

Judging HIV Criminalization: Failures of Judges and Commentators to Engage with Public Health Knowledge and HIV-Positive Perspectives

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*[Judges are] the ones who get you . . . and I would be scared to death if I let a judge
I'm in front of know that I'm HIV positive.¹*

In the epigraph above, an HIV-positive woman voices her fear that the protection of the law would give way if her fate were entrusted to a decision maker aware of her HIV status. More than thirty years into the epidemic, many readers may think this fear overblown. But it feels all too legitimate in light of my own experience.

I was diagnosed with HIV in 2010, during a health exam required by a South Korean government program that had hired me to teach English—and which

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1. C.L. Galletly & J. Dickson-Gomez, *HIV Seropositive Status Disclosure to Prospective Sex Partners and Criminal Laws That Require It: Perspectives of Persons Living with HIV*, 20 INT'L J. STD & AIDS 613, 616 (2009).

immediately fired me for my HIV status. On the morning of the day I was terminated, an HIV services worker left me with a reminder that South Korea had recently enacted a law to prohibit HIV discrimination. I mentioned this law in a meeting with the Korean government official who fired me. I mentioned, as well, the fact that HIV-positive teachers pose no risk of transmission to their students—a fact confirmed by the official’s own aide. Undeterred, the official told me that he could not allow me to work in his schools. He warned of the uproar my HIV status would cause in the community when it became public, and—implying he still viewed me as a threat to students—assured me that, if necessary, he would publicize my status himself.²

Though this experience occurred in South Korea, I soon learned that the Korean official’s beliefs and attitudes remain common in the United States, lending credence to the HIV-positive woman’s fear of revealing her status to an American judge. Despite ever-advancing science on HIV transmission risks,³ many Americans remain ignorant of transmission facts established even in the early years of the epidemic—ignorance reflected in their fear of casual contact with the HIV-positive.⁴ Further, though public health experts have long acknowledged the limited benefits of practicing safer sex with (or rejecting) only partners *known* to be HIV positive,⁵ many Americans react with excessive condemnation and even violence toward HIV-positive people they feel have “deceived” others into consensual sex.⁶ And while many HIV-positive Americans continue to face discrimination of the most material sorts,⁷ these experiences are

2. I include this personal account for two reasons. First, I argue in this Note that greater attention to the lived experiences of the HIV-positive can improve legal commentary and judicial decisions. See *infra* Part II.C. It thus seems appropriate to claim attention for such experience—including my own—in this Note. Second, by opening with my story, I am attempting to provide a counterpoint to a stigmatizing trend in HIV legal commentary: articles opening with stories of HIV-positive people infecting others. See, e.g., Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV. 847, 847–48 (1999); Erin McCormick, Note, *Strengthening the Effectiveness of California’s HIV Transmission Statute*, 24 HASTINGS WOMEN’S L.J. 407, 407–08 (2013). Of course, I am indebted to critical race theorists and other scholars who have claimed a space for personal narrative in legal commentary. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411–15, 2435–40 (1988).

3. See *infra* pp. 502–03.

4. A national survey conducted in 2011 found that many Americans remain unaware that HIV cannot be transmitted through sharing a toilet seat, swimming pool, or drinking glass with an HIV-positive person. THE HENRY J. KAISER FAMILY FOUNDATION, HIV/AIDS AT 30: A PUBLIC OPINION PERSPECTIVE 6 (June 2011). Many respondents also expressed discomfort (presumably rooted in fears of transmission) at the prospect of an HIV-positive coworker or roommate, as well as fear of HIV-positive people teaching their children or preparing their food. *Id.* at 7.

5. See *infra* pp. 507–08.

6. E.g., Jane K. Stoever, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1169–71 (2009); Erin Seatter, *When Disclosure Is Dangerous: Remembering Cicely Bolden*, POSITIVE WOMEN’S NETWORK (Sept. 14, 2012), http://www.pwn.bc.ca/2012/09/when-disclosure-is-dangerous/#.U__jqUu0b1o (reflecting on news that a sexual partner of Cicely Bolden stabbed her to death after she informed him she was HIV-positive, and reporting that some Twitter users said Bolden deserved to be murdered).

7. E.g., Brad Sears, *HIV Discrimination in Health Care Services in Los Angeles County: The Results of*

often overlooked or minimized as relics of the epidemic's early years, facilitating their continued occurrence.⁸

My growing awareness of these problems, spurred by my own experience of discrimination, led me to explore how American legal professionals perceive HIV and the HIV-positive, focusing on the manner in which judges deciding the fates of HIV-positive litigants engage with legal doctrine, public health knowledge, and the reality of HIV-positive lives. In exploring these questions, I found fertile ground in cases and commentaries concerning "HIV criminalization." The term refers to the criminal prosecution of HIV-positive people, or the enhancement of HIV-positive defendants' sentences, for conduct exposing others to real or perceived risks of HIV transmission.⁹ HIV exposure prosecutions most commonly target conduct, such as spitting and biting, that forcibly exposes others to the HIV-positive defendant's body fluids (albeit in a manner posing little or no risk of transmission),¹⁰ or consensual sexual conduct not prefaced by the "disclosure"¹¹ of the HIV-positive defendant's status.¹² The defendant may be charged under statutes specifically targeting forms of HIV exposure and/or under general criminal statutes criminalizing, for instance, assault and reckless endangerment.¹³ Empirical studies suggest that HIV criminalization does little or

Three Testing Studies, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 85, 96–104 (2008) (finding that 56% of skilled nursing facilities, 26% of plastic and cosmetic surgeons, and 47% of obstetricians in Los Angeles County refused to provide services to any HIV-positive person); U.S. Dep't of Justice Civil Rights Div., *DOJ HIV/AIDS Enforcement*, ADA.GOV, http://www.ada.gov/aids/ada_aids_enforcement.htm (last visited Jan. 5, 2014) (listing settlement agreements and consent decrees entered into by the Department of Justice in HIV discrimination cases, including twelve between the years of 2010 and 2013).

8. See Mark E. Wojcik, *Some Lessons Learned from the AIDS Pandemic*, 19 ANNALS HEALTH L. 63, 65 (2010) (recognizing that discrimination may still occur from time to time but claiming that "we" now have basic transmission knowledge, respect medical privacy for the HIV-positive, and feel no need to exclude the HIV-positive from schools, homes, churches, and places of employment).

9. See 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, 372–79 (2013).

10. See, e.g., *HIV Transmission Risk*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/policies/law/risk.html> (last updated July 11, 2013).

11. I distance myself from the term "disclosure" for two reasons. First, it is ambiguous; if I list my HIV-positive status on an online profile and have sex with a partner met through that profile, without mentioning my status in person or in a direct message, have I "disclosed"? Second, it equates behaviors of differing moral dimensions: the person who remains silent about her HIV status with a casual partner who does not raise the subject is just as guilty of "nondisclosure" as one who lies about her status when asked by a monogamous partner.

12. See *Prosecutions and Arrests for HIV Exposure in the United States, 2008–2014*, CENTER FOR HIV L. & POLY, <http://www.hivlawandpolicy.org/resources/prosecutions-and-arrest-hiv-exposure-united-states-2008%E2%80%932013-list-center-hiv-law-policy> (last visited Jan. 5, 2014).

13. See *id.* For a brief but well-researched history of the enactment of HIV-specific statutes by state legislatures, see Sergio Hernandez, *Sex, Lies and HIV: When What You Don't Tell Your Partner Is a Crime*, PROPUBLICA (Dec. 1, 2013, 10:58 PM), <http://www.propublica.org/article/hiv-criminal-transmission>. Most HIV-specific criminal statutes criminalize sexual activity—defined to varying degrees of specificity—without "disclosure," usually providing no affirmative defense where the risk of sexual transmission is greatly reduced by condom use or the defendant's undetectable viral load. See

nothing to promote safer behaviors, and in fact may undermine public health by promoting unhealthy practices, such as the avoidance of HIV testing.¹⁴ Nevertheless, as of October 2013, forty-three states were known to criminalize HIV exposure under general statutes, HIV-specific statutes, or both.¹⁵

I argue in this Note that judicial decisions and legal commentary concerning HIV criminalization often exhibit failures to engage with public health knowledge, including contemporary research on HIV transmission and sexual health strategies. Moreover, they suffer from a failure to engage with the experience and perspectives of HIV-positive people. These failures lead to unjust convictions and sentences in HIV exposure prosecutions, impoverished legal analysis, and the perpetuation of mistaken or outdated thought on HIV transmission and sexual health. By identifying recurring manifestations of these failures and their consequences, I hope to provide evidence of the need for interventions into judicial decision making in HIV exposure prosecutions, and thus generate support for proposed interventions such as the Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act of 2013 (REPEAL Act).¹⁶ I further hope that my identification and critique of recurring issues can contribute to discussions that will render such interventions more effective when they take place.

This Note is divided into four parts. Part I briefly describes recent advocacy against HIV criminalization, focusing on government interventions such as the REPEAL Act, and argues that legal commentary on HIV criminalization has not fully realized its potential to inform such interventions because it has devoted relatively little attention to judicial decision making. In Part II, I examine recent appellate opinions rendered in HIV exposure prosecutions, along with related cases and commentaries, to identify recurring failures to engage with public health knowledge and HIV-positive perspectives. In Part III, I draw on Suzanne Goldberg's work on judicial intuitions in sexual orientation cases¹⁷ to offer brief thoughts on how legal professionals might encourage judges' engagement with these sources of knowledge. Finally, I conclude in Part IV with an anecdote from an AIDS Coalition to Unleash Power (ACT UP) lawyer and an appeal to the profession.

Perone, *supra* note 9, at 373–75. Many statutes also criminalize the nonsexual transmission of body fluids, often targeting behaviors, such as spitting, that pose no scientifically proven risk of HIV transmission. *See id.* Some states have also adopted statutes that punish HIV-positive individuals for engaging in sex work, while others have enacted laws enhancing the penalty for sex offenses if the defendant is HIV-positive. *See id.* at 375–76, 378–79.

14. Patrick O'Byrne et al., *HIV Criminal Prosecutions and Public Health: An Examination of the Empirical Research*, 39 MED. HUMAN. 85, 88 (2013).

15. *HIV Criminalization by State Map*, LAWATLAS, <http://www.lawatlas.org/preview?dataset=hiv-criminalization-statutes> (last updated Oct. 2013).

16. H.R. 1843, 113th Cong. (2013); S. 1790, 113th Cong. (2013).

17. Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375 (2010).

