Journal of Health Care Law and Policy

Volume 13 | Issue 2 Article 12

Keeping Prevention in the Crosshairs: A better HIV Exposure Law for Maryland

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KEEPING PREVENTION IN THE CROSSHAIRS: A BETTER HIV EXPOSURE LAW FOR MARYLAND

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INTRODUCTION

In June 1981, the Centers for Disease Control and Prevention (CDC) reported findings of unusual opportunistic infections in the lungs of several gay men in Los Angeles.[1] Doctors soon discovered cases involving similar infections among gay men in other cities.[2] By 1982, the medical community was referring to the disease as "gay-related immune deficiency" (GRID) and hypothesized that it could be sexually transmitted.[3] It was not long before doctors found the same immunodeficiency disorders in the heterosexual population—most notably among intravenous drug users and hemophiliacs[4]—and more accurately termed the disease "acquired immune deficiency syndrome" (AIDS).[5] By 1985, two independent

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1. Pneumocystis *Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 1–3 (1981), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm.

2. *See Current Trends Update: Acquired Immune Deficiency Syndrome (AIDS)—United States*, 32 MORBIDITY & MORTALITY WKLY. REP. 688, 688–91 (1984), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00000254.htm (reporting that as of December 1983, 71% of reported cases of AIDS affected homosexual or bisexual men, and that the cities with the highest reported cases were New York, San Francisco, Los Angeles, Miami, and Newark).

3. Lawrence K. Altman, *Clue Found on Homosexuals' Precancer Syndrome*, N.Y. TIMES, June 18, 1982, at B8 (noting that scientists had designated the syndrome "GRID" and suspected the infection was spread by sexual contact).

4. *Current Trends Update: Acquired Immunodeficiency Syndrome (AIDS)—United States*, 32 MORBIDITY & MORTALITY WKLY. REP. 465, 465–67 (1983), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00000137.htm.

5. Jean L. Marx, *New Disease Baffles Medical Community*, 217 SCIENCE 618, 618 (1982); *see also* Matthew Carmody, *Mandatory HIV Partner Notification: Efficacy, Legality, and Notions of Traditional Public Health*, 4 TEX. F. ON C.L. & C.R. 107, 109–10 (1999) (providing an overview of the early demographics of the AIDS epidemic); Stanley M. Aronson, *A Quarter Century of AIDS Research*, PROVIDENCE J. BULL. (R.I.), Dec. 18, 2006, at C5 (reporting that the virus was initially referred to as gay-related immune deficiency (GRID), but later given the new "etiologically noncommittal" name acquired immune deficiency syndrome, or AIDS, in recognition that heterosexuals were also contracting the disease).

teams of researchers made an important discovery when the human immunodeficiency virus (HIV) was isolated, realizing that the virus was the cause of AIDS.[6] Tests for HIV were approved later that year.[7]

Since its formal recognition nearly three decades ago, an estimated 25 million people have died from AIDS, and another estimated 33.2 million globally are living with HIV.[8] Recent CDC estimates indicate that more than 56,000 people become infected with HIV each year in the United States, and more than a million in the United States are HIV-positive.[9] From the very start, public health efforts have played a critical role in stemming the spread of HIV and AIDS.[10] Public health measures relating to HIV/AIDS fall into three general categories: 1) surveillance, case finding, screening, and reporting;[11] 2) prevention efforts including counseling and education;[12] and 3) case management and treatment of those who are infected.[13] Public health-oriented HIV/AIDS prevention efforts have yielded significant results, as the CDC reports that more than 350,000 HIV infections have been avoided.[14] Specifically, the CDC points to prevention measures including HIV testing, education, and counseling for individuals at risk for infection, and

6. W. Thomas Minahan, *Disclosure Before Exposure: A Review of Ohio's HIV Criminalization Statutes*, 35 OHIO N.U. L. REV. 83, 85 & n.33 (2009) (citing Phillip J. Hilts, *The Doctor's World: U.S. and France Finally Agree in Long Feud on AIDS Virus*, N.Y. TIMES, May 7, 1991, at A1).

7. *Id.* at 85–86. For a detailed discussion of the origins and effects of HIV and AIDS, see *id.* at 84–86.

8. L. Gable et al., *A Global Assessment of the Role of Law in the HIV/AIDS Pandemic*, 123 PUB. HEALTH 260, 260 (2009).

9. CTRS. FOR DISEASE CONTROL & PREVENTION, HIV PREVENTION IN THE UNITED STATES: AT A CRITICAL CROSSROADS 1 (2009), *available at* http://cdc.gov/hiv/resources/reports/pdf/hiv_prev_us.pdf [hereinafter CDC CRITICAL CROSSROADS].

10. *See generally* Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1019 (1989) (discussing early calls to focus resources on education and counseling in the battle to stop the spread of AIDS). Professor Gostin cites to a prevention plan published in 1985, and notes that it did not advocate for the use of compulsion. *Id.* at 1019 n.8 (citing James O. Mason, *Public Health Service Plan for the Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, 100 PUB. HEALTH REP. 453 (1985)).

11. Gable et al., *supra* note 8, at 261; *see also* CDC CRITICAL CROSSROADS, *supra* note 9, at 6 (detailing new surveillance and data gathering tools); MD. HIV PREVENTION CMTY. PLANNING GROUP, MD. DEP'T. OF HEALTH & MENTAL HYGIENE, MARYLAND'S COMPREHENSIVE HIV PREVENTION PLAN: 2004–2008, 12–16 (2007), *available at* http://www.dhmh.state.md.us/AIDS/reports/StatewidePriorities.pdf (outlining Maryland's HIV trend-monitoring and reporting methods).

12. Gable et al., *supra* note 8, at 261; *see also* CDC CRITICAL CROSSROADS, *supra* note 9, at 2–3 (providing a summary of proven HIV prevention interventions for HIV-positive individuals, including counseling and education, as well as access to condoms).

13. Gable et al., *supra* note 8, at 261 (citing Thomas R. Frieden et al., *Applying Public Health Principles to the HIV Epidemic*, 353 NEW ENG. J. MED. 2397, 2397–2402 (2005)); *see also* CDC CRITICAL CROSSROADS, *supra* note 9, at 2–3 (describing treatment options, including anti-retroviral therapy and substance abuse treatment).

14. CDC CRITICAL CROSSROADS, *supra* note 9, at 1.

substance abuse treatment and harm reduction methods, such as access to condoms and sterile syringes, as key in the effort to fight the spread of HIV/AIDS.[15]

In addition to prevention-oriented public health efforts, many states have also elected to enact criminal statutes that are HIV-specific.[16] Although they vary widely in approach,[17] these statutes generally make it a crime to knowingly transfer or expose another person to HIV.[18] The laws were passed in part as a response to political pressure to address the emerging epidemic, and are often described as reflecting a general public morality surrounding the AIDS crisis.[19] Given the reactive nature of many of the HIV-specific statutes, they have drawn a healthy amount of criticism from scholars and advocates who maintain that they were enacted without much deliberation about conflicting public health goals or the needs of the HIV-positive community.[20]

Maryland has had an HIV-specific statute in its criminal code for more than twenty years.[21] This Comment argues that Maryland can and must write a better law to address the criminal concerns that arise when an HIV-positive individual knowingly exposes another person to the virus in the context of a voluntary and consensual sexual encounter.[22] Part I provides a general overview and history of HIV-specific criminal statutes, addressing both state-to-state variation among the laws and the constitutional challenges that certain types of HIV-specific laws have faced.[23] Part II explores the way in which public health interests, which are necessarily at the forefront of any measure dealing with a communicable disease,

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15. *Id.* at 1–3.

16. DAVID W. WEBBER, AIDS AND THE LAW § 7.03[H], at 7-47 (4th ed. Supp. 2010).

17. *Compare, e.g.*, KAN. STAT. ANN. § 21-3435(a)(1), (c) (1995) (making it a misdemeanor for a person infected with a "life threatening communicable disease" to engage in sexual intercourse or sodomy with the intent to expose another to the disease), *with* OHIO REV. CODE ANN. § 2903.11(B), (D) (LexisNexis 2006) (providing that an HIV-positive person who knowingly engages in sexual conduct without first disclosing his status, and also ensuring his partner is capable of "appreciat[ing] the significance of the knowledge" that he is HIV-positive, is guilty of "felonious assault").

18. *See* WEBBER, *supra* note 16, at 7-48 to 7-52 (detailing differences between various HIV-specific statutes, including, *inter alia*, evidentiary and intent requirements, and affirmative defenses).

19. *Id.* at 7-47; *see also* Gable et al., *supra* note 8, at 262 (noting criminal HIV exposure laws are "designed to reflect public morality or discourage socially undesirable behaviours").

20. *See* Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 506 (2007) (noting that many advocates contend that HIV-specific criminal laws are symbolic in nature and passed only to show that a legislature is taking action); J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 436, 446–47 (1994) (arguing that it is easier for a legislature to "forbid undefined risky activities and to omit discussion of defenses" than to craft a carefully drawn, effective, and fair HIV-specific criminal statute, and that legislatures need "more thought and less reaction").

21. Human Immunodeficiency Virus—Omnibus Bill, ch. 789, 1989 Md. Laws 4293, 4306 (codified as amended at MD. CODE ANN., HEALTH–GEN. § 18-601.1 (LexisNexis 2009)). Maryland's HIV criminal transfer statute was enacted more than two decades ago, in 1989. *Id.*

22. *See infra* Parts III–IV.

23. *See infra* Part I.

complicate the criminalization of HIV exposure when it occurs between consenting adults within the intimacy of a sexual relationship.[24] With public health goals in mind, Part II then details three general classes of arguments raised against HIV-specific statutes: 1) practical policy concerns;[25] 2) fairness concerns relating to defendants;[26] and 3) fairness arguments relating to the HIV-positive community generally.[27] Parts III and IV focus on Maryland in particular, contending that Maryland's HIV-specific statute is poorly drafted and misapplied,[28] and therefore arguing in favor of a more rigorously crafted statute that addresses both the criminal and public health concerns implicated by HIV exposure and transmission.[29]

I. TWENTY-PLUS YEARS OF HIV-SPECIFIC CRIMINAL STATUTES

In 1989, the Maryland General Assembly passed legislation making it a criminal offense for a person infected with HIV to "knowingly transfer or attempt to transfer" the virus to another.[30] The law was passed as a part of a general omnibus bill addressing various HIV-related matters, including procedures for testing, disclosure of positive test results, and discrimination against HIV-positive individuals.[31] In creating a law that provided criminal liability specifically related to HIV-exposure, Maryland joined a handful of states that had enacted statutes to criminalize conduct related to the spread of HIV.[32] One year later, Congress passed the Ryan White Comprehensive AIDS Resources Emergency Act.[33] This legislation provided states with federal funds for HIV/AIDS treatment and prevention,[34] but required that states either establish laws criminally prosecuting the intentional transmission of HIV or demonstrate that already-existing law could do so before it could take advantage of the funds available.[35] Specifically, a state had the option of

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24. *See infra* Part II.

25. *See infra* Part II.A.

26. *See infra* Part II.B.

27. *See infra* Part II.C.

28. *See infra* Part III.

29. *See infra* Part IV.

30. Human Immunodeficiency Virus—Omnibus Bill, ch. 789, 1989 Md. Laws 4293, 4306 (codified as amended at MD. CODE ANN., HEALTH–GEN. § 18-601.1 (LexisNexis 2009)).

31. *See generally id.* (detailing contents of the Human Immunodeficiency Virus Omnibus Bill).

32. *See* Ann LoLordo, *New Tool for Prosecutors: Attempted Murder by HIV Infected Suspects Are Called a "Loaded Gun"*, BALT. SUN, Aug. 2, 1993, at 1A (reporting that in 1986 states began enacting new laws that criminalize the knowing exposure of others to HIV); Lynda Richardson, *Wave of Laws Aimed at People with H.I.V.*, N.Y. TIMES, Sept. 25, 1998, at A1 (reporting that eight states passed laws in 1989 providing criminal penalties for knowingly exposing people to HIV).

33. Pub. L. No. 101-381, § 101, 104 Stat. 576, 603 (codified at 42 U.S.C. § 300ff-47) (repealed 2000).

34. *Id.* § 2; James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 715 (2009).

