PUNISHMENT WITHOUT PRINCIPLE: HIV CRIMINALIZATION AND THE SEX OFFENDER REGISTRY

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When the AIDS epidemic emerged in the 1980s, fear and moral outrage fueled a wave of laws criminalizing certain conduct of people with HIV. Many of these laws were aimed at behavior thought to transmit the virus, but the laws did not require actual transmission, intent, or any conduct that carried a medical risk of transmission. Medical research and public health efforts have since rendered HIV a manageable and treatable condition with virtually no transmission risk. Yet, decades later, some of these criminal laws remain in over thirty states. Scholars have criticized such laws for perpetuating stigma and ignoring significant medical advancement. Those critiques are well-founded.

This Article focuses on one especially punitive and underexamined consequence: In six states, individuals convicted under HIV-specific statutes must register as sex offenders, a designation thirty-eight other states may enforce through reciprocal registration laws. Although these provisions may survive constitutional scrutiny, they can produce outcomes that are deeply unjust and untethered from any principled theory of punishment.

This Article argues that mandatory sex offender registration for HIV-related convictions cannot be justified under prevailing punishment theories, which require a meaningful relationship between punishment, culpability, proportionality, and public safety. Many HIV laws penalize conduct involving neither criminal intent nor actual transmission, severing the link between blameworthiness and punishment. Labeling someone in either scenario as a sex offender runs afoul of the legislative goals underlying the sex offender regulatory schemes. Moreover, these laws disproportionately impact marginalized communities, including

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queer people, sex workers, and people of color, perpetuating the exact stigma that birthed these laws in the first place.

While scholarly critiques of HIV criminalization are well-developed, the specific consequences of mandatory sex offender registration remain underexplored. This Article relies on a punishment theory framework to shed light on this overlooked aspect of criminal law and calls for reform to ensure punishment aligns with science as well as core principles of justice and proportionality.

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Introduction

I first encountered the consequence of HIV criminalization as an appellate prosecutor.[1] The defendant, Marcus Bennett, challenged a law that required him to register as a sex offender in New York based on a felony conviction in Louisiana.[2] The law was clear: Bennett had been convicted of a felony in Louisiana that triggered registration there, and New York's reciprocal statute demanded the same result. Legally, there was little question; thus, Bennett lost his appeal. However, the outcome in Bennett's case reveals how the moral panic and punitive policies responsible for the initial drafting of HIV criminalization laws can continue to devastate lives.

Marcus Bennett was in his late twenties when he was convicted under Louisiana's "Intentional Exposure to AIDS Virus" statute,[3] drafted at the height of AIDS panic in the late 1980s.[4] He was prosecuted for failing to disclose his HIV-positive status before having consensual sex with another adult man.[5] No one alleged he tried to infect his partner and there was no proof of transmission.[6] Yet the law treated him as a dangerous felon and a sexual threat. Bennett pled guilty to the law, knowing it carried a maximum punishment of ten years' imprisonment

1. HIV criminalization refers to the use of HIV-specific laws to penalize the sexual behavior of people living with HIV. Several kinds of statutes fall within this category. *See infra* Section I.C.

2. Pseudonym provided by the author.

3. At the time of Marcus Bennett's conviction, the law provided that no person shall (1) "intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus," (2) through "sexual contact" or other "means or contact," including "biting" or "spitting," (3) "without the knowing and lawful consent of the victim." La. Stat. Ann. § 14:43.5 (1993) (amended 2018). The biting and spitting provisions were added when the law was amended in 1993. Act of June 9, 1993, § 14:43.5, 1993 La. Sess. Law Serv. Act 411 (West).

4. The law was designed to "curb the already dangerous health menace created by the alarming spread of AIDS (acquired immune deficiency syndrome) virus." Cheney C. Joseph, *Criminal Procedure*, 48 La. L. Rev. 257, 281 (1987); *see also* Emma Mustich, *A History of AIDS Hysteria,* Salon (June 5, 2011, 18:01 ET), https://www.salon.com/2011/06/05/aids_hysteria/ [https://perma.cc/AH4Z-7SYE] (detailing the "national panic" surrounding HIV in the 1980s); Milan Korcok, *AIDS Hysteria: A Contagious Side Effect,* 133 Canadian Med. Ass'n J. 1241, 1241, 1243 (1985) (finding that, during the early stages of the AIDS epidemic, city officials responded by "hand-deliver[ing] letters to known AIDS victims warning them of felony charges if they continue[d] to engage in sexual activity," "thousands of children [were] kept out of schools for fear of catching AIDS," and insurance companies "ordered [their] underwriters to screen applicants for high risk AIDS factors" such as being a single male aged 20–49 living in a city with "unusually high populations of AIDS victims"). These responses came to be recognized as symptoms of AIDS "hysteria." *Id.* at 1241.

5. Bennett contended it was a consensual sexual relationship, which was never challenged. *See* Brief of Defendant, [case name redacted], at 9 (on file with author).

6. *See* [case name redacted] (on file with author).

with hard labor, and served six months in jail.[7] Because of that conviction, he was required to register as a sex offender in Louisiana.[8] That designation followed him across state lines, placing him on registries whenever he relocated to another state[9] and branding him with a scarlet letter typically reserved for people convicted of sexually violent offenses and child molestation.[10]

Bennett's experience is not an anomaly. Across the United States, more than thirty states[11] still have laws that criminalize the behavior of people living with HIV.[12] These laws[13] emerged during the early AIDS crisis,[14] when fear and prejudice, particularly against gay men,[15] drove policy choices. Legislators once claimed these statutes would slow transmission, educate the public, and protect the uninfected.[16] However,

7. *See id.*; La. Stat. Ann. § 14:43.5 (1993) (amended 2018).

8. La. Stat. Ann. §§ 14:43.5 (2018), 15:541 (2025), 15:542 (2016).

9. *See* [case name redacted]; *see, e.g.*, N.Y. Correct. Law § 168-a(2)(d)(ii) (McKinney 2024).

10. As of this writing, Marcus Bennett has completed his level one sex offender registration requirements in the State of New York, and he is no longer on the registry, which is the main reason I use a pseudonym throughout this Article.

11. *HIV and STD Criminal Laws*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/hiv/policies/law/states/exposure.html [https://perma.cc/WL2R-8Q3C] (updated Dec. 19, 2023); *Equality Maps: HIV Criminalization Laws*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/hiv_criminalization_laws [https://perma.cc/9HSL-ZRRZ].