I. INTERVENTIONS INTO HIV CRIMINALIZATION

The number of HIV exposure prosecutions has risen internationally in recent years, and research on HIV criminalization has also increased.¹⁸ Perhaps unsurprisingly, then, HIV criminalization has been a focus of recent advocacy by and for the HIV-positive. The Positive Justice Project, a national anticriminalization initiative, was launched by the Center for HIV Law and Policy in 2010,¹⁹ and its launch was soon followed by the founding of the Sero Project, which also focused on advocacy against HIV criminalization.²⁰ Organizations not dedicated to the issue have recognized it as a priority as well: for instance, in a 2013 letter urging the LGBT community to renew its commitment to HIV issues, a group of LGBT and HIV organizations called for policymakers to “stop HIV criminalization.”²¹

This growing momentum in advocacy against HIV criminalization is apparent within the government as well. Though the federal government endorsed HIV criminalization early in the epidemic,²² the Obama Administration has taken a stance against it since at least 2010. In a section on reducing HIV stigma and discrimination, President Obama’s 2010 National HIV/AIDS Strategy acknowledges that, “[i]n many instances, the continued existence and enforcement of [HIV-specific criminal] laws run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment.”²³ Accordingly, the National Strategy recommends that “[s]tate legislatures should consider reviewing HIV-specific criminal statutes.”²⁴ Since the release of the National Strategy, federal officials have taken a broader stance against HIV criminalization, calling for the *elimination* of HIV-specific criminal laws rather than their review.²⁵

Congress has recently taken action against HIV criminalization as well. An amendment to the National Defense Authorization Act of 2014 (NDAA) requires the military to review the Uniform Code of Military Justice, related policies, and

18. O’Byrne et al., *supra* note 14, at 85.

19. Beirne Roose-Snyder et al., *The Positive Justice Project: A New National Campaign to End Exceptionalist Criminal Law Treatment of People with HIV*, CENTER FOR HIV L. & POL’Y (Oct. 1, 2010), <http://www.hivlawandpolicy.org/fine-print-blog/positive-justice-project-new-national-campaign-end-exceptionalist-criminal-law>.

20. *What We Do*, SERO, <http://seroproject.com/what-we-do/> (last visited Jan. 5, 2014).

21. Michael Adams et al., *We the LGBT*, POZ (June 3, 2013), http://www.poz.com/articles/we_the_lgbt_2676_24001.shtml.

22. Sarah J. Newman, Note, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1411–17 (2013).

23. WHITE HOUSE OFFICE OF NAT’L AIDS POL’Y, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 37 (July 2010), available at <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>.

24. *Id.*

25. PRESIDENTIAL ADVISORY COUNCIL ON HIV/AIDS, RESOLUTION ON ENDING FEDERAL AND STATE HIV-SPECIFIC CRIMINAL LAWS, PROSECUTIONS, AND CIVIL COMMITMENTS 2 (Feb. 2013), available at <http://aids.gov/federal-resources/pacha/meetings/2013/feb-2013-criminalization-resolution.pdf>.

court martial decisions to ensure that they demonstrate medically accurate understandings of HIV and public health, and to prepare recommendations to ensure that laws and policies regarding HIV-positive service members accord with contemporary understandings of HIV transmission and treatment.²⁶ Though the NDAA's intervention into HIV criminalization will be limited to the military, Congress is also considering an intervention at the state level: the REPEAL Act. Originally introduced by Representative Barbara Lee in 2011,²⁷ the REPEAL Act was reintroduced in both the House and the Senate in 2013.²⁸ If passed, the REPEAL Act would require certain federal agencies to conduct a review of state HIV criminalization law, assessing whether it demonstrates an evidence-based understanding of HIV transmission and the multiple factors affecting it, the health consequences of HIV infection in light of contemporary treatment and support services, and the impact of such law on public health.²⁹ The agencies would also be tasked with evaluating state laws from the perspective of HIV-positive defendants' civil rights, assessing whether the laws reflect an understanding of their impact on HIV-positive people and their communities, and whether the punishments inflicted are proportional to those imposed for comparable or more serious offenses, such as drunk driving and exposure to other communicable diseases.³⁰ The agencies' review would not be toothless; the REPEAL Act directs the agencies to issue best practice recommendations and guidance to state governments for use in criminal cases involving the HIV-positive, and to establish a system for monitoring statewide implementation of the best practice recommendations.³¹ Despite its name, the REPEAL Act looks well beyond the possibility of repealing (or amending) HIV-specific criminal statutes: its review would encompass state "laws, policies, regulations, *and judicial precedents and decisions*."³² Accordingly, it instructs the reviewing agencies to consult with and seek the participation of state judges, and to include recommendations for judges in the required set of best practice recommendations.³³

If the REPEAL Act were passed, its review and recommendations could be informed by legal commentary on HIV criminalization.³⁴ Margo Kaplan has

26. H.R. 1960, 113th Cong. § 550F (2013); *see also* Sean Strub, *The U.S. Military and HIV: A Huge Step Forward*, SEANSTRUB (Dec. 20, 2013), <http://www.seanstrub.com/blog/us-military-hiv-huge-step-forward>.

27. H.R. 3053, 112th Cong. (2011).

28. H.R. 1843, 113th Cong. (2013); S. 1790, 113th Cong. (2013).

29. H.R. 1843 § 4(a)–(b).

30. *See id.*

31. H.R. 1843 § 4(a)–(d).

32. *Id.* § 4(a)(1) (emphasis added).

33. *Id.* § 4(a)(2), (b)(3).

34. The REPEAL Act provides that the reviewing agencies may use "existing reviews of criminal and related civil commitment cases involving people living with HIV/AIDS," including reviews conducted by legal advocacy, public health, or trade organizations. *Id.* § 4(a)(3). Even if law review articles do not constitute such reviews, they could inform the views of the various stakeholders the reviewing agencies are instructed to consult, including legal advocacy organizations that work with HIV-positive people. *Id.* § 4(a)(2)(G).

usefully summarized the legal scholarship on HIV criminalization by dividing it into two branches, addressing distinct questions: whether HIV exposure should be criminalized at all, and, if so, what conduct should be criminalized.³⁵ While Kaplan is likely correct that these are the two primary questions addressed in the HIV criminalization literature, the scholarship also touches on a third important question for legal interventions: assuming that certain conduct creating risks of HIV transmission is to be criminalized, *how* should it be criminalized? More specifically, should the conduct be prosecuted under HIV-specific statutes, or under general criminal statutes such as those criminalizing assault and reckless endangerment? Several commentators have specifically addressed this question, with some favoring the use of general criminal law,³⁶ and others arguing in support of targeted statutes.³⁷

I call attention to this debate to remind advocates that criminalization can be carried out in various ways, limiting policymakers' ability to reign in overzealous prosecutors through legislative reform alone. For instance, Sara Klemm has pointed out that in Maryland, where the state's HIV-specific statute is drawn to criminalize only a narrow category of conduct, prosecutors have elected to charge HIV-positive defendants under general criminal statutes instead of—or in addition to—charging them under the state's HIV-specific law.³⁸ Maryland is not alone; LawAtlas indicates that twenty states that have enacted HIV-specific criminal statutes have continued to prosecute HIV exposure under general criminal law as well.³⁹ Prosecutors' potential turn to general criminal law gives weight to Kaplan's concern that even after HIV-specific laws are reformed, injustices will continue due to the influence of HIV stigma on decisions by judges and juries.⁴⁰

Indeed, the relatively few commentaries focused on prosecutions under general criminal laws have taken issue with judges' application of these laws to HIV exposure.⁴¹ Most notably, in an analysis of aggravated assault prosecutions

35. Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1519–20 (2013).

36. E.g., Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 515–16 (2007); James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 740–41 (2009); W. Thomas Minahan, *Disclosure Before Exposure: A Review of Ohio's HIV Criminalization Statutes*, 35 OHIO N.U. L. REV. 83, 104–05 (2009).

37. E.g., Sara Klemm, Comment, *Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland*, 13 J. HEALTH CARE L. & POL'Y 495, 519–24 (2010); Jodi Mosiello, Note, *Why The Intentional Sexual Transmission of Human Immunodeficiency Virus (HIV) Should Be Criminalized Through the Use of Specific HIV Criminal Statutes*, 15 N.Y.L. SCH. J. HUM. RTS. 595, 604–05, 609–12 (1999); Newman, *supra* note 22, at 1427–28.

38. Klemm, *supra* note 37, at 514–15 & n.158; see also Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 858 (2004) (reporting that, in a notorious “nondisclosure” case, New York prosecutors relied on general criminal law rather than the state's STI-specific misdemeanor statute).

39. *HIV Criminalization by State Map*, *supra* note 15.

40. See Kaplan, *supra* note 35, at 1553 (“[A statutory framework requiring] an individualized inquiry of risk may not be sufficient to ensure only those who pose substantial and unjustifiable risk of transmission are convicted. Finders of fact may still be swayed by fear and prejudice.”).

41. See Isabel Grant, *Rethinking Risk: The Relevance of Condoms and Viral Load in HIV*

for biting and for sex without disclosure, Ari Ezra Waldman exposes two recurring errors in these prosecutions that are “products of [judicial] interpretation rather than the governing regime itself.”⁴² He points to five cases demonstrating “a tendency toward error that even more specific [statutory] drafting could not resolve,” advising jurisdictions that continue to prosecute HIV exposure under general criminal law to “recognize the potential logical fallacies and due process errors that can occur [in judicial decision making] and guard against them.”⁴³ Of course, the fact that even the most carefully drafted statutes leave room for unjust decision making should not dissuade advocates from prioritizing the repeal or amendment of statutes that *mandate* unjust decisions; as Kaplan argues, “[A] statute that may be interpreted in a way that is overbroad is better than a statute that is necessarily overbroad.”⁴⁴ Nonetheless, as Waldman suggests, advocates should also look beyond statutory terms to recognize and guard against problems that arise when judges interpret and apply those statutes.

Other commentators, however, have done little to diagnose problematic judicial decision making in HIV exposure prosecutions, or to propose solutions. When most commentators note problems in judicial decision making, they do so only in passing.⁴⁵ Further, some commentators have attributed the potential for biased decision making only to nonjudicial actors,⁴⁶ or have minimized the issue’s

Nondisclosure Prosecutions, 54 MCGILL L.J. 389, 395–403 (2009) (arguing that trial judge should have recognized condom use as defense for sex without “disclosure” and should not have factored viral load into analysis); Scott A. McCabe, *Rejecting Inference of Intent to Murder for Knowingly Exposing Another to a Risk of HIV Transmission*, 56 MD. L. REV. 762, 779 (1997) (concluding that court properly refused to infer intent to kill from condomless sex but arguing it should have clarified that HIV exposure alone can *never* support inference of intent to kill); Joshua D. Talicska, Note, *Criminal Charges with Too Much Bite: Why Charging and Convicting HIV-Positive Biters and Spitters of Attempted Murder Is Unjustifiable*, 12 CONN. PUB. INT. L.J. 461, 476–81 (criticizing judges for affirming attempted murder convictions for spitting and biting without applying “obvious impossibility” exception).

42. Ari Ezra Waldman, *Exceptions: The Criminal Law’s Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL’Y & L. 550, 595–96 (2011). First, judges have relieved prosecutors of their duty to prove, beyond a reasonable doubt, a likelihood of harm, instead requiring only proof of a *possibility* of transmission. *Id.* at 565–68. Second, judges have convicted defendants on the basis of generalized evidence regarding average risks of transmission, as opposed to assessing the specific transmission risks posed by a defendant’s conduct. *Id.* at 565, 568–72.

43. *Id.* at 600.