35. Ryan White Comprehensive AIDS Resources Emergency Act § 101, 104 Stat. at 603.

prosecuting HIV transmission via traditional criminal laws,[36] or creating specific laws to outlaw transfer of HIV.[37] Not all states opted to pass specific criminal HIV transfer statutes,[38] but by the time the federal certification requirement provision was repealed in 2000,[39] every state had certified that its criminal laws could capture and prosecute "knowing HIV exposure."[40]

A. HIV-Specific Legislation: A Brief History and Comparison

Two years before the Maryland legislature enacted its criminal HIV exposure statute, President Ronald Reagan announced the formation of the Presidential Commission on the Human Immunodeficiency Virus Epidemic.[41] The Commission issued a report urging states to use criminal laws to address the spread of HIV, and further made suggestions as to the form specific statutes targeting HIV-transmitting conduct should take.[42] Specifically, the Commission recommended that states focus on individuals who know they are infected and criminalize conduct that such individuals should know has a high risk of HIV transmission.[43] In addition to clearly defining proscribed behaviors, the Commission also recommended that statutes explicitly require HIV-infected individuals to disclose their status to sexual

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36. *Id.*

37. *Id.*; 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, 599 (1999). States without specific criminal HIV transfer statutes have prosecuted cases involving conduct likely to transmit HIV under traditional laws including, *inter alia*, "homicide, attempted homicide, assault, reckless endangerment, exposure of others to a communicable disease, and sodomy." Donald H.J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 358–59 (1990). In general, statutes dealing solely with HIV transmission have targeted blood donation and sexual conduct. *Id.* at 37; *see also* AM. CIVIL LIBERTIES UNION, STATE CRIMINAL STATUTES ON HIV TRANSMISSION (2008), http://www.aclu.org/images/asset_upload_file292_35655.pdf (detailing specific state laws targeting conduct likely to transmit HIV).

38. *See* Burris et al., *supra* note 20, at 490 (stating that New York has no HIV-specific law); Bill Deener, *AIDS Fight Moving into Nation's Courtrooms: Criminal Cases Target Carriers Who Knowingly Spread Virus*, DALLAS MORNING NEWS, Aug. 24, 1987, at 1A ("Texas has no specific criminal statute relating to the transmission of AIDS."). In 1989 Texas enacted a law making exposure to HIV a felony, but the law was repealed in 1994 due to lack of prosecution. T.J. Milling, *Texas AIDS Law Off Books in '94: No Convictions Obtained in Statute's Brief History*, HOUS. CHRON., Sept. 5, 1993, at C1.

39. Pub. L. No. 106-345, § 301(a), 114 Stat. 1319, 1345 (2000).

40. Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 841 (2004).

41. Exec. Order No. 12,061, 52 Fed. Reg. 24,129, 24,129–30 (June 29, 1987); *see also* McArthur, *supra* note 34, at 712–17 (discussing federal legislation leading up to and influencing states' decisions to enact HIV-specific criminal statutes).

42. PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT OF THE PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130–31 (1988) [hereinafter PRESIDENTIAL COMM'N REPORT].

43. *Id.* at 131. Interestingly, the Commission also urged states not to criminally prosecute HIV-positive individuals where the conduct alleged did not "involve a scientifically established mode of transmission." *Id.*

partners and to obtain consent before engaging in any sexual activity having a high risk of HIV transmission.[44]

According to recent research conducted by the American Civil Liberties Union (ACLU), twenty-three states currently have criminal HIV exposure statutes relating to consensual and voluntary sexual behavior in force.[45] These statutes vary widely, including how specifically they define prohibited conduct,[46] what, if any, affirmative defenses are provided,[47] and the penalties imposed for violations.[48] Some states go into great detail as to what behaviors are captured by their HIV-specific criminal laws, while others more generally prohibit conduct that might result in transmission of the virus.[49] A number of states also provide that informed consent of the uninfected partner is either an affirmative defense or that non-consent is an element of the prosecution.[50] Others specifically provide that use of a condom while engaging in proscribed behavior is *not* a defense.[51] Some of the

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44. *Id.*

45. AM. CIVIL LIBERTIES UNION, *supra* note 37.

46. *Compare, e.g.*, CAL. HEALTH & SAFETY CODE § 120291 (West 2006) (prohibiting unprotected sexual activity and defining "sexual activity" to mean "insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner"), *with* 720 ILL. COMP. STAT. ANN. 5/12-16.2(a)(1), (b) (West 2002) (prohibiting a person who knows he is HIV-positive to "engage[] in intimate contact with another," and defining "intimate contact" to mean "the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV").

47. *Compare, e.g.*, IDAHO CODE ANN. § 39-608(3)(a) (2002) (providing an affirmative defense of informed consent where "the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity"), *with* N.D. CENT. CODE § 12.1-20-17(3) (1997) (providing an affirmative defense where the sexual activity "took place between consenting adults after full disclosure of the risk of such activity and with the use of an appropriate prophylactic device").

48. *Compare, e.g.*, IOWA CODE ANN. § 709C.1(3) (West 2003) ("Criminal transmission of the human immunodeficiency virus is a class 'B' felony."), *and* State v. Musser, 721 N.W.2d 734, 748 (Iowa 2006) (citing IOWA CODE ANN. §§ 709C.1(3), 902.9(2)) (providing that an offender of the HIV transmission statute is subject to a prison term of up to twenty-five years), *with* MD. CODE ANN., HEALTH–GEN. § 18-601.1(b) (LexisNexis 2009) (providing a prison term of up to three years for offenders).

49. *Compare, e.g.*, ARK. CODE ANN. § 5-14-123(c)(1) (2006) (clearly defining "sexual penetration" and listing behaviors that qualify), *and* CAL. HEALTH & SAFETY CODE § 120291(b)(1) (clearly defining "sexual activity" and listing conduct that qualifies), *and* IDAHO CODE ANN. § 39-608(2)(a), (b) (clearly defining "body fluid" and "transfer"), *with* 720 ILL. COMP. STAT. ANN. 5/12-16.2(b) (defining intimate contact generally as exposure "in a manner that could result in the transmission of HIV"), *and* LA. REV. STAT. ANN. § 14:43.5(A) (2007) (generally prohibiting intentional exposure through "sexual contact").

50. *See, e.g.*, ARK. CODE ANN. § 5-14-123(b) (using non-consent as an element of prosecution); FLA. STAT. ANN. § 384.24(2) (West 2007) (same); IDAHO CODE ANN. § 39-608(3)(a) (using consent as an affirmative defense); IOWA CODE ANN. § 709C.1(5) (same); MO. ANN. STAT. § 191.677.1(2)(a) (West 2004) (using non-consent as an element of prosecution); NEV. REV. STAT. ANN. § 201.205.2 (LexisNexis 2006) (using consent as an affirmative defense); TENN. CODE ANN. § 39-13-109(c) (2006) (same).

51. *See, e.g.*, MO. ANN. STAT. § 191.677.4. Most statutes are completely silent on the use of condoms, and no state court has ever allowed the fact that a defendant used a condom to serve as a

starkest variations in law regard punishment.[52] A handful of states provide authority to sentence offenders to as many as twenty-five to thirty years in prison, although it appears most states' courts tend to impose sentences in the one- to ten-year range.[53]

Laws criminalizing HIV exposure also address important issues of intent and risk in drastically different ways. For instance, California,[54] Virginia,[55] and Washington[56] all require the prosecution to prove a defendant had the specific intent to transfer HIV to another, or to cause "great bodily harm," in order to obtain a conviction. California's statute further provides that "[e]vidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent."[57] Most states, however, require only the general intent to engage in prohibited conduct while knowing one is infected with HIV.[58] These laws are arguably flawed in that they may be applied with the same force to offenders with very different levels of culpability regarding their intent to harm the victim.[59] The extent to which a statute might apply to conduct with little or no risk of transmitting HIV is another manner in which statutes vary from state to state.[60] For example, California clearly prohibits only behaviors that have been scientifically demonstrated to pose some degree of transmission risk,[61] while other

complete defense. WEBBER, *supra* note 16, at 7-52 to 7-53. Additionally, North Dakota requires both use of a condom or other "appropriate prophylactic device" and informed consent of the victim before a defendant may assert an affirmative defense. *Id.* at 7-52 (citing N.D. CENT. CODE § 12.1-20-17(3)).

52. *See* Amy L. McGuire, Comment, *AIDS as a Weapon: Criminal Prosecution of HIV Exposure*, 36 HOUS. L. REV. 1787, 1809 (1999) (discussing disparity in sentencing among the states with HIV-specific statutes).

53. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 120291(a) (West 2006) (providing for imprisonment for three, five, or eight years); GA. CODE ANN. § 16-5-60(c) (2007) (providing for up to ten years imprisonment if convicted); IDAHO CODE ANN. § 39-608(1) (providing for up to fifteen years imprisonment for conviction); IOWA CODE ANN. §§ 709C.1(3), 902.9(2) (providing up to twenty-five years imprisonment for conviction); LA. REV. STAT. ANN. § 14:43.5.E(1) (providing up to ten years imprisonment with or without hard labor for conviction); NEV. REV. STAT. ANN. § 201.205.1 (providing imprisonment for not less than two years and not more than ten years). For a comparison and analysis regarding sentences authorized for criminal exposure to HIV and drunk driving, see Wolf & Vezina, *supra* note 40, at 872.

54. CAL. HEALTH & SAFETY CODE § 120291(a).

55. VA. CODE ANN. § 18.2-67.4:1(A) (2009).

56. WASH. REV. CODE ANN. § 9A.36.011(1)(b) (West 2009).

57. CAL. HEALTH & SAFETY CODE § 120291(a).

58. WEBBER, *supra* note 16, at 7-54. Webber notes that in most states "the prosecution need only prove that the defendant knew he or she was infected and then engaged in acts that created some risk of transmission, even if transmission did not actually result." *Id.*

59. *See* Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J. L. MED. & ETHICS 327, 331–32 (2004) (discussing issues of criminal intent as they relate to different states' criminal HIV exposure laws).

60. *Id.* at 329.

61. CAL. HEALTH & SAFETY CODE § 120291(b)(1) (prohibiting only unprotected receptive or insertive vaginal or anal intercourse).

states prohibit acts that have been proven to carry extremely low levels of risk, if any.[62]

B. HIV-Specific Criminal Statutes: Not Unconstitutional

HIV-specific criminal exposure statutes have existed in many states for nearly two decades now. During this period, a number of defendants charged under these statutes have raised constitutional challenges.[63] These challenges tend to allege that the statute in question is overbroad or unconstitutionally vague.[64] Defendants also sometimes argue violations of First Amendment protections against compelled speech[65] or constraints on free association.[66] A few states also have faced claims that criminal HIV exposure statutes violate equal protection[67] and the right to

62. See, for example, the Arkansas and Michigan statutes, both of which criminalize the "intrusion, however slight, of . . . any object into a genital or anal opening of another person's body." ARK. CODE ANN. § 5-14-123(c)(1) (2006); MICH. COMP. LAW ANN. § 333.5210(2) (2001). Galletly and Pinkerton point out that "the risk of transmitting HIV through non-contaminated objects is, of course, zero." Galletly & Pinkerton, *supra* note 59, at 329.

63. *See generally* WEBBER, *supra* note 16, at 7-56.1 to 7-61 (providing a detailed discussion of various overbreadth and void-for-vagueness constitutional challenges in a number of different states); David Kromm, Note, *HIV-Specific Knowing Transmission Statutes: A Proposal to Help Fight an Epidemic*, 14 ST. JOHN'S J. LEGAL COMMENT. 253, 272–75 (discussing constitutional challenges in Illinois and Michigan); McGuire, *supra* note 52, at 1810–12 (analyzing overbreadth, vagueness, and substantive due process issues implicated in HIV-specific criminal statutes).