12. *HIV and STD Criminal Laws*, *supra* note 11. Criminalized behavior includes donating blood, tissues, and fluids as an HIV-positive person. *Id.*; *see, e.g.*, Ctr. for HIV L. & Pol'y, HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice (3d ed. 2024) [hereinafter Sourcebook], https://www.hivlawandpolicy.org/sourcebook [https://perma.cc/HS6Y-DZ3Y]. Statutes and regulations that control behavior include those that require people who are aware of their positive status to disclose their status to sex partners. *See* Sourcebook at Florida 3, Idaho 4. Bennett violated one of these laws in Louisiana. *See* La. Stat. Ann. § 14:43.5.

13. Much of the Centers for Disease Control and Prevention's historical HIV surveillance data, including the website cited *supra* notes 11 and 12, was recently removed from the agency's website under directives from the Trump Administration. That data is critical to understanding the epidemiology that underpinned these criminal laws. This loss of transparency is deeply troubling, and it makes scrutinizing these legal narratives even more important.

14. HIV criminalization laws were designed to "curb the already dangerous health menace created by the alarming spread of AIDS (acquired immune deficiency syndrome) virus." Joseph, *supra* note 4, at 281.

15. *Animus and Sexual Regulation*, *Developments in the Law: Sexual Orientation & Gender Identity*, 127 Harv. L. Rev. 1767, 1785 (2014) [hereinafter *Animus*].

16. *See* Stephen V. Kenney, Comment, *Criminalizing HIV Transmission: Lessons from History and a Model for the Future*, 8 J. Contemp. Health L. & Pol'y 245, 248 (1992) (state governments were expected to use these statutes to (1) inform "the public of the proscribed acts medically proven as capable of transmitting HIV," (2) reassure the public of "casual contagion," and (3) encourage testing and treatment programs).

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rather than objectively informing the public about the disease, these laws created stigma against individuals living with HIV, particularly gay and queer people.[17]

Four decades later, medical research and public health efforts have fundamentally changed the reality for people with HIV.[18] Most significantly, the disease is no longer a death sentence. People with HIV who follow treatment regimens can maintain undetectable viral loads,[19] making sexual transmission of the virus effectively impossible.[20] Indeed, public health authorities, including the Centers for Disease Control and Prevention ("CDC"), promote treatment-as-prevention strategies and emphasize the need to reduce stigma to improve testing and care.[21] Despite progress within the medical community, criminal law continues to be informed by the "moral panic" that spurred the laws' enactment.[22] Namely, more than thirty states retain laws criminalizing

17. *See Animus*, *supra* note 15, at 1775–89. I intentionally use the terms gay and queer throughout this Article. While gay typically refers to sexual orientation, queer operates more as an inclusive umbrella term encompassing a broader range of sexualities and gender identities. Both terms reflect the populations stigmatized by HIV criminalization laws, and I want to acknowledge those affected by these laws who may not identify as gay but who are nonetheless queer.

18. *See HIV Criminalization and Ending the HIV Epidemic in the U.S.*, Ctrs. for Disease Control & Prevention (Dec. 18, 2023), https://www.cdc.gov/hiv/policies/law/criminalization-ehe.html [https://perma.cc/E9P9-5HTG] (stating that, "[a]fter more than 40 years of HIV research and significant biomedical advancements to treat and prevent HIV, most HIV criminalization laws do not reflect current scientific and medical evidence.").

19. Viral load represents the amount of virus in a person's blood. *10 Things to Know About HIV Suppression*, Nat'l Inst. of Allergy & Infectious Diseases (Mar. 25, 2025) [hereinafter *10 Things to Know*], https://www.niaid.nih.gov/diseases-conditions/10-things-know-about-hiv-suppression [https://perma.cc/2YWE-87L2].

20. While HIV/AIDS was considered fatal in the 1980s and 1990s, a person living with HIV today who is taking antiretroviral medications ("ART") may have an undetectable and untransmissible level of HIV in their body, making their viral load zero and thus rendering them physically unable to transmit HIV to another person. *See* Jan Albert et al., *Risk of HIV Transmission from Patients on Antiretroviral Therapy: A Position Statement from the Public Health Agency of Sweden and the Swedish Reference Group for Antiviral Therapy*, 46 Scandinavian J. Infectious Diseases 673, 675 (2014) ("There is minimal risk of transmission through vaginal and anal intercourse if the HIV-infected partner is on effective ART and a condom is used throughout intercourse. There is also a very low risk of transmission through vaginal and anal intercourse if the HIV-infected partner is on effective ART and a condom is not used.").

21. *See HIV Criminalization and Ending the HIV Epidemic in the U.S.*, *supra* note 18.

22. Stanley Cohen, Folk Devils and Moral Panics: The Creation of the Mods and Rockers 1–2 (Routledge, 3d ed. 2002) (explaining that "moral panic" refers to fear-driven legislation targeting a perceived societal threat and vilifying a "folk devil"); *see* Catherine L. Carpenter, *Panicked Legislation*, 49 J. Legis. 1, 12 (2023) (noting that HIV criminalization laws exemplify such panicked legislation, enacted during the AIDS crisis to target gay men).

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HIV exposure, and twenty-one have HIV-specific provisions that punish certain behaviors solely because the person involved is HIV-positive.[23]

Scholars have rightly criticized these laws as outdated[24] and discriminatory.[25] Much of that work focuses on the public health consequences of these laws, such as discouraging testing, perpetuating stigma, undermining treatment efforts, or disproportionately impacting marginalized communities.[26] Other scholarly contributions examine the constitutional and civil rights implications of HIV criminalization.[27]

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23. *See HIV and STD Criminal Laws*, *supra* note 11.

24. *Id.* (noting "many state laws are now outdated and do not reflect our current understanding of HIV" as some "criminalize behaviors that cannot transmit HIV—such as biting or spitting—and apply regardless of actual transmission, or intent.").

25. *See, e.g.*, Saundra Young, *Imprisoned over HIV: One Man's Story*, CNN (Nov. 9, 2012, at 20:42 ET), https://www.cnn.com/2012/08/02/health/criminalizing-hiv/index.html [https://perma.cc/LM34-5WT8] (detailing the charges Nick Rhoades, a thirty-four-year-old man, faced under Iowa's HIV criminalization statute despite taking regular antiretroviral medications and wearing a condom during consensual sex). The Iowa statute criminalizing HIV transmission defined "intimate contact" as "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus." Rhoades v. State, 848 N.W.2d 22, 26 (Iowa 2014) (internal quotation marks and citations omitted); *see also* Iowa Code § 709C.1 (repealed 2014). Rhoades pled guilty to this charge and received the maximum sentence of twenty-five years (which was later reduced to time served and a five-year probationary period) and, like Marcus Bennett, became a registered sex offender upon his release. Young, *supra*.

