note 2727; GLOBAL CRIMINALISATION SCAN, *supra* note 326.

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 engages an interest in sexual autonomy, this interest would presumptively apply equally to gay and straight-identified complainants.[373] 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 co-investigators, 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."[374] The available public health research, though, does not suggest that nondisclosure varies by gender in this way.[375]

The apparent overrepresentation of women as complainants, and the apparent underrepresentation of MSM, does not necessarily indicate bias among hospital workers, police or prosecutors. It seems that most nondisclosure prosecutions originate with a criminal complaint by an uninformed partner.[376] 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."[377]

Uninformed female partners may be more likely to report nondisclosure 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.[378] 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."[379]

Moreover, given the intense media coverage of high-profile prosecutions for male nondisclosure to women, it would hardly be surprising that a heterosexual woman who learns that a partner was infected might be more likely to "think of [herself] as having been

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[373] See, e.g. Lawrence v. Texas, ("Persons in a homosexual relationship may seek [sexual] autonomy ... just as heterosexual persons do.")
[374] Cameron, *supra* note 14, 42.
[375] See notes 263-262, supra and accompanying text.
[376] Hoppe, *Disparate risks* (in Michigan, enforcement of the disclosure law is "nearly invariably 'complainant-driven"); UNAIDS, Background Paper: Criminalisation of HIV-Nondisclosure, supra note 14, at para. 119 http://alturl.com/o724z.
[377] UNAIDS Background Paper, para. 119 (parentheses in original).
[378] 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); Chacko, supra note 266 at 30.
[379] Mykhalovskiy & Betteridge (2012), 50; see also Grant, Rethink Cuerrier, 54; Cameron, *supra* note 14, 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").

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."[380] Correspondingly, 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 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 apparently start when public health authorities 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.[381] Other prosecutions have originated when health workers urged patients who sought testing to call the police.[382] Moreover, some HIV prosecutions seem to have been initiated by police during routine traffic stops or other law enforcement unrelated to HIV.[383] To the extent that government actors urge or initiate prosecutions, they may be implicated in the gender disparity.

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.[384] Mykhalovskiy and Betteridge, for example, note 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."[385] 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."[386] 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.[387] Men who see themselves and their community in any of these ways might be less likely than straight-

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[380] WEAIT, *supra* note 14, 146.

[381] See, e.g. Trevor Hoppe, *Controlling Sex in the Name of "Public Health": Social Control and Michigan HIV Law,* 60 Soc. Probs. 1 (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); State v. Mahan, 971 S.W. 2d 307, 309-311 (Mo. 1998) (describing public health interventions similar to those described by Hoppe, id.); UNAIDS Background Paper, para. 103 (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 278, 1-2, 100-102 (health authorities initiated Nushawn Williams prosecution).

[382] The Nick Rhoades prosecution began when his uninformed partner, Adam Plendl, sought prophylactic treatment. "According the police report ... the hospital called police." Young, *Imprisoned over HIV. See also, e.g.* Thompson-Sarmiento, supra note 127.

[383] See, e.g. Todd A. Heywood, *Police officer releases HIV status of suspect to his ex-girlfriend,* The Michigan Messenger (Nov. 29, 2010) (man pulled over, arrested for driving with suspended license; told state trooper he had HIV because he needed access to his medications; trooper told his ex-girlfriend, and she pressed nondisclosure charges). *Man convicted on AIDS case arrested on sex charge,* Joliet Herald News (April 21, 2011) (police found HIV medication while searching car, disclosed his HIV infection to partner, who was in car).

[384] Ciccarone, 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).

[385] Mykhalovskiy & Betteridge, *supra* note 13, 43-44.

[386] Symington, 660; see also Hoppe, *Disparate risks.*

[387] Spindelman, supra at 98.

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.[388] Certainly, gay men who report their partners' nondisclosure to police see themselves as victims of a sexual crime.[389]

Secondly, most MSM are not gay: about two thirds of MSM are not gay-identified.[390] 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.[391] Nonwhite MSM are also overrepresented among recent HIV infections.[392] 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,[393] or because he fears the consequences of revealing his same-sex sexual activity.[394]

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.[395] A facially neutral nondisclosure law is not necessarily benign if legislators, police, health workers 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.