64. *See, e.g.*, People v. Russell, 630 N.E.2d 794, 796 (Ill. 1994) (holding Illinois' statute not unconstitutional as applied because it is "sufficiently clear and explicit so that a person of ordinary intelligence need not have to guess at its meaning or application"); People v. Dempsey, 610 N.E.2d 208, 223 (Ill. App. Ct. 1993) (holding Illinois' statute not unconstitutionally vague as applied because the "defendant's conduct clearly fell within the proscription of the statute," and he thus had no standing to raise constitutional issues as they may apply to other individuals or acts); State v. Keene, 629 N.W.2d 360, 365 (Iowa 2001) (holding Iowa's statute not unconstitutionally vague as applied because it is "sufficiently clear and consequently provides a reasonably intelligent person with fair notice of its meaning"); State v. Gamberella, 633 So.2d 595, 603 (La. Ct. App. 1993) (finding that the language of the Louisiana statute may capture sexual acts not capable of transmitting the virus, but nevertheless holding it not unconstitutionally vague or overbroad because the statute "offers a clear and definite standard of conduct"); People v. Jensen, 586 N.W.2d 748, 751–52 (Mich. Ct. App. 1998) (holding Michigan's statute not unconstitutionally vague or overbroad because the defendant's conduct was "clearly encompassed by the language of the statute," and, because the statute "squarely applies to defendant," she was precluded from an overbreadth challenge).

65. *See, e.g.*, State v. Musser, 721 N.W.2d 734, 742–45 (Iowa 2006) (finding Iowa's statute compels speech but is nonetheless constitutional because it does not "compel public disclosure of an infected person's HIV status," and the court could not "conceive of a less restrictive way" the state could serve its compelling interest in protection of public health); *Jensen*, 586 N.W.2d at 759 (holding Michigan's statute constitutional even though it "may significantly infringe on [the] defendant's individual interests in remaining silent" because the state's public health interest in disclosure is "undeniably overwhelming").

66. *See, e.g.*, *Russell*, 630 N.E.2d at 796 (finding no infringement on the defendant's "supposed right of intimate association").

67. *E.g.*, *Musser*, 721 N.W.2d at 740 n.1 (declining to consider Musser's equal protection claim on appeal because he did not raise it in the district court); *Gamberella*, 633 So.2d at 604–05 (finding that Louisiana's statute classifies individuals on the basis of physical condition (i.e., HIV status) but is

privacy.[68] Defendants who have raised vagueness and overbreadth challenges generally have failed because they do not raise structural First Amendment issues, and therefore courts have only considered the constitutionality of statutes as applied to the particular defendants.[69] To date, no state has struck its criminal HIV exposure statute on constitutional grounds.[70] Despite the fact that some courts have even applied strict scrutiny review,[71] all courts have concluded that the state's public health interests in preventing the spread of HIV, coupled with the deference afforded states in the realm of criminal law are too strong to be overcome by the constitutional concerns raised by defendants.[72]

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constitutionally sound because the classification "substantially furthers a legitimate state objective"); *see also* Erin M. O'Toole, Note, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, 10 J. L. & HEALTH 183, 203–05 (1995–1996). O'Toole makes the argument that, for purposes of an equal protection analysis, the real class differentiation is not between HIV-positive and HIV-negative people, but rather those HIV-positive people who are tested at confidential testing sites and those HIV-positive people who either forego testing or get tested at anonymous testing centers. *Id.* at 196. The critical difference between being tested at a confidential site as opposed to an anonymous site is that the state can link an identity to test results produced at the former, but not the latter. *Id.* Viewed in this light, O'Toole suggests the criminal HIV exposure statutes may not survive even rational basis scrutiny because the law treats differently individuals who have voluntarily submitted to one form of HIV testing. *Id.* at 204. The law thus has the effect of punishing those HIV-positive people who have responsibly sought testing while "rewarding those who may in fact pose a greater public health danger by not being tested." *Id.* at 205.

68. *E.g.*, *Musser*, 721 N.W.2d at 747–48 (holding Iowa's statute does not unconstitutionally infringe on the right to privacy because the state has a compelling interest in stemming the spread of HIV and protecting human life). The *Musser* court distinguished the case from *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), where the United States Supreme Court held that state laws that work to control individuals' private sexual activity violated the due process right to liberty. *Musser*, 721 N.W.2d at 748. In *Musser*, the court found that the challenged statute prohibited intimate sexual contact without "full and mutual consent" from an HIV-positive person's partner, whereas *Lawrence* involved two adults fully and mutually consenting to sexual activity. *Id*; *see also Jensen*, 586 N.W.2d at 757–58 (finding no absolute right to privacy and holding Michigan's statute, while it "intrudes somewhat on the privacy of an HIV-infected individual," constitutional because "this intrusion is significantly outweighed" by the state's compelling interest in preventing the spread of HIV).

69. *See supra* note 64 and accompanying text (indicating that each court considered only an as-applied challenge to the relevant HIV-specific laws); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) (noting that where a statute may constitutionally apply to a particular defendant, he may not challenge the law on overbreadth grounds by arguing it may be unconstitutional as applied to others in situations not presently before the court).

70. Isabel Grant, *The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV*, 31 DALHOUSIE L.J. 123, 172–73 (2008); *see also* Amanda Weiss, Comment, *Criminalizing Consensual Transmission of HIV*, 2006 U. CHI. LEGAL F. 389, 397 (2006) (noting that courts have "unfailingly upheld the constitutionality of state HIV statutes").

71. *See, e.g.*, *Musser*, 721 N.W.2d at 744 (concluding strict scrutiny applied because HIV exposure statute involved compelled speech that is not content-neutral); *Gamberella*, 633 So.2d at 604 & n.5 (concluding the state's constitution required application of strict scrutiny because the HIV exposure statute burdened the fundamental right of privacy).

72. *See supra* notes 65–68 and accompanying text (referring to a state's compelling interest in public health generally and stopping the spread of HIV specifically). *But see* McGuire, *supra* note 52, at 1813 (suggesting that a state law attempting to prohibit conduct that does not carry a significant risk of HIV transmission may render the state's interest insufficiently compelling).

It has been more than twenty years since President Reagan's commission published its specific recommendations that states consider when either evaluating existing criminal HIV exposure laws or drafting new ones.[73] During this time period, scholars and public health advocates have offered a range of perspectives on these HIV-specific laws.[74] Some have continued to advocate for HIV exposure statutes, suggesting that laws drafted with care and attention, which clearly define prohibited conduct and provide affirmative defenses of informed consent and condom use, can be an effective and fair way to address the epidemiological problem.[75] Others, especially in the international community,[76] have expressed the belief that criminalizing the transfer of HIV does far more harm than good, and have accordingly called for the repeal of existing criminal HIV exposure statutes.[77] Still others have elaborated on prior notions of narrow tailoring and specificity by arguing that rigorous HIV exposure statutes should at minimum consider the level of intent required for conviction, the specific conduct criminalized, the degree of risk inherent in the behavior, and the parts disclosure and partner consent play in decriminalizing otherwise proscribed behavior.[78] These advocates argue further that

73. *See* PRESIDENTIAL COMM'N REPORT, *supra* note 42 (indicating that the Report was published in 1988).

74. *See generally* Burris et al., *supra* note 20, at 469 (detailing different perspectives on the ability of HIV-specific criminal laws to adequately address the AIDS crisis).

75. *See, e.g.*, Strader, *supra* note 20, at 446. Strader astutely notes that HIV-specific criminal laws are "politically difficult" and that legislatures are prone to not giving the matter much thought or deliberation when enacting them. *Id.* at 446–47. Public discussion that would lead to "carefully defining sex acts and applicable defenses" would demand legislators at least consider the notion that people should be able to engage in same-sex sexual activities if they so wish, for instance. *Id.* at 446. Even more, it may require legislators to acknowledge the complexity of sexual behavior and to allow for the reality that often disclosure and safe sex are negotiated in non-verbal ways. Burris et al., *supra* note 20, at 469.

76. *See* JOINT U.N. PROG. HIV/AIDS, CRIMINAL LAW, PUBLIC HEALTH, AND HIV TRANSMISSION: A POLICY OPTIONS PAPER 12 (2002), *available at* http://data.unaids.org/publications/IRC-pub02/JC733-CriminalLaw_en.pdf [hereinafter UNAIDS POLICY OPTIONS PAPER] (providing a number of recommendations, from a group with international membership, that would sharply constrain the application of the criminal law to cases of HIV exposure); Lawrence K. Altman, *Seeking Better Laws on HIV*, N.Y. TIMES, Aug. 9, 2008, at A11 (reporting that the 17th International AIDS Conference concluded with a call to repeal laws criminalizing groups at risk for HIV).

77. *See, e.g.*, JOINT U.N. PROG. HIV/AIDS, POLICY BRIEF: CRIMINALIZATION OF HIV TRANSMISSION 1, 2, 6 (2008), http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf [hereinafter UNAIDS BRIEF] (arguing that only general criminal law, and not HIV-specific statutes, should be applied to acts constituting the intentional transmission of HIV); Edwin Cameron et al., *HIV Is a Virus, Not a Crime: Ten Reasons Against Criminal Statutes and Criminal Prosecutions*, 11 J. INT'L AIDS SOC'Y (2008), http://www.jiasociety.org/content/pdf/1758-2652-11-7.pdf (arguing that the criminal law cannot adequately address HIV infection and transmission, and that the "sole rationale" is retribution and punishment, a "poor and distorted aim for public health purposes"). Justice Edwin Cameron is a member of the Constitutional Court of South Africa, and an HIV-positive person who has advocated strongly for a "major international push-back against misguided criminal laws and prosecutions." Altman, *supra* note 76.

78. Galletly & Pinkerton, *supra* note 59, at 331.

statutes targeting HIV specifically should take care not to undermine public health messages regarding what is or is not risky behavior.[79] Lastly, some among the HIV-positive community have suggested that, if the law requires those infected with HIV to disclose their status, it should also protect those disclosing against "unwanted secondary disclosure."[80]

II. IMPORTANT TENSIONS: THE PUBLIC HEALTH PERSPECTIVE COMPLICATES HIV-SPECIFIC STATUTES

Criminal and public health interests are both implicated when an HIV-positive individual knows his status and intentionally or recklessly engages in behavior likely to expose another to the virus. Although targeted legislation in both areas of law might be concerned with stemming the spread of HIV,[81] there are inevitable tensions between the two approaches.[82] The public health perspective is first and foremost focused on prevention, and is thus particularly reliant on individuals' willingness to be tested.[83] Public health officials and HIV prevention counselors have traditionally underscored the importance of voluntariness, confidentiality, and education in their efforts to combat the spread of the virus.[84] Education is central to any HIV prevention scheme, and not only for those who are diagnosed HIV-positive.[85] Certainly it is imperative that any individual who carries the virus be counseled as to what behaviors to avoid and how best to manage his

79. *Id.* at 336. Galletly and Pinkerton take issue particularly with the fact the nearly all HIV exposure statutes are completely silent on condom use, an omission that "runs counter to prevailing public health messages [that] stress practicing safer sex with all partners." *Id.* at 335–36.

80. 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, 617 (2009). Galletly and Dickson-Gomez's qualitative study of HIV-positive Michigan residents revealed an unequivocal belief among participants that those living with HIV have a duty to disclose their statuses to prospective sexual partners. *Id.* at 614. Interestingly, California's criminal HIV exposure statute is unique in that it contains several provisions relating to protection of the victim's (but not the defendant's) identity during the grand jury and trial processes. CAL. HEALTH & SAFETY CODE §§ 120291 (c)(1)–(4) (2006).

81. *See generally* Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 139–40 (1988) (detailing briefly the rationale behind public health and criminal measures relating to HIV transmission and exposure).

82. *See* Rebecca Bennett, *Should We Criminalize HIV Transmission?*, *in* THE CRIMINAL JUSTICE SYSTEM AND HEALTH CARE 225, 227–29 (Charles A. Erin & Suzanne Ost eds., 2007) (discussing the tension between a criminal approach rooted in a belief that criminal laws will deter behavior that risks HIV transmission and the public health perspective's acknowledgement that transmission "often occurs in a situation of reduced rationality").

83. Wolf & Vezina, *supra* note 40, at 831; *see also* Grant, *supra* note 70, at 168 (noting that public health law "works best when those who are subject to it are cooperative").