44. See Kaplan, *supra* note 35, at 1553 (emphasis omitted).

45. See, e.g., Burris et al., *supra* note 36, at 471–72, 508 n.165 (noting that judges are poor at accurately assessing transmission risks); Harlon L. Dalton, *Shaping Responsible Behavior: Lessons from the AIDS Front*, 56 WASH. & LEE L. REV. 931, 946 (1999) (noting that judges sometimes “impute motives to [HIV exposure] defendants or infer an entire mindset from a single comment or action”); Kaplan, *supra* note 35, at 1552 (noting that courts have upheld convictions requiring substantial risks of transmission even where risks were negligible).

46. See Klemm, *supra* note 37, at 522 (recognizing “the danger that *jurors* will unfairly apply expansive readings of a traditional criminal statute,” and arguing that legislative reform “can reign in both *prosecutors and jurors*” (emphasis added)); Amy L. McGuire, Comment, *AIDS As a Weapon: Criminal Prosecution of HIV Exposure*, 36 HOUS. L. REV. 1787, 1815 (1999) (arguing that “*prosecutors* may twist the meaning of [statutory] elements to fit the crime of HIV transmission” (emphasis added)); cf. Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 8 AM. J. PUB. HEALTH 1350, 1352 (2013) (calling for “immediate policy interventions to assist *prosecutors*,

significance by advocating judicial discretion as a solution for statutory shortcomings.⁴⁷ Commentators' relative inattention to judicial decision making could limit attempts to inform interventions such as the REPEAL Act; for instance, though Sarah Newman provides suggestions for the legislative reform she hopes will be accomplished through the REPEAL Act,⁴⁸ she mentions potential bias in judicial decision making only to support her argument for HIV-specific statutes over prosecutions under general criminal law.⁴⁹

In this Note, I supplement the existing literature on HIV criminalization by identifying recurring failures in judicial decisions rendered in HIV exposure prosecutions, as well as in related cases and legal commentaries that may influence such decisions. Rather than focus, like Waldman, on prosecutions for aggravated assault or other particular charges,⁵⁰ I organize my analysis thematically, grouping cases and commentaries on the basis of their shared failure to engage with distinct sources of knowledge on HIV and the HIV-positive. By doing so, I hope to provide evidence that judicial decisions in HIV exposure prosecutions can and should be improved by interventions, such as the REPEAL Act, that would help integrate these sources of knowledge into the law.

II. HIV EXPOSURE DECISIONS AND COMMENTARY: NEGLECTED SOURCES OF KNOWLEDGE

In this section, I identify recurring flaws in judicial decision making and legal commentary that I attribute to judges' and commentators' failure to engage with three sources of knowledge on HIV and the HIV-positive. First, judges and commentators have exaggerated transmission risks due to a failure to familiarize themselves with the science of HIV transmission, contributing to unjust convictions and sentences in HIV exposure prosecutions. Even where expert evidence on the improbability of transmission has been presented, judges have misapplied legal standards to circumvent that evidence and uphold unjust convictions. Second, judges and commentators have demonstrated little awareness of sexual health research on the limits of "disclosure"-based prevention strategies, and little sensitivity to the ethic, promoted by public health experts, of shared responsibility for transmission risks. Their impoverished understandings of sexual

defense attorneys, and public health personnel to interpret and fairly apply [HIV-specific criminal] laws" (emphasis added)).

47. See McCormick, *supra* note 2, at 425–27 (proposing an unusually draconian HIV exposure statute, and trusting judges to achieve proportionality between punishment and risks of transmission by applying mitigating factors at sentencing).

48. Newman argues that Congress should pass the REPEAL Act, provide new guidelines for the reform of HIV-specific criminal statutes, and condition HIV services funding on states' compliance with the guidelines. Newman, *supra* note 22, at 1427–29, 1435. She offers suggestions on how the federal government should craft the guidelines, favoring carefully drafted HIV-specific statutes that would, for instance, provide clear notice of the scientifically established modes of transmission sufficient to establish criminal liability. *Id.* at 1428–35.

49. *Id.* at 1428.

50. See Waldman, *supra* note 42, at 574; Talicska, *supra* note 41, at 471.

health strategies have contributed to the disproportionate punishment of “nondisclosure” defendants, as well as the unjustifiable punishment of HIV-positive people who *have* “disclosed” to consenting partners. Finally, commentators’ failure to engage with the experiences and perspectives of the HIV-positive has likely deprived their analyses of insight, while further encouraging the overzealous prosecution of those who fail to “disclose.” In turn, judges’ failure to attend to the experience and perspectives of HIV exposure defendants themselves has led them to uphold and impose convictions without the required proof of a culpable mental state.

My material consists of recent appellate opinions rendered in HIV exposure prosecutions, as well as related cases and commentaries. The judicial opinions I examine were gathered mostly in the summer of 2013 from law review articles, advocacy documents, and searches in the Westlaw database. To focus my critique on judicial decision making, I exclude opinions in which the result was dictated or persuasively suggested by the governing statute. Further, to render my analysis more relevant to contemporary and future interventions, I choose to examine only opinions rendered in the last decade (i.e., between 2004 and 2013). Perhaps most importantly, because my research methods limit my analysis to appellate opinions, they exclude the far vaster universe of unreviewed judicial decision making in trial courts. My analysis is qualitative and diagnostic rather than quantitative, and by necessity: a review of any substantial fraction of judicial decision making in HIV exposure prosecutions would be a task of real enormity, underscoring the need for government leadership in initiating systemic interventions.

A. The Science of HIV Transmission

It is much more difficult to transmit HIV, and to determine the precise degree of transmission risk from a particular exposure, than is commonly believed. Though prosecutors and judges have compared the probability of transmission from a sexual encounter to the likelihood of harm from a gunshot,⁵¹ in actuality, even *by far* the riskiest sexual activity—receptive anal sex without protection—has been estimated to pose less than a one-in-fifty chance of transmission.⁵² Estimates based solely on body parts, positioning, and condom use cannot, however, reliably assess the precise degree of transmission risk from any given incidence of sexual activity, which is affected by additional factors: these include the HIV-positive partner’s treatment and viral load,⁵³ the infection of either partner with other

51. See, e.g., *State v. Musser*, 721 N.W.2d 734, 750 (Iowa 2006) (“[A ‘nondisclosure’ defendant] is just like the first-degree robber who attempts to inflict serious injury on his victim. And, just like the robber carrying a gun or a knife, [he] is armed with a dangerous virus capable of inflicting serious injury or death on the victim.”).

52. See Marie-Claude Boily et al., *Heterosexual Risk of HIV-1 Infection Per Sexual Act: Systematic Review and Meta-Analysis of Observational Studies*, 9 LANCET INFECTIOUS DISEASES 118, 118, 122 (2009); Eric Vittinghoff et al., *Per-Contact Risk of Human Immunodeficiency Virus Transmission Between Male Sexual Partners*, 150 AM. J. EPIDEMIOLOGY 306, 306, 310 (1999).

53. E.g., *HIV Transmission Risk*, *supra* note 10 (explaining that high viral loads, typically

sexually transmitted infections,⁵⁴ and the HIV-negative partner's use of pre-exposure prophylaxis (PrEP).⁵⁵

Unfortunately, judges and legal commentators often fail to engage with the complexity of HIV transmission, and their exaggerations of transmission risks contribute to unjust convictions and disproportionate sentences in HIV exposure prosecutions. Though commentators have recognized the impact of viral load on transmission risk and analyzed its legal relevance since at least 2009,⁵⁶ other recent commentaries have omitted viral load when discussing factors that determine risks of transmission.⁵⁷ More troublingly, some commentators have exaggerated the risks of transmission from performing oral sex,⁵⁸ or have even legitimized illusory fears of transmission from casual contact.⁵⁹

Judicial rhetoric has likewise legitimized illusory or exaggerated fears of transmission.⁶⁰ For instance, when a store clerk thwarted one defendant's

occurring in early and late stages of infection, increase transmission risk, while antiretroviral medications can reduce an HIV-positive individual's infectiousness by up to ninety-six percent).

54. *E.g.*, *The Role of STD Detection and Treatment in HIV Prevention - CDC Fact Sheet*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/std/hiv/stdfact-std-hiv.htm> (last updated Sept. 1, 2010) (explaining that STI-related ulcers and inflammation can increase HIV-negative individuals' susceptibility to infection, and that STIs such as gonorrhea increase the infectiousness of HIV-positive individuals).

55. *See, e.g.*, Kristen Underhill, *Paying for Prevention: Challenges to Health Insurance Coverage for Biomedical HIV Prevention in the United States*, 38 AM. J.L. & MED. 607, 618–19 (2012). PrEP is the use of antiretroviral drugs by HIV-negative individuals to protect themselves from HIV infection. *See id.* at 618.

56. *E.g.*, Grant, *supra* note 41, at 400–03 (arguing against use of low viral load as a mitigating factor in “nondisclosure” prosecutions); Leah H. Wissow, Comment, *Public Health vs. Privacy: Rebalancing the Government Interest in Involuntary Partner-Notification Following Advancements in HIV Treatment*, 21 AM. U. J. GENDER SOC. POL'Y & L. 481, 483, 496–502 (2012) (arguing that partner-notification statutes may be unconstitutional as applied to HIV-positive people who maintain an undetectable viral load).

57. *See* Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 582–84 (2011) (failing to mention viral load when discussing factors that influence infection rates, including “transmission efficiency”); McCormick, *supra* note 2, at 425 (defining degree of transmission risks, for purposes of mitigation at sentencing, only by reference to condom use and type of sexual activity).

58. *See* Bradford Bigler, Comment, *Sexually Provoked: Recognizing Sexual Misrepresentation As Adequate Provocation*, 53 UCLA L. REV. 783, 828–29 (2006) (indicating that an HIV-positive woman who performed oral sex on man without informing him of her HIV status exhibited “disregard for his safety,” and assuming the man would “reasonably” have foregone the oral sex if he knew her HIV status, in part due to the “high risk”).

59. *See* Amanda Weiss, Comment, *Criminalizing Consensual Transmission of HIV*, 2006 U. CHI. LEGAL F. 389, 406 (2006) (warning that in addition to risk that infected sexual partner will sexually transmit HIV to others, the infected partner poses risk of “incidental exposure” to the general public).

60. Though I focus on HIV exposure prosecutions, judges have exaggerated transmission risks in other contexts as well. *See* Kaplan, *supra* note 35, at 1553 (noting that judges in antidiscrimination cases have found HIV-positive employees to pose “direct threats” of transmission, contrary to medical evidence); Lisa M. Keels, “Substantially Limited:” *The Reproductive Rights of Women Living with HIV/AIDS*, 39 U. BALT. L. REV. 389, 400–06 (2010) (critiquing Americans with Disabilities Act cases in which judges exaggerate risks of perinatal transmission and perpetuate the stigmatizing notion that the seropositive should not reproduce).

shoplifting attempt by dragging him to the ground, the defendant scratched the clerk and possibly tried to bite him while saying, “I’m HIV positive, let go of me, let go of me.”⁶¹ The defendant’s conduct posed a negligible risk of transmission, even if he did attempt to bite the clerk.⁶² However, in affirming the defendant’s conviction for felony menacing, the court held that a reasonable juror could find the defendant’s conduct “practically certain to cause fear.”⁶³ Even worse, after the arresting officer in *State v. Price* was spit upon and bitten by an HIV-positive defendant with hemophilia, a panel of judges stated that the officer “had to limit his family interactions out of a concern that he had contracted HIV or Hepatitis C and would transfer them to his wife and children.”⁶⁴ Of course, even in the unlikely event that the officer had contracted HIV, he would not have “had to” modify anything but his sexual relations with his wife—and there would be no reason at all to limit his interactions with his children.⁶⁵

Judicial ignorance of HIV transmission can have stark consequences for defendants in HIV exposure prosecutions. Judges have upheld outrageous sentences for spitting and biting based on mistaken impressions of the transmission risks,⁶⁶ and exaggerations of sexual transmission risks likewise underlie the disproportionate sentences imposed or upheld by judges in “nondisclosure” prosecutions.⁶⁷ Such sentences, and their lack of basis in the science of HIV transmission, are a recurring focus of the existing criticism.⁶⁸ Commentators, however, tend to focus on the manner in which *legislatures* have called for disproportionate sentences through HIV-specific statutes,⁶⁹ and their

61. *People v. Shawn*, 107 P.3d 1033, 1034–35 (Colo. App. 2004).

