

REDEFINING RISK: JUDICIALLY HEIGHTENED RISK STANDARDS AND HIV-SPECIFIC CRIMINAL LAWS

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INTRODUCTION

Nick Rhoades was diagnosed with human immunodeficiency virus (HIV) in 1998.¹ By 2008, an antiretroviral treatment had lowered

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¹ *Rhoades v. State*, 848 N.W.2d 22, 25 (Iowa 2014).

Rhoades's viral load² to an undetectable level, meaning that he was incapable of transmitting HIV to sexual partners.³ In 2008, Rhoades engaged in consensual oral and anal sex with a condom and without informing his partner that he was HIV positive.⁴ Rhoades's partner "understood Rhoades to be HIV negative, in part because Rhoades's online profile listed him as HIV negative."⁵ Rhoades's partner later found out that Rhoades was living with HIV, and he contacted the police.⁶ Rhoades was charged under an Iowa law that criminalized transmission of HIV, even though his partner never tested positive for HIV.⁷

Rhoades pled guilty to criminal transmission of HIV.⁸ An Iowa district court sentenced him to twenty-five years in prison and required him to register as a sex offender.⁹ In 2010, Rhoades applied for postconviction relief, alleging that his trial counsel was ineffective.¹⁰ The district court and appeals court denied his application.¹¹ In 2014, the Iowa Supreme Court reversed and granted his application, effectively holding that Iowa's HIV-specific criminal statute could not be used to prosecute people living with HIV (PLHIV) who engaged in activity with a very low risk of transmitting HIV.¹²

Just three months later, the Tennessee Supreme Court reached a similar conclusion.¹³ In November 2006, Barry Hogg was diagnosed with HIV, and his doctor informed him that he could transmit HIV through unprotected sexual activity.¹⁴ In 2009, forty-seven-year-old

² A person's "viral load" is "[t]he amount of HIV in a sample of blood" and is "reported as the number of HIV [ribonucleic acid] copies per milliliter of blood." *Viral Load*, CLINICAL INFO HIV.GOV, <https://clinicalinfo.hiv.gov/en/glossary/viral-load-vl> [<https://perma.cc/6QN2-H2RB>].

³ *Rhoades*, 848 N.W.2d at 25; *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 8, 2021), <https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html> [<https://perma.cc/HSQ7-HWD2>].

⁴ *Rhoades*, 848 N.W.2d at 25–26.

⁵ *Id.*

⁶ *Id.* at 26.

⁷ *Id.*; Maurice Possley, *Nick Rhoades*, NAT'L REGISTRY OF EXONERATIONS (July 11, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4514> [<https://perma.cc/ED2E-ADE8>].

⁸ *Rhoades*, 848 N.W.2d at 26.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; *Rhoades v. State*, No. 12-0180, 2013 WL 5498141 (Iowa Ct. App. Oct. 2, 2013), *vacated*, 848 N.W.2d 22 (Iowa 2014).

¹² *Rhoades*, 848 N.W.2d at 25; *see infra* notes 119–33 and accompanying text.

¹³ *State v. Hogg*, 448 S.W.3d 877 (Tenn. 2014).

¹⁴ *Id.* at 881–82.

Hogg engaged in sexual acts with a thirteen-year-old boy.¹⁵ Hogg did not inform the boy of his HIV status.¹⁶ Hogg was arrested and tried for sexual misconduct and criminal exposure of another to HIV.¹⁷ A jury convicted Hogg of several offenses, including seven counts of criminal HIV exposure, and the judge sentenced him to an effective sentence of 174 years in prison.¹⁸

Hogg appealed, arguing that the evidence was insufficient to support the convictions for criminal HIV exposure.¹⁹ The Tennessee Supreme Court agreed in part, holding that there was insufficient evidence to support the convictions in three of the counts—those which involved licking the victim's anus, performing oral sex on the victim, and manipulating the victim's penis with his hand.²⁰ The court held that these three activities posed little to no risk of transmitting HIV, and therefore did not fall under activities prohibited by Tennessee's HIV-specific criminal statute.²¹

Rhoades and *Hogg* involved defendants with very different levels of moral culpability, but the Iowa Supreme Court and Tennessee Supreme Court both read heightened risk requirements into their state's respective HIV-specific criminal laws.²² Many writers have argued that HIV-specific criminal laws are overbroad because they punish PLHIV who are not morally deserving of punishment.²³ Although such laws have survived claims that they are unconstitutionally vague, they often do not specify which acts are punishable, and this, coupled with their often cursory descriptions of the level of risk necessary for conviction,

¹⁵ *Id.* at 882.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 884.

¹⁹ *Id.* at 885.

²⁰ *Id.* at 887–90.

²¹ *Id.*

²² *Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014); *Hogg*, 448 S.W.3d 877.

²³ Aziza Ahmed, *Adjudicating Risk: AIDS, Crime, and Culpability*, 2016 WIS. L. REV. 627, 628–29, 636, 639–40; Brian Cox, Note, *Turning the Tide: The Future of HIV Criminalization After Rhoades v. State and Legislative Reform in Iowa*, 11 NW. J.L. & SOC. POL'Y 28, 34–35 (2016); Leslie Pickering Francis & John G. Francis, *Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust*, 6 CRIM. L. & PHIL. 47, 51 (2012); Joseph Allen Garmon, Comment, *The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of HIV/AIDS*, 57 HOW. L.J. 665, 668–69 (2014); Sara Klemm, Comment, *Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland*, 13 J. HEALTH CARE L. & POL'Y 495, 501, 511 (2010); Sarah J. Newman, Note, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1419 (2013); Joseph Payne, Note, *Criminal HIV Transmission Statutes and Covert Online Investigations: A Due Process Analysis*, 49 COLUM. HUM. RTS. L. REV. 324, 357, 362 (2018) (citing Alexandra McCallum, Note, *Criminalizing the Transmission of HIV: Consent, Disclosure, and Online Dating*, 2014 UTAH L. REV. 677, 688).

means that they do not provide adequate notice to PLHIV that they may be legally liable for certain behaviors.²⁴ Many public health experts argue that such laws are contradictory to public health goals because they disincentivize HIV testing²⁵ and contribute to misinformation about how HIV is transmitted.²⁶ Advocates for PLHIV also argue that these laws harm vulnerable populations that already experience stigmatization and discrimination.²⁷

This Note argues that judicially imposed heightened risk requirements, like those in *Rhoades* and *Hogg*, mitigate many of the harms that HIV-specific criminal laws cause. If states are going to criminalize HIV exposure or transmission, they should only criminalize behavior that has a nonnegligible risk of transmission based on medical evidence. Due to political impediments in the way of state legislatures amending their laws, state courts should look to the *Rhoades* and *Hogg* decisions as persuasive precedent and adopt similar risk requirements for conviction.

Part I of this Note explains the risk of HIV transmission associated with certain behaviors, lays out variations in HIV-specific criminal laws, and examines how those laws are applied. Part I also examines the courts' reasoning in *Rhoades* and *Hogg*. Part II analyzes the legal and policy problems that these laws create, the challenges to amending or repealing the laws, and the utility of *Rhoades* and *Hogg* as persuasive precedent. Part III highlights the benefits of heightened risk requirements and proposes that attorneys and advocates rely on *Rhoades* and *Hogg* to encourage state courts to adopt those requirements. Considering the vast number of HIV-specific criminal laws—as of December 2021, thirty-five states have such laws and/or sentence enhancements—this Note does not comprehensively address

²⁴ Although the laws are vague from a policy perspective, no state high court has struck down an HIV-specific criminal law as unconstitutional. Klemm, *supra* note 23, at 502–05; Payne, *supra* note 23, at 355.

²⁵ Editorial, *HIV Criminalisation Is Bad Policy Based on Bad Science*, 5 LANCET HIV e473 (2018); Cox, *supra* note 23, at 30; Garmon, *supra* note 23, at 674. Although it is often claimed that HIV-specific criminal laws disincentivize testing, some scholars have argued otherwise. See, e.g., Rebecca Ruby, Note, *Apprehending the Weapon Within: The Case for Criminalizing the Intentional Transmission of HIV*, 36 AM. CRIM. L. REV. 313, 318 (1999). Before 2015, this argument had not been empirically tested. In 2015, a study was published finding that at-risk individuals residing in states with HIV-specific statutes are no less likely to report having been tested for HIV than those who live in other states. Sun Goo Lee, Note, *Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to the Law*, 14 YALE J. HEALTH POL'Y L. & ETHICS 194, 194 (2015).

²⁶ Ahmed, *supra* note 23, at 653; Cox, *supra* note 23, at 28, 30, 35; Garmon, *supra* note 23, at 673; Newman, *supra* note 23, at 1418.

²⁷ Ahmed, *supra* note 23, at 634–35, 643; Garmon, *supra* note 23, at 669–70; Klemm, *supra* note 23, at 511–12; Newman, *supra* note 23, at 1407, 1418, 1427; Payne, *supra* note 23, at 331–32.

all of the debates that they inspire, nor does it address every possible solution to the problems they cause.²⁸

I. BACKGROUND

A. *Evolution of Knowledge of HIV Transmission and Treatment*

When the HIV pandemic began, doctors, governments, and the general public had little understanding of how HIV was transmitted.²⁹ In the years after its discovery, speculation over how the virus spread abounded. Potential means included: casual contact; sharing food, water, and ambient air; insect vectors; and contact with saliva, urine, tears, sweat, or feces of PLHIV.³⁰ These have all been disproven as methods of transmission,³¹ and understanding of transmission routes has since improved.³² It is now understood that HIV is only spread through certain types of contact with the blood, semen, vaginal fluids, rectal fluids, or breast milk of PLHIV.³³ The most common means of transmission in the United States are sexual activity and sharing drug-injection needles.³⁴ These fluids must somehow enter a person's

²⁸ *HIV and STD Criminalization Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 22, 2021), <https://www.cdc.gov/hiv/policies/law/states/exposure.html> [<https://perma.cc/3RX5-ZRXS>].

²⁹ James W. Curran & Harold W. Jaffe, *AIDS: The Early Years and CDC's Response*, 60 *MORBIDITY & MORTALITY WKLY. REP.* 64 (2011).

³⁰ *Id.*

³¹ *Id.*; *The HIV/AIDS Epidemic in the United States: The Basics*, KAISER FAM. FOUND. (June 7, 2021), <https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics> [<https://perma.cc/R2DY-SZRR>]; *Basic Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 1, 2021), <https://www.cdc.gov/hiv/basics/statistics.html> [<https://perma.cc/WY2M-DAEC>]; *Ways HIV Cannot Be Spread*, C.S. MOTT CHILD.'S HOSP., <https://www.mottchildren.org/health-library/hw188479> [<https://perma.cc/V33G-94SL>].

³² *A Timeline of HIV/AIDS*, AIDS.GOV, <https://www.hiv.gov/sites/default/files/aidsgov-timeline.pdf> [<https://perma.cc/ZUA5-B9JS>].

³³ *How Is HIV Transmitted?*, HIV.GOV (June 24, 2019), <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/how-is-hiv-transmitted#:~:text=Contact%20between%20broken%20skin%2C%20wounds,is%20not%20spread%20through%20saliva> [<https://perma.cc/5XVS-F7SU>]; *Breastfeeding: Human Immunodeficiency Virus (HIV)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 2, 2022), <https://www.cdc.gov/breastfeeding/breastfeeding-special-circumstances/maternal-or-infant-illnesses/hiv.html#:~:text=In%20the%20United%20States%2C%20to,pregnancy%2C%20birth%2C%20or%20breastfeeding> [<https://perma.cc/Q82Z-YUU5>].