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[388] Mykhalovskiy & Betteridge, *supra* note 13, 44 (noting that "Gay men are heterogeneous in their views on the legal and moral duty of HIV disclosure); B. Adam, *What do HIV-Positive People Think about the Criminalization of HIV Transmission?* See also Horvath, supra note 2 (65% of MSM respondents think HIV nondisclosure should be illegal before *unprotected* sex).

[389] See, e.g. Adam Plendl, supra note -; People v. Clayton, 2002 WL 31058331, at 1 (Mich. App.) ("When the victim discovered defendant was infected with HIV, he went to the hospital and reported the incident to the police. The victim spent the following 2–1/2 weeks living at [a domestic violence shelter] and never returned to the house where defendant lived.")

[390] 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 National Health Statistics Reports at 26 Tbl. 9, 27 Tbl. 10, 30 Tbl. 13 (2011) (4.2% 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"); Gates, at 1, 5 ("adults 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 identify as [lesbian, gay man or bisexual].").

[391] See Russell Robinson, *Racing the Closet*.

[392] CDC, Supplementary Report (2012), at 8 (of new infections among MSM, 55% were young black men age 13-24).

[393] Hoppe, *Disparate risks*; Mykhalovskiy & Betteridge, *supra* note 13, 44. In Australia, Cameron et al found "anecdotal evidence of the police not taking complaints from gay men as seriously as from heterosexual women": *supra* note 14, 45-46 note 48.

[394] See, e.g. Robinson, *Racing the Closet* (citing structural constraints on ability of low-income minority men to come out as gay).

[395] See, generally e.g. Lauren Edelman; Reva Siegel, *Why Equal Protection Fails to Protect*.

The demographics of nondisclosure prosecutions are consistent with an assumption—whether by law enforcement, the Florida courts,[396] 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 they are seen by others, 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.[397] 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.[398] It seems unlikely that heterosexual men constitute a legally subordinated or disfavored group in the context of consensual sex.[399]

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.[400] Prosecutors sometimes suggest, whether in good faith or for tactical reasons, that men who nondisclose to women may be bisexual.[401]

Given the stereotypical characterization of bisexual men or men "on the down low" as deceitful "bridges" who spread HIV to heterosexual populations,[402] and widespread denial that unprotected heterosexual sex is high-risk,[403] 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.[404]

Meanwhile, though heterosexual nondisclosure seems to be prosecuted more vigorously than its same-sex counterpart, it does not seem that nondisclosure laws are

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[396] See note -, supra, and accompanying text.
[397] See, e.g. Sullivan & Field, *supra* note 83.
[398] 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.
[399] Robert Wyrod, *Masculinity and the persistence of AIDS stigma,* 13(4) Culture, Health and Sexuality 443, 445 (2011).
[400] See, e.g. 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 (2006) (the stigmatization of HIV-positive black MSMW as "bridges" may increase risk behaviors, as they hesitate to suggest condoms or disclose their HIV status for fear their female partners will suspect they are gay); Mutchler, 743 (same). *See also* Miller, 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.).
[401] 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, 1998 WL 1989782 (Mich. App.)
[402] See notes 319-322, supra, and accompanying text.
[403] See Part III, supra.
[404] See Russell Robinson, *Racing the Closet*; Yoshino, *The Epistemic Contract of Bisexual Erasure*.

enforced as aggressively on behalf of male victims of women's nondisclosure than for female victims of men's nondisclosure.[405] 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.[406] 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[407] and biting or spitting—that could cause anxiety to men who are behaving as conventional gender expectations might predict. Since biting and spitting cannot transmit HIV,[408] 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.[409] In Nashville, the number of HIV prosecutions for biting or spitting was comparable to the number of prosecutions for sexual nondisclosure.[410] 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,[411] other evidence does not suggest a similar recent decline nationwide.[412] 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.[413] Felony HIV-prostitution is a crime even if the sex worker discloses his or her status.[414] HIV-positive sex workers have been prosecuted even though they were carrying condoms.[415] As Galletly & Lazzarini point out, prosecutions for such commercial sexual activities "[do] not appear to be based on either actual risk or evidence of intent to harm."[416]