62. *HIV Transmission Risk*, *supra* note 10.

63. *Shawn*, 107 P.3d at 1035.

64. *State v. Price*, 834 N.E.2d 847, 848, 850 (Ohio Ct. App. 2005).

65. The court’s concern also would have been unwarranted if the officer had contracted hepatitis C, which, like HIV, is not transmitted through casual contact. *See, e.g., Hepatitis C FAQs for the Public*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hepatitis/C/FAQ.htm#transmission>.

66. *See, e.g., United States v. Studnicka*, 450 F. Supp. 2d 680, 681–82 (E.D. Tex. 2006) (upholding sentence enhancements for HIV-positive prisoner who bit guard’s arm because, due to “serious possibility of infection,” injury fell between “serious” and “permanent or life-threatening”); Gretel C. Kovach, *Prison for Man with H.I.V. Who Spit on a Police Officer*, N.Y. TIMES, May 16, 2008, at A16, available at http://www.nytimes.com/2008/05/16/us/16spit.html?_r=0 (reporting a thirty-five year sentence for spitting under habitual offender statute).

67. *See, e.g., Hernandez*, *supra* note 13 (reporting that an Iowa judge initially sentenced Nick Rhoades to twenty-five years in prison—2.5 times the maximum sentence available for sexual abuse of a child—for oral and anal sex without “disclosure,” even though Rhoades had an undetectable viral load and used a condom during anal sex).

68. *E.g., Kaplan*, *supra* note 35, at 1536–39 & n.131 (comparing state punishments for endangerment offenses and HIV-exposure offenses, and noting that punishments in HIV-exposure prosecutions may exceed those available for playing Russian Roulette); Talicska, *supra* note 41, at 474–75 (noting that convictions for biting and spitting are disproportionate to the transmission risks and sometimes exceed punishments for sex without “disclosure,” even though sexual transmission risks are much higher).

69. Commentators often illustrate the disproportionate punishment of HIV exposure defendants through comparisons of the offense levels and sentence ranges set by HIV-specific

condemnation of sentences imposed or upheld by judges usually fails to interrogate the judges' reasoning or to account for the role of prosecutorial zeal in determining the severity of sentences. I have thus sought to identify cases in which conviction and sentencing were influenced by *judicial* failure to engage with transmission knowledge.

In one set of such cases, judges have explicitly rejected the need for any evidence on the degree of transmission risks posed by the defendant's specific conduct.⁷⁰ For instance, in *Mathonican v. State*, the court asserted that no expert testimony was needed for a jury to find that an HIV-positive man's semen was a deadly weapon, even though the statute defined "deadly weapons" by their potential to harm in the manner of their *intended use*—a qualification potentially of great importance in the case, since the jury could have concluded that the defendant intended to emit his semen on or near his partner,⁷¹ which would present zero risk of transmission. Furthermore, in *People v. Odom*, the court upheld a prisoner's sentence enhancement for spitting in an officer's face after an altercation that allegedly left the defendant bleeding from the mouth, holding that the officer had been "subjected or exposed to a harmful biological substance" under the relevant statute.⁷² The court considered no expert evidence on the risks of transmission from the defendant's conduct, instead merely taking judicial notice of the fact that blood can transmit HIV—and citing only a CDC advisory stating that blood can do so *when it enters the body*.⁷³ Even the transmission knowledge cited by the court, then, should have led it to hold that *facial contact* with the defendant's saliva, even if mixed with blood, did not "subject or expose" the officer to a harmful biological substance.

Even where judges are presented with expert evidence on transmission risks, they have sometimes misapplied legal standards to that evidence in order to justify convictions. In *State v. Price*, the court affirmed an HIV-positive hemophiliac's assault convictions for spitting at an arresting officer,⁷⁴ disregarding a fundamental requirement of criminal law: that every element of a conviction be proven beyond a reasonable doubt. The defendant's treating physician testified that there would be a low or remote risk of transmission even if an HIV-positive hemophiliac spat into another person's mouth, but another doctor testified that the defendant's saliva probably contained "microscopic blood" at least ninety-five percent of the

criminal statutes to those set by other criminal statutes. See Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED & ETHICS 327, 333–34 (2004); Kaplan, *supra* note 35, at 1536–37; Wolf & Vezina, *supra* note 38, at 859, 882.

70. For an argument that conviction without proof of specific transmission risks violates due process, see Waldman, *supra* note 42, at 568–72.

71. *Mathonican v. State*, 194 S.W.3d 59, 69, 70 & n.8 (Tex. Ct. App. 2006); see also *id.* at 72 (Ross, J., concurring and dissenting) (explaining why jury could not rationally conclude defendant's semen was deadly weapon without expert testimony).

72. *People v. Odom*, 740 N.W.2d 557, 560–62 (Mich. Ct. App. 2007).

73. *Id.* at 561–62 & n.10.

74. *State v. Price*, 834 N.E.2d 847, 847–50 (Ohio Ct. App. 2005).

time, and opined that a mixture of saliva and blood could potentially carry a high concentration of HIV.⁷⁵ On appeal, the court found the doctors' testimony "sufficient to establish that . . . [the defendant's] saliva was a deadly weapon capable of inflicting physical harm to another."⁷⁶ The court should have recognized that a reasonable doubt remained regarding whether the defendant's saliva was infectious: the doctor's speculation about a *potentially* high concentration of HIV in the defendant's saliva due to the presence of "microscopic blood" hardly proved its infectiousness beyond a reasonable doubt, especially given the doctor's recognition that the defendant's saliva may *not* have contained microscopic blood at the time of the incident.⁷⁷

Other judges have openly disregarded statutory requirements to affirm exposure convictions. In *United States v. Dacus*, the defendant pleaded guilty to aggravated assault charges for sex without "disclosure" and later, in light of expert testimony on the unlikelihood of transmission, sought to rescind his plea.⁷⁸ The aggravated assault statute required that death or grievous bodily harm be the "likely" result of the defendant's conduct, meaning "the natural and *probable* consequence of a particular use of any means."⁷⁹ Nevertheless, the court inquired only whether the defendant's conduct posed "more than merely a fanciful, speculative or remote possibility" of death or grievous bodily harm—a probability standard inconsistent with the statute and derived solely from prior "HIV assault cases."⁸⁰ This lax standard enabled the court to conclude that there was no substantial conflict between the defendant's plea and the expert evidence on the improbability of transmission.⁸¹ Sadly, despite the concurring judges' suggestion that future courts should reassess this judicially invented probability standard,⁸² and even after *Dacus* was roundly critiqued by Waldman,⁸³ military judges have again applied its reasoning to affirm an HIV-positive man's conviction for conduct posing only remote risks of transmission.⁸⁴

75. *Id.* at 849.

76. *Id.* Though the court spoke only of "physical harm," the statute defined "deadly weapon," appropriately, as a thing capable of inflicting *death*. *Id.* at 848.

77. *Id.* at 849.

78. *United States v. Dacus*, 66 M.J. 235, 237 (C.A.A.F. 2008). During sentencing, an expert testified that because of the defendant's undetectable viral load, the risk of transmission from sex was "very, very unlikely"—specifically, one in 50,000 with a condom and one in 10,000 even without a condom. *Id.* at 237, 240.

79. *Id.* at 238 (emphasis added).

80. *Id.*

81. *Id.* at 239–40.

82. *See id.* at 240–41 (Ryan, J., concurring).

83. Waldman, *supra* note 42, at 589–95.

84. *See United States v. Gutierrez*, No. ACM 37913, 2013 WL 1319443, at *2–3 (A.F. Ct. Crim. App. Mar. 21), *set aside*, 73 M.J. 128 (C.A.A.F. 2013); *see also id.* at *1 n.1 (dismissing objections of *Dacus* concurrence because they did not sway *Dacus* majority).

B. Research on Sexual Health Strategies

Greater engagement with research on sexual health strategies could lead judges and commentators to an understanding of the limits of seroadaptation as a strategy for managing risks of sexual transmission. Seroadaptation is an umbrella term for sexual decision making based on knowledge or assumptions of HIV status.⁸⁵ Common seroadaptive behaviors entail the use of prospective partners' perceived HIV status to inform the following sexual decisions: whether to use a condom; which sexual activities to engage in, including, where appropriate, whether to assume the insertive or receptive position; and whether to have sex with a prospective partner at all.⁸⁶ Seroadaptive behavior with respect to this last decision (the choice of partners) is known as "serosorting."⁸⁷

Public health experts have acknowledged that information deficits limit seroadaptation's efficacy as a prevention strategy.⁸⁸ Because people cannot reliably determine prospective partners' HIV status by appearance or other cues,⁸⁹ their most reliable source of HIV status information is often the "disclosure" of an HIV-positive partner's prior diagnosis. But those who have been diagnosed with HIV may not "disclose," and those not diagnosed—who have been estimated to comprise one-fifth of the HIV-positive population, and who are more likely than their diagnosed counterparts to transmit the virus⁹⁰—cannot "disclose." Thus, a seroadapter may well reject a diagnosed partner on the basis of her "disclosure," even if that prospective partner's diagnosis has enabled her to receive treatment reducing or even eliminating her infectiousness, only to embrace riskier sex with an *unknowingly* HIV-positive partner with a high viral load.

In addition to these limits on seroadaptation, sexual health research could also sensitize judges and commentators to the ethic of shared responsibility for managing sexual transmission risks. Prevention experts have long sought to instill a sense of accountability in the HIV-negative for their own health and for the transmission risks they create, thereby encouraging them to adopt more effective

85. Willi McFarland et al., *HIV Seroadaptation Among Individuals, Within Sexual Dyads, and by Sexual Episodes, Men Who Have Sex with Men, San Francisco, 2008*, 23 AIDS CARE 261, 262 (2011); Ryan D. Murphy et al., *Seroadaptation in a Sample of Very Poor Los Angeles Area Men Who Have Sex with Men*, 17 AIDS & BEHAV. 1862, 1862 (2013).

86. See J. Jeff McConnell et al., *Sexual Seroadaptation: Lessons for Prevention and Sex Research from a Cohort of HIV-Positive Men Who Have Sex with Men*, PLOS ONE, Jan. 2010, at 1, 2 (2010); Murphy et al., *supra* note 85, at 1862–63.