26. *See, e.g.*, Sienna Baskin et al., *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 96 Denv. L. Rev. 355, 355 (2016) (mapping U.S. laws criminalizing HIV-positive sex workers and arguing for decriminalization to improve public health, finding such laws compound penalties and impede HIV prevention); Siobhán Elizabeth Stade Murillo, Comment, *Twenty-First Century Regression: The Disparate Impact of HIV Transmission on Gay Men*, 30 Emory Int'l L. Rev. 623, 623 (2016) (proposing a model criminal statute focused on intentional HIV transmission, with stricter intent requirements and safeguards to reduce stigma and disparate impact on gay men); Angela Perone, *From Punitive to Proactive: An Alternate Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 23 Hastings Women's L.J. 363, 369 (2013) (urging destigmatization and decriminalization of HIV through legislative and educational reforms).

27. Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 Whittier L. Rev. 821, 859–61 (2004) (arguing that HIV criminalization laws undermine public health approaches, fail to promote safer behavior, disregard criminal intent, and reflect the public's misperception of risk); Lauren Catherine Elizabeth Taylor, Note, *HIV No Longer a Death Sentence but Still a Life Sentence: The Constitutionality of HIV Criminalization Under the Eighth Amendment*, 56 Ga. L. Rev. 1189, 1189 (2022) (arguing HIV criminalization statutes are unconstitutional for virally suppressed individuals under the Eighth Amendment); Joshua D. Blecher-Cohen, Note, *Disability Law and HIV Criminalization*, 131 Yale L.J. 1560, 1564 (2021) (arguing that HIV-specific criminal laws constitute unlawful "serodiscrimination" under the Americans with Disabilities Act and proposing disability-based litigation as a reform strategy); *Animus*, *supra* note 15, at 1785 (examining the Supreme Court's use of animus doctrine in landmark gay rights cases and arguing that

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This Article takes a different approach. It examines one particularly punitive and understudied consequence of HIV criminalization laws: mandatory sex offender registration for HIV-specific convictions. By evaluating these registration requirements through the lens of criminal punishment theory, this Article reveals how such mandates fail to advance any of the accepted goals of punishment—retribution, deterrence, rehabilitation, incapacitation, or moral condemnation—and instead reinforce stigma and fear-driven policymaking reminiscent of the early AIDS crisis. In doing so, this Article fills a gap in the existing scholarship and offers a new normative framework for reforming HIV criminalization laws.[28]

And reform is needed now, because in at least six states, an HIV-specific conviction can trigger sex offender registration.[29] Through reciprocal statutes, that designation follows individuals across state lines, branding them as sexual predators for consensual adult relationships in which no harm was intended or caused.[30]

The harmful effects of such legislation cannot be overstated as sex offender registration is a lifelong punishment.[31] Human Rights Watch has documented the "devastating" consequences of public sex offender registries, which are accessible to anyone with internet access. According to the report, public sex offender registries have subjected some individuals to extreme harassment, including being "hounded from their homes, [having] rocks thrown through windows, and feces left on their doorsteps," and others "have been beaten, burned, stabbed, and had their homes set on fire." The report further

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HIV exposure laws, often rooted in stigma, may be uniquely vulnerable to animus-based constitutional challenges).

28. *See infra* Part III.

29. *See* Ark. Code Ann. §§ 12-12-903(12)(A), 12-12-905(a), 12-12-906(a)(1)(A)(ii) (West 2025); La. Rev. Stat. Ann. §§ 14:43.5, 15:536(A), 15:541(24)(a), 15:542(A)(1) (West 2025); Ohio Rev. Code Ann. §§ 2950.01(G)(1)(c), 2950.04(A)(1) (West 2025); S.D. Codified Laws §§ 22-24B-1(20), 22-24B-2 (2026); Tenn. Code Ann. §§ 40-39-202(19), 40-39-212 (West 2025); Wash. Rev. Code §§ 9.94A.507(1)(a)(ii), 9A.36.011(1)(b), 9A.44.130 (2024). The Washington registration requirement only applies to people who transmit HIV to a child or a vulnerable adult with an intent to harm. Wash. Rev. Code §§ 9A.44.130, 70.24.027(3)(c) (2024).

30. *See, e.g.*, Ala. Code § 15-20A-5(38) (West 2026) ("Any offender determined in any jurisdiction to be a sex offender shall be considered a sex offender in this state."); N.Y. Correct. Law § 168-a(2)(d)(ii) (McKinney 2024) (an offender is required to register as a sex offender in New York if they have been convicted of "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred").

31. *See* Press Release, Hum. Rts. Watch, US: Sex Offender Laws May Do More Harm Than Good (Sep. 11, 2007), https://www.hrw.org/news/2007/09/11/us-sex-offender-laws-may-do-more-harm-good [https://perma.cc/SU3E-UHZR].

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revealed that strangers killed at least four individuals after locating them through online registries while other registrants were driven to suicide.[32] Human Rights Watch concluded that these laws, along with residency restrictions, violate the basic rights of former offenders and urged comprehensive reform.[33]

Although courts have formally characterized sex offender registration as a civil regulatory measure,[34] scholars have widely shown that it functions as a punitive system, imposing severe, enduring sanctions that mirror traditional punishment.[35] Sex offender registration often requires public online listings, residency restrictions, barriers to employment and housing, and relentless social stigma.[36] Critically, these registries were designed to monitor individuals who have demonstrated they pose a sexual danger (particularly to children),[37] not to punish people for failing to disclose their treatable medical condition that carries a negligible transmission risk during consensual sexual encounters.

This Article interrogates the legal and social consequences of requiring individuals convicted under HIV criminal statutes to register as sex offenders, arguing that such registration requirements cannot be justified under any theory of criminal punishment. These statutes often function as strict liability offenses in that a person may be convicted for engaging in consensual sexual activity solely because of their positive HIV status. This is true even if no transmission occurred, no intent to harm existed, precautions were taken, or the individual's viral load was undetectable. The legitimacy of punishment in our system rests on principles of proportionality, harm prevention, moral culpability, and public

32. *Id.*

33. *See id.*

34. *See, e.g.*, Femedeer v. Haun, 227 F.3d 1244, 1249 (10th Cir. 2000) (declaring that the intent of the legislature in passing a sex offender regulatory scheme "was clearly to establish a civil remedy"); Commonwealth v. Baker, 295 S.W.3d 437, 443 (Ky. 2009) (analyzing the express and implied intent of the legislature to conclude that the registration scheme was civil).