³⁴ Cox, *supra* note 23, at 30–31 (citing *HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 28, 2020), <https://www.cdc.gov/hiv/basics/transmission.html> [<https://perma.cc/RV4P-RB6T>]).

bloodstream for transmission to occur.³⁵ Contemplating risk of HIV infection can be difficult, considering that the likelihood of transmission is, in plain terms, low for nearly all activities, including sexual acts.³⁶ However, medical professionals agree that behaviors such as spitting, biting, throwing bodily fluids, sharing sex toys, and oral sex pose a negligible risk of transmission.³⁷

Other factors further mitigate the risk of transmitting HIV.³⁸ PLHIV may take antiretroviral medications to suppress their viral loads to prevent HIV's progression to AIDS.³⁹ PLHIV who properly adhere to antiretroviral regimens and who achieve and maintain viral suppression—often referred to as being “undetectable” because a viral load that is sufficiently reduced cannot be detected by an HIV test—have effectively no risk of transmitting HIV to their sexual partners and a greatly reduced risk of transmitting HIV via other methods, including needle sharing.⁴⁰ People without HIV can also effectively eliminate the risk of becoming infected by taking pre-exposure prophylaxis (PrEP).⁴¹ If taken correctly, PrEP is ninety-nine percent effective at preventing transmission.⁴² Condom use is approximately eighty percent effective at

³⁵ *How Is HIV Transmitted?*, *supra* note 33.

³⁶ *HIV Risk Behaviors*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 13, 2019), <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> [<https://perma.cc/ACN2-JP4K>]. The risk of transmission varies greatly depending on the act. The calculable risk of transmission for certain acts are: 138 transmissions per 10,000 exposures for receptive anal intercourse; 11 per 10,000 for insertive anal intercourse; 8 per 10,000 for receptive penile-vaginal intercourse; and 4 per 10,000 for insertive penile-vaginal intercourse. The risks of other methods of exposure are 63 per 10,000 for needle sharing and 9,250 per 10,000 for blood transfusions, both of which are outside the scope of this Note. For some activities, “while transmission is biologically possible, the risk is so low that it is not possible to put a precise number on it.” *Id.* Biting, spitting, throwing bodily fluids (including semen and saliva), and sharing sex toys all have a “non-calculable” risk of infection—the CDC rates such methods of exposure as having negligible risk. Receptive and insertive oral intercourse also have no calculable risk of transmission per 10,000 exposures—the CDC classifies the risk of transmission from these activities as “low.” *Id.*

³⁷ *Id.*

³⁸ *HIV Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 20, 2021), <https://www.cdc.gov/hiv/basics/livingwithhiv/treatment.html> [<https://perma.cc/3X8M-R4B9>].

³⁹ *Id.*

⁴⁰ *Id.*; Ann Pietrangelo, *What's the Connection Between Viral Load and Risk of HIV Transmission?*, HEALTHLINE (Apr. 25, 2020), <https://www.healthline.com/health/hiv-aids/undetectable-viral-load-transmission-risk#outlook> [<https://perma.cc/J6AG-NSWQ>].

⁴¹ *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 8, 2021) [hereinafter *Prevention Strategies*], <https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html#:~:text=There%20are%20now%20more%20options,can%20all%20effectively%20reduce%20risk> [<https://perma.cc/HSQ7-HWD2>].

⁴² *Id.*

preventing transmission, at least among heterosexual men and women.⁴³

Although HIV was at first considered a death sentence given its inevitable progression to AIDS if left untreated, treatment has improved to the point where HIV diagnosis has little effect on life expectancy.⁴⁴ Conditions such as high blood pressure, heart disease, and diabetes have a greater impact on life expectancy than does HIV.⁴⁵ One author has pointed out the inconsistency of applying criminal sanctions to HIV transmission, when “criminal sanctions generally do not apply to conduct that puts people at risk for these conditions.”⁴⁶

B. *The History and Policy of HIV-Specific Criminal Laws*

By the 1990s, the situation in the United States was dire. It is estimated that up to 988,000 Americans had become infected with HIV by 1991.⁴⁷ By 1992, AIDS had become the number one cause of death for men aged twenty-five to forty-four; by 1994, it was the leading cause of death for all Americans in that age group.⁴⁸ It was in the context of this growing crisis and under pressure from the federal government that states enacted HIV-specific criminal laws.

State legislatures enacted most HIV-specific criminal laws early in the pandemic, when little was understood about the virus and it was considered a “gay man’s disease.”⁴⁹ In 1987, President Reagan created

⁴³ *Id.* The CDC discusses “heterosexual men and women” as a proxy for what it refers to in other publications as “penile-vaginal intercourse.” *Id.*; *supra* note 36. This more inclusive term accurately reflects that it is the sex act itself, irrespective of the sexuality or gender identities of the individuals, that creates the risk of HIV transmission.

⁴⁴ Roger Pebody, *Yes, the Same Life Expectancy as HIV-Negative People, but Far Fewer Years in Good Health*, NAM (Mar. 13, 2020), <https://www.aidsmap.com/news/mar-2020/yes-same-life-expectancy-hiv-negative-people-far-fewer-years-good-health> [https://perma.cc/GYT4-CNCQ]. In 2000, PLHIV were expected to live twenty-two fewer years than HIV-negative people, but this had narrowed to nine years by 2016. At the end of the study discussed in the article, a twenty-one-year-old PLHIV was predicted to live to age seventy-seven, compared to age eighty-six, as predicted for someone without HIV. However, the same article noted that PLHIV “live substantially fewer healthy years than people without HIV.” *Id.*

⁴⁵ Cox, *supra* note 23, at 37.

⁴⁶ *Id.*

⁴⁷ Robert J. Biggar & Philip S. Rosenberg, *HIV Infection/AIDS in the United States During the 1990s*, 17 CLINICAL INFECTIOUS DISEASES S219, S219 (1993).

⁴⁸ *1990s HIV/AIDS Timeline*, AM. PSYCH. ASSOC. (Mar. 2017), <https://www.apa.org/pi/aids/youth/nineties-timeline> [https://perma.cc/L3AP-SZWT].

⁴⁹ Garmon, *supra* note 23, at 690. Garmon points out that “HIV stigma has often been perpetuated by the denunciation of HIV infection as sinful. Fear of the transmission of HIV in the late 1980s not only generated a rejection of HIV/AIDS patients, but it also revealed society’s rejection of homosexuality, itself.” *Id.* at 691 (first citing *Gender, Sexuality, Rights & HIV: An*

the Presidential Commission on the Human Immunodeficiency Virus, which found that states should “explore the use of the criminal law in the face of this epidemic,” but cautioned that “criminal sanctions for HIV transmission must be carefully drawn, must be directed only towards behavior which is scientifically established as a mode of transmission, and should be employed only when all other public health and civil actions fail to produce responsible behavior.”⁵⁰ Congress enacted the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (CARE Act), which mandated that “states would only receive federal funding for HIV/AIDS prevention and relief after demonstrating that ‘the criminal laws of the State are adequate to prosecute [intentional HIV exposure].’”⁵¹ Under the CARE Act, states either had to enact HIV-specific criminal laws or demonstrate that existing criminal laws were sufficient to prosecute intentional HIV exposure.⁵² The majority of states chose the former option and passed HIV-specific criminal laws.⁵³ Many states, including some that enacted HIV-specific criminal laws, prosecute HIV-related offenses under general criminal laws, such as those pertaining to reckless endangerment, attempted murder, and aggravated assault.⁵⁴ The purpose of these laws and prosecutions is to both punish criminally culpable behavior and to support the public health goal of combating the HIV pandemic.⁵⁵

States took different approaches to criminalizing HIV exposure or transmission,⁵⁶ including, most relevant to this Note, regarding which

Overview for Community Sector Organizations, INT’L COUNCIL OF AIDS SERVICE ORGS. (2007), https://www.hivlawandpolicy.org/sites/default/files/genderreport_web_080331.pdf [https://perma.cc/82G7-MD]6]; and then citing ALLAN M. BRANDT, NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880, at 183 (1985)).

⁵⁰ PRESIDENTIAL COMM’N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC REP. 130 (1988); Garmon, *supra* note 23, at 670.

⁵¹ Newman, *supra* note 23, at 1416 (alteration in original) (quoting Ryan White Comprehensive AIDS Resources Emergency Act, 42 U.S.C. § 300ff-47 (repealed 2000)).

⁵² *Id.*; see Klemm, *supra* note 23, at 498–99.

⁵³ *HIV Criminalization in the United States*, CTR. FOR HIV L. & POL’Y (July 28, 2020), <https://www.hivlawandpolicy.org/resources/map-hiv-criminalization-united-states-chlp-2022> [https://perma.cc/T6JA-HME7].

⁵⁴ CTR. FOR HIV L. AND POL’Y, HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW AND PRACTICE (3d ed. 2021) [hereinafter SOURCEBOOK], <https://www.hivlawandpolicy.org/sourcebook> [https://perma.cc/4K59-627M].

⁵⁵ Klemm, *supra* note 23, at 506–07.

⁵⁶ See generally SOURCEBOOK, *supra* note 54. Confusingly, some statutes that are labeled as criminalizing “transmission” do not require actual transmission as an element of the offense. See, e.g., FLA. STAT. § 775.0877(5) (2016) (“Nothing in this section [titled ‘Criminal transmission of HIV; procedures; penalties’] requires that an HIV infection have occurred in order for an offender to have committed criminal transmission of HIV.”).

behaviors are criminalized.⁵⁷ The laws also vary in other ways, including whether actual transmission—or just “exposure”—is necessary for conviction, the mens rea necessary for conviction, the availability of defenses, and the punishment imposed for violations.⁵⁸ These criteria are discussed below in varying levels of detail.

C. *The Form of HIV-Specific Criminal Laws*

There are two main categories of state laws. Many states prohibit PLHIV from engaging in certain conduct, regardless of the actions someone takes to reduce the risk of exposure or transmission of HIV.⁵⁹ Other states prohibit PLHIV from engaging in certain conduct only if the circumstances are such that the conduct presents a certain level of risk of HIV transmission, meaning that risk reduction measures may result in avoidance of criminal liability.⁶⁰ Some states have passed multiple HIV-specific criminal statutes and have laws that fall into both categories.⁶¹ Florida is an example of the former category. In Florida, it is a third-degree felony for PLHIV who are aware of their HIV status and who have been informed that HIV can be transmitted through sex to have sex without disclosing their HIV status to partners.⁶² Condom use, an undetectable viral load, and other factors that greatly mitigate risk of transmission are not defenses against prosecution—as written, Florida’s law absolutely prohibits PLHIV from having sex without informing partners of their status, even when transmission risk is negligible.⁶³ Numerous other states similarly place blanket prohibitions

⁵⁷ See generally SOURCEBOOK, *supra* note 54.

⁵⁸ *Id.*

⁵⁹ See, e.g., ARK. CODE ANN. § 5-14-123(b), (c)(1) (2021) (“A person commits the offense of exposing another person to [HIV] if the person . . . engages in sexual penetration with another person ‘[S]exual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into a genital or anal opening of another person’s body.”); KAN. STAT. ANN. § 21-5424(a)(1) (2021) (“It is unlawful for an individual, who knows oneself to be infected with a life threatening communicable disease, to . . . : [e]ngage in sexual intercourse or sodomy with another individual with the intent to expose that individual to that life threatening communicable disease. . . .”). See generally SOURCEBOOK, *supra* note 54.

⁶⁰ See *infra* notes 65–70 and accompanying text. See generally SOURCEBOOK, *supra* note 54.

⁶¹ See, e.g., GA. CODE ANN. § 16-5-60 (2021); *id.* § 17-10-15 (2021).

⁶² SOURCEBOOK, *supra* note 54, at Florida-1; FLA. STAT. §§ 775.082–.083, 384.24(2), 384.34(5) (2021).