84. UNAIDS BRIEF, *supra* note 77, at 2 & n.6 (citing G.A. Res. 60/262, ¶ 25, U.N. Doc. A/RES/60/262 (June 15, 2006)).

85. *Cf.* Gable et al., *supra* note 8, at 262 (arguing that the law should support public health efforts to educate vulnerable and at-risk populations so that they can protect themselves and empower public health officials to engage in surveillance, screening, and testing).

disease.[86] Effective HIV prevention is also dependent upon the education of the general public,[87] and in the ability to communicate ways to avoid or reduce risk of exposure.[88] In order for a public health-oriented scheme of prevention to be effective in the context of a disease that is so interlaced with issues of private, sexual behavior, those who are at risk for infection must trust in the confidentiality of testing sites and any information provided to them by health counselors.[89]

Although criminal HIV exposure statutes are almost always justified on grounds that they aid in preventing the spread of HIV,[90] there are other considerations in criminal law that are often at odds with the public health approach.[91] As with any criminal law, HIV-specific statutes seek to punish people who engage in criminally culpable conduct—and the intentional or reckless exposure of another person to a potentially fatal and certainly life-altering disease certainly fits this description.[92] Further, to the extent criminal law also aims to produce norms of conduct, criminal HIV exposure statutes arguably work to deter behavior that risks transmitting the virus to an unknowing victim.[93] Finally, it also

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86. *See* CDC CRITICAL CROSSROADS, *supra* note 9, at 2 (detailing prevention programs for people living with HIV and noting that they "help ensure [people diagnosed with HIV] do not transmit the virus to others").

87. *See id.* at 4–5 (noting that "too many Americans are still at risk for HIV," and detailing the populations at greatest risk).

88. Gable et al., *supra* note 8, at 261. For a critical analysis of the notion that non-HIV-infected individuals bear a burden equal to HIV-positive individuals regarding risk reduction of the sexual transmission of HIV, see Grant, *supra* note 70, at 160. Grant argues this premise is "based on a construction of heterosexual relationships as involving two equal participants with equal power to assert in the context of sexual activity," and that this construction does not reflect many relationships as they actually exist. *Id.*

89. *See* Cameron et al., *supra* note 77 (discussing the implications of the fact that "when it comes to sex, with its potent elements of need, want, trust, passion, shame, fear, risk, and heedlessness, normal, reasonable people simply do not always follow public health guidelines"). *Cf.* Burris et al., *supra* note 20, at 477 (citing John E. Anderson et al., *HIV Testing in the United States, 2002*, ADVANCE DATA, Nov. 8, 2005, at 1, 11–12 (2005)) (noting that research supports the proposition that people who know they are infected and are given the tools to help protect others are less likely to transmit HIV, but that more than one third of people engaging in risky behavior have never been tested).

90. Sullivan & Field, *supra* note 81, at 158–60.

91. *See* Arianne Stein, Note, *Should HIV Be Jailed? HIV Criminal Exposure Statutes and Their Effects in the United States and South Africa*, 3 WASH. U. GLOBAL STUD. L. REV. 177, 180–81 (2004) (noting in addition to the purported goal of halting the spread of HIV, the three primary objectives of criminal HIV statutes are "incapacitation, promotion of normative behavior, and deterrence") (internal citations omitted).

92. Gostin, *supra* note 10, at 1038; Mosiello, *supra* note 37, at 609. For a more detailed articulation of the potential harmful effects of failing to disclose HIV status sexual partners, see Grant, *supra* note 70, at 149.

93. Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J. L. MED & ETHICS 239, 239 (2002). *But see* UNAIDS POLICY OPTIONS PAPER, *supra* note 76, at 21 (arguing that deterrence is a poor justification for HIV-specific criminal statutes in practice because it is difficult to deter "spontaneous behaviour," and that fear of infection likely does just as much, if not more, to deter conduct that risks spreading HIV).

is often suggested that prosecution and punishment under to these statutes serves to incapacitate those whose culpable behavior threatens to spread HIV.[94] While these goals are all legitimate, they often necessarily compete with the public health perspective so reliant on education and voluntariness to combat spread of HIV.[95] To the extent that legislators do not consider the primacy of traditional public health approaches to HIV prevention when drafting criminal exposure statutes,[96] laws tend to get written in ways that are either silent on or discouraging of risk-reducing behaviors and thus tend to undermine the public education efforts.[97]

Generally, the American public seems to favor criminal charges for those who knowingly infect another person with HIV.[98] In the decades since states started bringing criminal charges against people accused of knowingly or intentionally exposing others to HIV via specific statutes, the debate as to whether this is a good idea or bad idea has become highly contentious.[99] While arguments in favor of these laws all tend to focus on notions of public health[100] and holding criminally accountable people found to have engaged in immoral conduct,[101] the arguments against specific criminal HIV exposure statutes are varied and not always interrelated.[102] Generally those who advocate repealing criminal HIV exposure laws make arguments that fall into one of three categories, none of which are

94. *E.g.*, Grant, *supra* note 70, at 149. Grant also observes that the "language of rehabilitation, or concern for the accused's welfare, is starkly absent" in cases dealing with criminal HIV exposure. *Id.*

95. O'Toole, *supra* note 67, at 185.

96. *See* Strader, *supra* note 20, at 446 (noting that general HIV-statutes are often so broad that they capture conduct that carries no real risk of HIV transmission, and that it is generally difficult for legislators to draft statutes that are clear and fair).

97. WEBBER, *supra* note 16, at 7-56 n.211 to 7-56.1 (citing Sullivan & Field, *supra* note 81, at 196).

98. Wolf & Vezina, *supra* note 40, at 825 (citing 142 CONG. REC. E1447 (daily ed. Aug. 1, 1996)) ("[M]ore than three-quarters of Americans agreed that those who knowingly infect another person with HIV should face criminal charges."); *see also* Robert O. Boorstinc, *Criminal and Civil Litigation on Spread of AIDS Appears*, N.Y. TIMES, June 19, 1987, at A1 (reporting that public opinion polls in the late 1980s indicated more than half of respondents supported a law making it a crime for a person infected with HIV to have sex with another person).

99. *See, e.g.*, James Janega, *Student Charged in HIV Case Gets New Lawyer: AIDS Advocates Watch Dakota Case*, CHI. TRIB., June 4, 2002, at 5 (noting that, since the mid-1980s, legal scholars and public interest advocates have debated whether or not criminalizing HIV exposure is counterproductive in the effort to prevent HIV transmission).

100. *See, e.g.*, Karen E. Lahey, Note, *The New Line of Defense: Criminal HIV Transmission Laws*, 1 SYRACUSE J. LEGIS. & POL'Y 85, 95 (1995) (suggesting HIV-specific statutes that "address the intricacies of the HIV virus and how it is transmitted" could serve the goal of reducing transmission).

101. *See, e.g.*, Kromm, *supra* note 63, at 255 (arguing that properly drafted criminal HIV exposure statutes can ensure those who knowingly transfer the virus are punished and also supply the deterrent effect needed to prevent future such cases); Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV. 847, 850–51 (1999) (arguing criminal HIV exposure laws afford easier conviction of those who intentionally transmit the virus and also communicate what conduct is prohibited and what conduct is permissible).

102. *See, e.g.*, Cameron et al., *supra* note 77 (providing ten distinct arguments against the use of criminal HIV statutes).

mutually exclusive: 1) practical policy arguments related to HIV prevention;[103] 2) fairness arguments relating to defendants charged under the laws;[104] and 3) fairness arguments relating to the HIV-positive population generally.[105] Additionally, scholars conducting empirical research into the practical operation of these laws have argued the desirable effects touted by supporters are not necessarily occurring.[106] Implicit in many of these arguments against HIV exposure laws are challenges to the deterrent, retributive, and incapacitation justifications generally set out by proponents.[107]

A. Practical Policy Concerns

Overwhelmingly, the case against criminal HIV exposure laws is made on the practical policy front. One of the most frequent arguments encountered is that specific HIV transfer statutes deter people, especially those at high risk for infection, from getting tested for the virus.[108] Because every state's statute at minimum requires that a person know he is HIV-positive,[109] some express concern

103. *See, e.g.*, Wolf & Vezina, *supra* note 40, at 869–70 (arguing that HIV-specific statutes deter testing and have not been demonstrated effective at actually preventing HIV); O'Toole, *supra* note 67, at 206–07 (arguing that favoring a public health approach over criminal statutes will better encourage testing and education, and further free up resources for proven prevention methods).

104. *See, e.g.*, Hermann, *supra* note 37, at 357 (emphasizing the danger of selective prosecution against gay men and other minority or unpopular groups); O'Toole, *supra* note 67, at 205 ("[E]very defendant in criminal transmission prosecutions is also a victim of the same crime by nature of his/her infected status.").

105. *See, e.g.*, Galletly & Dickson-Gomez, *supra* note 80, at 617 (indicating that HIV-positive people have reported feeling vulnerable to hostility and discrimination, and that disclosure laws do not adequately account for potential negative impacts, including unwanted secondary disclosure); Galletly & Pinkerton, *supra* note 59, at 335 (arguing that statutes not narrowly tailored to address only the most risky behaviors "increase the likelihood of unfounded discrimination against persons infected with HIV"); Strader, *supra* note 20, at 446–47 (arguing that criminal HIV exposure laws "provide broad condemnation of large groups of society"). Criminal HIV exposure statutes have also been subject to many constitutional challenges in a number of states. See *supra* Part I.B for a more detailed discussion of the constitutional arguments against these laws.

106. Burris et al., *supra* note 20, at 507; Lazzarini et al., *supra* note 93, at 247.

107. *See, e.g.*, Lazzarini et al., *supra* note 93, at 239–40 (discussing the theoretical versus practical impact of HIV-specific criminal laws on accepted perceptions of the criminal law's function).

108. Wolf & Vezina, *supra* note 40, at 869–70. Wolf and Vezina note further that studies indicate more than half of people who test positive for HIV do not return to the testing centers to receive their results. *Id.*

109. A few statutes explicitly define what evidence is required to prove a defendant knew he was infected with HIV. *See, e.g.*, ARK. CODE ANN. § 5-14-123(b) (2006) (providing knowledge where a "person knows he or she has tested positive for human immunodeficiency virus"); MICH. COMP. LAW ANN. § 333.5210(1) (West 2001) (providing a person has knowledge of HIV infection when "he or she has or has been diagnosed as having acquired immunodeficiency syndrome"); NEV. REV. STAT. ANN. § 201.205(1) (LexisNexis 2006) (providing knowledge is "testing positive in a test approved by the state board of health for exposure to the human immunodeficiency virus and receiving actual notice of that fact"); OHIO REV. CODE ANN. § 2903.11(B) (LexisNexis 2006) (providing knowledge where "the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome"). How and when the knowledge requirement of many criminal HIV exposure statutes may be satisfied has been the

that people will refrain from testing so as to remain outside the scope of the criminal HIV exposure laws.[110] The use of otherwise confidential test results in criminal prosecutions might also compromise the sense of trust a person has in the agencies and organizations that provide services and resources to the communities at risk for HIV infection.[111] Obviously, if these sorts of deterrence dynamics exist, they undermine one of the cornerstones of HIV prevention: voluntary testing and subsequent education, counseling, and treatment.[112] While this logic certainly appears compelling, the empirical evidence that exists actually suggests that HIV exposure statutes have not had this sort of dramatic chilling effect on HIV testing.[113] Scholars have offered a few explanations for why this might be the case, including the idea that the potentially negative consequences of criminal liability are far outweighed by the many positive things to be gained by knowing one's HIV status.[114] While HIV-positive individuals certainly have reported a fear of criminal prosecution,[115] it is hard to ignore the many benefits that come with knowing whether one is infected with HIV, including treatment options that increasingly extend life expectancies of those living with the virus[116] and the ability to protect loved ones from infection.[117]

The more recent literature relating to the criminalization of HIV offers what are perhaps more convincing practical policy arguments against enacting HIV-specific exposure statutes. First, the overwhelming majority of such statutes are bereft of language regarding safe sex or condom use.[118] Some statutes also prohibit

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source of much debate. *See, e.g.*, Lahey, *supra* note 100, at 88–90 (discussing the "constructive knowledge approach" some jurisdictions employ when evidence of actual knowledge cannot be found); Mosiello, *supra* note 37, at 614–17 (discussing whether and when a court may impute knowledge of HIV status, absent the existence of official test results).