35. *See, e.g.*, Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071 (2012); State v. Noble, 829 P.2d 1217, 1223 (Ariz. 1992) (holding that the Arizona registration requirement serves the traditional deterrent function of punishment, reasoning that "a convicted sex offender is less likely to commit a subsequent offense if his whereabouts are easily ascertained by law enforcement officials"); *see also* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 186–87 (1995) (applying punishment theories of retribution and deterrence to analyze Virginia's sex offender registration statute).

36. *See* Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 266–68 (2016).

37. *Id.* at 244–45, 275–77.

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safety.[38] Imposing sex offender registration on people living with HIV, in cases with no intent to harm and no actual transmission, breaks the essential link between blameworthiness and punishment. It also perpetuates stigma that undermines public health goals and violates basic principles of justice.

This Article unfolds as follows. Part I situates HIV criminalization laws in their historical context, showing how stigma and fear during the AIDS crisis led to their enactment and persistence despite medical advances. Part II examines how mandatory sex offender registration for certain HIV-related convictions extends the punitive reach of these laws, imposing severe consequences that disrupt the daily lives of the registrants. Despite its significant impact, this aspect of HIV criminalization has received remarkably little scholarly attention.

Part III applies a punishment theory framework to challenge these registration requirements, contending they violate fundamental principles of criminal law by being disproportionate, disconnected from culpability, and lacking a public safety rationale. Part IV argues for repealing HIV-specific criminal statutes that impose strict liability or mandate sex offender registration and, where repeal is not feasible, for reforming these laws to reflect principles of intent and proportionality.

By examining this overlooked dimension of HIV criminalization, this Article offers a novel contribution to the legal scholarship on punishment. Reform is vital in these cases so that criminal punishment can accurately reflect the scientific reality of those individuals living with HIV while respecting the core principles of justice that theoretically guide our system of punishment.

I. The Enduring Burden of HIV-Based Crimes

Reform efforts over the past decade might suggest that HIV criminalization is a problem receding into the past. Indeed, several states have amended or repealed their statutes, and public health advocates have successfully pushed for more evidence-based approaches.[39] However, more reform efforts are urgently needed. As of 2023,

38. *See* Stanley E. Grupp, Theories of Punishment 3–10 (1971) (discussing how retribution is a theory of punishment grounded in deserved culpability rooted in morality and how deterrence and rehabilitation prioritize proportionality and harm prevention); Michael Cavadino et al., The Penal System: An Introduction 37–46 (6th ed. 2020).

39. Recently, at least fourteen states have modernized or repealed their HIV criminalization statutes. *See Criminal Justice: HIV Criminalization Laws*, Movement Advancement Project (May 22, 2025), https://www.lgbtmap.org/img/maps/citations-hiv-criminalization.pdf [https://perma.cc/27DW-4N4F]. Those states are California, Colorado, Georgia, Illinois, Iowa, Maryland, Michigan, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Virginia, and Washington. *Id.*; *HIV and STD Criminal Laws*, *supra* note 11.

thirty-four states still criminalized conduct by people living with HIV, and several retained HIV-specific provisions drafted during the height of AIDS hysteria.[40]

Much has been written about the flaws of these laws, including their medical inaccuracy, stigmatizing effects, discouraging effect on testing, and disparate enforcement.[41] Rather than revisiting these well-documented critiques, this Part explains why HIV criminalization cannot be dismissed as a closed chapter in American legal history. It shows how these laws were drafted in an atmosphere of fear and moral condemnation during the AIDS panic of the 1980s and 1990s and argues that many of those features persist in today's statutes. Even as science advanced, lawmakers often refused to reform these laws in line with medical reality.

Section A recounts how the AIDS crisis produced fear-based legislation that cast people with HIV as threats to society. Section B discusses transmission and treatment only insofar as necessary to highlight that many of these laws discount modern science. Section C surveys the types of HIV criminalization statutes still in force, demonstrating they often criminalize behavior that has minimal risk or is consensual. Finally, Section D illustrates how constitutional challenges to these laws have consistently failed in the courts.

A. AIDS Epidemic and Mass Hysteria

When the first HIV cases were reported in the early 1980s,[42] America responded with fear and blame. The disease quickly became

40. *HIV and STD Criminal Laws*, *supra* note 11.

41. *See, e.g.*, Ralf Jürgens et al., *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 Reprod. Health Matters 163, 165–66 (2009); Blecher-Cohen, *supra* note 27, at 1575 ("Many state laws are also vague and overbroad, vesting significant discretion with law enforcement officials and prosecutors. As a result, HIV-criminalization statutes can be discriminatorily enforced against communities that are already overpoliced."); Perone, *supra* note 26, at 383–85; Mark A. Wainberg, Editorial, *HIV Transmission Should Be Decriminalized: HIV Prevention Programs Depend on It*, *5* Retrovirology 108, 109 (2008); *see also HIV Criminalization Reform in California: What Does It Mean for Me?,* Lambda Legal, https://lambdalegal.org/wp-content/uploads/2018/01/faq_for_new_ca_law_sb_239.pdf [https://perma.cc/T4VS-5J2Q] ("[L]aws which unnecessarily criminalize HIV are a disincentive to testing and engaging in care. You can't be prosecuted for knowingly spreading HIV if you never knew that you were HIV-positive in the first place!").

42. *See HIV and AIDS Timeline*, Ctrs. for Disease Control & Prevention (Oct. 21, 2020), https://stacks.cdc.gov/view/cdc/106722/cdc_106722_DS1.pdf [https://perma.cc/Z4TK-QR3F] (documenting HIV in the United States from 1981 to 2020); *see also About HIV,* Ctrs. for Disease Control & Prevention (Jan. 14, 2025), https://www.cdc.gov/hiv/about/?CDC_AAref_Val=https://www.cdc.gov/hiv/basics/

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associated with already marginalized communities, such as gay men,[43] people who use injection drugs,[44] and sex workers.[45] Politicians and the media routinely invoked HIV as punishment for purportedly immoral behavior. Terms like "gay cancer,"[46] "GRID,"[47] and "gay compromise syndrome"[48] entered public discussion, cementing the idea that HIV resulted from a moral failing.[49]

As cases appeared among heterosexuals, anxiety spread to the broader public.[50] Widespread fear of the outbreak led people to demand drastic measures, including quarantines and forced testing.[51] One particularly extreme proposal came from William F. Buckley Jr., who argued in a widely read op-ed that people diagnosed with AIDS should be forcibly tattooed on the forearm to warn needle users and on the buttocks to "protect" other homosexual men.[52]

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whatishiv.html [https://perma.cc/5MXF-AW2P] (providing an overview of HIV's genesis, symptoms, and treatment).