⁶³ SOURCEBOOK, *supra* note 54, at Florida-1; FLA. STAT. § 384.24(2) (2016) (“It is unlawful for any person who has [HIV], when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such

on certain behaviors, even behaviors that have extremely low risk of transmission, such as exposure to urine, saliva, or feces.⁶⁴

State laws in the second category consider risk of transmission, but they vary in how risk is defined. Some require that the risk be medically significant. For example, in Minnesota, it is unlawful for someone “who knowingly harbors an infectious agent to transfer” the infectious agent through “sexual penetration with another person without having first informed the other person that the person has a communicable disease. . . .”⁶⁵ “Transfer” is defined as “engag[ing] in behavior that has been *demonstrated epidemiologically* to be a mode of direct transmission of an infectious agent which causes the communicable disease.”⁶⁶ In Indiana, it is unlawful for PLHIV to engage in “high risk

other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.”).

⁶⁴ See, e.g., GA. CODE ANN. § 16-5-60(c)(1) (2021) (“A person who is an HIV infected person who, after obtaining knowledge of being infected with HIV . . . [k]nowingly engages in sexual intercourse or performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person and the HIV infected person does not disclose to the other person the fact of that infected person’s being an HIV infected person prior to that intercourse or sexual act . . . is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than ten years.”); IDAHO CODE § 39-608(1) (2021) (“Any person who exposes another in any manner . . . knowing that he or she is or has been afflicted with [AIDS] . . . or other manifestations of [HIV], transfers or attempts to transfer any of his or her body fluid . . . to another person is guilty of a felony”); LA. STAT. ANN. § 14:43.5(B) (2021) (“No person shall intentionally expose another to HIV through any means or contact without the knowing and lawful consent of the victim”); MISS. CODE ANN. § 97-27-14(2)(a)–(c) (2021) (“A person commits the crime of endangerment by bodily substance if the person attempts to cause or knowingly causes a corrections employee, a visitor to a correctional facility or another prisoner or offender to come into contact with blood, seminal fluid, urine, feces, or saliva. . . . A violation of this subsection is a misdemeanor unless the person . . . knows that he is infected with [HIV or hepatitis B or C], in which case it is a felony. . . .”); N.J. STAT. ANN. § 2C:34-5(b) (West 2021) (“A person is guilty of a crime of the third degree who, knowing that he or she is infected with [HIV] . . . commits an act of sexual penetration without the informed consent of the other person.”); N.Y. PUB. HEALTH LAW § 2307 (Consol. 2021) (“Any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor.”); N.D. CENT. CODE § 12.1-20-17(2) (2021) (“A person who, knowing that that person is . . . afflicted with [AIDS, AIDS-related complexes, or HIV], willfully transfers any of that person’s body fluid to another person is guilty of a class A felony.”); OHIO REV. CODE ANN. § 2903.11(B)(1) (LexisNexis 2021) (“No person, with knowledge that the person has tested positive as a carrier of [HIV], shall knowingly . . . [e]ngage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in sexual conduct. . . .”); S.C. CODE ANN. § 44-29-145(1) (2021) (“It is unlawful for a person who knows that he is infected with [HIV] to . . . knowingly engage in sexual intercourse, vaginal, anal, or oral, with another person without first informing that person of his HIV infection. . . .”). This list is not exhaustive.

⁶⁵ MINN. STAT. § 609.2241 (2021).

⁶⁶ *Id.* (emphasis added); see also CAL. HEALTH & SAFETY CODE § 120290(e)(1) (West 2021) (“‘Conduct that poses a substantial risk of transmission’ means an activity that has a reasonable probability of disease transmission as proven by competent medical or epidemiological

activity” with others, including sexual contact “that has been *epidemiologically demonstrated* . . . to bear a significant risk of transmitting [HIV].”⁶⁷

Other state laws have broader definitions of risk that do not incorporate epidemiological knowledge. In Tennessee, it is illegal for a PLHIV to engage in “intimate contact with another,” which is defined as “the exposure of the body of one person to a bodily fluid of another person in any manner that presents a *significant risk* of HIV transmission.”⁶⁸ In South Dakota, it is unlawful for PLHIV to engage in “intimate physical contact,” which the statute defines as “bodily contact which exposes a person to the body fluid of the infected person in any manner that presents a *significant risk* of HIV transmission.”⁶⁹

Further, some state laws do not explicitly contemplate risk, but they implicitly require its consideration for conviction or application of a sentence enhancement. For example, Massachusetts’s sentence enhancement for rape of a child states that “sexual intercourse . . . with a child under 16 . . . in a manner in which the victim *could contract* a sexually transmitted disease or infection” may result in “imprisonment in the state prison for life or for any term of years, but not less than 15 years.”⁷⁰

The laws vary as to the mens rea necessary for conviction, the availability of defenses, and the punishments faced by those convicted. The variations in mens rea requirements include the standards of

evidence.”); GA. CODE ANN. § 17-10-15(f) (2021) (“[S]ignificant exposure’ means contact of the victim’s ruptured or broken skin or mucous membranes with the blood or bodily fluids of the person arrested for such offense, other than tears, saliva, or perspiration, of a magnitude that the Centers for Disease Control and Prevention have epidemiologically demonstrated can result in transmission of [HIV].”).

⁶⁷ IND. CODE §§ 16-41-7-1 to -5 (2020) (emphasis added).

⁶⁸ TENN. CODE ANN. § 39-13-109 (2021) (emphasis added).

⁶⁹ S.D. CODIFIED LAWS §§ 22-18-31 to -32 (2021) (emphasis added); *see also* CAL. HEALTH & SAFETY CODE § 120290(a)(1) (West 2021) (“A defendant is guilty of intentional transmission of an infectious or communicable disease if all of the following apply . . .” including if the “[d]efendant . . . engages in conduct that poses a *substantial risk* of transmission . . .” (emphasis added)); IOWA CODE § 709D.2 (2021) (“Exposes’ means engaging in conduct that poses a *substantial risk* of transmission.” (emphasis added)).

⁷⁰ MASS. GEN. LAWS ch. 265, § 22B (2021) (emphasis added); *see also* WIS. STAT. § 973.017 (2021) (explaining that sentence enhancement applies to some sex crimes if the victim is “significantly exposed” to HIV—“[s]ignificantly exposed’ means sustaining a contact that carries a potential for transmission of a sexually transmitted disease or HIV” via one of several methods); OKLA. STAT. tit. 21, § 1192.1(A) (2021) (explaining that PLHIV may be punished for engaging in conduct that is “reasonably likely to result in the transfer of the person’s own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or other membranes of another person”).

intentional, willful, knowing, and reckless.⁷¹ The laws also deviate regarding whether specific or general intent is required for conviction.⁷² An example of general intent in these circumstances would be the intent to engage in sexual activity, while specific intent would entail the intent to transmit HIV via that sexual activity.⁷³

The availability of defenses ranges from robust in some states to completely unavailable in others. California's affirmative defenses are an example of the former—PLHIV cannot be prosecuted for acting with the specific intent necessary for conviction if they take any "practical means to prevent transmission," which are:

method[s], device[s], behavior[s], or activit[ies] demonstrated scientifically to measurably limit or reduce the risk of transmission of an infectious or communicable disease, including, but not limited to, the use of a condom, barrier protection or prophylactic device, or good faith compliance with a medical treatment regimen for the infectious or communicable disease prescribed by a health officer or physician.⁷⁴

⁷¹ See, e.g., MISS. CODE ANN. § 97-27-14(1) (2021) ("It shall be unlawful for any person to knowingly expose another person to [HIV]" (emphasis added)); GA. CODE ANN. § 16-5-60 (2021) (applying where PLHIV "[k]nowingly engage[] in sexual intercourse or perform[] or submit[] to any sexual act involving the sex organs of one person and the mouth or anus of another person" (emphasis added)); IND. CODE §§ 16-41-7-1 to -5 (2020) (explaining that "[i]ndividuals with [HIV] . . . have a duty to inform or cause to be notified . . . a person at risk" and stating that "a person who recklessly violates or fails to comply" is guilty of a misdemeanor (emphasis added)); LA. STAT. ANN. § 14:43.5(A) (2018) ("No person shall intentionally expose another to [HIV] . . ." (emphasis added)).

⁷² See, e.g., MICH. COMP. LAWS § 333.5210(1) (1979) ("A person who knows that he or she has [HIV] who engages in anal or vaginal intercourse with another person . . . with the specific intent that the uninfected person contract HIV is guilty of a felony." (emphasis added)); GA. CODE ANN. § 16-5-60 (2021) (requiring that PLHIV merely act with general intent to engage in sexual activity, among other prohibited behaviors); CAL. HEALTH AND SAFETY CODE § 120291 (repealed 2018) (requiring that PLHIV act with specific intent to transmit HIV for conviction). A Louisiana statute states that "[n]o person shall intentionally expose another to [HIV] through sexual contact without the knowing and lawful consent of the victim . . ." LA. STAT. ANN. § 14:43.5(A) (2018). Although this law's plain text seems to require specific intent, Louisiana courts have held otherwise. See, e.g., *State v. Roberts*, 844 So. 2d 263, 272 (La. Ct. App. 2003) ("[The statute] does not require the State to prove that a defendant acted with the specific intent to expose the victim to [HIV].").

⁷³ See, e.g., sources cited *supra* note 72; NEV. REV. STAT. § 201.205 (2016) (repealed 2021) (assigning liability when PLHIV only intend to engage in prohibited acts); *General Intent*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/General_intent [<https://perma.cc/F8E6-MUAM>] ("Actual intent to perform some act, but without a wish for the consequences that result from that act."); *Specific Intent*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/Specific_intent [<https://perma.cc/CJD5-Z86N>] ("Actual intent to perform some act, along with a wish for the consequences that result from that act.").

⁷⁴ CAL. HEALTH & SAFETY CODE § 120290(e)(3) (2021).

Prior disclosure of HIV status to the person exposed to HIV is also a defense in California.⁷⁵ In many other states, disclosure, or the HIV-negative person otherwise knowing the PLHIV's status, is the only available defense.⁷⁶ Some states' statutes specifically allow antiretroviral treatment plans or an undetectable viral load as defenses to prosecution,⁷⁷ while others provide for "medical advice" defenses, which are, in effect, the same thing.⁷⁸ The text of other states' statutes does not leave room for any such defense, based largely on the unconditionality of the statutes' language.⁷⁹

The punishments imposed upon conviction are often severe. The laws are not uniform regarding whether conviction is a felony or a misdemeanor and, correspondingly, the lengths of prison sentences and sizes of fines also vary. In Florida, failure to disclose one's HIV status on multiple occasions is a first-degree felony punishable by a maximum of thirty-years' imprisonment.⁸⁰ In Arkansas, a first-time offender can be sentenced to up to thirty years in prison.⁸¹ Some violations are misdemeanors and prescribe much briefer sentences, including California's statute, which allows for sentences ranging from six months' imprisonment for transmission to ninety days for intentional exposure without transmission.⁸² Most of the statutes prescribe prison sentences of between one and ten years.⁸³

⁷⁵ *Id.* § 120290(a)(1)(E) (requiring prosecutors prove that "the person exposed to the disease during voluntary interaction with the defendant did not know that the defendant was afflicted with the disease").

⁷⁶ *See, e.g.*, ARK. CODE ANN. § 5-14-123(b) (2016) (providing that nondisclosure is a required element of the offense). In North Dakota, it is an affirmative defense if PLHIV disclose their status *and* use condoms. N.D. CENT. CODE § 12.1-20-17(3) (2016).

⁷⁷ *See, e.g.*, MICH. COMP. LAWS § 333.5210(4) (2021) ("A person who knows that he or she has HIV who is adherent with the *treatment plan* of an attending physician and has been *medically suppressed* per accepted medical standards is not acting with reckless disregard." (emphasis added)).

⁷⁸ *See, e.g.*, IDAHO CODE § 39-608(3)(b) (2016) ("It is an affirmative defense that the transfer of body fluid, body tissue, or organs occurred after advice from a licensed physician that the accused was noninfectious."); LA. STAT. ANN. § 14:43.5(F)(2) (2016) ("It is also an affirmative defense that the transfer of bodily fluid . . . occurred after advice from a licensed physician that the accused was noninfectious . . .").