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

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[405] See notes 366-367, supra.
[406] Buchanan, *Engendering Rape*; see also Buchanan, *Our Prisons, Ourselves* (in men's jails and prisons, sexual victimization emasculates victims in the eyes of other men).
[407] Although sex work may involve high-risk sexual behavior such as 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 notes 71-72, supra, and accompanying text.
[408] See, e.g. CDC, *HIV Transmission Risk* (2013), http://alturl.com/yoty8 (characterizing risk from biting as "negligible"). Thirteen states have laws that specifically criminalize biting, spitting or throwing blood while HIV-positive: CHLP, State-by-state Criminal Laws, *supra* note 66.
[409] See, e.g. CHLP, Prosecutions (of 130 HIV prosecutions identified by CHLP since May 2010, 27 alleged biting or spitting [update]).
[410] Galletly & Lazzarini, 2627 (finding 11 biting and spitting prosecutions (of which 10 victims were police officers) and eight male-to-female sexual nondisclosure prosecutions).
[411] Galletly & Lazzarini, 2627 note that the decline was not statistically significant.
[412] See note 411, supra; see also State v. Schroeder, 2011 WL 208078 (Tenn. Crim. App. 2010) (prosecution for biting hospital employee).
[413] See Part I.C, supra.
[414] See CHLP, ENDING AND DEFENDING, *supra* note 3.
[415] See, e.g. People v. Hall, No. B190199, 2007 WL 2121912 (Cal. Ct. App. July 25, 2007).
[416] Galletly & Lazzarini, *supra* note 7 at 2632.

from carrying and using them.[417] To the extent that sex workers 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) customers 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 might 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.[418] A majority of 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.[419] 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 16% are men and women whose infection is attributed to injection drug use without any male-male sexual contact.[420]

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[417] See, e.g. Megan McLemore, *Distributing, then Confiscating, Condoms* New York Times, July 15, 2012 (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"); Jim Dwyer, *Giving Away, then Seizing, Condoms,* New York Times, April 24, 2012 (reporting that New York police confiscated and destroyed condoms from people they suspected of being sex workers); Human Rights Watch, Sex Workers at Risk (2012), at http://alturl.com/juzm9 (reporting on police and prosecutorial use of condoms as evidence of prostitution in New York City, Washington, DC, 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 she had "never had any young men afraid to take condoms."

[418] 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 (Sept. 2013), http://alturl.com/6zv9k. In the UK, where heterosexual transmission is more common than in the US, the public health agency estimates HIV prevalence to be 1.5 per 1,000 for the entire UK 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: data to end 2012* at 4, 7 (Public Health England: 2013).

[419] CDC, Monitoring Selected National HIV Prevention and Care Objectives by Using HIV Surveillance Data—United States and 6 U.S. Dependent Areas—2010
HIV Surveillance Supplemental Report, Volume 17, Number 3 (Part A), at 22 Tbl. 5a, 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.

[420] 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.

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 his or her serostatus has wronged him or her by exposing him or her to a much higher risk than s/he 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.

This argument, though superficially plausible, is misguided on a number of levels. As a preliminary matter, it is not clear who should be entitled to make the assumption that partners are uninfected. Non-gay-identified MSM might be as surprised to learn that a partner had HIV as an exclusively heterosexual man or woman might be.

Furthermore, this reasoning would imply that an HIV-positive man should be prosecuted for nondisclosing to a female partner, but not for nondisclosing to a man. The 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 high-risk activities. In any case, many heterosexuals engage in anal sex.[421] Since HIV can be transmitted to and by both men and women, a gender distinction based on differential prevalence rates seems unfair, and, if explicit, might be unconstitutional.[422]

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.[423] While this group is a very small percentage of the adult population—roughly one out of every 770 American adults[424]—these 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.

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421 See, e.g. Chandra, supra at 1 (36% of women and 44% of men say they have had anal sex with a heterosexual partner).

422 See Lawrence v. Texas, cite (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. Craig v. Boren; U.S. v. Virginia. Although biological differences between men and women can justify gender classifications (see, e.g. INS v. Nguyen), 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: U.S. v. Virginia, Craig v. Boren. 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: Romer v. Evans; Lawrence v. Texas (O'Connor, concurring); U.S. v. Windsor.

423 See note 390, supra, and accompanying text.

424 While CDC estimates HIV prevalence for the US population aged 13 and older, no equivalent age-based census data were available. The 2010 US Census estimated that the total US population of persons age 16 or older was 243,275,505: US Dept. of Commerce, Economics and Statistics Administration, US Census Bureau, Age and Sex Composition: 2010, 2010 Census Briefs, Tbl 2 at 2 (2011), http://alturl.com/eb8rs.