87. McConnell et al., *supra* note 86, at 2; Murphy et al., *supra* note 85, at 1862. The term "serosorting" is sometimes used more broadly, to encompass various seroadaptive behaviors. McFarland et al., *supra* note 85, at 261–62; Murphy et al., *supra* note 85, at 1862. For clarity, I use "serosorting" only to refer to the choice of partners on the basis of HIV status information.

88. See, e.g., McFarland et al., *supra* note 85, at 261; Murphy et al., *supra* note 85, at 1863.

89. E.g., Linda M. Niccolai et al., *HIV-Infected Persons' Knowledge of Their Sexual Partners' HIV Status*, 14 AIDS EDUC. & PREVENTION 183, 187 (2002).

90. H. Irene Hall et al., *HIV Transmission in the United States: Considerations of Viral Load, Risk Behavior, and Health Disparities*, 17 AIDS & BEHAV. 1632, 1632 (2013); Ann O'Leary & Richard J. Wolitski, *Moral Agency and the Sexual Transmission of HIV*, 135 PSYCHOL. BULL. 478, 478 (2009).

risk-management strategies.⁹¹ In the context of seroadaptation, for instance, the HIV-negative exercise more responsibility for their sexual health when they seroadapt only as a supplement to “universal precautions” taken with all partners,⁹² or seroadapt *proactively* by directly communicating about HIV status, rather than “seroguessing.”⁹³

These understandings have implications for HIV criminalization. The prosecution of consensual sex without affirmative “disclosure” of one’s HIV-positive status imposes a legal duty on the HIV-positive to assist others in exercising their choice to seroadapt. One’s sense of the appropriate extent of this legal duty depends, first, on the value one attributes to the choice to seroadapt—value limited by the information deficits discussed above. It also depends on the weight one gives to an HIV-positive person’s responsibility to *assist* a prospective partner in seroadaptive behaviors, even where the partner makes no effort to obtain the necessary information and adopts no universal precautions. The ethic of shared responsibility may affect this weight: if one expects HIV-negative individuals to proactively manage transmission risks, their failure to discuss HIV status or to adopt default prevention strategies—to the extent possible, given the power dynamics of the encounter⁹⁴—can be read as consent to a greater degree of risk. These understandings of sexual health thus mitigate the moral culpability of those who engage in sex without “disclosure.”⁹⁵ Furthermore, the ethic of shared responsibility cannot be reconciled with the punishment of the HIV-positive for sex *with* “disclosure”—that is, for sex with partners who consent to sex, and its attendant transmission risks, after being apprised of the HIV-positive person’s status. Sadly, judges and legal commentators’ failure to engage with these

91. Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & BEHAV. 451, 451, 455 (2006); O’Leary & Wolitski, *supra* note 90, at 478. Recently, public health experts have moved away from a near-exclusive focus on this message and devoted increasing resources to interventions into risk behaviors by the HIV-positive. *Id.* But even those promoting this shift have not abandoned the ethic of shared responsibility. *See id.* at 487.

92. *See* Galletly & Pinkerton, *supra* note 91, at 453. For example, an HIV-negative gay man might use PrEP or resolve to use condoms even with partners presumed HIV-negative, but take *additional* precautions—e.g., only “topping” during anal sex; foregoing anal sex; or foregoing sex altogether—with a known HIV-positive partner. In contrast, the man would seroadapt as a *substitute* for other risk-management strategies if he adopted precautions only with partners known to be HIV-positive.

93. *See* Niccolai et al., *supra* note 89, at 188–89; Iryna B. Zablotska et al., *Gay Men’s Current Practice of HIV Seroconcordant Unprotected Anal Intercourse: Serosorting or Seroguessing?*, 21 AIDS CARE 501, 502, 508 (2009) (defining “seroguessing” as “serosorting based on the *assumption* of seroconcordance rather than on direct discussion of [a] partner’s status”).

94. Power imbalances between sexual partners may limit the ability of the relatively vulnerable to adopt prevention strategies. *E.g.*, Stoeber, *supra* note 6, at 1175–77.

95. I do not argue that the choice to seroadapt has no value, or that the HIV-positive have no responsibility to assist prospective partners in exercising it. Nor am I attempting a nuanced analysis of the ethical dimensions of “nondisclosure.” My critique is targeted at the manner in which judges and commentators facilitate the universalizing, absolutist condemnation reflected in one commentator’s statement that “*any* intentional failure to disclos[e] one’s HIV-positive status to their partner is a *paramount* wrong.” McCormick, *supra* note 2, at 426 (emphasis added).

understandings of sexual health has helped sustain the disproportionate punishment of the HIV-positive for “nondisclosure,” as well as their continued punishment for fully informed, consensual sex.

Judges have treated serosorting—the most “extreme” seroadaptive behavior—as natural and even inevitable, implying that its benefits are too great for any reasonable person to pass up. For instance, judges have implied that serodiscordant couples (in which one partner has HIV and the other does not⁹⁶) cannot or should not have sex,⁹⁷ and that knowledge of HIV status is so fundamentally, invariably material to the decision to have sex or abstain that “nondisclosure” negates a partner’s consent to sex.⁹⁸ In at least one case, judges have even hinted that serosorting is so natural—and serodiscordant sex so irrational—that an HIV-negative rapist would feel compelled to spare an HIV-positive victim.⁹⁹ In addition to implicitly overstating the value of serosorting as a prevention strategy, this reasoning potentially endangers legal redress for HIV-positive victims of rape.¹⁰⁰

Judges may overvalue serosorting because they fail to recognize the information deficits that limit the efficacy of all seroadaptive behaviors. For instance, in *John B. v. Superior Court*, a negligence suit in which the court recognized “reason to know” of one’s HIV-positive status as sufficient to trigger a duty to “disclose,”¹⁰¹ the court authorized discovery into the defendant’s extramarital sexual behavior for the following reason: “Evidence that John engaged in unprotected [casual] sex . . . might reasonably lead to the discovery of evidence as to John’s *awareness* of the HIV status of those partners . . . and thus may be relevant to whether John knew or had reason to know he was infected with HIV.”¹⁰²

The court thus suggested that John could reliably assess the degree of

96. See generally *Mixed-Status Couples*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/staying-healthy-with-hiv-aids/friends-and-family/mixed-status-couples/> (last updated June 11, 2012).

97. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008) (suggesting HIV “precludes intercourse” for serodiscordant couples, though endorsing their potential use of sex toys).

98. See, e.g., *Musser v. Mapes*, 854 F. Supp. 2d 652, 667 (S.D. Iowa 2012); *Commonwealth v. Cordoba*, 902 A.2d 1280, 1286 (Pa. 2006). This logic is almost never applied to criminalize the “nondisclosure” of any other information that may be material to a prospective partner’s choice to consent or abstain, including information regarding STIs other than HIV. See John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1132–47 (2011); Kaplan, *supra* note 35, at 1525.

99. *Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004) (“[T]he implications of Nance regarding Ms. Heath as HIV-positive draw into question whether he had the requisite intent to rape her.”).

100. The naturalization of serosorting may also promote some forms of violence against the HIV-positive. See Stoeber, *supra* note 6, at 1171–72, 1179 (noting that presumptions of HIV-positive undesirability may be exploited by abusers to prevent HIV-positive victims from leaving, or even encourage abusers to intentionally infect HIV-negative victims).

101. *John B. v. Superior Court*, 137 P.3d 153, 159–66 (Cal. 2006).

102. *Id.* at 163 (emphasis added).

transmission risks he created through unprotected casual sex by counting the number of his partners *he knew* to be HIV-positive—without reference to factors, such as viral load and other STIs, affecting those partners’ infectiousness, or to the potentially greater risks created with HIV-positive partners who did not “disclose” or who had never been diagnosed.¹⁰³ A dissenting justice further elided the HIV status information deficit in a somewhat insensitive hypothetical:

[A]fter 25 years of widely available public information regarding the risk factors for HIV and the manner in which HIV is transmitted, one would think the potential sexual partner of an intravenous drug user bearing needle marks and showing signs of any kind of illness would, if not run for the nearest exit, insist on precautions against possible transmission of HIV.¹⁰⁴

Evidently, twenty-five years’ worth of prevention messages did not convince this justice to encourage the HIV-negative to adopt precautions with *all* casual partners, rather than relying on their perceived ability to determine who is “infected.”¹⁰⁵

In addition to overlooking the limits of seroadaptation as a prevention strategy, judges may encourage overzealous condemnation of “nondisclosure” by downplaying the HIV-negative’s shared responsibility for managing the sexual transmission risks they consent to creating. For instance, the defendant in *State v. Kinder*, without volunteering his HIV-positive status, had consensual sex with three men who worked for his online prostitution business, and who regularly had casual sex with strangers met online—at least sometimes without condoms.¹⁰⁶ None asked about the defendant’s HIV status or brought condoms.¹⁰⁷ The men thus made no effort to obtain the information necessary to seroadapt, and they had already created substantial risks of their own infection by eschewing condoms

103. At least one commentator has implied the same. *See* Mosiello, *supra* note 37, at 616–17 (endorsing assessment of “reason to know” through past partners known to be HIV-positive, while rejecting assessment through past “risky” sex regardless of partners’ known or presumed HIV status); *cf.* Kaplan, *supra* note 35, at 1560 (suggesting juries should consider a “nondisclosure” defendant’s partner to have consented to a greater degree of transmission risks if she knew the defendant had previously slept with a partner known to be HIV-positive).

104. *John B.*, 137 P.3d at 182 (Moreno, J., dissenting).

105. *See also* Fan, *supra* note 57, at 577 (arguing that without systems for reliable verification of HIV status, people “*have to* resort to crude heuristics of who is ‘clean’ . . . to determine if someone is a ‘safe’ and healthy sexual partner” (emphasis added)). On a similar note, Russell Robinson offers “some hypothetical sexual scenarios in which arguably both partners have some responsibility for discussing HIV and safe sex,” including a scenario in which a woman’s friend tells her that a prospective sexual partner’s “face looks a little funny,” with pronounced cheekbones and a gaunt quality similar to those of an acquaintance with AIDS. Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1520–22 (2009). Robinson makes excellent use of public health research to critique both HIV criminalization and “down low” narratives. *See id.* at 1467–68, 1471–72, 1515–32. But his critique would be yet more enlightening if it clarified that an individual’s HIV status cannot be determined through physical appearance, and that consenting sexual partners arguably share responsibility for managing transmission risks in *all* scenarios.

106. *State v. Kinder*, No. 94722, 2011 WL 826284, at * 1 (Ohio Ct. App. Mar. 10, 2011).

107. *Id.* at *2.

as a universal precaution with their casual partners. But the court flatly rejected the suggestion that these facts mitigated the defendant's culpability.¹⁰⁸ By giving the same unyielding weight to the HIV-positive's moral duty to assist their partners in navigating transmission risks, judges communicate that transmission risks are unilaterally created by the HIV-positive,¹⁰⁹ facilitating their punishment for degrees of risk to which their partners arguably consented.