⁷⁹ *See, e.g.*, FLA. STAT. § 384.24(2) (2016) ("It is unlawful for any person who has [HIV] . . . to have sexual intercourse with any other person, unless such person has been informed of the presence of the sexually transmissible disease . . ."); S.D. CODIFIED LAWS § 22-18-31(1) (2018) (stating that "[a]ny person who, knowing himself or herself to be infected with HIV, intentionally exposes another person to infection by . . . [e]ngaging in sexual intercourse or other intimate physical contact with another person" violates the law).

⁸⁰ FLA. STAT. §§ 384.24(2), 384.34(5), 775.082 (2016).

⁸¹ ARK. CODE ANN. §§ 5-14-123(a)-(d), 5-4-401(a)(2) (2016).

⁸² CAL. HEALTH & SAFETY CODE § 120290(a)(1), (g)(1)-(2) (2018).

⁸³ Klemm, *supra* note 23, at 501; SOURCEBOOK, *supra* note 54.

These factors in combination mean PLHIV can face criminal liability for engaging in behaviors that pose little to no risk of HIV transmission and for which PLHIV do not know they may be liable. For example, Florida's law allows for imposition of thirty-year prison sentences if PLHIV have sexual intercourse without disclosing their HIV status, regardless of the use of risk-reduction measures or intent to expose another to HIV or whether transmission actually occurred.⁸⁴ But such scenarios are not mere hypotheticals. In 2016, an HIV-positive Illinois man was arrested and charged with knowingly transmitting HIV after failing to disclose his serostatus to three women with whom he had sex.⁸⁵ He adhered to an antiretroviral regimen throughout the course of his relationships with the women, so transmission was virtually impossible, and sources do not state that the women contracted HIV.⁸⁶ In 2014, an HIV-positive Florida man was arrested for having a sexual relationship with a woman for several months without informing her that he was HIV positive.⁸⁷ He used a condom during all of their encounters.⁸⁸ Nonetheless, he pled guilty to the charges.⁸⁹

Contact with bodily fluids of PLHIV outside of sex can also lead to criminal liability. In 2018, an Alabama man with HIV was arrested for allegedly splashing a police officer with feces.⁹⁰ He faced a sentence enhancement due to his having HIV, despite the medical community's consensus that HIV cannot be transmitted via contact with the feces of someone with HIV.⁹¹ In 2008, a Maryland man with HIV was sentenced to eighteen years in prison for biting a police officer during his arrest.⁹²

⁸⁴ FLA. STAT. §§ 384.24(2), 384.34(5), 775.082 (2016).

⁸⁵ William Lee, *Wilmette Personal Trainer Accused of Knowingly Transmitting HIV*, CHI. TRIB. (Oct. 10, 2016, 6:57 AM), <https://www.chicagotribune.com/news/breaking/ct-wilmette-personal-trainer-accused-of-knowingly-transmitting-hiv-20161009-story.html> [https://perma.cc/L88V-5N2N].

⁸⁶ See *id.* Charges were dropped after prosecutors consulted medical experts. Brian L. Cox, *Charges Dropped Against Man Accused of Criminal Transmission of HIV*, CHI. TRIB. (Apr. 20, 2017, 4:30 PM), <https://www.chicagotribune.com/news/breaking/ct-hiv-transmission-charges-dropped-met-20170420-story.html> (last visited Apr. 24, 2022).

⁸⁷ Jeff Weiner, *HIV-Positive Man Charged with Having Sex Without Alerting Partner*, ORLANDO SENTINEL (Aug. 6, 2014, 12:00 AM), <https://www.orlandosentinel.com/news/os-xpm-2014-08-06-os-hiv-sex-arrest-orange-county-inmate-20140806-story.html> [https://perma.cc/C2GU-VW2K].

⁸⁸ *Id.*

⁸⁹ Plea Form at 1, *State v. Mitchell*, No. 2014-CF-010535-A-O (Fla. Cir. Ct. Aug. 6, 2014).

⁹⁰ Carol Robinson, *Gadsden Drug Suspect Stomps Bag of Feces, Splashes Deputy, Records State*, AL.COM (Mar. 7, 2019), https://www.al.com/news/birmingham/2018/06/gadsden_drug_suspect_stomps_ba.html [https://perma.cc/4ZZM-XJER].

⁹¹ *Id.*; SOURCEBOOK, *supra* note 54, at Alabama-1.

⁹² SOURCEBOOK, *supra* note 54, at Maryland-1.

Ten years of the sentence came from a charge of knowingly attempting to transfer HIV, despite the medical consensus that biting poses a negligible risk of transmission.⁹³

D. *Efforts to Amend HIV-Specific Criminal Laws*

As of December 2021, thirty-five states criminalize HIV exposure and four states have sentence enhancement laws, which increase sentence length when PLHIV commit certain crimes.⁹⁴ Several states have seen successful campaigns to amend or appeal their laws. Amendments have variously reformed risk and mens rea requirements, availability of defenses, and sentences imposed.

Illinois amended its law in 2012 to require that prosecutors prove that PLHIV have specific intent to transmit HIV and limited prosecution to only “sexual activity with another without the use of a condom,” in turn defining “sexual activity” to include only vaginal or anal intercourse.⁹⁵ The bill was enacted with unanimous support from both chambers of the Illinois General Assembly.⁹⁶ The law, as initially introduced by two Republican General Assembly Members, amended the state’s law to allow prosecutors to access medical records to learn if someone knew their HIV status, which is an element that must be established prior to conviction.⁹⁷ The provisions of the bill that narrowed the statute’s scope were added as a compromise between advocates for PLHIV and law enforcement, who desired easier access to PLHIV’s medical records.⁹⁸ In 2021, Illinois took the important step of entirely repealing its HIV-specific criminal statute.⁹⁹

In 2017, California amended its law by reducing charges for certain HIV-related crimes from felonies to misdemeanors and reducing sentencing to a maximum of six months; prior to the amendment,

⁹³ *Id.*

⁹⁴ *HIV and STD Criminalization Laws*, *supra* note 28.

⁹⁵ 720 ILL. COMP. STAT. 5/12-5.01 (2020) (repealed 2021); Ramon Gardenhire, *How Illinois’ HIV Criminalization Law Has Changed*, AIDS FOUND. CHI. (July 27, 2012), <https://www.aidschicago.org/page/news/all-news/how-illinois-hiv-criminalization-law-has-changed> [<https://perma.cc/D23V-VLC2>].

⁹⁶ Gardenhire, *supra* note 95.

⁹⁷ *Id.*; 720 ILL. COMP. STAT. 5/12-5.01 (2016) (repealed 2021).

⁹⁸ Gardenhire, *supra* note 95.

⁹⁹ *Illinois Becomes Second State to Repeal HIV Criminalization Laws*, CTR. FOR HIV L. & POL’Y (July 28, 2021), <https://www.hivlawandpolicy.org/news/illinois-becomes-second-state-repeal-hiv-criminalization-laws> [<https://perma.cc/762N-A7HE>]. Illinois is only the second state to fully repeal its HIV-specific criminal statute, after Texas in 1994. *Id.*

convicted PLHIV could face up to eight years in prison.¹⁰⁰ The new law established that PLHIV cannot be prosecuted for acting with the specific intent necessary for conviction if they take practical means to prevent transmission, while also establishing that someone who does not employ such practical means is not presumed to have acted with specific intent.¹⁰¹ The amendment also changed the law so that it no longer applies exclusively to HIV but also to other communicable diseases.¹⁰² Louisiana amended its HIV criminal statute in 2018 to provide for three affirmative defenses, all of which are some variation on disclosing HIV status to sexual partners.¹⁰³

There is an ongoing effort in Georgia to amend its law.¹⁰⁴ Under Georgia's current law, PLHIV face up to ten years in prison for not disclosing their HIV status to sexual partners, and up to twenty years imprisonment for an assault of a peace or correctional officer "using his or her body fluids (blood, semen, or vaginal secretions), saliva, urine, or feces."¹⁰⁵ The current law does not consider a defendant's viral load or whether a condom was used during sex.¹⁰⁶ Proposed amendments would narrow Georgia's law by requiring "a significant risk of transmission based on current scientifically supported levels of risk of transmission" for conviction.¹⁰⁷ The Georgia House of Representatives approved a bill to amend Georgia's law in 2020.¹⁰⁸ The Georgia Senate

¹⁰⁰ CAL. HEALTH & SAFETY CODE § 120291 (1998) (repealed 2017); S.B. 239, 2017–18 Leg., Reg. Sess. (Cal. 2017); Julie Moreau, *New California Law Reduces Penalty for Knowingly Exposing Someone to HIV*, NBC NEWS (Oct. 13, 2017, 9:53 AM), <https://www.nbcnews.com/feature/nbc-out/new-california-law-reduces-penalty-knowingly-exposing-someone-hiv-n809416> [<https://perma.cc/GG3X-AUBU>].

¹⁰¹ CAL. HEALTH & SAFETY CODE § 120290 (2018); SOURCEBOOK, *supra* note 54, at California-1.

¹⁰² *Supra* note 101.

¹⁰³ LA. STAT. ANN. § 14:43.5.A, F(1)–(3) (2018); SOURCEBOOK, *supra* note 54, at Louisiana-1.

¹⁰⁴ Tamar Hallerman, *Georgia Could Overhaul HIV Law for First Time Since AIDS Crisis*, ATLANTA J.-CONST. (Mar. 8, 2020), <https://www.ajc.com/news/state—regional-govt—politics/georgia-could-overhaul-hiv-laws-for-first-time-since-aids-crisis/XQLE4VhEPKVkaD8I5yQssM> [<https://perma.cc/3U8N-Q3SL>]; Amanda C. Coyne, *Georgia House Passes Update to State HIV Laws*, ATLANTA J.-CONST. (Mar. 12, 2020), <https://www.ajc.com/news/local/georgia-house-passes-update-state-hiv-laws/umCPjCW4CXlHnAXJ4TjmTO> [<https://perma.cc/QN6R-VEBA>]; Matt Hennie, *Georgia Senate Passes Bill to Modernize State's HIV Laws*, PROJECT Q ATLANTA (Mar. 10, 2021), <https://www.projectq.us/georgia-senate-passes-bill-to-modernize-states-hiv-laws> [<https://perma.cc/R559-R54P>].

¹⁰⁵ GA. CODE ANN. § 16-5-60(c)–(d) (2016); *supra* note 104.

¹⁰⁶ GA. CODE ANN. § 16-5-60(c); Hallerman, *supra* note 104.

¹⁰⁷ H.B. 719, 155th Gen. Assemb., Reg. Sess. (Ga. 2020); Hallerman, *supra* note 104.