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 s/he is exclusively heterosexual and has never shared a needle, but cannot safely assume the same of a prospective or current sexual partner. Many men who have sex with men do not tell all their women partners.[425] 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 the first time they have sex with them."[426] 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. Conversely, 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.[427] Heterosexual-identified men are overrepresented among this group.[428] The likelihood that a non-drug-injecting heterosexual might 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 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

[425] See note -, supra (discussing MSMW). See also Gates, at 5 Tbl. 4 (adults 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").
[426] Rubenfeld, 37.
[427] CDC, 2012, Tbl. 5a, estimating that about 207,600 Americans do not know they have HIV.
[428] 11.8% people living with undiagnosed HIV are men infected by sex with women, compared to 8.7% of those who know of their diagnosis. Id.

negligible levels.[429] 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 a 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 infection, 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 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 affirmatively accommodates 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 affirmatively 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.[430]

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[429] See note 29, supra.

[430] See generally Melissa Murray, *Marriage as Punishment,* 112 Colum. L. Rev. 1 (2012); Jane E. Larson, *"Women Understand so Little, they Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction,* 93 Colum. L. Rev. 374 (1993).

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.[431] Like advocates 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.[432] 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,"[433] 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."[434]

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.[435] Martha Chamallas 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."[436] Likewise, Decker and Baroni argue that criminalizing sex by deception would protect the "sexual integrity of women."[437] "Sexual activity," they contend, "is one of the most intimate encounters people engage in ... [T]olerance [of sex by deception] promotes an unseemly

[431] See, e.g. Estrich, Real Rape, 102-03; Schulhofer, Unwanted Sex, at 154, 274, 276 (where a man's promise of marriage was "fraudulent from the outset," the woman's sexual autonomy is compromised: "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,146; Susan Estrich, *Rape,* 95 Yale L.J. 1087, 1120 (1986); Decker & Baroni; Schulhofer; Mathen & Plaxton; 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); Larson, 414, 420; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct,* 61 S. Cal. L. Rev. 777 (1988); Patricia Falk, 141; see also *Cuerrier* (L'Heureux-Dubé J., concurring).

[432] See, e.g. Decker & Baroni, 1168-69; Schulhofer, 152-159; Estrich, Real Rape, 103; Estrich, *Rape,* 1120, 1182; Chamallas, 813; Cuerrier, para. 134.

[433] e.g. Jane E. Larson, *"Women Understand so Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction,* 93 Colum. L. Rev. 374, 414 (1993). She argues, though, for creation of a tort, not a crime, to address this "dignitary" disparity: id. 404, 416. See also, e.g. Cuerrier, para. 125; Falk, 141, 154-55; SUSAN ESTRICH, REAL RAPE 70, 102-103 (1987); Decker & Baroni, 1167-68; Schulhofer, Unwanted Sex, 154-155; Mathen & Plaxton, 485 (advocating that the standard for criminal liability for sexual fraud should be lower than that for commercial fraud).

[434] Schulhofer, 277.

[435] See, e.g. Chamallas, 783-84 (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," and should be prohibited by law.). See also Larson, supra 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, 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.") 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").

[436] Chamallas, 813.

[437] see, e.g. Decker & Baroni, 1168-69.

status quo in our social fabric that denigrates the most intimate of relationships."[438] 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."[439] 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).[440]

In contrast to their embrace of informed-consent rationales for HIV nondisclosure, courts and lawmakers have not been receptive 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.[441] Proceeding from the assumption that "it will more often be the man who lies,"[442] Justice Cory's majority offered a number of examples of sexual deception that self-evidently "lacked the character of criminal acts."[443] 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."[444] To treat such lies as "serious criminal offence[s]," the Court asserted, would "trivialize" sexual assault.[445] 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."[446]

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.[447] Almost all these scenarios involve men lying to get sex from women. For example, "a man promises a woman a fur coat in exchange for intercourse," and fails to deliver;[448] a man has sex with a

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[438] See, e.g. Decker & Baroni, 1168; Smyrnick, 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.").

[439] Cuerrier, paras. 119, 126, quoting *Katherine K.*

[440] 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." *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation,* 53 UCLA L. Rev. 783, 809-10 (2006)

[441] In a concurrence, L'Heureux-Dubé J. 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," *Cuerrier*, para. 16.

[442] Cuerrier, para. 134 (but holding that "its consequences would be the same if it were the woman")

[443] Cuerrier, para. 133.

[444] Cuerrier, para. 134-35.

[445] Cuerrier, 135.

[446] Cuerrier, para. 135.