110. Hermann, *supra* note 37, at 357.

111. *See* O'Toole, *supra* note 67, at 192–93 (discussing the role of confidentiality in HIV exposure laws). Webber further makes the argument that the use of test results in criminal prosecutions also discourages disclosure by those who do not obtain informed consent prior to their first sexual encounter because to do so would be to "admit to having committed a felony." WEBBER, *supra* note 16, at 7-55 to 7-56. Because a public health approach favors late disclosure over no disclosure, the effect "runs counter to an important public health goal." *Id.*

112. *Cf.* Burris et al., *supra* note 20, at 477 (emphasizing the importance of voluntary testing in the fight to stop the spread of HIV, and noting that "getting those at risk to come in for testing has proven far from easy").

113. *Id.* at 512.

114. *See* Grant, *supra* note 70, at 157 (suggesting that individuals have strong reason to want to know their statuses in order to seek treatment, to modify behavior so as to protect loved ones, and, if pregnant, to safeguard the health of a fetus); Rebecca Ruby, Note, *Apprehending the Weapon Within: The Case for Criminalizing the Intentional Transmission of HIV*, 36 AM. CRIM. L. REV. 313, 318 (1999) (noting that, because drug combinations can extend and improve the quality of life for HIV-positive individuals, the incentive to get tested is greater).

115. Galletly & Dickson-Gomez, *supra* note 80, at 617.

116. McGuire, *supra* note 52, at 1808.

117. Grant, *supra* note 70, at 157; Sullivan & Field, *supra* note 81, at 184.

118. Galletly & Pinkerton, *supra* note 59, at 335–36.

conduct that has never been shown to actually transmit the virus—exchange of saliva or the use of uncontaminated sex toys, for instance[119]—alongside behavior that is in fact very high risk if proper precautions are not taken.[120] Thus, there is a real danger that these laws communicate messages that at best undermine, and at worst run directly counter to, public health efforts to combat the spread of HIV.[121] We also live in a world of limited resources, and it is quite possible that the significant amounts of money being spent on the criminal prosecution of the knowing exposure to HIV might be better spent elsewhere.[122] Finally, some counter the already-weak incapacitation argument by pointing out that those who are convicted, particularly those who do harbor the intent to infect others, are sent to prison where access to condoms is rare and rape is a significant problem.[123]

B. Fairness to Defendants

In addition to practical policy arguments generally against the use of criminal HIV exposure statutes, advocates have raised a number of fairness issues relating to individual defendants and to the HIV-positive population at large. For as long as scholars and advocates have been writing about specific HIV laws, the problem of selective prosecution has been consistently flagged, even by writers spanning the spectrum of opinion on the issue.[124] Prosecutors appear to have wide, uncabined discretion as to when and against whom charges are brought.[125] Indeed, prosecution under HIV exposure statutes appears to be largely a product of "the accident of being caught" and "the attention of a willing prosecutor."[126] Once prosecution has begun, it is not implausible that a defendant will face jury members with negative preconceived notions about HIV-positive individuals, who may attribute a greater

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119. McArthur, *supra* note 34, at 722–23.

120. Galletly & Pinkerton, *supra* note 59, at 335.

121. *Id.* at 335–36.

122. Scott A. McCabe, *The Maryland Survey: 1995–1996: Recent Decisions: The Maryland Court of Appeals*, 56 MD. L. REV. 656, 775 (1997). It is also important to note here, and to keep in mind generally, that the criminal conduct at issue here is sex that is otherwise consensual. Non-consensual sex "is rape, and rape should always be prosecuted." Cameron et al., *supra* note 77.

123. Lazzarini et al., *supra* note 93, at 249.

124. *Compare, e.g.*, Markus, *supra* note 101, at 862 (acknowledging the risk of prejudicial or selective enforcement in the context of criminal prosecutions for knowingly exposing another to HIV, yet arguing that specific statutes are still desirable if drafted correctly), *with* Grant, *supra* note 70, at 174 (noting that, given the demographics of HIV/AIDS, criminal HIV exposure statutes "run the risk of selecting out particularly vulnerable populations for criminal sanction," and thus recommending Canada not adopt specific HIV exposure laws).

125. Lazzarini et al., *supra* note 93, at 240; *cf.* Sullivan & Field, *supra* note 81, at 189–91 (discussing the danger that HIV-specific exposure statutes will be used by the state to harass members of unpopular groups); Glenn Puit, *Prosecution Rare: Unprotected Sex Leads to Charges*, LAS VEGAS REV.-J., Sept. 11, 2001, at 1B (reporting on the case of gay men charged pursuant to Nevada's HIV-specific exposure statue, and noting that the law is most often brought to bear against prostitutes).

126. Lazzarini et al., *supra* note 93, at 247.

degree of culpability than is warranted.[127] As law professor Mona Markus suggests, "[a] jury that disapproves of certain lifestyles might consider the commonplace practices of people who live that lifestyle as a deviation from law-abiding conduct even where that conduct is perfectly legal."[128] Further, prosecution necessarily involves speaking openly and publicly about extremely private matters of health and sexual intimacy, which is understandably distressing to many.[129]

C. Fairness to the HIV-Positive Community

Recent research indicates that the majority of those living with HIV believe they have a duty to disclose their status to potential sexual partners.[130] At the same time, it is also argued that specific HIV laws that criminally enforce this duty are unjustified in light of the negative impact they have on the HIV-positive population generally.[131] Broadly speaking, these laws can amplify and exacerbate the stigma, prejudice, and discrimination that already result from widely held stereotypes about HIV-positive people.[132] Although there are other sexually transmitted diseases that

127. Markus, *supra* note 101, at 855; Sullivan & Field, *supra* note 81, at 179; *see also* Ruby, *supra* note 114, at 333 (discussing the likelihood of juror discrimination). Ruby argues that a better way to address the issue of intentional or knowing exposure of HIV is via creating penalty enhancements for already existing criminal laws. *Id.* at 314. She raises the issue of juror discrimination in this context, where the defendant's HIV-positive status would need to be proven beyond a reasonable doubt to a jury who may be more likely to infer guilt because of its "irrational fears of the disease." *Id.* at 333. Similar problems of juror discrimination and bias no doubt exist where a defendant is being prosecuted under an HIV-specific criminal statute.

128. Markus, *supra* note 101, at 855. See also Matthew Weait, *Criminal Law and the Sexual Transmission of HIV:* R v Dica, 68 MOD. L. REV. 121, 133–34 (2005), for an articulation of slightly different concerns relating to juror bias. Although Weait writes in the context of British prosecutions for the knowing exposure of HIV, his argument that juries may have pre-conceived notions about the dynamics of various different types of relationships is relevant, especially to those states in which informed consent can be a defense to prosecution under HIV exposure statutes. *Id.* Essentially, Weait suggests convictions may turn in part on the "inevitably subjective evaluations by juries about whether the relationship [a defendant had with his] partner was one in which consent to the risk of infection was likely." *Id.* at 134.

129. *Cf.* Galletly & Dickson-Gomez, *supra* note 80, at 616 (noting that the very nature of HIV disclosure laws "broadcasts to others that a person is infected with HIV").

130. *Id.* at 614. Research also indicates people who know they are HIV-positive do in fact take steps to prevent transmitting the virus to other people. UNAIDS BRIEF, *supra* note 77, at 2 (citing Gary Marks et al., *Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States: Implications for HIV Prevention Programs*, 39 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 446, 448 (2005)).

131. *Cf.* Sullivan & Field, *supra* note 81, at 148–49 (arguing against status-based quarantine as a means to combat the spread of HIV because it implies that all AIDS victims are unable to control themselves and could lead to the harming of an unpopular minority).

132. Cameron et al., *supra* note 77. Cameron also links back to policy arguments against specific criminal laws for HIV exposure by noting that this stigma is often a force behind reluctance to get tested or to seek resources and information. *Id.*; *see also* Gregory M. Herek et al., *HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999*, 92 AM. J. PUB. HEALTH 371, 376 (2002) (discussing a longitudinal study of AIDS-related attitudes and concluding that AIDS stigma is still present in the United States).

can have grave consequences, HIV is the only such disease that states have chosen to criminalize specifically to such a great extent.[133] Early in the epidemic, HIV and AIDS particularly afflicted gay men and intravenous drug users,[134] thus laws that explicitly link HIV-positive status to criminality might have a disproportionately adverse effect on the perception of already unpopular and vulnerable groups.[135] Advocates also argue that criminal exposure statues unfairly place the entire burden of disease prevention on those infected with the virus,[136] and do not assign to those who are HIV-negative a responsibility to protect themselves.[137] This argument also relates back to the policy debate.[138] Putting the legal responsibility for stemming the spread of HIV solely on those who are HIV-positive diminishes the "public health message of shared responsibility for sexual health between sexual partners."[139] Some have also noted that HIV has been a public health concern for almost three decades at this point, and thus the risk of infection is an "inescapable facet of having sex."[140] Given that the risk of HIV transmission is simply part of the contemporary sexual environment, the responsibility for practicing safe sex is properly shouldered by everyone.[141] While it is hard to imagine that anyone would deny that an HIV-positive person has a non-delegable moral duty to avoid transmitting the virus to others, it is also perhaps not entirely fair or prudent to rest the responsibility for disease prevention entirely within one population.[142]

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133. WEBBER, *supra* note 16, at 7-47.

134. *Current Trends Update*, *supra* note 4, at 465.

135. *Cf.* Gable et al., *supra* note 8, at 262 (noting that anti-sodomy laws, which are typically associated with homosexuals, can have the harmful effect of "driv[ing] these individuals underground" as the laws "become guises for discrimination").

136. *See generally* Matthew Weait, *Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV*, 23 J. SOC. WELFARE & FAM. L. 441, 452–53 (2001) (discussing the notion of shared responsibility in the context of sexual transmission of HIV).

137. Galletly & Dickson-Gomez, *supra* note 80, at 617. Galletly and Dickson-Gomez also note the "particular irony" that the law "assigns responsibility for HIV prevention to the party that is most likely to be sexually deprived." *Id.*

138. See *supra* Part II.A for a broader discussion of the policy debate relating to the use of HIV-specific criminal statutes.

139. UNAIDS BRIEF, *supra* note 77, at 5.

140. Cameron et al., *supra* note 77.

141. *Id.* For a more philosophical discussion of the role of disclosure and consent it relates to HIV and sexual behavior, see S.D. Pattinson, *Consent and Informational Responsibility*, 35 J. MED. ETHICS 176, 178 (2009). Pattinson suggests that where a person has general knowledge of the risks of HIV transmission—and he further notes that most "educated Western" people will—he is on notice to ask sexual partners about their HIV status or otherwise protect his interest by using condoms, among other options. *Id.*

142. *See, e.g.*, Weait, *supra*, note 128, at 128–29. Weait argues the consent defense should apply to those situations where an HIV-negative person may have reason to know his non-disclosing sexual partner is HIV-positive; for example, he may know his partner is sexually active with a number of people or does not regularly practice safe sex. *Id.* at 128. In proffering this argument, he is careful to explicitly note he is not seeking to "deny the moral turpitude of those who fail to provide their sexual

III. MARYLAND'S HEALTH-GENERAL CODE: CRIMINALIZING HIV TRANSMISSION

Maryland's criminal HIV exposure statute states simply that "[a]n individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual," and that a person in violation of the provision is guilty of a misdemeanor and may be fined up to $2,500 and/or be incarcerated for a term of up to three years.[143] Though unique in several aspects,[144] Maryland's criminal HIV exposure statute has apparently flown under the radar and escaped much of the scrutiny applied by jurists and scholars to similar statutes in other states.[145] Maryland is one of seven states that declined to codify its statute among its criminal laws, choosing instead the Health-General Code.[146] The penalties for violation of Maryland's HIV exposure law fall at the low end of the spectrum,[147] and it is the only state to make violation of its law a misdemeanor, rather than a felony.[148] Even more notable than its procedural or technical oddities, Maryland's criminal HIV exposure statute stands out as one of the broadest facial articulations of what conduct is prohibited and which HIV-positive actors may be captured.[149] Indeed, Maryland's statute has been characterized as "a study in ambiguity" for its lack of guidance regarding "acceptable behaviors and thresholds of risk."[150]

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partners with information which may enable them to make better informed decisions about the kind of sex they are willing to have." *Id.*

143. MD. CODE ANN., HEALTH–GEN. § 18-601.1 (LexisNexis 2009).

144. *See, e.g.*, Galletly & Pinkerton, *supra* note 59, at 333 (noting Maryland is the only state to classify criminal exposure to HIV via sexual activity as a misdemeanor); Wolf & Vezina, *supra* note 38, at 854–55 (noting Maryland is one of only three states failing to address the role of informed consent in its criminal HIV exposure statute).