¹⁰⁸ H.B. 719, 155th Gen. Assemb., Reg. Sess. (Ga. 2020); Hallerman, *supra* note 104.

overwhelmingly approved a similar bill in March 2021, but the bill eventually failed due to time limitations.¹⁰⁹

Iowa is a prominent example of a state that has dramatically reformed its HIV-specific criminal laws.¹¹⁰ Prior to reforming the law, Iowa's statute made it a crime for PLHIV to intentionally engage in "intimate contact" with another person without informing that person that they were HIV positive.¹¹¹ "Intimate contact" required that (1) there was an "intentional exposure of the body of one person to a bodily fluid of another person" and that (2) this occurred "in a manner that could result in the transmission of" HIV.¹¹² Iowa's new law applies to hepatitis and meningococcal disease in addition to HIV, recognizing that modern options available for managing HIV mean that HIV does not necessarily qualify for the uniquely harsh treatment it once received.¹¹³ The law criminalizes conduct only when it poses a "substantial risk" of transmitting one of these diseases, creates gradations in the offense based on intent and result of the conduct (whether transmission occurs), and establishes an affirmative defense that applies if defendants "take practical means to prevent transmission."¹¹⁴

In May 2021, Missouri also approved a broad overhaul of its HIV-specific criminal law via the passage of Senate Bill 53, which downgraded the crime of "reckless exposure" to HIV to a Class D felony from a Class B felony.¹¹⁵ Senate Bill 53, which took effect in August 2021, also changed the mens rea requirements so that prosecutors must prove that PLHIV "knowingly" exposed others to HIV.¹¹⁶ HIV is no longer singled out for particularly harsh treatment, given that the law also applies to all "serious or communicable diseases."¹¹⁷

¹⁰⁹ S.B. 164, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); Craig Washington, *It's Time to Stop Criminalizing HIV*, ATLANTA MAG. (Oct. 1, 2021), <https://www.atlantamagazine.com/news-culture-articles/its-time-to-stop-criminalizing-hiv> [https://perma.cc/7RLM-3M6X].

¹¹⁰ *Iowa Scraps Harsh HIV Criminalization Law in Historic Vote*, NBC NEWS (May 1, 2014, 3:40 PM), <https://www.nbcnews.com/news/us-news/iowa-scraps-harsh-hiv-criminalization-law-historic-vote-n94946> [https://perma.cc/SS6A-ESWP]; Garmon, *supra* note 23, 666–67, 677–78. See generally Cox, *supra* note 23.

¹¹¹ IOWA CODE § 709C.1(1)(a), (3) (repealed 2014); SOURCEBOOK, *supra* note 54, at Iowa-1.

¹¹² IOWA CODE § 709C.1(2)(b) (repealed 2014).

¹¹³ *Id.* § 709D.2(1)–(2) (2015); Cox, *supra* note 23, at 43–44.

¹¹⁴ IOWA CODE § 709D.3; Cox, *supra* note 23, at 44–45.

¹¹⁵ Sophie Hurwitz, *After 30 Years, Missouri Reforms HIV Transmission Criminalization Law*, MO. INDEP. (Aug. 5, 2021, 8:00 AM), <https://missouriindependent.com/2021/08/05/after-30-years-missouri-reforms-hiv-transmission-criminalization-law> [https://perma.cc/39GD-64MB]; S.B. 53, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

¹¹⁶ Hurwitz, *supra* note 115; Mo. S.B. 53.

¹¹⁷ Hurwitz, *supra* note 115; Mo. S.B. 53.

E. *The Rhoades and Hogg Decisions and Their Reasoning*

In *Rhoades* and *Hogg*, the Iowa Supreme Court and the Tennessee Supreme Court read heightened risk requirements into their respective HIV-specific criminal laws when presented with defendants who engaged in behaviors with a negligible risk of transmitting HIV.¹¹⁸

Prior to its amendment, the Iowa statute prohibited PLHIV from “[e]ngag[ing] in intimate contact with another person” without disclosing their HIV status, and it defined “intimate contact” as “the intentional exposure of the body of one person to a bodily fluid of another person in a manner that *could result* in the transmission of [HIV].”¹¹⁹ In 2001, the Iowa Supreme Court held that the word “could” required “that transmission of . . . HIV from the infected person to the exposed person was *possible* considering the circumstances.”¹²⁰

However, thirteen years later, the court vacated Nick Rhoades’s conviction because it determined that the statutory language contained an implied reasonableness requirement that precluded conviction for very low or merely theoretical risks.¹²¹ The court then determined that scientific evidence and medical advances precluded a finding by judicial notice that Rhoades’s acts “met the requisite risk level to transmit HIV.”¹²² In *Rhoades*, the court elaborated on the meaning of “possible” as used in the statute and noted that it “may mean allowing any likelihood of occurrence, no matter how remote.”¹²³ The court explained that “possible” can also mean “having an indicated potential by nature or circumstances,” a definition that the court noted, “considers the reality of a thing occurring, rather than a theoretical chance.”¹²⁴ The court considered the Eleventh Circuit’s position on what makes an occurrence “possible”:

The potential for legal liability must be reasonable, not merely theoretical. In considering possible state law claims, possible must mean more than such a possibility that a designated residence can be

¹¹⁸ See *supra* notes 1–22 and accompanying text.

¹¹⁹ IOWA CODE § 709C.1 (repealed 2014) (emphasis added); *Rhoades v. State*, 848 N.W.2d 22, 26 (Iowa 2014).

¹²⁰ *Rhoades*, 848 N.W.2d at 27 (alteration in original) (quoting *State v. Keene*, 629 N.W.2d 360, 365 (Iowa 2001)).

¹²¹ *Id.* at 25, 27–28.

¹²² *Id.* at 33; *Cox*, *supra* note 23, at 41, 43.

¹²³ *Rhoades*, 848 N.W.2d at 27 (first citing *Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co. v. Indianapolis, Columbus & S. Traction Co.*, 81 N.E. 487, 488 (Ind. 1907); and then citing *Gustafson v. Benda*, 661 S.W.2d 29, 31 (Mo. Ct. App. 1982)).

¹²⁴ *Id.* (quoting *Possible*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabr. ed. 2002)).

hit by a meteor tonight. That is possible. Surely, as in other instances, reason and common sense have some role.¹²⁵

The justices noted that some courts in other states have recognized an “inherent reasonableness consideration in construing the meaning of ‘possible’ in the context of certain statutes.”¹²⁶ After considering *Legg* and several cases from other states, the court chose the latter definition of “possible” because the justices “recognize[d] this statute require[d] expert medical testimony on the likelihood of transmission of HIV,” and experts need not “testify in absolutes when it comes to causation,”¹²⁷ which “implicitly acknowledged [that] . . . it is very difficult to have an expert testify that a specific act under specific circumstances poses absolutely no risk.”¹²⁸ The justices also relied on the purposes of criminal law, to punish and deter, in reaching their decision: they “would not want to deprive a person of his or her liberty on the basis the defendant’s actions caused something that could only theoretically occur.”¹²⁹

The court held that “[c]ausation must be reasonably possible under the facts and circumstances of the case to convict a person of criminal transmission of HIV.”¹³⁰ Advancements in medicine were essential to the court’s decision.¹³¹ Consistent with this analysis, the court was “unable to take judicial notice that an infected individual can transmit HIV when an infected person engages in protected anal sex with another person or unprotected oral sex, regardless of the infected person’s viral load.”¹³² The Iowa Supreme Court was the first state court of last resort to incorporate modern medical knowledge of HIV transmission into its analysis of an HIV-specific criminal law.¹³³

¹²⁵ *Id.* (quoting *Legg v. Wyeth*, 428 F.3d 1317, 1325 n.5 (11th Cir. 2005)).

¹²⁶ *Id.* at 27–28 (first citing *Topeka City Ry. v. Higgs*, 16 P. 667, 674 (Kan. 1888); then citing *Sullivan v. Mountain States Power Co.*, 9 P.2d 1038, 1047 (Or. 1932); and then citing *Commonwealth v. Allied Bldg. Credits, Inc.*, 123 A.2d 686, 691 (Pa. 1956)).

¹²⁷ *Id.* at 28.

¹²⁸ *Cox*, *supra* note 23, at 42.

¹²⁹ *Rhoades*, 848 N.W.2d at 28.

¹³⁰ *Id.*

¹³¹ *See id.*; *Cox*, *supra* note 23, at 29.

¹³² *Rhoades*, 848 N.W.2d at 32. A court takes “judicial notice” when it “declares a fact presented as evidence as true without a formal presentation of evidence.” A court may only take judicial notice of “indisputable facts.” *Judicial Notice*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/judicial_notice [<https://perma.cc/Q2L6-HE8L>]. When the Iowa Supreme Court stated that it was “unable to take judicial notice that an infected individual can transmit HIV when an infected person engages in protected anal sex . . . or unprotected oral sex,” the court was effectively holding that prosecutors must present medical evidence showing that transmission was “reasonably possible.” *Rhoades*, 848 N.W.2d at 28, 32.

¹³³ *See Rhoades*, 848 N.W.2d at 32–33; *Cox*, *supra* note 23, at 29.

In *Hogg*, the Supreme Court of Tennessee redefined the risk requirement in Tennessee's HIV-specific criminal statute, which made it a crime for PLHIV to engage in "intimate contact" in a manner that presented a "significant risk" of transmitting HIV.¹³⁴ The relevant issue before the court was whether there was sufficient evidence to support the convictions for the seven counts of criminal exposure to HIV of which the defendant was convicted.¹³⁵ The defendant argued that although his conduct could result in transmission of HIV, it did not pose a "significant risk" of transmission, and that the State's evidence therefore did not support his conviction.¹³⁶

The court noted that "[w]hen the language of the statute is clear and unambiguous, we apply the statute's plain language in its normal and accepted use."¹³⁷ *Hogg* challenged his conviction on all seven counts of criminal HIV transmission upon which he had been convicted, arguing that the most appropriate definition of "significant risk" was "risks so great that they are almost certain to materialize if nothing is done."¹³⁸ The State countered that significant risk in this context meant "that the risk is notable, as opposed to negligible or *de minimis*."¹³⁹

To settle this question, the court considered the framework laid out by the United States Supreme Court in *School Board of Nassau County v. Arline*.¹⁴⁰ The Supreme Court:

identified four factors for determining whether a person with a contagious disease poses a significant risk to others. These include: (a) the nature of the risk; (b) the duration of the risk; (c) the severity of the risk; and (d) the probability the disease will be transmitted.¹⁴¹

The Eleventh Circuit expanded upon these factors in *Onishea v. Hopper*.¹⁴² The circuit court wrote that "when the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk 'significant.'"¹⁴³ It went on to hold that in the context of potential transmission of a fatal disease, risk is "significant" if it "shows both (1) that a certain event can occur and (2) that according to reliable medical

¹³⁴ TENN. CODE ANN. § 39-13-109(a)(1), (b)(2) (2016).

¹³⁵ *State v. Hogg*, 448 S.W.3d 877, 881 (Tenn. 2014).

¹³⁶ *Id.* at 885.

¹³⁷ *Id.* at 887 (citing *Keen v. State*, 398 S.W.3d 594, 610 (Tenn. 2012)).

¹³⁸ *Id.* (citation omitted).

¹³⁹ *Id.* at 888.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987)).

¹⁴² *Onishea v. Hopper*, 171 F.3d 1289, 1296-98 (11th Cir. 1999).

¹⁴³ *Hogg*, 448 S.W.3d at 888 (quoting *Onishea*, 171 F.3d at 1297).

opinion the event can transmit the disease.”¹⁴⁴ The Tennessee Supreme Court also considered the United States Supreme Court’s examination of “significant risk” in the context of the Occupational Health and Safety Act in *Industrial Union Department v. American Petroleum Institute*, in which the Supreme Court wrote that identifying significant risk did not require a “mathematical straightjacket.”¹⁴⁵ Even if the risk in question is one of death, the risk is not significant if the likelihood of the harm occurring is very low.¹⁴⁶

Based on its review of these cases, the court rejected both parties’ proffered definitions of “significant risk” and instead determined that risk is a product of (1) the severity of the consequences and (2) the likelihood of HIV transmission.¹⁴⁷ The magnitude of the harm caused by HIV infection was potentially very high, but that did not automatically render all risks of transmission “significant.”¹⁴⁸ The court ultimately held that “significant risk” required “a chance of HIV transmission that is more definite than a faint, speculative risk, as shown by expert medical proof.”¹⁴⁹ In doing so, the court abandoned what was effectively a bright line rule that *any* risk of exposure qualified as “significant” because the consequences were so severe.