[447] Herbert Wechsler, quoted in Bryden, fn 505. See also Subotnik, 343.

[448] Cuerrier, paras. 52, 68, per McLachlin C.J.

prostitute and refuses to pay;[449] "Ted" lies to "Sally" about his infidelity to her;[450] "a married man ... pretends to be single and has sex with a single woman;"[451] and the crime of seduction. These deceptions, they claim, are "the common misrepresentations of dating and courtship:"[452] "lies about love, commitment, marital status, and fidelity."[453] Because "[g]irls are taught by their parents to be suspicious of the blandishments of suitors,"[454] Richard Posner argues, women should rely on "self-protection" rather than criminal remedies.[455]

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.[456]

There are sound, gender-neutral reasons to defend *caveat emptor* as a general rule with respect to sexual deception:[457] 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 relationship, partners tend to see each other in an idealized light.[458] Because people routinely have first-time sex with people 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.[459] 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.[460] This analogy is flawed: sexual consent is not like consent in contract. Moreover, the presumptions about full information and rational decisionmaking that underpin the law of contracts—and whose empirical validity is questionable in many contractual contexts—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

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[449] Bryden, 466-67;
[450] Bryden, 463; see also Schulhofer, 156-57; Subotnik, 356;
[451] Bryden, 464.
[452] Posner, 393.
[453] Bryden, 468. See also Schulhofer, 155; Dan Subotnik argues that deception is not only "pervasive," but "socially purposive." (at 348); "A healthy, livable human lifetime of relationships with others is ... inconceivable without deception."(id. at 343).
[454] Richard Posner, Sex and Reason 393 (1992).
[455] Id. 393; see also Bryden, 465.
[456] See, e.g. Sylvia A. Law, *Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955, at 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).
[457] For one less gendered defense of the legality of sex-by-deception, see Rubenfeld, supra.
[458] See, e.g. Bryden; Subotnik; Rubenfeld.
[459] Bryden
[460] See, e.g. Schulhofer; Estrich; Chamallas.

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 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 about B 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 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, marital status or STIs would be material. But there are people who do not mind, or even prefer, that a sexual partner be married to someone else. There are "bug chasers" who prefer a partner with HIV, and there are people who engage in casual anonymous unprotected sex without inquiring about STI status.[461]

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 her or him 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. 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:

> 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 disclose this to B. 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 shocked 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 with B at this stage of the relationship, A is signaling trust in B. B might be

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461 See Dean, *supra* note 50.

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 mandated 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. Emotional intimacy cannot be required by criminal law; where it exists, it builds over time. Couples build trust by taking emotional and sexual risks.[462] Emotional intimacy entails sharing aspects of oneself—including aspects 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 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.[463] Sexual deception, though, is not a violent crime, and there is little reason (other than the evidence-free stereotypes advanced in support of the *caveat emptor* rule) to believe that lack of candor in sexual relationships systematically reinforces gender hierarchy the way rape 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[464]). But the selective criminalization of sexual nondisclosure by HIV-positive and transgender men 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 likely to disclose their serostatus.[465] But casual, exploitative and abusive relationships are commonplace. Poverty, abuse, homophobia and gender inequality structure the HIV vulnerability of groups such as men who have sex with men, married poor African women,

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[462] 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 270 at 801 [citations omitted]; see also Corbett, id.

[463] See generally, e.g. Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy,* 105 Yale L.J. 2116 (1996); Susan Estrich, *Rape,* 1177.

[464] See, e.g. Terri Fisher, *Gender Roles and the Pressure to be Truthful: The Bogus Pipeline Modifies Gender Differences in Sexual but not Non-sexual Behavior,* 68 Sex Roles 401, 411-12 (2013) (and finding that, when respondents thought their answers were being monitored by a lie detector, female respondents reported *more* sexual partners than males did).

[465] See note -, supra.

sex workers, poor people and racial minorities.[466] 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.[467]

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.[468]

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.[469] Our society deals with such betrayals through social or public health sanctions. In general, they are not crimes.

Part 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 moral or 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.

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[466] See, e.g. CDC, noting that "Women who have experienced sexual abuse may be more likely than women with no abuse history to engage in high-risk 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 Women, http://alturl.com/wzwa5; CDC, HIV Among Gay Men, supra note 418 (noting that "Homophobia, stigma, and discrimination ... can lead to rejection by friends and family, discriminatory acts, and bullying and violence. These dynamics may make it difficult for some MSM to be open about same-sex behaviors with others, which can increase stress, limit social support, and negatively affect health.") See also GLOBAL COMMISSION REPORT, *supra* note 27 at 21 (noting that HIV prosecutions exacerbate the vulnerability of populations such as HIV-positive women, MSM, transgender people, drug users, and sex workers).