43. *See AIDS Crisis Timeline,* HISTORY (Sep. 29, 2025), https://www.history.com/topics/1980s/hiv-aids-crisis-timeline [https://perma.cc/Q4FQ-W7XQ]; Elizabeth Fee & Nancy Krieger, *Understanding AIDS: Historical Interpretations and the Limits of Biomedical Individualism*, 83 AM. J. PUB. HEALTH 1477, 1477–79 (1993) (explaining the paradigm of AIDS as a "gay plague" and the responses of the public, scientists, and the gay and lesbian communities to the rise of AIDS).

44. *Why the HIV Epidemic Is Not Over,* WORLD HEALTH ORG., https://www.who.int/news-room/spotlight/why-the-hiv-epidemic-is-not-over [https://perma.cc/SC2V-J4AC] ("At the beginning of the 1980s, before HIV had been identified as the cause of AIDS, the infection was thought to only affect specific groups, such as gay men in developed countries and people who inject drugs.").

45. Perone, *supra* note 26, at 372.

46. *See* Lou Chibbaro Jr., *'Gay Cancer' Focus of Hearing*, WASH. BLADE, Apr. 16, 1982, at A-13.

47. *See AIDS Crisis Timeline*, *supra* note 43 (identifying the article that coined the term "Gay-Related Immune Deficiency" ("GRID")).

48. Robert O. Brennan & David T. Durack, *Gay Compromise Syndrome*, 318 LANCET 1338, 1338 (1981).

49. *See* Larry O. Gostin, *Public Health Strategies for Confronting AIDS: Legislative and Regulatory Policy in the United States*, 261 JAMA 1621, 1621 (1989) (emphasizing that the main groups tending to have HIV are "disfavored populations," making society less accepting of the disease and those people living with it); *see also* RICHARD PARKER ET AL., HORIZONS PROGRAM, HIV/AIDS-RELATED STIGMA AND DISCRIMINATION: A CONCEPTUAL FRAMEWORK AND AN AGENDA FOR ACTION 7 (2002).

50. *See Epidemiologic Notes and Reports: Immunodeficiency Among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS) — New York*, 31 MORBIDITY & MORTALITY WKLY. REP. 697, 697–98 (1983) (CDC report describing AIDS-related immunodeficiency in female partners of men with AIDS and suggesting possible heterosexual transmission).

51. PARKER ET AL., *supra* note 49, at 5.

52. *See* William F. Buckley Jr., Opinion, *Crucial Steps in Combating the AIDS Epidemic: Identify All the Carriers*, N.Y. TIMES, Mar. 18, 1986, at A-27 ("Everyone detected with AIDS should be tattooed in the upper forearm, to protect common-needle users, and on the buttocks, to prevent the victimization of other homosexuals.").

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When state legislatures began drafting HIV criminalization statutes in the late 1980s and early 1990s, they did so in this atmosphere of misinformation and prejudice.[53] People with HIV were routinely portrayed as dangerous in their communities, a view policymakers echoed.[54] Legislative hearings focused heavily on protecting the public from individuals portrayed as sexually irresponsible or deceptive, such arguments reflecting longstanding stereotypes about gay men, sex workers, and people who use drugs.[55] Although these laws were formally framed as public health measures, the legislative records and media narratives together reveal how they also served to express moral condemnation of homosexuality under the guise of disease control.

B. Transmission and Treatment: The Ignored Science

Medical science has fundamentally changed our understanding of the disease. Over the past forty years, research has transformed HIV from a near-certain death sentence to a manageable chronic condition.[56] Modern research makes clear that HIV is far harder to transmit than early

53. *See* J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & Behav. 997, 1000 fig. 1 (2014) (graphically displaying state statutes criminalizing HIV exposure from 1986 to 2011); *HIV and STD Criminal Laws*, *supra* note 11 (providing the timing of HIV-specific criminal exposure law implementation).

54. *See, e.g.*, Korcok, *supra* note 4, at 1241, 1243 (finding that during the early stages of the AIDS epidemic, city officials responded by "hand-deliver[ing] letters to known AIDS victims warning them of felony charges if they continue[d] to engage in sexual activity," keeping "thousands of children . . . out of schools for fear of catching AIDS," and ordering insurance companies and underwriters to "screen applicants for high risk AIDS factors" such as being a single male aged 20–49 living in a city with "unusually high populations of AIDS victims"). These responses came to be recognized as symptoms of AIDS "hysteria." *Id.* at 1241.

55. *See* The Presidential Comm'n on the Hum. Immunodeficiency Virus Epidemic, Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 130 (1988) (devoting an entire section to criminalizing HIV transmission for individuals "who knowingly conduct themselves in ways that pose a significant risk of transmission to others" and suggesting states adopt HIV-specific criminalization statutes); *HIV and STD Criminal Laws*, *supra* note 11; Claudia Wallis, *Medicine: The Deadly Spread of AIDS*, TIME (1982), https://time.com/archive/6882683/medicine-the-deadly-spread-of-aids/ [https://perma.cc/VPR2-RPM2] (noting that, in 1982, once the CDC realized that AIDS must be bloodborne or sexually contracted, the CDC announced that AIDS was most common among homosexual men, injection drug users, Haitians, and people with hemophilia and began to recommend prevention strategies).

56. *See* Helena M. Swinkels, Andrew D. Nguyen & Peter G. Gulick, HIV and AIDS 2 (2024) (recognizing that the availability of antiretroviral therapies has, along with advances in treatment of HIV generally, "rendered the disease a manageable chronic illness").

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laws assumed, as we now understand that everyday contact poses no risk. HIV can only be transmitted when certain bodily fluids (blood, semen, pre-seminal fluid, rectal or vaginal secretions, or breast milk) from a person living with HIV enter the bloodstream or mucous membranes of another person.[57] In the United States, sexual transmission occurs almost exclusively through unprotected anal or vaginal intercourse or the sharing of injection equipment.[58]

Critically, the risk of sexual transmission drops dramatically—and in many cases to zero—when a person living with HIV is on antiretroviral therapy and maintains an undetectable viral load.[59] The medical consensus is unequivocal: "Undetectable = Untransmittable."[60] The science therefore demonstrates that a person on sustained treatment who has achieved viral suppression *cannot* sexually transmit HIV.[61] For individuals who are not living with HIV, additional prevention tools further reduce risk. Pre-Exposure Prophylaxis ("PrEP") lowers the chance of acquiring HIV from sex by approximately 99% when taken

57. *See How HIV Spreads*, Ctrs. for Disease Control & Prevention (Nov. 25, 2024), https://www.cdc.gov/hiv/causes/index.html [https://perma.cc/HT74-QPQK] (describing how HIV is passed from one person to another).