Dr. Catherine McGowan, an infectious disease specialist who had treated Hogg for his HIV and AIDS diagnoses, testified at trial.¹⁵⁰ Dr. McGowan’s testimony was essential to the court’s analysis.¹⁵¹ She stated that there was some risk of transmission of HIV in any sexual encounter but noted that the chances of transmission “can be evaluated by considering the type of sexual contact, the viral load of the infected person, and the presence and quantity of bodily fluid exchanged during sexual activity.”¹⁵² Dr. McGowan explained that the different sexual activities between Hogg and the victim presented different risks.¹⁵³ She testified that Hogg’s acts of licking the victim’s anus, performing oral sex on the victim, and particularly his performing masturbation on the victim posed little to no risk of transmitting HIV.¹⁵⁴ However, she explained that the other acts—digitally probing the victim’s anus,

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (quoting *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 655 (1980)).

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 888–89.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 883.

¹⁵¹ *See id.* at 889–90.

¹⁵² *Id.* at 883.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 889–90.

performing anal sex on the victim (the offense in two of the seven counts), and receiving oral sex from the victim—posed varying, but higher, risks of transmission.¹⁵⁵ Nevertheless, the jury convicted Hogg of all seven counts.¹⁵⁶

Based on the Tennessee Supreme Court's new definition of "significant risk" and Dr. McGowan's testimony, the court reversed Hogg's conviction on three of the counts because medical evidence introduced at trial showed that the acts did not constitute a significant risk of HIV transmission.¹⁵⁷

II. ANALYSIS

A. *The Problems with HIV-Specific Criminal Laws*

The problems with HIV-specific criminal laws are multitudinous and fall into three broad, often intersecting categories. These laws: (1) do not comport with society's and the law's typical conceptions and norms of criminal justice; (2) are at odds with the public health goals they allegedly buttress and are inconsistent with modern medical knowledge; and (3) contribute to stigmatization of PLHIV.¹⁵⁸ These categories often overlap with and reinforce one another.

There is a general consensus among scholars that HIV-specific criminal laws are often at odds with the norms of criminal law.¹⁵⁹ Authors are virtually unanimous in their criticism of these laws as overbroad—most of them as written and many in practice punish conduct that has a negligible risk, or no risk at all, of transmitting HIV.¹⁶⁰ Since the enactment of HIV-specific criminal laws, PLHIV have been arrested, charged, and convicted for engaging in low-risk sexual activity and for spitting, throwing urine, or otherwise exposing people to bodily fluids in ways that do not transmit HIV.¹⁶¹ Even where a defendant is acquitted or charges are dropped, arrest and/or prosecution can be devastating.¹⁶²

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 884.

¹⁵⁷ *Id.* at 891.

¹⁵⁸ Cox, *supra* note 23, at 34–39; Klemm, *supra* note 23, at 505–14; Garmon, *supra* note 23, at 699–700; Payne, *supra* note 23, at 331–34.

¹⁵⁹ Cox, *supra* note 23, at 37–39.

¹⁶⁰ *Id.* at 34–35.

¹⁶¹ See generally SOURCEBOOK, *supra* note 54.

¹⁶² Klemm, *supra* note 23, at 510–11; Payne, *supra* note 23, at 332, 349–50, 362. See generally SOURCEBOOK, *supra* note 54. A salient example of the devastation that an arrest can cause is the

Most HIV criminal laws also differ from the norms of criminal law in that PLHIV's conduct must merely create some risk of harm, not actually cause harm, and many of the laws also fail to differentiate between different *mentes rea*.¹⁶³ Many of them infer intent to transmit or expose from merely failing to disclose one's HIV status.¹⁶⁴ As a result, these laws punish PLHIV who lack culpability and fail to give adequate notice to PLHIV that certain behaviors could lead to criminal liability.¹⁶⁵ It is reasonable that PLHIV who engage in low-risk behaviors would not be on notice that those behaviors are criminally sanctionable where the law in question prohibits activities that have a "risk" or "significant risk" of exposure. This is particularly true when PLHIV use condoms or adhere to an antiretroviral regimen, considering that condoms greatly reduce risk and antiretrovirals can effectively eliminate it.¹⁶⁶ Based on the foregoing, these laws generally do not further the two primary goals of criminal law: to punish and to deter.¹⁶⁷

These laws also do little to serve the public health goals that are often invoked to justify them, and, in fact, they are likely counterproductive to reaching those goals. They make achieving public health goals more difficult by: (a) contributing to misinformation about HIV transmission routes; (b) discouraging HIV testing; and (c) placing

case of a Tennessee man who was arrested in 2019, more than four years after he allegedly exposed his partner to HIV. His partner found a pill bottle and a prescription bag for ATRIPLA, an antiretroviral medication, with the man's name on it. Josh Breslow, *Nashville Man Charged with Knowingly Exposing Pregnant Woman to HIV*, WKRN.COM (Sept. 24, 2019, 8:57 PM), <https://www.wkrn.com/news/crime-tracker/nashville-man-charged-with-knowingly-exposing-pregnant-woman-to-hiv> [<https://perma.cc/X6W2-R8Z7>]. If taken correctly, ATRIPLA can suppress a person's viral load to an undetectable level—one study showed that after forty-eight weeks, ninety-seven percent of PLHIV taking ATRIPLA daily had a suppressed viral load. Benjamin Ryan, *Atripla Taken Every Other Day Still Suppresses HIV at High Rate*, POZ (Apr. 12, 2019), <https://www.poz.com/article/atripla-taken-every-day-still-suppresses-hiv-high-rate> [<https://perma.cc/Q947-TQK9>]. After his arrest, the man was detained by federal Immigration and Customs Enforcement. Mathew Rodriguez, *ICE Detained a Tennessee Man After HIV Exposure Charge*, THEBODY (Oct. 30, 2019), <https://www.thebody.com/article/ice-detained-tennessee-man-hiv-exposure-charge> [<https://perma.cc/36UD-62EX>].

¹⁶³ Cox, *supra* note 23, at 38. See generally SOURCEBOOK, *supra* note 54.

¹⁶⁴ Garmon, *supra* note 23, at 673.

¹⁶⁵ *Id.* at 673, 699 ("Punishing individuals for crimes that they neither intended to commit nor are medically capable of committing stands in direct contravention with the basic premises of culpability.").

¹⁶⁶ *Prevention Strategies*, *supra* note 41.

¹⁶⁷ *Id.*; Cox, *supra* note 23, at 39 ("HIV criminalization laws do not apply to individuals who do not know their HIV status, and thus can have no deterrent effect on the highest-risk population or conduct."); *id.* at 52 ("[C]riminalization has no demonstrated deterrent effect . . ."). But see Klemm, *supra* note 23, at 506 ("As with any criminal law, HIV-specific statutes seek to punish people who engage in criminally culpable conduct . . . [T]o the extent the criminal law also aims to produce norms of conduct, criminal HIV exposure statutes arguably work to deter behavior that risks transmitting the virus to an unknowing victim.").

the burden of preventing HIV transmission entirely on the backs of PLHIV.¹⁶⁸ The general public still has many misconceptions about how HIV is transmitted, and arresting and prosecuting PLHIV for engaging in behaviors with negligible risks of transmitting HIV reinforces these misconceptions and makes it more difficult to educate people about how HIV is actually transmitted.¹⁶⁹

Misconceptions regarding how HIV is transmitted also contribute to stigmatization and marginalization of PLHIV, many of whom already belong to communities that experience marginalization and prejudice.¹⁷⁰ In the United States, these groups include sex workers, the LGBT community (particularly men who have sex with men), incarcerated persons, drug users, and Black and Latinx Americans.¹⁷¹ These groups have been stereotyped as “quintessential HIV transmitters” since the beginning of the pandemic.¹⁷² Some statutes

¹⁶⁸ See Cox, *supra* note 23, at 28, 36 (“HIV criminalization . . . put[s] the onus entirely on people living with HIV. This can create a false sense of security for the HIV-negative partner: if they understand that any HIV-positive sexual partner is legally obligated to proactively disclose his or her status, they may not raise the question themselves or take their own protective measures, since it is the HIV-positive partner’s ‘job’ to do so.” (footnotes omitted)); Newman, *supra* note 23, at 1418; *Criminal Law, CTR. FOR HIV L. & POL’Y*, <https://www.hivlawandpolicy.org/issues/criminal-law> [<https://perma.cc/PTZ5-BHQL>] (“From the beginning of the HIV epidemic, fear and ignorance about HIV’s routes and relative risks of transmission have fueled a backlash against people living with HIV, most evident in the laws that punish them for engaging in consensual sex or activities that pose no risk of HIV transmission. The media coverage that accompanies these cases often demonizes people with HIV and misrepresents the risk of transmission, helping to perpetuate stigma that results in denial of jobs and services and decreased willingness to get tested. Because there is no evidence that HIV-specific criminal laws and prosecutions have any effect on behavior, the argument that these laws serve a deterrent effect is unfounded. Punishing people for behavior that is either consensual or poses no risk of HIV transmission only serves to further stigmatize already marginalized communities while missing opportunities for prevention education.”).

¹⁶⁹ Garmon, *supra* note 23, at 695; *Criminal Law, supra* note 168.

¹⁷⁰ Ahmed, *supra* note 23, at 627–28 (“In countries with concentrated epidemics, it is racial minorities, sex workers, men who have sex with men, and drug users who face the brunt of the epidemic.” (footnotes omitted)); U.S. *Statistics*, HIV.GOV (June 30, 2020), <https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics> [<https://perma.cc/JP3K-S3BU>]. In 2018, Black Americans represented 13% of the population, but 41% of PLHIV. Latinx Americans represented 18% of the population, but 23% of PLHIV. Between 2014 and 2018, Black and Latinx Americans represented 42% and 28% of new cases, respectively. *Impact on Racial and Ethnic Minorities*, HIV.GOV (Feb. 1, 2021), <https://www.hiv.gov/hiv-basics/overview/data-and-trends/impact-on-racial-and-ethnic-minorities> [<https://perma.cc/2WCG-RVZE>].

¹⁷¹ Ahmed, *supra* note 23, at 627–28; *Impact on Racial and Ethnic Minorities, supra* note 170.

¹⁷² Payne, *supra* note 23, at 333 (“Included among these stereotyped figures are the fabled bogeyman ‘Patient Zero,’ a ‘promiscuous’ gay man alleged to have brought HIV to the United States, and Nushawn Williams, an African-American man who continued to have unprotected sex with women even after he was told by state health authorities that he was HIV positive. . . . [These stereotypes] ‘may help explain why criminal transmission statutes are still unduly applied to these minority groups.’” (first citing RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS,

further stigmatize those convicted by requiring registration as a sex offender.¹⁷³

This stigma, coupled with the fact that nearly all HIV-specific criminal laws require knowledge of one's HIV status as an element necessary for conviction, discourages people at risk of HIV infection from seeking out testing and knowing their status.¹⁷⁴ Given that most HIV infections result from contact with people who are unaware that they are infected with HIV, this further contravenes the public health goals that these laws allegedly further.¹⁷⁵

This contravention of public health goals is compounded by the fact that HIV-specific criminal laws place the onus of preventing exposure and transmission of HIV entirely on PLHIV.¹⁷⁶ This instills complacency and a false sense of security in people who do not have HIV regarding their own health: It can be reasoned that if PLHIV are legally obligated to share their status, then people not living with HIV do not need to take their own protective measures.¹⁷⁷ Because many transmissions result from sexual activities with PLHIV who do not

PEOPLE, AND THE AIDS EPIDEMIC 147 (1987); then citing THOMAS SHEVORY, NOTORIOUS H.I.V.: THE MEDIA SPECTACLE OF NUSHAWN WILLIAMS, at xv–xvi (2004); and then citing Donald G. McNeil, Jr., *HIV Arrived in the U.S. Long Before “Patient Zero,”* N.Y. TIMES (Oct. 26, 2016), <https://www.nytimes.com/2016/10/27/health/hiv-patient-zero-genetic-analysis.html> [<https://perma.cc/M8CY-QWDF>]]; 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, 369 (2013).