[467] See, e.g. Global Commission report, id. 20-26; Jane K. Stoever, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV/AIDS,* 87 N.C. L. Rev. 1157, 1172-77 (2009) (HIV-positive women subject to abuse and threats to expose their serostatus, and partners often accuse them of infidelity and beat them if they suggest condom use).

[468] See generally Franke, Domesticated Liberty; Murray, Marriage as Punishment.

[469] See, e.g. Abby Goodnough, *Impersonator to go on trial for kidnapping,* NY Times (May 25, 2009) (man impersonated a Rockefeller, married 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 Ann. ch.266, §37E (impersonation criminalized only when "intent to defraud"); NY Penal Code §190.25 (impersonation criminalized only with "intent to obtain a benefit or to injure or defraud"). Impersonation to get sex is not a crime. See Part II.C, supra.

One way to address the discriminatory HIV exceptionalism[470] that characterizes our current criminal regime might be to "ratchet up,"[471] 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 victims as the serious crime that it is.[472] 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.[473] HIV prosecutions for oral sex, digital manipulation, biting and spitting crimes 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).[474] While such changes would represent an improvement over the current status quo, no state has adopted all of them.[475]

Furthermore, the experience of other Anglo-American jurisdictions suggests that such reforms are unlikely to disrupt the gender disparities of HIV prosecution. For example,

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[470] 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. of the Int'l AIDS Society 47 (2010).

[471] See Aya Gruber, *Murder, Minority Victims, and Mercy,* 85 Colo. L. Rev. 129 (2014), highlighting the choice between "ratcheting up" and "ratcheting down" as a solution to inequality.

[472] See, e.g. Crenshaw, *Mapping the Margins*; Hernandez; Iglesias.

[473] See, e.g. laws in California and those adopted recently in Illinois and Iowa, note , supra and accompanying text. See, e.g. Pinkerton & Galletly (recommending this approach); Kaplan, *supra* note 8 (same); GLOBAL COMMISSION REPORT, *supra* note 27 (same); Mykhalovskiy & Betteridge, *supra* note 14 (same); UNAIDS, Guidance Note, 2-4.

[474] See id.

[475] California and Illinois, like many other states, 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, Cal. Penal Code §647F, CHLP, ENDING AND DEFENDING, *supra* note 3 at 60 (discussing Illinois prosecutions of sex workers in the absence of risky activity).

in the United Kingdom, nondisclosers can be prosecuted only if they transmit HIV.[476] Nonetheless, gender disparities there resemble those seen in the United States and Canada, which punish nondisclosure regardless of transmission.[477]

Another reform might address HIV exceptionalism by expanding criminal liability to other life-threatening sexually transmissible infections. Four US states nominally criminalize nondisclosure of hepatitis, but these laws seem rarely, if ever, to be enforced.[478] In Canada, likewise, nondisclosers can be prosecuted for any STI—or contraceptive deception[479]—that poses a "significant risk of serious bodily harm."[480] Between 1989 and 2010, Canada saw more than 120 prosecutions for HIV nondisclosure; 78% resulted in conviction.[481] In that time, there has been only one prosecution for nondisclosure of hepatitis. In contrast to HIV prosecutions, the hepatitis nondiscloser was acquitted because the trial judge did not consider a per-act transmissibility of "less than 1%" to be "significant."[482] 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. Law 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 difficult 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 are unlikely to come forward.

Nondisclosure of HIV is not a sexual assault. 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 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.

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[476] See generally WEAIT, *supra* note 14.
[477] See notes 341-349, supra, and accompanying text.
[478] See notes 197-201, supra, and accompanying text.
[479] 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 SCC 19. 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. para. 46. Contraceptive fraud is not a crime if the deceived partner cannot become pregnant.
[480] R. v. Cuerrier; R. v. Mabior; R. v. D.C.
[481] Mykhalovskiy & Betteridge, *supra* note 13, 46.
[482] *R.* v. *Jones,* 2002 NBQB 340.

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 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 questions about whether 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 victims, such as sex workers and needle sharers, is rarely a crime and, it seems, is hardly ever prosecuted. 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 the law ought to 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.