In fact, some judges have proved willing to punish the HIV-positive even for consensual sex with HIV-negative partners fully informed of their status, on the theory that the HIV-positive partner is solely responsible not only for the risks of transmission to the HIV-negative partner, but also, if that partner is infected, for any risks of transmission generated by her future activity.¹¹⁰ For instance, in *United States v. Gutierrez*, the defendant's partners said that they would not have consented to sex with the defendant if he had "disclosed" his HIV status.¹¹¹ However, in upholding the constitutionality of the defendant's conviction for "indecent acts," the court reasoned that his partners *could* not have consented to sex with him, because a person "cannot consent to an act that is likely to result in death or grievous bodily harm."¹¹² The court relied on a case that punished a defendant for consensual sex with a partner fully aware of his status, on the grounds that punishment was necessary to protect those whom the "misguided" consenting partner might subsequently infect.¹¹³

Though the judges in *Gutierrez* only implied willingness to punish the HIV-positive for fully informed, consensual sex, other judges have actually imposed such punishment in recent years. The trial court in *State v. Rick*, over the defendant's objections, instructed the jury on a statutory provision criminalizing the "transfer" (medical donation) of certain bodily fluids and tissues, including sperm.¹¹⁴ The jury convicted the defendant on this charge, despite finding that he had "disclosed," and the trial judge denied the defendant's post-trial motion for

108. See *id.* at *2 ("The fact the men may not live a conventional lifestyle, did not inquire about Kinder's HIV status, and failed to provide condoms, are not defenses to Kinder failing to notify the victims he was HIV positive prior to having unprotected sex with them.").

109. Cf. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (stating that an HIV-positive woman who has sex to get pregnant "imposes on the man a significant risk of becoming infected." (emphasis added)).

110. One commentator, as well, has advocated prosecution of the HIV-positive for consensual and fully informed serodiscordant sex, albeit only where the partners *intend* to transmit the virus. Weiss, *supra* note 59, at 401–08.

111. *United States v. Gutierrez*, No. ACM 37913, 2013 WL 1319443, at *1, *4 (A.F. Ct. Crim. App. Mar. 21), *set aside*, 73 M.J. 128 (C.A.A.F. 2013).

112. *Id.* at *4 (citing *United States v. Bygrave*, 46 M.J. 491 (C.A.A.F. 1997)).

113. See *Bygrave*, 46 M.J. at 492, 496 ("The Government's interests in the present case . . . encompass the health of any sexual partners [the defendant's partner] may have in the future, any children she may bear, and anyone else to whom she may potentially transmit HIV through nonsexual contact."), *aff'd* 40 M.J. 839, 842 (N-M. C.M.R. 1994) ("In giving her misguided consent to infection with a potentially deadly virus, Petty Officer C does not speak for those she might subsequently infect.").

114. See *State v. Rick*, 821 N.W.2d 610, 612, 615–16 (Minn. Ct. App. 2012).

acquittal or a new trial.¹¹⁵ The trial judge thus enforced an interpretation of the statute that criminalized an HIV-positive person's participation in fully informed, consensual sex.¹¹⁶ Furthermore, the trial judge was not alone in believing the punishment warranted—when the court of appeals reversed the conviction, the dissenting judge protested that the trial court's interpretation was necessary to protect public health.¹¹⁷

A similarly draconian desire to protect public health led another judge to impose *civil* punishment for an offer of informed, consensual sex. When Jose Ramirez, undocumented and homeless, offered to perform oral sex on an undercover officer in exchange for money, an Immigration Judge found that his HIV-positive status rendered his offer a “particularly serious crime,” justifying the termination of his withholding of removal¹¹⁸—and clearing the way for his deportation. Most disturbingly, the judge held that Ramirez's intent to “disclose” was irrelevant, reasoning that his client's knowledge of his HIV status could not “mitigate the danger [his] behavior posed to the subsequent sexual partners of his client.”¹¹⁹

Though the punishments imposed in *Rick* and *Ramirez* were reversed or vacated,¹²⁰ the judicially imposed imprisonment of another HIV-positive man for fully informed, consensual sex was apparently allowed to stand. In *State v. Eversole*, the trial court revoked a defendant's probation and sentenced him to two years of imprisonment for *technical* noncompliance with his parole order, which required him to bring prospective sexual partners to his probation officer for written confirmation that they knew his HIV status.¹²¹ The defendant's noncompliance was only technical because the partner whom he failed to present for the court's approval admittedly knew the defendant's HIV status when he consented to the alleged sexual contact.¹²² On appeal, the court did not pretend to be bound to uphold the punishment.¹²³ Nevertheless, the court found that the trial court had acted within its discretion, speculating that the parole order may have been

115. *Id.* at 612.

116. *Id.* at 616.

117. *Id.* at 620 (Collins, J., dissenting).

118. Brief for Amici Curiae American Academy of HIV Medicine et al. on Behalf of Respondent at 1–3, Ramirez, (No. A075986662), available at http://www.lambdalegal.org/in-court/legal-docs/ramirez_ca-amicus-brief.

119. *Id.* at 2.

120. The Board of Immigration Appeals vacated the Immigration Judge's Ramirez decision after the federal government, apparently swayed by advocates, ceased its efforts to deport Ramirez. See Ramirez, A075986662 (B.I.A. May 31, 2013), available at http://www.lambdalegal.org/in-court/legal-docs/in-re-ramirez_us_20130531_decision.

121. *State v. Eversole*, 912 N.E.2d 643, 645 (Ohio Ct. App. 2009).

122. *Id.*

123. The court recognized that a probationer is entitled to liberty if he “substantially abides by the conditions of his supervision.” *Id.* at 647. It discussed precedent reinstating a defendant's probation where the defendant had been ordered not to contact minors without the probation department's approval, but neglected to secure that approval when marrying a minor. *Id.* at 647 (citing *State v. Thompson*, 782 N.E.2d 688 (Ohio Ct. App. 2002)).

designed to achieve several goals beyond ensuring “disclosure”—most notably, to “safeguard subsequent sexual partners of [the unapproved partner].”¹²⁴ In other words, the court acknowledged the possibility that the trial court sought to discourage HIV-negative individuals from making their own informed decision to have sex with the defendant—and suggested the court had discretion to reimprison the defendant for allowing his partners that choice.

C. HIV-Positive Experience and Perspectives

The value of attention to the lived experiences of the HIV-positive has been recognized by advocates in the United States and abroad,¹²⁵ as well as by the federal government.¹²⁶ It has also been demonstrated in the work of a select few legal commentators who have highlighted HIV-positive voices and experiences.¹²⁷ Judicial decisions and legal commentary, however, often suffer from a failure to engage with the experiences and perspectives of the HIV-positive. This failure deprives the law of the benefits of such engagement, including the potential to enrich legal analysis. More concretely, it contributes to the disproportionate punishment of “nondisclosure” defendants and the unjust conviction of other exposure defendants without proof of intent to harm.

Attending to a broad spectrum of HIV-positive experience has the potential

124. *Id.* at 648. The court also suggested that enforcing technical compliance with the order may have been reasonable to ensure that the defendant and his partners were reminded to practice safe sex. *Id.* But this goal was not incorporated into the terms of the order, since the parole officer was not required (or qualified) to advise the partners on safe sex, and she never did. *Id.* at 648–49 (Donovan, J., dissenting). Finally, the court cited the goal of requiring the defendant to “act responsibly and respect lawful authority.” *Id.* at 648 (majority opinion). But this goal, if recognized as sufficient to punish noncompliance, could justify any parole condition, however unjust.

125. For instance, prominent HIV-positive advocate Sean Strub faulted the authors of the “We the LGBT” video and statement for failing to identify anyone in the video as HIV-positive, or to conduct outreach to any of the “five national networks of people with HIV in the U.S. that were created by and are run/controlled by people with HIV.” See Sean Strub, *We the LGBT? What About Us with HIV?*, POZ BLOGS (June 3, 2013, 4:04 PM), http://blogs.poz.com/sean/archives/2013/06/we_the_lgbt_what_abo.html. International organizations also recognize the value of bringing the experience of the HIV-positive to the forefront. See, e.g., UNITED NATIONS JOINT PROGRAMME ON HIV/AIDS & INTERNATIONAL DEVELOPMENT LAW ORGANIZATION, TOOLKIT: SCALING UP HIV-RELATED LEGAL SERVICES 33 (2009) (“Testimony from people living with HIV about their experiences with the legal system is a very powerful way to challenge attitudes and convey the reality of living with HIV.”), available at <http://issuu.com/idlonews/docs/hivtoolkit>.

126. E.g., WHITE HOUSE OFFICE OF NAT’L AIDS POLICY, *supra* note 23, at 35, 37 (recommending promotion of public leadership by HIV-positive people and recognizing that historically, “an essential element of what has caused social attitudes to change has been when the public sees and interacts with people who are openly living with HIV”).

127. See Cynthia Chandler et al., *Community-Based Alternative Sentencing for HIV-Positive Women in the Criminal Justice System*, 14 BERKELEY WOMEN’S L.J. 66, 69–73, 85–90 (1999) (presenting views and experiences of HIV-positive coauthors Gwen Patton and Jenny Job); Keels, *supra* note 60, at 390, 410 (reporting HIV-positive women’s experiences with stigma discouraging them from having children); Stoeber, *supra* note 6, at 1169–73, 1175–79 (highlighting stories from HIV-positive survivors of domestic violence); cf. Perone, *supra* note 9, at 363 n.† (2013) (thanking HIV-positive individuals for sharing stories with the author and enriching her understanding).

to enrich legal analysis by calling attention to the ways in which HIV, stigma, and legal doctrine play out in diverse HIV-positive lives.¹²⁸ For instance, through her representation of HIV-positive clients and other domestic violence survivors affected by HIV, Jane Stoever has recognized seven categories of HIV-motivated violence largely ignored by legal scholarship.¹²⁹ Further, HIV-positive experience may inform the attempts of some HIV criminalization commentators to complicate the meaning of “disclosure” and of consent to transmission risks. Kaplan, for example, discusses verbal and non-verbal cues that the HIV-positive may use in lieu of “disclosure,” suggesting that members of “the gay-male community” often possess some sophistication in navigating these cues.¹³⁰ As a participant in a gay male community, however, I am skeptical that a substantial number of gay men are attuned to such subtle cues as the presence of HIV medications.¹³¹ On the contrary, several men with whom I have interacted online have proven so unsophisticated in navigating HIV status information that they have even neglected to read the portion(s) of my profile plainly listing my status. Some of these men have invited me to have sex with them, only to rescind the invitation after I “disclosed” my HIV-positive status more *directly*—raising the question of whether I would be subject to conviction under a “nondisclosure” statute had I slept with them after “disclosing” my status only on my profile. Despite the salience of this legal question in the lives of the many HIV-positive people looking for sex and romance online, I have yet to see any commentator address it.

Engagement with HIV-positive perspectives may also lead to greater proportionality of punishment in “nondisclosure” prosecutions. Rather than interrogating the experiences and perspectives that lead some HIV-positive people to engage in sex without “disclosure,” the media has long indulged the public’s prurient fascination with men, such as Philippe Padieu and Nushawn Williams, who have repeatedly engaged in sex without “disclosure.”¹³² Recently, the media has also developed a fascination with Black men “on the down low,” who have sex with women without telling them that they also have sex with men, and who are portrayed as a chief cause of HIV infections among Black women.¹³³ Some

128. Given the exposure of many HIV-positive people to HIV care, and their personal interest in challenging transmission ignorance, commentators connected to the HIV-positive may also be less likely to omit or misrepresent knowledge of HIV transmission in the ways discussed above. See *supra* pp. 502–03.