145. *See generally* 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, 323–47 (2001) (analyzing criminal HIV exposure statutes of sixteen states, not including Maryland).

146. The other states housing their criminal HIV exposure statutes in health-related sections of their codes are California, Florida, Idaho, Michigan, Missouri, and South Carolina. CAL. HEALTH & SAFETY CODE § 120291 (West 2006); FLA. STAT. ANN. § 384.24 (West 2007); IDAHO CODE ANN. § 39-608 (2002); MICH. COMP. LAW ANN. § 333.5210; MO. ANN. STAT. § 191.677.1 (West 2004); S.C. CODE ANN. § 4429-145 (2002).

147. *Compare* MD. CODE ANN., HEALTH–GEN. § 18-601.1(b) (indicating penalties for conviction are up to three years imprisonment and/or a fine of $2500), *with* IDAHO CODE ANN. § 39-608(1) (providing up to fifteen years imprisonment for conviction), *and* IOWA CODE §§ 709C.1(3), 902.9(2) (West 2003 & Supp. 2010) (providing up to twenty-five years imprisonment for conviction).

148. Galletly & Pinkerton, *supra* note 59, at 333.

149. *Id.* at 331.

150. *Id.*

A. Broad Language, Narrow Application?

At first glance, Maryland's statute appears broad and all encompassing, especially when compared to the language of similar statutes in other states.[151] Given the wide breadth of the population (any individual who knows he is HIV-positive), and the lack of guidance as to proscribed behavior or the role of consent, Maryland's law appears to capture a broad range of actors and conduct—perhaps even including the person who discloses his status to a sexual partner and also uses a condom. A closer look at the language and Maryland law reveals that this is not the case, and that Maryland's criminal HIV exposure statute is perhaps as narrow and limited in application as the California statute,[152] which has been described as unfriendly to prosecutors.[153] Maryland can prosecute an HIV-positive individual if he either actually transfers or attempts to transfer the virus to another.[154] The first scenario runs into causation and mens rea problems.[155] The prosecutor must establish that the victim was infected with HIV after a sexual encounter with the defendant and that the defendant is the person who infected the victim.[156] Additionally, the prosecutor must prove that the defendant knew transmission could happen before or during the specific sexual act resulting in infection.[157] The second scenario, an attempt to transfer, requires that the prosecution prove a defendant acted with the specific intent to transfer the virus, rather than only recklessly or with disregard for the fact that transmission or exposure *could* result.[158] Thus, it

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151. See, for example, CAL. HEALTH & SAFETY CODE § 120291, 720 ILL. COMP. STAT. ANN. 5/12-16.2 (West 2002), or IOWA CODE ANN. § 709C.1, statutes that are all significantly longer than MD. CODE ANN., HEALTH–GEN. § 18-601.1, and delve into far greater detail regarding definitions, defenses, and evidentiary requirements.

152. CAL. HEALTH & SAFETY CODE § 120291(a); *see also* John M. Glionna, *Law on HIV Infection Little Used: As a Victim Finds, State's Tough Standard Means Few Who Knowingly Pass the Virus Are Prosecuted*, L.A. TIMES, Sept. 10, 2003, at 1 (commenting on the specific intent requirement to California's HIV-specific statute, and noting that as of 2003 only one person has been convicted pursuant to it); *HIV and Full Disclosure*, L.A. TIMES, July 7, 2006, at 12 (noting that California's civil statute makes prosecution of knowing HIV exposure easier than does the state's criminal statute).

153. *See* Galletly & Pinkerton, *supra* note 59, at 332 (noting that a congressional aide actually went on record to describe California's intent requirement as a "nearly impossible" standard to meet, making the law "pretty much meaningless"); Shriver, *supra* note 145, at 327 (indicating that recklessness is not sufficient to satisfy the specific intent to transmit required by California's statute and that prosecutors must prove malice, making the statute a difficult one to prosecute).

154. MD. CODE ANN., HEALTH–GEN. § 18-601.1.

155. *Cf.* McGuire, *supra* note 52, at 1797–98 (discussing causation and mens rea hurdles relating to prosecution of HIV transmission under the law of murder, which often required proving actual transmission).

156. *Cf.* Hermann, *supra* note 37, at 363–64 (noting the difficulty of proving two necessary negative facts—that the victim was not HIV-positive prior to the alleged conduct and that the victim was not infected by some other source—in the context of a homicide prosecution for HIV transmission).

157. McGuire, *supra* note 52, at 1797.

158. For an articulation of Maryland's law of attempt, see Dabney v. State, 858 A.2d 1084, 1089 (Md. Ct. Spec. App. 2004). In order to successfully prosecute a defendant for an attempt, the state must establish that the defendant had the mens rea of intent to commit a particular crime and also that he took

appears that Maryland's statute captures only a small universe of HIV-positive individuals who engage in risky behavior with the knowledge and intention of actually transferring the virus to another.

The legislative history of the Human Immunodeficiency Virus—Omnibus Bill[159] further supports an interpretation that gives the statute a limited application. First, the preamble indicates that the bill as a whole was concerned with allaying "[p]ublic fears and misconceptions of methods of HIV infection [that] have resulted in discrimination against persons with HIV infection."[160] The fact that a criminal HIV statute with a broad sweep is more, not less, likely to foster discrimination and bias among the HIV-positive population countenances in favor of inferring that the Maryland General Assembly intended a strict construction of the statute.[161] Even more convincing is the fact that the preamble indicates the legislature's understanding that the "*willful and intentional* exposure of others by an infected person poses a serious public health threat."[162] While admittedly not contained in the statute itself, the use of the words *willful* and *intentional* to describe the proscribed conduct suggests the legislature intended to punish only those who act with culpability higher than recklessness.

B. Maryland's Use of Traditional Criminal Law

Historically, Maryland has used the traditional criminal law as a means of deterring and punishing exposure to and transmission of HIV, and continues to do so.[163] In *Smallwood v. State*,[164] the Maryland Court of Appeals addressed the

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a "substantial step, beyond mere preparation, toward commission of a targeted crime." *Id.*; *see also* Jennifer Grishkin, Note, *Knowingly Exposing Another to HIV*, 106 YALE L. J. 1617, 1622 n.31 (1997) (noting Maryland's statute "require[s] a showing of intent to transfer the virus, which leaves the State in the same position as proving intent to kill"); McArthur, *supra* note 34, at 721 n.106 (commenting on Maryland's "surprisingly small punishment" in light of the fact that a prosecutor must prove "knowing *transmission*" in order to convict). Grishkin suggests that, because the Maryland statute refers only to transmission or attempted transmission, and not exposure, the burden of proof for the prosecution is actually more rigorous than other states. Grishkin, *supra*, at 1622 n.31.

159. Ch. 789, 1989 Md. Laws 4293, 4306 (codified as amended at MD. CODE ANN., HEALTH–GEN. § 18-601.1 (LexisNexis 2009)).

160. *Id.* at 4295.

161. *See* State v. Fabritz, 348 A.2d 275, 279 (Md. 1975) (citing the "well settled" rule that "penal statutes must be strictly construed"). For additional discussion of the stigmatizing effects criminal HIV exposure statutes can have on the HIV-positive population, see *supra* Parts II.B–C.

162. Human Immunodeficiency Virus—Omnibus Bill, ch. 789, 1989 Md. Laws at 4295 (emphasis added); *see also* AIDS ADMIN., MD. DEPT. HEALTH & MENTAL HYGIENE, COUNSELING, TESTING AND REFERRAL PROGRAM COUNSELOR KNOWLEDGE EVALUATION SELF-LEARNING PACKET—FY08, at 11 (2008) *available at* http://dhmh.maryland.gov/AIDS/ProviderResources/CTR/Self%20Learning%20FY08.pdf (indicating that a person who violates "this *willful exposure provision* is guilty of a misdemeanor") (emphasis added).

163. *See, e.g.*, CTR. FOR HIV LAW & POLICY, PROSECUTIONS FOR HIV EXPOSURE IN THE U.S., 2008–2010 (2010) (providing an "illustrative, not exhaustive," chart of recent criminal HIV prosecutions, and indicting that Maryland has seen at least three since June 2008); Daniel Ostrovsky, *Maryland Case Triggers Question: Should Exposure of HIV Be a Felony?*, KAN. CITY DAILY REC.

question of whether a court may infer a specific intent to kill from conduct that risks HIV transmission.[165] Smallwood, an HIV-positive defendant, was convicted of attempted first-degree rape, robbery, assault with intent to murder, reckless endangerment, and three counts of attempted second-degree murder.[166] The Court found that, within a five-day period in 1993, Smallwood had robbed and then raped three different women at gunpoint, and did not wear a condom during any of the attacks.[167]

Smallwood appealed his assault with intent to murder and attempted murder convictions, contending evidence was insufficient to support a finding of the required specific intent to kill.[168] Specific intent to kill may be inferred, inter alia, where a person directs a deadly weapon at a vital part of the human body.[169] For example, it is reasonable to assume that a person who points a loaded gun at another person's chest and pulls the trigger intends his victim to die "as a natural and probable consequence of his actions."[170] In holding that evidence did not support Smallwood's convictions of assault with intent to murder and attempted murder,[171] the Court reasoned that it is unclear that death by AIDS is both a natural *and* probable consequence of exposure to HIV so as to support an inference of specific intent to kill.[172]

Notably, Smallwood argued on appeal that reckless endangerment,[173] not attempted murder, was the appropriate charge given the facts of his case.[174] Courts

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(Mo.), Jul. 11, 2006 (reporting that a Maryland defendant accused of having unprotected sex without disclosing his HIV-positive status was charged with three misdemeanors: second-degree assault, reckless endangerment, and violation of Maryland's HIV-specific exposure statute); Patricia M. Murret, *Man Sentenced for Exposing Woman He Met Online to HIV*, GAZETTE, Mar. 10, 2010, http://www.gazette.net/stories/03102010/montnew202848_32557.php (reporting that a Montgomery County man was sentenced to eighteen months in prison for reckless endangerment and knowingly exposing others to HIV).

164. 680 A.2d 512 (Md. 1996).

165. *Id.* at 515–16 (holding that the specific intent to kill necessary to first-degree murder prosecutions could not be inferred from intentional conduct exposing another to HIV).

166. *Id.* at 513–14. Smallwood was not prosecuted under Maryland's criminal HIV exposure statute, an omission that is perhaps meaningful given that conviction constitutes only a misdemeanor. One could plausibly argue that the absence of any reference to Maryland's criminal HIV exposure statute in the context of *Smallwood* suggests the statute was not meant to apply to those situations where traditional criminal conduct (e.g., rape or other sexual assault) is also at issue, but rather to instances of otherwise consensual sexual intercourse.

167. *Id.* at 513.

168. *Id.* at 514.

169. *Id.* at 515 (citing State v. Raines, 606 A.2d 265, 269 (Md. 1992)).

170. *Id.* at 516.

171. *Id.* at 618.

172. *Id.* at 516 (emphasis added). The Maryland Court of Appeals' decision in this case was controversial. Kromm, *supra* note 63, at 261–62. Kromm notes that many states passed criminal HIV exposure statutes in the wake of *Smallwood*. *Id.* at 262.

173. In Maryland, a person is guilty of reckless endangerment when he recklessly engages in conduct that "creates a substantial risk of death or serious physical injury to another." MD. CODE ANN.,

in other jurisdictions have similarly concluded that such conduct can constitute reckless endangerment.[175] Given that the crime of reckless endangerment is focused on the actual risky conduct of the actor and does not require that any harm actually result,[176] it is arguably more in harmony with the public health goal of preventing the spread of HIV than specific intent crimes are.[177]

IV. RE-WRITING MARYLAND'S HIV-SPECIFIC CRIMINAL STATUTE

In 2005, the Department of Mental Health and Hygiene estimated there were 40,000 Marylanders living with HIV/AIDS.[178] Although the years 2001 to 2005 revealed a decline in the infection rate to an average 2,100 annual new infections, the rate was still high enough that "every four hours another Marylander [became] infected with HIV."[179] If the state intends to continue to use the criminal law as a

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CRIM. LAW § 3-204 (West 2008). Three elements are required to establish a *prima facie* case of reckless endangerment: 1) the defendant "engaged in conduct that created a substantial risk of death or serious physical injury to another;" 2) a "reasonable person would not have engaged in that conduct;" and 3) "the defendant acted recklessly." Holbrook v. State, 772 A.2d 1240, 1247 (Md. 2001) (quoting Jones v. State, 745 A.2d 396, 406 (Md. 2000)). The first test for reckless endangerment is an objective one, and requires a court to determine whether the defendant's conduct was "so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe." State v. Pagotto, 762 A.2d 97, 108 (Md. 2000) (quoting Minor v. State, 605 A.2d 138, 141 (Md. 1992)). Maryland case law further indicates: "[i]t is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." *Minor*, 605 A.2d at 141.