58. *See* Sandra M. Gonzalez et al., *Mucosa: Key Interactions Determining Sexual Transmission of the HIV Infection*, 10 Frontiers in Immunology 1, 1–4 (2019) (explaining how differences in mucosal epithelial structure, the outer layer of organ tissue and "[t]he first barrier for viral entry," in the anus, vagina, penis, and mouth contribute to HIV infection after exposure); *id.* at 3 ("[T]he anorectal epithelium exhibits the highest probability of HIV-transmission (0.3-5%) in comparison to the female (0.05-0.5%) and male genital epithelium (0.04-0.14%) . . . , followed by the oral mucosa (0.01%) that is the least susceptible epithelium . . . ." (internal footnotes omitted)); *see also* James Wilton, *Putting a Number on It: The Risk from an Exposure to HIV*, Stan. Health Care, https://stanfordhealthcare.org/medical-conditions/sexual-and-reproductive-health/hiv-aids/causes/risk-of-exposure.html [https://perma.cc/UF8K-HMV7] (indicating that receptive anal sex has the highest risk of HIV infection followed by receptive vaginal sex).

59. Effective antiretroviral therapy ("ART") can suppress a person's viral load to undetectable levels, eliminating the risk of sexual transmission. ART refers to the daily combination of antiretroviral medications taken by individuals who are HIV-positive to treat their HIV infection. Viral load represents the amount of virus in a person's blood. *10 Things to Know*, *supra* note 19.

60. Margaret M. Paschen-Wolff et al., *HIV Treatment Knowledge in the Context of "Treatment as Prevention" (TasP)*, 24 AIDS & Behav. 2984, 2984 (2020).

61. *Risk of Sexual Transmission of HIV from a Person Living with HIV Who Has an Undetectable Viral Load: Messaging Primer & Consensus Statement*, Prevention Access Campaign (Jan. 10, 2018), https://www.preventionaccess.org/wp-content/uploads/2021/07/UU-Consensus-Statement.pdf [https://perma.cc/M5T9-9SCD] ("Once you begin [ART], you stay on therapy, with full virologic suppression you not only have protection from your own HIV . . . but you also are not capable of transmitting HIV to a sexual partner. With successful antiretroviral treatment, that individual is no longer infectious." (quoting an interview with Carl W. Dieffenbach, Ph.D., Director, Division of AIDS, NIAID, NIH)).

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consistently, and Post-Exposure Prophylaxis ("PEP"), when started within seventy-two hours of a potential exposure, is highly effective at preventing infection.[62] These tools, along with newer biomedical advances, including long-acting prophylaxis and emerging biannual injectables,[63] mean that the likelihood of transmission in consensual adult sexual relationships is exceedingly low, particularly when either partner is using modern prevention methods. Public health authorities, including the CDC, endorse "treatment as prevention" as a cornerstone of fighting HIV.[64]

Yet many criminal statutes remain frozen in time, ignoring this medical consensus.[65] They continue to punish people for behaviors that pose no realistic risk of transmission.[66] Some statutes criminalize nondisclosure even when a person is undetectable.[67] Others criminalize

62. *Preventing HIV with PrEP*, Ctrs. for Disease Control & Prevention (Jan. 18, 2024), https://www.cdc.gov/hiv/prevention/prep.html [https://perma.cc/RW6A-ERK6]; *Preventing HIV with PEP*, Ctrs. for Disease Control & Prevention (Dec. 2, 2024), https://www.cdc.gov/hiv/prevention/pep.html [https://perma.cc/39AK-FALM]; *HIV Prevention: Pre-Exposure Prophylaxis (PrEP)*, Nat'l Insts. of Health (July 3, 2025), https://hivinfo.nih.gov/understanding-hiv/fact-sheets/pre-exposure-prophylaxis-prep [https://perma.cc/89QM-6EHE].

63. *WHO Recommends Injectable Lenacapavir for HIV Prevention*, World Health Org. (July 14, 2025), https://www.who.int/news/item/14-07-2025-who-recommends-injectable-lenacapavir-for-hiv-prevention [https://perma.cc/3A6H-B6JN].

64. *See HIV Treatment as Prevention*, Ctrs. for Disease Control & Prevention (Oct. 24, 2024), https://www.cdc.gov/hivpartners/php/hiv-treatment/index.html [https://perma.cc/J24R-VELF]; Albert et al., *supra* note 20, at 675 ("There is minimal risk of transmission through vaginal and anal intercourse if the HIV-infected partner is on effective ART and a condom is used throughout intercourse. There is also a very low risk of transmission through vaginal and anal intercourse if the HIV-infected partner is on effective ART and a condom is not used.").

65. *See HIV Criminalization and Ending the HIV Epidemic in the U.S.*, *supra* note 18 (stating that, "[a]fter more than 40 years of HIV research and significant biomedical advancements to treat and prevent HIV, most HIV criminalization laws do not reflect current scientific and medical evidence"); *HIV and STD Criminal Laws*, *supra* note 11 (noting "many state laws are now outdated and do not reflect our current understanding of HIV" as some "criminalize behaviors that cannot transmit HIV—such as biting or spitting—and apply regardless of actual transmission, or intent").

66. *See What HIV Criminalization Means to Women in the U.S.*, Ctr. for HIV L. & Pol'y 1, https://www.hivlawandpolicy.org/sites/default/files/Women%20and%20HIV%20Criminalization.pdf [https://perma.cc/GC6N-VUHJ] (describing the situations in which a person living with HIV could be prosecuted under HIV criminalization laws). Moreover, some state statutes do not specify the types of activities to which they apply. *See, e.g.*, Okla. Stat. Ann. tit. 21, § 1192.1 (West 2026).

67. *See, e.g.*, Ark. Code Ann. § 5-14-123 (West 2025); Fla. Stat. Ann. § 384.24 (West 2025); La. Stat. Ann. § 14:43.5 (2018); Ohio Rev. Code Ann. § 2903.11(B) (West 2025); S.C. Code Ann. § 44-29-145 (2025).

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acts like biting or spitting, despite clear scientific evidence that these actions cannot transmit HIV.[68]

Lawmakers were not unaware of these advances. Nevertheless, efforts to modernize HIV criminal laws have often stalled due to political pressure and the enduring stigma surrounding HIV and sexuality.[69] Even where reform movements have succeeded, they typically required years of sustained advocacy from public health experts, LGBTQ+ organizations, and people living with HIV to counteract outdated perceptions of risk and public safety.[70] As a result, many statutes remain frozen in their original form, leaving people with HIV vulnerable to prosecution for conduct that modern medicine now recognizes as posing little to no risk.