129. Stoever, *supra* note 6, at 1160 n.4, 1167–80 & n.49.

130. Kaplan, *supra* note 35, at 1550–51 & n.199; see also Galletly & Pinkerton, *supra* note 91, at 456.

131. See Kaplan, *supra* note 35, at 1550; Galletly & Pinkerton, *supra* note 91, at 456; Robinson, *supra* note 105, at 1521.

132. See, e.g., Catherine Hanssens, *AIDS Criminals and Innocent Victims: Is There Anything Wrong with This Picture?*, CTR. FOR HIV L. & POL’Y (Sept. 29, 2009), <http://www.hivlawandpolicy.org/fine-print-blog/aids-criminals-and-innocent-victims-there-anything-wrong-picture> (critiquing press coverage of Padieu and relating it to coverage of Williams).

133. Robinson, *supra* note 105, at 1469–78.

commentators have echoed these alarmist tales of “AIDS predators” and men on the down low. For instance, commentators have employed sensationalistic references to Williams and Padieu to add “spice” to their articles.¹³⁴ This technique resembles that used by the publishers of Randy Shilts’s famous book *And the Band Played On*, who successfully courted publicity by inaccurately portraying “predator” Gaëtan Dugas as “Patient Zero”¹³⁵—a narrative that commentators have referenced without any mention of its epidemiological inaccuracy.¹³⁶ Finally, at least one commentator has perpetuated hysterical media accounts of the public health threat posed by men on the down low, arguing that current privacy protections for HIV status information “giv[e] rise to a pandemic in the Black community” and that “[t]he need to reach the ‘down-low’ phenomenon is critical to saving the lives of Black women and girls.”¹³⁷ These commentators’ failure to engage with circumstances that may mitigate the culpability of those who engage in sex without “disclosure,”¹³⁸ or to more thoughtfully assess the impact such people have on the epidemic,¹³⁹ may contribute to the disproportionate punishment of defendants in “nondisclosure” prosecutions.

Judges’ similar unwillingness to engage with the mindsets and circumstances of HIV exposure defendants can lead to unjust convictions without the required proof of *mens rea*. Since statutes criminalizing sex without “disclosure” use the defendant’s knowledge of her HIV status as a proxy for a culpable mental state,¹⁴⁰ the issue is not particularly salient in prosecutions under those statutes. But the issue is of critical importance in prosecutions requiring proof of intent to harm or

134. See Fan, *supra* note 57, at 533–34 (beginning with account of Philippe Padieu and this sensationalistic sentence: “Venturing online to jumpstart her love life after divorce, Diane Reeve met the man who would give her AIDS”); Markus, *supra* note 2, at 847–48 (opening with sensationalistic account of Nushawn Williams’s “killing spree”).

135. See PHIL TIEMEYER, PLANE QUEER: LABOR, SEXUALITY, AND AIDS IN THE HISTORY OF MALE FLIGHT ATTENDANTS 168–80 (2013).

136. See Christina M. Shriver, *State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications*, 21 N. ILL. U. L. REV. 319, 319–20 & n.2 (2001) (referring to Dugas as “Patient Zero” and implying that he “helped contribute to the dramatic spread of AIDS during the early days of the epidemic”); McArthur, *supra* note 36, at 713, 737.

137. Gloria J. Browne-Marshall, *A Cautionary Tale: Black Women, Criminal Justice, and HIV*, 19 DUKE J. GENDER L. & POL’Y 407, 423–28 (2012).

138. E.g., Dalton, *supra* note 45, at 946–48 (linking documentary subject Fabian Bridges’ “nondisclosure” to poverty and the absence of institutional and familial support); Kaplan, *supra* note 35, at 1541–42 (describing varying interests defendants may have in sexual activity and in “nondisclosure”); Stoeber, *supra* note 6, at 1169–71 (describing “disclosure”-motivated abuse and violence). Mitigating circumstances may exist even in the most notorious cases: commentators have noted that Nushawn Williams was diagnosed with schizophrenia and that he claimed he did not believe he was infected with HIV, suspecting health officials were only trying to drive him out of town for having sex with White women. Burris et al., *supra* note 36, at 509; Wolf & Vezina, *supra* note 38, at 824–25.

139. See Robinson, *supra* note 105, at 1467–68, 1470–72 (explaining that there is limited empirical evidence on the prevalence of down low behavior and its public health impact, and pointing to alternative explanations for HIV infections in Black women).

140. Kaplan, *supra* note 35, at 1532–34.

to kill, such as those targeting HIV-positive aggressors for assault and attempted murder. HIV-positive people may engage in acts of aggression such as spitting and biting, and even explicitly threaten to infect their targets, without genuinely intending to infect them—indeed, quite likely knowing that their actions present no realistic chance of transmission.¹⁴¹ Life with HIV renders the HIV-positive painfully aware of the public's irrational fears of transmission, and we may be tempted to exploit those fears in the heat of a confrontation. Giving in to that temptation may not be admirable, but it is a far cry from a desire to maim or kill.

Judges, however, have proven ready to impute such desires to HIV-positive defendants on the basis of minimal evidence.¹⁴² For instance, in *State v. Price*, the court relied on an HIV-positive hemophiliac's "knowledge of his illnesses" to find sufficient evidence that he knew his saliva was a deadly weapon when spitting at an arresting officer.¹⁴³ If the court simply meant that the defendant knew he was a hemophiliac and infected with HIV, such knowledge is grossly insufficient to establish knowledge of *the infectiousness of his saliva* due to these conditions.¹⁴⁴ The year after *Price*, another panel of the court affirmed an HIV-positive defendant's conviction for attempted felonious assault on a police officer after he spat in an arresting officer's eye, relying on *Price* and the officer's testimony that he "observed what he believed to be blood in the saliva that he cleaned out of his eye."¹⁴⁵ The court cited no evidence that the defendant *knew* his saliva contained blood (if, in fact, it did),¹⁴⁶ or that he believed the presence of blood created a risk of transmission sufficient to render his saliva a deadly weapon. Instead, the court simply inferred nefarious intent from the fact that the defendant had previously spat on a police officer, told him he was HIV-positive, and said, "I should have

141. Dalton, *supra* note 45, at 941.

142. Commentators, also, have denied the complexity of HIV-positive aggressors' mental states by indicating that a simple threat, or even a "menacing" laugh, may be sufficient to dispel a reasonable doubt regarding a defendant's intent to transmit. See McCabe, *supra* note 41, at 774; Jaclyn Schmitt Hermes, Note, *The Criminal Transmission of HIV: A Proposal to Eliminate Iowa's Statute*, 6 J. GENDER RACE & JUST. 473, 488–89 (2002).

143. *State v. Price*, 834 N.E.2d 847, 849 (Ohio Ct. App. 2005).

144. Did the defendant know that his saliva might contain "microscopic blood"? See *id.* Did he believe that the presence of microscopic blood in his saliva rendered it capable of inflicting death—despite widespread recognition, even by at least one member of the court, that saliva generally poses no risk of HIV transmission? See *id.* at 848–49 (quoting *State v. Bird*, 692 N.E.2d 1013 (Ohio 1998) (Pfeifer, J., dissenting) (finding "nothing suggesting that the saliva of an HIV-positive person can transmit the disease to another")). Did he know all of this during an encounter with police responding to his "nonsensical" calls, implying that his mental state may have been impaired? See *id.* at 847–48. The court was silent on these points, which should have been proven beyond a reasonable doubt.

145. See *State v. Branch*, No. L-05-1269, 2006 WL 2045911, at *3 (Ohio Ct. App., July 21, 2006).

146. Other than the officer's asserted belief, the court mentioned no evidence that blood was present in the defendant's saliva, and offered no explanation for its presence: the court did not suggest that the defendant was struck during or prior to the arrest. See *id.* at *1, *3.

spit in your mouth”—without citing any evidence of the defendant’s knowledge or mental state when making those statements.¹⁴⁷

Other judges have gone even further, using a defendant’s threatening statements while spitting as the basis for *imposing* a conviction. In *State v. Ingram*, the defendant was beaten by an officer and bitten on the head by a police dog while being arrested for stealing small items.¹⁴⁸ While being led to an officer’s car in handcuffs, he spat in the officer’s face, told him he was HIV-positive, and said he hoped the dog developed AIDS.¹⁴⁹ A jury convicted the defendant of criminal exposure to HIV, but the reviewing court reversed the conviction because the state had failed to establish that exposure to the defendant’s saliva posed a significant risk of transmission.¹⁵⁰ Nevertheless, the court took it upon itself to impose an attempt conviction, finding the defendant’s statements to be sufficient proof that he *believed* spitting in the officer’s face would expose him to a significant risk of transmission.¹⁵¹ The court was not even deferring to a jury’s fact finding—the court imposed the conviction, despite the flimsy evidence of intent, on its own accord.¹⁵²

In suggesting that these problems may be remedied if judges and commentators more closely attend to the perspectives and experiences of the HIV-positive, I do not mean to suggest that lived experience with HIV leads to one correct perspective on law and policy. It should be evident in this Note that I personally oppose HIV criminalization, and my stance on the issue is informed by my direct experience with HIV and its stigma. But other commentators have invoked HIV-positive experiences—albeit of third parties, and focusing on the experience of infection—to *advocate* HIV criminalization.¹⁵³ I also would caution that attention to the lived experiences of the HIV-positive should respect the diversity of that experience. As a gay, middle-class White man infected through casual sex, my experiences, concerns, and privileges may color my perspective; for

147. *See id.* at *1–4.

148. *State v. Ingram*, No. W2011-02595-CCA-R3-CD, 2012 WL 5355694, at *1–3 (Tenn. Crim. App. Oct. 31, 2012).

149. *Id.* at *2.

150. *Id.* at *5.

151. *See id.* at *5.

152. The defendant’s stated hope that the police dog would develop AIDS, even if sincere, could only demonstrate that the defendant believed his *blood* could infect a dog that ingested it, not that he believed his *saliva* could infect a person even without entering the body. The court cited no evidence regarding the defendant’s knowledge of transmission routes and no evidence regarding the defendant’s state of mind—for instance, none rebutting the possibility that, in his anger after being caught, beaten, and attacked by a dog, the defendant was merely engaging in petty rebellion by attempting to play on the officer’s irrational fears of transmission.