174. *Smallwood*, 680 A.2d at 514.

175. *See generally* People v. Dembry, 91 P.3d 431, 433, 438 (Colo. App. 2003) (affirming trial jury's conviction of reckless endangerment where HIV-positive defendant sexually assaulted a foster child in his care); Hancock v. Commonwealth, 998 S.W.2d 496, 497, 499 (Ky. Ct. App. 1998) (holding that allegations that HIV-positive defendant repeatedly engaged in sexual intercourse with the victim over a period of two years provided sufficient basis for charge of wanton endangerment); Commonwealth v. Cordoba, 902 A.2d 1280, 1283, 1289 (Pa. Super. Ct. 2006) (holding that an HIV-positive defendant may have placed the victim in danger of serious bodily injury sufficient to constitute reckless endangerment when he engaged in unprotected oral sex with her five or six times). Interestingly, Colorado, Kentucky, and Pennsylvania do not have specific HIV statutes that broadly criminalize the knowing transfer of HIV via sexual contact. *See* McArthur, *supra* note 34, at 709 & n.16 (noting that twenty-one states currently have HIV-specific statutes and Colorado, Kentucky, and Pennsylvania are not among them). All three states provide for enhanced penalties where an HIV infected person solicits or engages in prostitution, and Pennsylvania criminalizes conduct intended to expose another to HIV specifically in prisons and correctional facilities. *See* AM. CIVIL LIBERTIES UNION, *supra* note 37.

176. *Cf.* McArthur, *supra* note 34, at 738 (noting that many HIV-specific statutes criminalize conduct that only risks transmission, and do not require intent to infect). McArthur cites the MODEL PENAL CODE § 211.2 (1985) to illustrate that recklessness is focused on conduct, not intent. *Id.* at 738 n.248.

177. *See generally* Hermann, *supra* note 37, at 369 (detailing the use of reckless endangerment to prosecute conduct likely to transmit HIV); *cf.* Wolf & Vezina, *supra* note 40, at 836–37 (observing that criminal law tends to impose punishment after a violation occurs while public health law seeks to prevent harm before it occurs).

178. AIDS ADMIN., MD. DEP'T HEALTH & MENTAL HYGIENE, TWENTY-FIVE YEARS OF AIDS IN MARYLAND 8 (n.d.), *available at* http://www.dhmh.state.md.us/AIDS/Data&Statistics/AIDS25YR.pdf.

179. *Id.*

tool to combat the spread of HIV as a way to hold accountable those who would intentionally frustrate those efforts by having unprotected sex without disclosing their HIV-positive status to potential partners, it needs to do so in a clear, deliberate, and fair way. First, the Maryland legislature needs to decide whether to prosecute intentional or reckless exposure to HIV in situations involving otherwise consensual sex via a specific HIV-statute or via the traditional criminal law.[180] Not only is the practice of charging a defendant under both the specific and general law a naked attempt to induce guilty pleas, but it also tends to undermine legality in the form of clear warning as to exactly what conduct is prohibited.[181]

Some argue that HIV transmission and exposure cases are ill-suited for the criminal law, and that those who knowingly and recklessly expose others to the virus should never be criminally prosecuted, save the rare individual who acts only with the intent to transfer HIV to many partners.[182] While these advocates might legitimately privilege public health concerns above all else, they are too quick to dismiss one of the valid and important functions of the criminal law: retribution and punishment.[183] Put simply, a person who recklessly or intentionally exposes another to a fatal disease commits a wrong that warrants the social condemnation that a criminal statute represents.[184] The more important and messier question is how we properly define the wrong and assign appropriate penalties, while at the same time keeping public health goals of prevention and education, as well as risk and

180. *See* Markus, *supra* note 101, at 863 n.95 ("A good statute will clarify, either in the text or legislative history, that it is meant to be used in place of, not in addition to, traditional criminal offenses."). For a discussion of specific versus general laws, and their implications for plea bargains, see Lazzarini et al., *supra* note 93, at 240.

181. Lazzarini et al., *supra* note 93, at 240; *see also* LON L. FULLER, THE MORALITY OF LAW 63–65 (rev. ed. 1969) ("[O]bscure and incoherent legislation can make legality unattainable by anyone . . . .").

182. *E.g.*, Gostin, *supra* note 10, at 1057 (arguing that most cases of HIV transmission are outside the reach of the law and that those that do get noticed are likely to be the poorest and most vulnerable of HIV-positive individuals); Sullivan & Field, *supra* note 81, at 195–97 (arguing that enacting criminal laws to deal with the reckless or negligent transmission of HIV is a mistake); *see also* UNAIDS BRIEF, *supra* note 77, at 2 ("Except in the rare cases of intentional HIV transmission, applying criminal law to HIV transmission does not serve [retributive or deterrence] goals.").

183. *See, e.g.*, Grant, *supra* note 70, at 177 (stating that we should not minimize the importance of retribution and denunciation in the context of reckless sexual exposure to HIV). *But see* UNAIDS POLICY OPTIONS PAPER, *supra* note 76, at 28–29 (arguing that the slope between retribution for wrongdoing and revenge is too slippery when it comes to punishing HIV transmission and exposure).

184. *Accord* Gostin, *supra* note 10, at 1038 ("The transmission of a potentially lethal infection with forethought or recklessness is just as dangerous as other behavior the criminal law already proscribes."). Though he acknowledges the blameworthiness of reckless or intentional HIV exposure, Professor Gostin does not support retribution as a sound reason for enacting HIV-specific exposure statutes. *Id.* at 1056. Professor Gostin contends that it more often than not hard to establish that an offender had "evil intentions deserving punishment," and that instead the offender "took unreasonable risks motivated by sexual passions, physical dependence on drugs or both." *Id.*

culpability, at the forefront.[185] Although it has failed to do so thus far, it is entirely possible for Maryland to accomplish this delicate balance.

A. HIV-Specific Versus Traditional Criminal Statutes

In Maryland, traditional criminal statutes offer a few potentially viable options. First, the state could continue to bring charges under the reckless endangerment statute.[186] However, given the relatively light penalties a reckless endangerment conviction generally provides, such a charge may insufficiently address and punish those most egregious instances of intentional exposure to HIV.[187] Prosecutors could also, as some scholars have advocated, prosecute defendants under assault statutes.[188] In many states, including Maryland, such a scheme could address variations in risk of exposure and even the virulence of a defendant's particular strain of HIV.[189] Professor Isabel Grant provides another provocative possibility, arguing that Canada should adopt a provision within its sexual assault laws providing that "no consent is obtained where the accused, knowing that he carries a sexually transmitted disease, engages in unprotected vaginal or anal sex without disclosing his medical status to the complainant."[190] Applying this scheme, an HIV-positive individual could be charged with sexual assault where he knows that he is HIV-positive and that the behavior he intends to engage in (i.e. unprotected vaginal or anal sex) carries a high risk of transmitting the virus, and either does not tell his partner that he is infected or lies about his status.[191] The logic here is that his partner lacks crucial information necessary to make an autonomous and informed choice as to whether to have sex with him, and that consent to sex would not have been given had this information been properly disclosed.[192] In Maryland, the use of rape or sexual assault as a means to prosecute

185. *See* Galletly & Pinkerton, *supra* note 59, at 335–36 (discussing the challenges of drafting an effective and fair HIV-specific statute that both punishes culpable conduct and also furthers critical public health concerns).

186. *See supra* notes 173–77 and accompanying text (outlining reckless endangerment law in Maryland).

187. *See, e.g.*, McArthur, *supra* note 34, at 739 (detailing the use of reckless endangerment to prosecute exposure to HIV).

188. *Id.* at 740–41.

189. *Id.* at 741. MD. CODE ANN., CRIM. LAW § 3-202(a) (LexisNexis 2002 & Supp. 2009) provides that first-degree assault occurs where one "intentionally cause[s] or attempt[s] to cause serious physical injury to another," whereas MD. CODE ANN., CRIM. LAW § 3-203(a) simply provides, for assault in the second-degree, that "a person may not commit an assault."

190. Grant, *supra* note 70, at 177.

191. *See id.* (advocating that the definition of *consent* in Canada's sexual assault statute be amended to require disclosure of HIV-positive status, thus making non-disclosure tantamount to non-consent for purposes of sexual assault).

192. *Id.* There is an important difference between non-disclosure and deceit. UNAIDS POLICY OPTIONS PAPER, *supra* note 76, at 10. Sex, especially unprotected sex, is risky behavior. Both partners shoulder responsibility for asking one another questions about past behavior, testing history, and any other details that are important in making a risk-assessment. *Id.* Where, however, one partner asks those

reckless or intentional exposure to HIV would likely require the addition of a new statute to the sexual crimes scheme, rather than an elaboration on the definition of consent as Professor Grant proposes for Canada.[193]

Maryland's current HIV-specific statute is deficient on many levels. First, notwithstanding the fact that the legislature arguably intended to limit the scope of the HIV-specific statute to those cases of "intentional" or "willful" exposure,[194] it does not articulate exactly what conduct is proscribed and in what circumstances. As written, the law is neither "clearly drawn" nor "narrowly tailored to proscribe only the behavior that has epidemiologically been demonstrated to transmit HIV," and thus risks facilitating "discrimination of HIV infected people and miseducation of the public."[195] Maryland also needs to abandon its position as one of only three states that fail to mention consent,[196] and provide that a defendant who discloses his status to his sexual partners prior to engaging in risky behavior is immune from prosecution, so long as the subsequent sexual encounter is voluntary and consensual.[197] Further, the current HIV-specific statute does not account for the

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questions and receives untruthful or misleading answers from the other (i.e., that the partner is HIV-negative or otherwise disease-free when he is in fact not), the deceitful partner has completely foreclosed the other's ability to make an informed decision and should be held criminally accountable for it. *Cf. id.* (noting that "deliberate deceit" as it relates to a person's HIV-positive status is "conduct that may be characterized as morally blameworthy and therefore deserving of punishment through criminal sanctions").

193. *See* MD. CODE ANN., CRIM. LAW § 3-301 (providing definitions relating to Subtitle 3—Sexual Crimes—and *consent* is not among them).

194. *See supra* notes 158–62 and accompanying text (suggesting that Maryland's HIV-specific criminal statute is actually written so as to apply narrowly).

195. Mosiello, *supra* note 37, at 609. The concern for miseducation should not be discounted, as a 1999 study revealed that approximately fifty percent of respondents believed HIV could be transmitted via sharing a drink out of the same glass or being coughed or sneezed on by someone who has the AIDS virus, up from forty-eight percent and forty-six percent, respectively, in 1991. Herek et al., *supra* note 132, at 373. The authors of the study note that the results suggest that educational efforts have been less than successful in "convincing the public that AIDS is not spread through casual social contact." *Id.* at 376.