C. The Rise and Persistence of HIV Criminalization Laws

HIV criminalization laws were drafted during the peak of the AIDS crisis.[71] States rushed to criminalize perceived exposure risks, often drawing no distinction between consensual sex and violent assault.[72]

One early example, *Brock v. State*, shows how fear of the disease informed charging decisions.[73] An HIV-positive inmate who bit an officer during a scuffle was charged with attempted murder and assault with a deadly weapon on the theory that his teeth were a weapon solely because he had HIV.[74] Even though the Alabama appellate

68. Even though the CDC disputes the likelihood of transmitting HIV by biting someone, several states continue to prosecute and criminalize HIV exposure due to spitting or biting. *See* Campbell v. State, No. 05-08-00736-CR, 2009 WL 2025344, at *1, *3 (Tex. App. July 14, 2009); Weeks v. State, 834 S.W.2d 559, 561, 565 (Tex. App. 1992); Carrie Griffin Basas, *The Sentence of HIV*, 101 Ky. L.J. 543, 561 (2013).

69. *See* Carpenter, *supra* note 22, at 12–16 (detailing how moral panic and public misperceptions shaped early HIV laws and continue to influence policymakers). *See generally* Lawrence O. Gostin, *The AIDS Litigation Project: A National Review of Court and Human Rights Commission Decisions, Part II: Discrimination*, 263 JAMA 2086 (1990) (discussing political pressures and public fear surrounding HIV legislation).

70. *See, e.g.*, Iowa Code Ann. § 709D.3 (West 2025) (modernizing HIV exposure statute); Cal. Health & Safety Code § 120290 (West 2026) (amended by S.B. 239, 2017) (reclassifying HIV exposure from a felony to a misdemeanor); S.B. 16-146, 2016 Gen. Assemb., Reg. Sess. (Colo. 2016) (repealing several HIV-specific criminal provisions after expert testimony from medical and public health professionals); Perone, *supra* note 26, at 394–95 (discussing comprehensive reform campaigns required to counteract outdated beliefs about transmission).

71. *See* Lehman et al., *supra* note 53, at 1000 fig. 1 (graphically displaying state statutes criminalizing HIV exposure from 1986 to 2011).

72. *HIV and STD Criminal Laws*, *supra* note 11 (providing the timing of HIV-specific criminal exposure law implementation); Sourcebook, *supra* note 12.

73. 555 So. 2d 285, 286–88 (Ala. Crim. App. 1989).

74. *Id.* at 286–87.

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court ultimately rejected that theory,[75] similar logic underpins many state statutes.[76]

Congress's Ryan White CARE Act of 1990 reinforced this punitive approach by conditioning federal HIV funding on states' adoption of laws addressing the criminal transmission of HIV.[77] Although the provision was designed to account for intentional harm, it effectively encouraged states to adopt HIV-specific criminal statutes as a prerequisite for receiving essential public health resources.[78] That fiscal pressure ensured that state governments would continue criminalizing HIV, even as scientific advances later undermined the assumptions about risk on which many of these laws were based.[79]

The Presidential Commission on the HIV Epidemic[80] itself warned in 1988 that criminal laws must target scientifically proven transmission methods and only be used as a last resort.[81] It also cautioned about the dangers of enacting policy that intrudes into private sexual conduct[82] and discriminatory enforcement.[83] These warnings largely went unheeded.

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75. *Id.* at 286–88.

76. *See supra* note 68.

77. *See* Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576, 603 (codified throughout 42 U.S.C.). Ryan White, an Indiana teenager, received an infected blood transfusion, which caused him to be diagnosed with AIDS. Howard Markel, *Remembering Ryan White, the Teen Who Fought Against the Stigma of AIDS*, PBS NEWS (Apr. 8, 2016, at 08:32 ET), https://www.pbs.org/newshour/health/remembering-ryan-white-the-teen-who-fought-against-the-stigma-of-aids [https://perma.cc/UV39-BL64]. As a result of this diagnosis, he became an internationally renowned activist for destigmatizing HIV/AIDS. *See id.* Following White's untimely death at age eighteen in 1990, Congress passed an Act bearing his name. *Id.*

78. Ryan White Comprehensive AIDS Resources Emergency Act § 2647(a) (amending the Public Health Service Act) (requiring that states protect against intentional transmission by criminalizing "mak[ing] a donation of blood, semen, or breast milk," "engag[ing] in sexual activity," or "inject[ing] himself or herself with a hypodermic needle and subsequently provid[ing] the needle to another person for purposes of hypodermic injection").

79. *See id.*; Raymond C. O'Brien, *A Legislative Initiative: The Ryan White Comprehensive AIDS Resources Emergency Act of 1990,* 7 J. CONTEMP. HEALTH L. & POL'Y 183, 203 (1991) (discussing criminal charges brought in Florida and South Carolina).

80. *See* THE PRESIDENTIAL COMM'N ON THE HUM. IMMUNODEFICIENCY VIRUS EPIDEMIC, *supra* note 55, at 130 (suggesting the criminalization of HIV exposure).

81. *Id.* The Commission warned states that "criminal sanctions for HIV transmission must be carefully drawn, must be directed only towards behavior which is scientifically established as a mode of transmission, and should be employed only when all other public health and civil actions fail to produce responsible behavior." *Id.*

82. *Id.* (voicing concerns that "[f]ear of intrusive policing of private sexual activity" would be an "obstacle[] to progress in criminalizing the transmission of HIV").

83. *Id.* (recognizing that in the criminalization of the transmission of HIV there is a "danger of selective prosecution and misuse of the criminal law to harass unpopular groups").

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As of 2023, thirty-four states continued to criminalize a wide range of conduct by people living with HIV, often without requiring proof of intent to transmit the virus or evidence that transmission was even possible.[84] Most statutes only require that a person knew their HIV-positive status and engaged in a listed act such as consensual sexual intercourse,[85] donating blood or tissue,[86] or, in some jurisdictions, conduct like biting or spitting that poses no realistic risk of transmission.[87] Some laws appear designed to reduce transmission risk;[88] however, many states also impose liability even when a person used precautions such as condoms or had an undetectable viral load—conditions under which medical science recognizes that sexual transmission cannot occur.[89]

States also differ in their requirements for proving actual transmission or intent, with many not requiring either.[90] Laws often punish the failure to disclose HIV status rather than any actual harm,[91]

84. *HIV and STD Criminal Laws*, *supra* note 11. Many of these state laws criminalize behaviors that cannot transmit HIV and apply regardless of actual transmission or intent. *Id.* For a compilation of each state and U.S. territory's statutes and case law related to HIV criminalization and a more in-depth analysis of state responses to HIV criminalization, see SOURCEBOOK, *supra* note 12. The vast majority of these states only require that HIV-infected persons have intended to engage in the act that exposed another to HIV (e.g., sexual activity, needle-sharing). They do not require that the person intended to transmit the virus. *See, e.g.*, *id.* at Florida 1. It is also important to recognize that this area of law has changed rapidly over the last few years as more states have updated their HIV criminalization statutes. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.5210(3) (West 2025) (reducing nondisclosure of one's seropositive status to a misdemeanor if there is no transmission of HIV).