¹⁷³ ARK. CODE ANN. § 12-12-903(13)(A)(i)(p) (2016); LA. STAT. ANN. §§ 15:536(A), :541(24)(a), :542(A)(1)(a) (2018); OHIO REV. CODE ANN. § 2950.01(G)(1)(c) (2016); S.D. CODIFIED LAWS § 22-24B-1(20) (2018); TENN. CODE ANN. § 40-39-202(30), (31)(N) (2021); WASH. REV. CODE § 9.94A.500(1) (2016). See generally SOURCEBOOK, *supra* note 54; *HIV Criminalization in the United States*, *supra* note 53.

¹⁷⁴ Garmon, *supra* note 23, at 674; Cox, *supra* note 23, at 30; *HIV Stigma and Discrimination*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 27, 2019), <https://www.cdc.gov/hiv/basics/hiv-stigma/index.html> [<https://perma.cc/E5JW-GHA9>]; *Standing Up to Stigma*, HIV.GOV, <https://www.hiv.gov/hiv-basics/overview/making-a-difference/standing-up-to-stigma> [<https://perma.cc/WT4P-4E4M>]; *HIV Criminalisation Is Bad Policy Based on Bad Science*, *supra* note 25. Although it is often claimed that HIV-specific criminal laws disincentivize testing, some scholars have argued otherwise. See *supra* note 25.

¹⁷⁵ Cox, *supra* note 23, at 39 (“[N]early half of new infections today originate with individuals who do not know their HIV status, even though those individuals represent only 18% of the total population living with HIV.” (citing H. Irene Hall, David R. Holtgrave & Catherine Maulsby, *HIV Transmission Rates from Persons Living with HIV Who Are Aware and Unaware of Their Infection*, 26 AIDS 883, 883 (2012)).

¹⁷⁶ *Id.* at 36 (citing *15 Ways HIV Criminalization Laws Harm Us All*, LAMBDA LEGAL (Feb. 5, 2016), <https://www.lambdalegal.org/sites/default/files/publications/downloads/15-ways-hiv-criminalization-laws-harm-us-all.pdf> [<https://perma.cc/D7LG-R9M6>]).

¹⁷⁷ *Id.*

know their status, this reasoning is obviously incorrect.¹⁷⁸ Furthermore, regardless of potential legal liability, there is no guarantee that PLHIV will comply with disclosure obligations.¹⁷⁹

B. *Impracticality of Amending HIV-Specific Statutes*

Despite the problems scholars have identified with HIV-specific criminal laws and the potential benefits of amending them, the laws have supporters, and writing heightened risk requirements into them faces hurdles.¹⁸⁰ Authors have noted that in many states, there may be little chance of repeal or amendment because voters and legislators lack the political will for such change.¹⁸¹ Furthermore, examining successful amendment efforts reveals that not all amendments are created equal.¹⁸²

Often, significant amendments have followed highly publicized blatant miscarriages of justice, as in the case of Iowa's amendments

¹⁷⁸ Fourteen percent of PLHIV in the United States do not know their status, but they account for forty percent of transmissions. *U.S. Statistics, supra* note 170; *HIV Testing*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 9, 2020), <https://www.cdc.gov/hiv/testing/index.html> [<https://perma.cc/BZG5-Y64U>].

¹⁷⁹ See *HIV Testing, supra* note 178.

¹⁸⁰ See, e.g., Sudhin Thanawala, *Sex with HIV Still a Crime? Updated Laws Divide Advocates; Louisiana Law Changed Last Year*, ACADIANA ADVOC. (July 23, 2019, 2:45 PM), https://www.theadvocate.com/acadiana/news/article_710b5266-ad82-11e9-9db3-d3dac9e93915.html [<https://perma.cc/T3H3-BP6N>] (noting that the Arkansas Attorney General opposes the idea that criminalizing HIV no longer serves any purpose); Moreau, *supra* note 100 (noting that many Republican legislators in California opposed amendment of that state's HIV-specific criminal law).

¹⁸¹ Payne, *supra* note 23, at 352 (“There is currently no political will to repeal or replace criminal transmission statutes; by extension, there is little possibility of reformulating affirmative defense provisions in criminal transmission statutes.”).

¹⁸² For example, the 2018 Louisiana reforms—passed in a Republican-controlled legislature—created three affirmative defenses, all of which are contingent on PLHIV showing by a preponderance of evidence that they disclosed their HIV status. LA. STAT. ANN. § 14:43.5(F)(1)–(3) (2018); *Louisiana State Senate Elections, 2015*, BALLOTPEDIA, https://ballotpedia.org/Louisiana_State_Senate_elections_2015 [<https://perma.cc/B6CX-D7GA>]; *Louisiana House of Representatives Elections, 2015*, BALLOTPEDIA, https://ballotpedia.org/Louisiana_House_of_Representatives_elections_2015 [<https://perma.cc/3NQE-KRKB>]. The benefit of these affirmative defenses is limited, considering that it can often be exceedingly difficult to prove disclosure. SOURCEBOOK, *supra* note 54, at Georgia-1, Illinois-1, Louisiana-2. In comparison, 2017 amendments of California's laws were much more comprehensive in that they greatly reduced the penalty for violations to six months, expanded the law to apply to other communicative diseases so that HIV was no longer singled out, and narrowed liability to behaviors that pose a “substantial risk of infection.” *The 2017 Modernization of California's HIV Criminal Exposure Laws: What Did It Do, Who Will It Affect?*, CTR. FOR HIV L. & POL'Y, <https://www.hivlawandpolicy.org/sites/default/files/Analysis%20California%20HIV%20Crim%20Law.pdf> [<https://perma.cc/RH6L-VQH6>].

following the experience of Nick Rhoades.¹⁸³ In at least one state, a state agency that administered HIV-specific criminal regulations adopted new rules through notice and comment procedures.¹⁸⁴ Previously, amendments that incorporated heightened risk requirements and other meaningful changes were typically passed in states where the legislatures were under Democratic control.¹⁸⁵ However, the successful

¹⁸³ *Iowa Scraps Harsh HIV Criminalization Law in Historic Vote*, *supra* note 110; Cox, *supra* note 23, at 43–48. The reforms in Iowa were significant in form and effect. Prior to the 2014 reform, it was a felony punishable by up to twenty-five years in prison for PLHIV to engage in intimate contact with another. “Intimate contact” included exposure to a bodily fluid in a manner that could transmit HIV. Neither intent to transmit nor actual transmission was required. Those convicted were required to register as sex offenders. Under the new law, PLHIV who expose someone to HIV with the intent to transmit HIV but who do not transmit the virus face up to five years in prison. If there is intent to transmit and transmission occurs, the penalty is up to twenty-five years in prison. PLHIV who take practical measures to prevent transmission or disclose their status and offer to take such practical measures are deemed to have not acted with the mens rea necessary for prosecution. The amendment also allows previously convicted PLHIV to have their names removed from sex offender registries and brings certain other communicable diseases within the law’s ambit. Finally, PLHIV may now only be convicted if there is a “substantial risk” of transmission. See IOWA CODE § 709C.1(2)(b) (repealed 2014); *id.* § 709D.2 (2016); SOURCEBOOK, *supra* note 54, at Iowa-1–Iowa-4. An amendment to Missouri’s HIV-specific criminal law took effect in August 2021 following the sentencing of Michael L. Johnson, a gay Black man, to thirty years in prison for “recklessly exposing” his sexual partners to HIV, despite prosecutors offering no genetic evidence that Mr. Johnson had transmitted HIV. Mr. Johnson was freed in 2019 after serving approximately five years. See Hurwitz, *supra* note 115; Emily S. Rueb, *He Emerged from Prison a Potent Symbol of H.I.V. Criminalization*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/michael-johnson-hiv-prison.html> [<https://perma.cc/7V5L-SWSL>].

¹⁸⁴ Sean Bland & Ainslie Tisdale, *The Modernization of North Carolina’s HIV Criminal Laws and Its Consequences*, O’NEILL INST. FOR NAT’L & GLOB. HEALTH L. GEO. L. (June 29, 2018), <https://oneill.law.georgetown.edu/the-modernization-of-north-carolinas-hiv-criminal-laws-and-its-consequences> [<https://perma.cc/TWM6-9LT9>].

¹⁸⁵ The Illinois General Assembly and California State Legislature were heavily Democratic when reforms were passed in 2011 and 2017, respectively. *California State Senate Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/California_State_Senate_elections,_2016 [<https://perma.cc/JQ9W-FZA4>]; *California State Assembly Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/California_State_Assembly_elections,_2016 [<https://perma.cc/RXQ6-M2H6>]; *Illinois House of Representatives Elections, 2010*, BALLOTPEDIA, https://ballotpedia.org/Illinois_House_of_Representatives_elections,_2010 [<https://perma.cc/J9YU-ZJQT>]; *Illinois State Senate Elections, 2010*, BALLOTPEDIA, https://ballotpedia.org/Illinois_State_Senate_elections,_2010 [<https://perma.cc/NJP6-E48L>]. Georgia’s state government is Republican controlled, but efforts to amend Georgia’s law have picked up steam. *2020 Georgia Legislative Session*, BALLOTPEDIA, https://ballotpedia.org/2020_Georgia_legislative_session [<https://perma.cc/3ERS-VHWF>]; Thanawala, *supra* note 180. 2020 membership of the Georgia House of Representatives included 74 Democrats and 105 Republicans. Of the 40 House members who voted against H.B. 719, only one was a Democrat. *HB 719: Crimes and Offenses; Modernization of HIV Related Laws; Provide*, GA. GEN. ASSEMBLY, <https://www.legis.ga.gov/legislation/56476> [<https://perma.cc/QF7H-KU45>] (click “House Vote #595” hyperlink; then count the “No” votes and click each legislator’s name to see which is a Republican and which is a Democrat).

amendment of Missouri's law,¹⁸⁶ as well as the ongoing effort in Georgia,¹⁸⁷ have challenged this trend. Republicans hold "trifectas" in both states.¹⁸⁸

The conditions that enabled meaningful reform do not exist in many states. Although this should not be a partisan issue, there appears to be a correlation between membership in the Republican party and opposition to reforming HIV-specific criminal laws.¹⁸⁹ Recent efforts in Missouri and Georgia¹⁹⁰ challenge this view and hopefully Republican legislators will continue to be receptive to reform, but it is unclear whether this trend will continue. It should also be noted that Missouri's amendment followed one of the "much publicized and obvious miscarriages of justice" previously discussed.¹⁹¹

In states with complete Republican control of government, chances of enacting meaningful amendments appear lower, at least absent public outrage over a particularly sympathetic case or an agency's ability to amend administrative regulations.¹⁹² It is obviously undesirable that reform should have to wait for a case of egregious injustice. Furthermore, given that most HIV-specific criminal laws are contained in criminal codes and do not grant rulemaking authority to agencies, administrative agencies are generally not positioned to enact reforms.¹⁹³

¹⁸⁶ See *supra* notes 115–17 and accompanying text.

¹⁸⁷ See *supra* notes 104–09 and accompanying text.

¹⁸⁸ A political party has a "trifecta" when it controls both chambers of a state's legislature and its governorship. *Party Control of Missouri State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Missouri_state_government [<https://perma.cc/HSD4-EQ7V>].

¹⁸⁹ See *supra* note 185 and accompanying text.

¹⁹⁰ See *supra* text accompanying notes 184–88.

¹⁹¹ See *supra* note 183.