196. Weiss, *supra* note 70, at 392–93.

197. *See* WEBBER, *supra* note 16, at 7-55 (noting that statutes providing a defense of informed consent encourage those infected with HIV to disclose their statuses prior to engaging in risky behavior, while those that do not "in effect tell people that if they test positive for HIV, they will be forbidden from engaging in most sexual activities, even if their partner knowingly consents"); Strader, *supra* note 20, at 440 (noting without defenses such as informed consent or condom use, "an HIV-positive person is consigned to a sexless life," and that "[e]ngaging in non-risky sexual activities hardly warrants criminal penalties"). Strader notes that whether consent to high-risk sexual acts is a legally acceptable defense is debatable. *Id.* at 440 & n.24. It is similarly unclear whether, in Maryland, informed consent of the victim in an intentional or reckless HIV exposure case involving very risky conduct constitutes a defense. In Taylor v. State, 133 A.2d 414, 415 (Md. 1957), the Maryland Court of Appeals distinguished between two classes of criminal assault, stating that consent is an acceptable defense in only one of the classes. Specifically, the Court provided that criminal assaults tending to disturb the public peace are viewed as crimes against the public generally, thus consent of the victim is not a defense. *Id.* However, those criminal assaults "not accompanied by threat of serious hurt or breach of the public peace" are treated as crimes against persons, and consent of the victim is considered a defense. *Id.* In a case where the risk of

spectrum of risk and culpability implicated by the different behaviors and mental states that are involved in situations of reckless or intentional exposure to HIV.[198]

B. A Better HIV-Specific Statute for Maryland

Maryland can do better. After dissecting the options offered by traditional criminal laws and critically assessing various experiments with HIV-specific statutes, it is clear that the General Assembly should repeal the state's existing HIV-specific statute and replace it with one that is responsive to public health concerns.[199] While the traditional criminal law is attractive because it does not single out HIV alone, and thus reduces the risk of discrimination or bias against HIV-positive individuals in general,[200] a new statute can accomplish the same goal while adding the specificity lacking in traditional criminal laws.[201] A statute modeled after reckless endangerment and focused on risky conduct, but dealing only with the issue of sexually transmitted diseases within the context of voluntary and consensual sexual encounters, provides a potential defendant with the notice

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HIV transmission is very high, it is quite plausible that the Court of Appeals would view the alleged conduct as a "crime against the public generally," and decline to accept consent as a defense.

198. Galletly & Pinkerton, *supra* note 59, at 331 (addressing the problem of risk differentials relating to different behaviors that might transfer HIV and suggesting that current HIV-specific criminal statutes do not adequately account for these differences). Some have also argued that HIV-related criminal laws must advance and adapt with the virus itself and the medical technologies that are developed to fight it. *See generally* McArthur, *supra* note 34, at 725–31 (discussing in detail the changing HIV/AIDS epidemic, and examining the implications new treatments have for the spectrum of risk and subsequent culpability). The medical context surrounding HIV/AIDS is very different today from what it was in 1989 when the HIV-specific statute was first passed. For example, we now know that a number of factors determine whether a person will become infected after exposure to HIV, including the strength of his immune system, the stage of the HIV-positive individual's disease, the quantity of virus in the HIV-positive individual's genital fluids, and whether or not the HIV-positive individual is receiving anti-retroviral treatment. Galletly & Pinkerton, *supra* note 59, at 328. We also now have medical therapies that can reduce an HIV-positive individual's viral load, thus reducing his risk of transmitting the virus to another as compared to a non-treated individual. McArthur, *supra* note 34, at 730 (citing Julio S. G. Montaner et al., *The Case for Expanding Access to Highly Active Antiretroviral Therapy to Curb the Growth of the HIV Epidemic*, 368 LANCET 531, 531 (2006)); *cf.* Glenn Betteridge, *Criminal Law and Cases of HIV Transmission or Exposure*, 13 HIV/AIDS POL'Y & L. REV. 33, 34 (2008) (discussing a Canadian case involving a defendant whose viral load was undetectable and the judge accepted expert evidence that there was thus a "very high probability that the [defendant] was not infectious, i.e. could not have transmitted HIV"). Unfortunately there are now also super-potent strains of the virus resistant to certain drugs commonly used for treatment, and thus more devastating to the individual who unknowingly contracts them. McArthur, *supra* note 34, at 708–09.

199. *See supra* Part II.A (discussing practical public health concerns that are implicated when the reckless or intentional exposure of HIV is criminalized).

200. *See supra* Parts II.B–C (noting that HIV-specific legislation has the dangerous potential to increase bias and stigma against those living with HIV, and thus it must be carefully drafted).

201. In omitting any specific reference to HIV, traditional criminal laws such as assault or reckless endangerment do not provide clear notice to an HIV-positive individual that he could be prosecuted specifically for an exposure or transmission-related offense. *Cf.* FULLER, *supra* note 181, at 63–65 (discussing the need for clarity in the law).

crucial to the legitimacy of any criminal law.[202] A clear statement on prohibited conduct also serves prevention and education efforts by communicating accurate information to the public relating to how HIV is contracted.[203] Further, a narrowly applicable statute is easily detailed to newly diagnosed HIV-positive individuals, who are then able to discuss their obligations and how best to avoid criminal liability with a prevention and education-oriented counselor.[204] Although an HIV-specific statute does not fully ameliorate concerns related to stigma and bias, a specific statute does guard against the danger that jurors will unfairly apply expansive readings of a traditional criminal statute to HIV-positive defendants charged according to comparatively less egregious facts in order to arrive at an unduly harsh and inappropriate result.[205] A specific statute can reign in both prosecutors and jurors by explicitly defining the narrow circumstances where risk and culpability demand that a person be held criminally accountable for his conduct.[206]

A useful and fair HIV-specific statute for Maryland will have at least five components: it should 1) define *knowledge* as it relates to HIV status; 2) define specifically the conduct prohibited; 3) outline conduct implicating different levels of culpability; 4) provide affirmative defenses; and 5) provide fair and commensurate penalties.[207] Maryland's new statute should provide that a person knows his HIV status for purposes of the law when he has received a positive test

202. *See* Ruby, *supra* note 114, at 323 (noting that statutes that are explicit in the behavior they prohibit are "crucial to the legitimacy of the criminal justice system").

203. *See supra* notes 118–22 (discussing the grave consequences of HIV-specific laws that are not sufficiently clear and thus do not further HIV education and prevention efforts).

204. Health practitioners—because they are on the frontlines of counseling and regularly provide patients with test results—should be required to inform individuals who test positive of the relevant laws and how to avoid liability. Currently in Maryland practitioners are advised that they should refer individuals to various case management and supportive services and discuss "precautions that may be taken to prevent infection, re-infection or transmission to others." Memorandum from the AIDS Admin., Md. Dep't Mental Health & Hygiene to Counseling, Testing, and Referral Sites; Health Care Providers and Facilities 4–5 (Aug. 15, 2008), *available at* http://www.healthymaryland.org/documents/HIVTestingPracticeAdvisoryAug2008FINAL_001.pdf. Missouri provides a possible model of regulation that ensures proper notice to HIV-positive individuals regarding the criminal laws of the states. *See* State v. Mahan, 971 S.W.2d 307, 309–10 (Mo. 1998) (describing the multiple counseling sessions received by the defendant after testing positive for HIV, and noting that Missouri's HIV-specific criminal statute was read to the defendant, who then signed a form indicating his awareness of the law).

205. *See, e.g.*, Sullivan & Field, *supra* note 81, at 179–81 (discussing problems of juror bias and discrimination in the context of applying traditional recklessness or criminal negligence standards to HIV transmission).

206. *Id.* at 182–83.

207. *See supra* Part II (detailing important public health tensions in many current HIV-specific statutes, and noting how a focus on these concerns can help make criminal laws relating to reckless or intentional HIV exposure better and fairer).

result from an HIV Counseling, Testing, and Referral (CTR) site,[208] or from a comparable official testing center located in another state. Defining knowledge in this way provides clarity for defendants, prosecutors, and jurors, and also better ensures that those charged were culpably aware of the risks their conduct posed in light of the counseling provided by CTRs. The statute should prohibit only that sexual conduct that poses a substantial risk of HIV transmission and should plainly articulate exactly what qualifies as such conduct. California's statute is instructive here, defining the prohibited sexual activity as unprotected "insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner."[209] In recognition of the meaningful difference between non-disclosure and deceit,[210] Maryland should also consider explicitly incorporating different levels of culpable behavior into the statute. This could be accomplished via affirmative defense provisions of disclosure and condom use. First, an individual's disclosure of his HIV-positive status prior to the risky sexual activity should be an affirmative defense, so long as the sexual encounter is fully voluntary and consensual.[211] Maryland's statute could also provide that, in the absence of disclosure, the proper use of a condom during all risky consensual sexual activity is an affirmative

208. See Md. AIDS Admin., Dep't of Mental Health & Hygiene, Provider Resources, http://www.dhmh.state.md.us/AIDS/ProviderResources/index.htm (last visited June 19, 2010), for a list of official testing centers in Maryland, as well as other testing resources and information.

209. CAL. HEALTH & SAFETY CODE § 120291(b)(1) (West 2006).

210. UNAIDS POLICY OPTIONS PAPER, *supra* note 76, at 10 (arguing that criminal sanctions may be applied in cases of deceit, but that "mere non-disclosure of HIV-positive status should not amount to a criminal offence"). *But see* Weait, *supra* note 136, at 452 (noting the "moral distinction" between lying about one's status and failing to disclose it, but arguing that the law does not recognize this distinction). Both Professor Weait and the UNAIDS policy paper argue that one does not need to know the HIV status of a potential sexual partner in order to make a meaningful choice regarding whether and how to engage in sexual behavior with him or her. UNAIDS POLICY OPTIONS PAPER, *supra* note 76, at 10; Weait, *supra* note 136, at 452. While this argument does underscore the important point that we all share responsibility for minimizing risks in sexual encounters, there are likely many people who do not agree with such a statement. For example, Professor Grant points out the particularly devastating consequences of non-disclosure, including attempted suicide, and notes that "the judicial and prosecutorial desire to recognize this harm" is understandable." Grant, *supra* note 70, at 149.

211. Such a provision would appropriately balance the interest of a non-infected partner's right to know about the risks of any particular sexual encounter with the interest of an HIV-positive person's legitimate and very human desire to express his sexuality in a responsible way. *See, e.g.*, Lawrence O. Gostin & James G. Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 66–67 (1998) (noting that both infected individuals and their partners have legitimate interests that need to be considered in the context of consensual sex and that the law should aim to balance these interests in a way that furthers societal health); Joseph W. Rose, Note, *To Tell or Not to Tell: Legislative Imposition of Partner Notification Duties for HIV Patients*, 22 J. LEGAL MED. 107, 118–19 (2001) (suggesting that a statute such as North Dakota's, which requires use of a prophylactic device and informed consent of an HIV-negative partner, provides protection for both partners that "may be a productive step toward the maximization of societal health and safety").

defense,[212] so long as the defendant did not actively deceive his partner by lying about his status either voluntarily or in response to questions. These defenses encourage behaviors—disclosure and safer sex—that are central to reducing the number of HIV transmissions. Finally, Maryland needs to reassess the penalties applied for violation of the statute. The current misdemeanor scheme is likely appropriate for instances of non-disclosure in the context of unprotected consensual sexual activity—where both partners share a burden of risk and responsibility—but it is not sufficient where the HIV-positive individual has lied to his partner, or where an intent to infect can be demonstrated.[213]

CONCLUSION

If Maryland is to keep prevention of HIV transmission a priority, public health efforts must be supported, not undermined, by the criminal law. While it is legitimate to hold those who recklessly or intentionally expose others to HIV criminally accountable, the state must be careful that the laws it uses to do so are clear, effective, and fair. The HIV-specific statute that currently exists is none of these things.

212. *See* Grant, *supra* note 70, at 177 n.193 (suggesting that an HIV-positive individual who did not disclose his status, but did wear a condom, should be excluded from liability because "the public interest in promoting the use of condoms outweighs the public interest in criminalizing the failure to disclose where a condom is used"). The CDC has reported that proper and consistent use of condoms conclusively provides a "high degree of protection" against HIV transmission during sex because they are an "essentially impermeable barrier to particles the size of HIV." CTRS. FOR DISEASE CONTROL & PREVENTION, CONDOMS AND STDS: FACT SHEET FOR PUBLIC HEALTH PERSONNEL 2 (2009), *available at* http://www.cdc.gov/condomeffectiveness/docs/Condoms_and_STDS.pdf.

213. *Cf.* Jaclyn Schmitt Hermes, Note, *The Criminal Transmission of HIV: A Proposal to Eliminate Iowa's Statute*, 6 J. GENDER RACE & JUST. 473, 485–88 (2002) (arguing that Iowa's HIV-specific statute provides for an excessive sentence, and suggesting that a twenty-five year sentence might be appropriate for those who act with the specific intent to transfer the virus, but that it is unduly harsh for those who do not intend harm).