153. *See* Marc Spindelman, *Sexuality’s Law*, 24 COLUM. J. GENDER & L. 87, 88–89, 216 & n.582, 226–27 (2013) (protesting an allegedly small number of legal actions for sexual transmission between gay men, and encouraging HIV-positive gay men to use their “lived, practical knowledge” to reclaim transmission as legal harm); McCormick, *supra* note 2, at 407 & n.1, 416–17 (arguing for criminalization “from a purely retribution standpoint” and identifying infection of author’s father as inspiration for article).

instance, by predisposing me to contemplate “disclosure” in the context of casual, noncommercial sex between same-sex partners, possibly leading me to overlook different concerns surrounding “disclosure” in sex work or in committed (and potentially abusive) heterosexual relationships. My identity and experiences may resonate with an image of the HIV-positive that remains dominant in certain circles, but they leave me ill-equipped to provide the types of insight available from the experiences—with prison, pregnancy, domestic violence, and more—shared by the HIV-positive women given voice in other commentaries.¹⁵⁴

III. DISLODGING JUDGES’ “STICKY INTUITIONS”

I offer the foregoing analysis as evidence of a need for interventions into judicial decision making in HIV exposure prosecutions. There is no blueprint for such interventions, but to begin framing them, it may be wise to ask *why* judges fail to engage with public health research and the HIV-positive as sources of knowledge. Suzanne Goldberg has shed some light on this question by examining one reason we all, at times, deem it unnecessary to consult outside sources of knowledge: intuitive thinking.¹⁵⁵ Goldberg questions why judges, despite advances in understanding that have fueled the growing momentum in the fight for gay rights, “continue to promote and sustain restrictions on the rights of lesbians and gay men.”¹⁵⁶ She attributes the phenomenon to “a set of intuitions, impulses, instincts, and so-called commonsense views regarding sexual orientation and gender . . . [that] have maintained their influence well after being undermined by both data and shifts in societal views.”¹⁵⁷ She proceeds to sketch a typology of these “sticky intuitions” as they manifest in judicial decisions, as well as in scholarship and public discourse.¹⁵⁸

Like the decisions examined by Goldberg, the opinions I have critiqued in this Note arguably reflect “a wide range of nonanalytically derived beliefs.”¹⁵⁹ For instance, that transmission is *likely* when an HIV-negative individual has sex with an HIV-positive person, or comes into any manner of contact with an HIV-positive person’s blood; that sex with a partner known to be HIV-positive invariably presents greater transmission risks than sex with a partner presumed to be HIV-negative; that the HIV-negative do not create transmission risks and are not responsible for them; and that the HIV-positive are often willing to deliberately infect others, while simultaneously unaware that biting, scratching, and spitting are poor methods of doing so. Acceptance of such “sticky intuitions” as

154. See Chandler et al., *supra* note 127, at 69–73, 85–90; Keels, *supra* note 60, at 390, 410; Stoever, *supra* note 6, at 1169–73, 1175–79.

155. See Goldberg, *supra* note 17.

156. *Id.* at 1378.

157. *Id.* at 1379.

158. *Id.*

159. *Id.* at 1380.

commonsense truth might underlie some judges' failure to attend to outside sources that could offer contrary evidence and perspectives.

If intuitive thinking is indeed at work in these cases, what can be done about it? Goldberg warns that because people "tend to evaluate the persuasiveness of new information based on its conformity to their experience," the presentation of facts contrary to harmful intuitions may be insufficient to destabilize them.¹⁶⁰ However, factual contestation may be more effective in the context of HIV criminalization, at least with respect to intuitions concerning HIV transmission¹⁶¹—judges may be less ready to discount the persuasiveness of authorities on a subject so scientific and arcane. Advocates should thus make good use of resources on the science of HIV, such as those prepared specifically for advocates by the Positive Justice Project.¹⁶² But other intuitions at work in these cases are likely less susceptible to factual contestation because they concern subjects more psychological or cultural.¹⁶³ Helpfully, Goldberg explores alternatives to factual contestation, drawing on cognitive theory to identify two strategies for destabilizing antigay intuitions: exposing decision makers to the presence and voices of gay people (the contact hypothesis) and encouraging decision makers to imagine themselves in gay people's figurative shoes (role taking).¹⁶⁴

Advocates and commentators might make use of these strategies to influence judicial decision making in HIV exposure prosecutions. Litigators can place judges in "contact" with the HIV-positive through in-depth personal testimony by HIV-positive witnesses, or through the incorporation of HIV-positive people's stories and voices into written submissions such as amicus briefs.¹⁶⁵ Commentators can also encourage such "contact" by collaborating with the HIV-positive in their work, either by cowriting a piece with HIV-positive collaborators¹⁶⁶ or, more simply, by documenting their words and experiences.¹⁶⁷ Through creative role-taking strategies, litigators and commentators might also encourage judges to identify with the HIV-positive. One strategy is simply to ask judges to do so, perhaps through a narrative in the second person.¹⁶⁸ Another

160. *Id.* at 1408.

161. *See* Lazzarini et al., *supra* note 46, at 1351–52.

162. *See, e.g.*, POSITIVE JUSTICE PROJECT, TRANSMISSION ROUTES, VIRAL LOADS AND RELATIVE RISKS: THE SCIENCE OF HIV FOR LAWYERS AND ADVOCATES, CTR. FOR HIV L. & POLY (June 2011), <http://www.hivlawandpolicy.org/resources/transmission-routes-viral-loads-and-relative-risks-science-hiv-lawyers-and-advocates>.

163. *See* Lazzarini et al., *supra* note 46, at 1352 (noting that empirical data cannot directly help resolve questions of values, such as the balance of responsibility for transmission risks).

164. Goldberg, *supra* note 17, at 1408–10.

165. *See id.* at 1409 & n.146.

166. *See* Chandler et al., *supra* note 127, at 69.

167. *See* Keels, *supra* note 60, at 390, 410; Stoeber, *supra* note 6, at 1169–73, 1175–79.

168. Jaclyn Hermes has used this strategy with her readers, opening her Note by instructing readers to imagine themselves as an eighteen-year-old boy who is revealed, through a story highlighting his fear of "disclosing" his status to his prom date, to be HIV-positive. Hermes, *supra* note 142, at 473.

strategy is to present a judge with a hypothetical legal regime imposing burdens on the HIV-negative analogous to those currently imposed on the HIV-positive.¹⁶⁹ Advocates might posit, for example, a law seeking to promote seroadaptation by criminalizing the failure to “disclose” one’s HIV status regardless of whether it is negative or positive. Finally, Goldberg suggests that “attention to language may do some work in bridging differences and reshaping intuitions.”¹⁷⁰ In this vein, advocates might destabilize harmful intuitions by, for example, shifting discourse in prosecutions for consensual sex from “disclosure” to seroadaptation,¹⁷¹ and by contesting judges’ and prosecutors’ use of stigmatizing metaphors, such as those equating HIV transmission with death.¹⁷²

Piecemeal attempts to influence individual judges as HIV exposure prosecutions arise are not, of course, the ideal response to the influence of HIV-related ignorance and stigma in our courts; pervasive problems beg for systemic interventions. Goldberg briefly references one “top-down” prospective approach to destabilizing intuitions, noting that judges can be exposed to both role taking strategies and up-to-date factual information in judicial trainings like those provided by the Williams Institute.¹⁷³ If the REPEAL Act is enacted, the inclusion of such trainings in the required best practice recommendations to states might lead to substantial progress in the dissemination of public health knowledge and HIV-positive perspectives among the judiciary.¹⁷⁴ Of course, judges are people, and their decision making will always reflect the culture in which they are situated; interventions in the judiciary will likely never succeed unless contextualized within broader efforts to educate the public and eradicate HIV stigma.¹⁷⁵

169. See Goldberg, *supra* note 17, at 1410.

170. *Id.* at 1410–11 (pointing to LGBT rights lawyers’ efforts to frame debates in terms of same-sex couples’ sexual intimacy and marriage rights rather than “homosexual sodomy” or “same-sex marriage”).

171. A focus on the HIV-negative partner’s frustrated desire to seroadapt emphasizes that she, and not only the HIV-positive defendant, was creating and navigating transmission risks. Further, the mere naming of seroadaptive behaviors—particularly serosorting—divests them of a sense of naturalness or inevitability and clarifies that they are only particular strategies in managing transmission risks.

172. See, e.g., Trevor Hoppe, *From Sickness to Badness: The Criminalization of HIV in Michigan*, 101 SOC. SCI. & MED. 139, 143–45 (2013) (describing persistence of “death narratives” in Michigan “nondisclosure” prosecutions).

173. Goldberg, *supra* note 17, at 1411 n.158.

174. Jane Stoever has also recommended that existing judicial trainings on domestic violence raise judges’ awareness of its intersections with HIV and involve judges in exploring responses. Stoever, *supra* note 6, at 1216–17 & n.220.

175. Angela Perone has proposed educational campaigns against stigma as part of a proactive, non-punitive approach to “responding to inequality emanating from HIV criminalization laws.” Perone, *supra* note 9, at 394–406.

IV. CONCLUSION: LISTEN REAL LOUD¹⁷⁶

In an interview with the ACT UP Oral History Project, Mary Dorman recounts how she first became a lawyer for the famous HIV activist group when, while attending a demonstration, she was asked to represent some of the hundreds of ACT UP members arrested there.¹⁷⁷ When the judge called fifteen male arrestees into the court, Dorman—initially terrified because she had little experience in criminal law—gained strength from the sight of the ACT UP members holding hands in the courtroom, sporting bright red lipstick.¹⁷⁸ But when her clients were called at a follow-up proceeding, Dorman noticed a less welcome sight: court employees, evidently fearing “contamination” from the HIV activists, donning rubber gloves.¹⁷⁹ Perhaps emboldened by her clients’ own unapologetic style, Dorman took the unusual step of confronting the judge:

I said that I’d observed court officers wearing gloves when my clients were present. And it was my obligation to advise my clients that I’d perceived that to be a violation of the law—that they were being disparately treated because they were perceived to be disabled. And that he was the highest officer in the court, and I would have to advise them to make their complaints against him, because only he could order the gloves taken off, and he should know that it was against their rights to have court officers in his courtroom wear rubber gloves.¹⁸⁰

According to Dorman, the judge simply stormed off in response, and her clients sent him off with ACT UP’s signature chant: “ACT UP, [f]ight back, [f]ight AIDS!”¹⁸¹

Such spectacular manifestations of HIV stigma are no longer common in U.S. courts. But I include Dorman’s anecdote as a reminder that “fighting AIDS” has always meant fighting stigma, particularly as it infects our government and our law—and that lawyers have joined that fight since the early days, serving as key advocates for the HIV-positive. Though its presence is more subtle, HIV stigma remains in our courts, codified in statutes and enacted in decisions by prosecutors, juries, and judges. To follow the example of lawyers like Dorman, today’s lawyers should support the REPEAL Act and other interventions against HIV stigma in

176. I have derived the title of this section from an article documenting the perspectives of several HIV-positive women prisoner activists on public safety and the criminal justice system. See Cynthia Chandler & Carol Kingery, *Yell Real Loud: HIV-Positive Women Prisoners Challenge Constructions of Justice*, 27 SOC. JUST. 150 (2000). The title of that article, in turn, is derived from the testimony of one of the activists, Rebecca:

To be an activist in prison you need to talk to, and for, people who don’t have a voice or the courage to talk in front of others. You have to find out what the problems are, pass on the information to others, yell real loud, and not be afraid of what might happen to you.

Id. at 153.

177. Interview by Sarah Schulman with Mary Dorman, in N.Y.C., N.Y. (Oct. 17, 2003), available at <http://www.actuporalhistory.org/interviews/images/dorman.pdf>.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

the law. Even in the absence of such formal interventions, lawyers should listen—and encourage judges to listen—to sources of knowledge on HIV and the HIV-positive, including public health research and the HIV-positive themselves.