¹⁹² See, e.g., H.B. 1599, Gen. Assemb. (Tenn. 2019). This bill, the "HIV Modernization Act," was killed in the Republican-controlled Criminal Justice Subcommittee. *Id.* California Republicans opposed efforts to reform that state's law. See Eli Rosenberg, *Knowingly Exposing Others to HIV Is No Longer a Felony in California*, WASH. POST (Oct. 10, 2017, 8:07 AM), <https://www.washingtonpost.com/news/to-your-health/wp/2017/10/09/knowingly-infecting-others-with-hiv-is-no-longer-a-felony-in-california-advocates-say-it-targeted-sex-workers> [[https://perma.cc/P7W\]-VZSM](https://perma.cc/P7W]-VZSM)] (quoting a Republican legislator as stating that it is "absolutely crazy" to "go light on" intentional HIV exposure); *supra* note 185 and accompanying text.

¹⁹³ SOURCEBOOK, *supra* note 54.

C. *The Utility of Rhoades and Hogg for Challenging HIV-Specific Criminal Laws*

Rhoades's holding prevented the conviction of someone living with HIV who engaged in sexual activity while having an undetectable viral load.¹⁹⁴ However, the Iowa Supreme Court's reading of a reasonableness requirement into the state's HIV-specific criminal law is applicable to prosecutions for other acts that have negligible risks of transmitting HIV. *Hogg* also reaches far beyond the facts on which it was decided. The Iowa Supreme Court and Tennessee Supreme Court both in 2014 independently established nearly identical frameworks for prosecutions under their states' respective HIV-specific criminal statutes. First, the courts determined that the act in question must have an actual, nonnegligible risk of transmitting HIV based on the circumstances.¹⁹⁵ Second, the prosecution must provide "expert medical proof" showing such a risk in the circumstances.¹⁹⁶ To establish these frameworks, the courts identified ambiguities in the statutory language.¹⁹⁷ The Tennessee Supreme Court relied exclusively on persuasive case law to determine the meaning of "significant risk," while the Iowa Supreme Court considered dictionary definitions, the goals of criminal law, and case law to determine the meaning of "could."¹⁹⁸

As has already been argued of *Rhoades*, both cases can have an enormous impact in adjudicating charges brought under HIV-specific criminal laws in other states.¹⁹⁹ Many HIV-specific criminal laws contain either explicit or implicit considerations of risk.²⁰⁰ Some, such as Indiana and Minnesota, already contain specific instructions for finding adequate risk of transmission by requiring epidemiological evidence.²⁰¹ Others are broader in their definitions of risk, but when risk of transmission or exposure is explicitly an element of the offense, there is no question that *Rhoades* and *Hogg* can be cited as persuasive precedent. Consider South Dakota, where PLHIV may not engage in "intimate physical contact," defined as "bodily contact which exposes a person to the body fluid of the infected person in any manner that presents a *significant risk* of HIV transmission."²⁰² It would be

¹⁹⁴ *Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014).

¹⁹⁵ *Id.* at 28, 32–33; *State v. Hogg*, 448 S.W.3d 877, 888–89 (Tenn. 2014).

¹⁹⁶ *Rhoades*, 484 N.W.2d at 28, 32–33; *Hogg*, 448 S.W.3d at 888–89.

¹⁹⁷ *Rhoades*, 484 N.W.2d at 27; *Hogg*, 448 S.W.3d at 887–88; see discussion *supra* Section II.C.

¹⁹⁸ *Supra* note 197.

¹⁹⁹ *Cox*, *supra* note 23.

²⁰⁰ See *supra* notes 65–70 and accompanying text.

²⁰¹ IND. CODE § 16-41-7-2 (2016); MINN. STAT. § 609.2241 (2021).

²⁰² S.D. CODIFIED LAWS § 22-18-31 to -32 (2018) (emphasis added).

reasonable to rely on *Hogg* to encourage South Dakota courts to adopt a requirement that prosecutors enter into evidence medical proof that the behavior in question truly poses a significant risk of transmission.

Rhoades and *Hogg* also have utility in states with implicit considerations of risk in their HIV-specific criminal laws. For example, Massachusetts's sentence enhancement for rape of a child considers whether a defendant acted "in a manner in which the victim *could* contract a sexually transmitted disease or infection."²⁰³ The Iowa Supreme Court's analysis of "could" can be applied to require that causation be "reasonably possible under the facts and circumstances of the case."²⁰⁴ Wisconsin imposes a similar sentencing enhancement for certain sex crimes.²⁰⁵ The enhancement applies where a defendant with HIV "significantly expose[s]" a victim to HIV.²⁰⁶ "Significant exposure" is defined as "sustaining a contact that carries a *potential* for transmission of a sexually transmitted disease or HIV."²⁰⁷ "[A] potential" is not a far cry from "could,"²⁰⁸ given that both are defined as including a "possibility" of occurrence, so defendants are in a position to persuasively argue that the *Rhoades* standard should apply.²⁰⁹ In Nevada, PLHIV may face criminal liability if they "engage[] in conduct in a manner that is intended or *likely to transmit* the disease to another person."²¹⁰ Given that Nevada's statute does not define "likely to transmit,"²¹¹ there is room to argue that prosecutors must provide medical evidence showing that defendants engaged in behaviors with actual, nonnegligible risks of transmission.

²⁰³ MASS. GEN. LAWS ch. 265, § 22B(f) (2016) (emphasis added).

²⁰⁴ *Rhoades v. State*, 848 N.W.2d 22, 28 (Iowa 2014).

²⁰⁵ WIS. STAT. § 973.017 (2016).

²⁰⁶ *Id.* § 973.017(4)(b)(3).

²⁰⁷ *Id.* § 973.017(4)(a)(4) (emphasis added).

²⁰⁸ IOWA CODE § 709C.1 (repealed 2014).

²⁰⁹ *Potential*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/potential> [<https://perma.cc/FPQ7-9LMY>] (defining "potential" as "existing in *possibility*" (emphasis added)); *Could*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/can> [<https://perma.cc/S743-GWCQ>] (stating that "can," the past tense of "could," is "used to indicate *possibility*" (emphasis added)); *Risk*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/risk> [<https://perma.cc/TDY4-YRZV>] (defining a "risk" as a "*possibility* of loss or injury" (emphasis added)).

²¹⁰ NEV. REV. STAT. § 201.205 (2015) (emphasis added).

²¹¹ *Id.*

III. PROPOSAL

Heightened risk requirements have the potential to mitigate many of the harms caused by HIV-specific criminal laws.²¹² Consider the effects on public health efforts. Courts rejecting charges under HIV-specific criminal laws where the risk of transmission is negligible will not only prevent prosecution of PLHIV but will affect the coverage of those cases in the media.²¹³ This means that there will be fewer news stories of PLHIV being arrested, charged, and convicted under these laws for acts that do not pose a risk of transmitting the disease. When people read or see news about arrests and prison sentences for activities that do not spread HIV, it is reasonable for them to incorrectly conclude that these behaviors do in fact spread HIV.²¹⁴ Furthermore, media representations of PLHIV in these circumstances often vilify the accused.²¹⁵

This vilification contributes to stigmatization, as does the form that HIV-specific criminal laws take. By criminalizing acts with a negligible risk of transmitting HIV, these laws encourage the belief that sex and other forms of contact with PLHIV are inherently dangerous and that PLHIV are unclean or undesirable.²¹⁶ Imposing heightened risk requirements will also alleviate a source of stigma—criminal prosecution and punishment—and will thereby reduce the perverse incentives these laws create to avoid taking HIV tests to learn one's status.

Courts rejecting charges where PLHIV have engaged in activities with a negligible risk of transmission will place these laws in line with traditional conceptions of criminal law as a tool of deterrence and punishment. If the goal is deterrence, there is no reason that a

²¹² For a discussion of the problems HIV-specific criminal laws cause, see *supra* Section II.A. However, Ahmed points out that even in an environment where courts consider likelihood of transmission when determining culpability, inequality in access to antiretroviral medications results in disparate treatment of minorities living with HIV. Ahmed, *supra* note 23, at 629 (“This paper argues that while the [Iowa Supreme Court’s] consideration of treatment and low viral load to mitigate culpability is a positive move forward, it is important to note that the pre-existing maldistribution of access to HIV treatment means that only some of the accused will benefit legally from these scientific advancements. This could have a disparate effect on racial minorities who have less access to ART and, in turn, will not have the capacity to mitigate potential culpability by arguing that they are less likely to transmit HIV.”); see also *supra* Section I.D.

²¹³ *Criminal Law*, *supra* note 168.

²¹⁴ Cox, *supra* note 23, at 35.

²¹⁵ Ahmed, *supra* note 23, at 653; Griffin C. Kenyon, Comment, *A Dangerous Situation—the Knowing Transmission of HIV in an Out-of-Body Form and Whether New York Should Criminally Punish Those Who Commit Such an Act*, 35 PACE L. REV. 785 (2014); *Criminal Law*, *supra* note 168.

²¹⁶ Cox, *supra* note 23, at 36.

heightened risk requirement would not deter behavior that poses a significant risk, while providing at least some notice that such behaviors may result in criminal sanctions. Heightened risk requirements will also decrease prosecutions under HIV-specific criminal laws by deterring prosecutors from bringing charges where there is not a significant risk of HIV transmission.²¹⁷

If states choose to criminalize HIV exposure or transmission, they should only criminalize behavior that has an actual, nonnegligible risk of transmission, based on medical evidence. Given the likely insurmountable hurdles of repealing or amending HIV-specific criminal laws in many states, advocates for PLHIV should look to state courts as avenues for change. Specifically, advocates should look to *Rhoades* and *Hogg* as persuasive precedent and encourage high courts in other states to adopt similar risk requirements.

Authors note the utility of *Rhoades* as persuasive precedent, but they also note its limitations as a guide for reform depending on each state's approach to criminalizing HIV.²¹⁸ In many respects, *Hogg* faces the same limitations, given that both cases require the statute in question to somehow contemplate risk of transmission to serve as effective persuasive precedent. However, notwithstanding scholars' lack of attention to *Hogg*, it adds to the conversation by providing very different facts than *Rhoades*. Unlike *Rhoades*, *Hogg* is not a story of resounding injustice—*Hogg* was undoubtedly culpable for his crimes. Where a court is presented with a less sympathetic defendant facing a sentence that is more in line with his overall culpability, as in *Hogg*, *Hogg* may prove more persuasive.

However, preventing convictions following a trial is not the only use for these cases. It is important that advocates continue to pressure prosecutors to exercise their discretion fairly, and they can point to these cases as examples of where certain charges should not have been brought because the activities posed negligible risks of transmission. This too is important, given that most charges end in plea bargains and that prosecutors have enormous discretion regarding what charges to bring and against whom to bring them.²¹⁹

²¹⁷ SOURCEBOOK, *supra* note 54, at Introduction-2.

²¹⁸ Cox, *supra* note 23, at 30 (“The force of the [*Rhoades*] decision as persuasive precedent varies significantly from state to state depending on each state's current approach to HIV criminalization.”).

²¹⁹ SOURCEBOOK, *supra* note 54, at Introduction-2; Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350 (2013).

CONCLUSION

PLHIV have faced the possibility of criminal sanctions for engaging in acts that have negligible risk of transmitting HIV since the beginning of the HIV pandemic. Although spitting, biting, oral sex, and many other acts have always been very low risk, advances in medicine, such as the availability of antiretrovirals and PrEP, greatly reduce the possibility of transmission even in acts that were once invariably high risk, such as anal sex. Despite these advances and the scientific community's consensus that the aforementioned acts pose only a negligible risk of transmission in most circumstances, HIV-specific laws passed early in the pandemic are still on the books and fail to account for these changes. These laws continue to contribute to stigmatization and marginalization of PLHIV, contradict the public health goals that they supposedly support, and, by inadequately accounting for culpability of defendants and deterring behavior that does not transmit HIV, do not comport with traditional notions of the purposes of criminal law.

Rhoades and *Hogg* are both potentially very valuable to advocates seeking to mitigate the negative effects of HIV-specific criminal laws. They should look to these cases for guidance when challenging laws in other states, especially where those laws incorporate the risk an act has of transmitting HIV as an element of the offense.