85. Twenty-seven states fell into this category in 2023. *HIV and STD Criminal Laws*, *supra* note 11. For a more in-depth analysis of state responses to HIV criminalization, see SOURCEBOOK, *supra* note 12.

86. Thirteen states fell into this category in 2023. *HIV and STD Criminal Laws*, *supra* note 11. For a more in-depth analysis of state responses to HIV criminalization, see SOURCEBOOK, *supra* note 12.

87. *HIV and STD Criminal Laws*, *supra* note 11; *see, e.g.*, SOURCEBOOK, *supra* note 12, at Oklahoma 2.

88. As of 2023, additional criminalized behaviors included sharing needles (ten states), anal sex (eight states), prostitution or solicitation (six states), vaginal sex (nine states), oral sex (seven states), and sharing sex objects (three states). *HIV and STD Criminal Laws*, *supra* note 11.

89. In Alaska, for instance, "[a]n enhanced sentence can be imposed even if the defendant's viral load is low or non-detectable, if protection, such as a condom was used, or if the crime involved penetration with a body part or object that cannot transmit HIV." SOURCEBOOK, *supra* note 12, at Alaska 1.

90. *See generally* SOURCEBOOK, *supra* note 12 (comparing state HIV criminalization statutes).

91. Overall, in 2023, thirteen states "require[d] people with HIV who [were] aware of their status to disclose their status to sex partners, and [four] states require[d] disclosure to needle-sharing partners." *HIV and STD Criminal Laws*, *supra* note 11; *see, e.g.*, ARK. CODE ANN. § 5-14-123 (West 2025); LA. STAT. ANN. § 14:43.5 (2018); MICH. COMP. LAWS ANN. § 333.5210 (West 2025); MO. ANN. STAT. § 191.677 (West 2025); OHIO

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making consensual sexual relationships legally risky for people with HIV, even when their partners may already know their status or when transmission is medically impossible.[92]

The main defense available to people charged under these laws is disclosure.[93] However, proving that private conversations about HIV took place is notoriously difficult.[94] These cases frequently come down to one person's word against another's, creating enormous leverage for prosecutors.[95] Accordingly, people charged under HIV criminalization

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Rev. Code Ann. § 2903.11 (West 2025); Okla. Stat. Ann. tit. 21, § 1192.1 (West 2026); S.C. Code Ann. § 44-29-145 (2025).

92. In 2023, thirteen states did not have a specific statute to prosecute people living with HIV for potential exposure. Criminal charges related to HIV exposure that occur in these states, however, are often prosecuted under general criminal laws such as attempted murder or aggravated assault. *See HIV and STD Criminal Laws*, *supra* note 11 (noting which states do not have an HIV or STD-specific statute to criminalize HIV and which states use general criminal laws like aggravated assault instead); *see, e.g.*, Sourcebook, *supra* note 12, at Texas 1.

93. *See, e.g.*, Sourcebook, *supra* note 12, at Idaho 1 ("It is an affirmative defense [in Idaho] if the defendant can prove that the sexual activity was consensual and their partner was informed 'of the risk of such activity.'" (citation omitted)); *id.* at Missouri 2 (People living with HIV in Missouri "may assert as a defense that the person claiming exposure was aware that the person accused was living with the health condition at issue and therefore effectively consented to the conduct. However, disclosure of HIV status before sexual intercourse is often difficult to prove retroactively." (citation omitted)); *id.* at Ohio 1 ("The only affirmative defense to prosecution [in Ohio] is the disclosure of one's HIV status to sexual partners prior to engaging in any of these activities. The disclosure must be made prior to the first initial act of such conduct and using condoms or other forms of protection is not a defense.").

94. *HIV Criminalization and Women*, Well Project (Apr. 4, 2024), https://www.thewellproject.org/hiv-information/hiv-criminalization-and-women [https://perma.cc/JK78-9W4L] ("In the majority of known HIV criminalization cases across the globe, HIV transmission is not at issue in the case – only alleged HIV non-disclosure (a complainant claiming that their partner did not tell them that they were living with HIV), which pits the word of two partners against one another in court, and is almost impossible to truly prove. Although many criminal justice systems are meant to be based on ideals of due process and 'innocent until proven guilty,' those values and processes are weakened when people living with HIV are inherently seen as sexual predators and 'infectors' just for having a health condition."); Todd Heywood, *4 Stories: The Effects of HIV Criminalization on Sex and Intimacy*, Advocate (Apr. 1, 2013), https://www.advocate.com/print-issue/current-issue/2013/04/01/four-stories-effects-hiv-criminalization-sex-and-intimacy [https://perma.cc/TL4S-3DJ7] ("Who is to say, in a court of law, how and when I have disclosed to my partners my HIV status? . . . I protect from prosecution by disclosing my status each and every time, though without witnesses to my disclosure I worry that it would be impossible to prove in court.").

95. *See, e.g.*, State v. Gamberella, 633 So. 2d 595, 598–99 (La. Ct. App. 1993) (convicting a person with HIV of intentional exposure despite that man's testimony that he disclosed his HIV status to his girlfriend and wore condoms during sex). The man's girlfriend testified that after she became pregnant by the defendant following a condom use failure, they engaged in unprotected sexual intercourse on multiple occasions. She testified that she did not know his HIV status during the entire relationship. The

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statutes often plead guilty to avoid the risk of long prison sentences.[96] In one Georgia case, a woman was sentenced to eight years in confinement despite witness testimony that her partner knew her HIV status and despite local media coverage publicizing it.[97]

False accusations also pose serious risks, especially in the context of personal disputes.[98] Marcus Bennett, whose prosecution I once handled on appeal, has described in the press how his case arose after a breakup turned hostile, leading his former partner to report him to the police.[99]

Because of the severe penalties imposed under the HIV criminalization laws and because of the difficulty in proving disclosure, those accused often plead guilty regardless of their individual intent or any actual risk of transmission involved. The litigants who have risked trial in order to challenge the laws have largely failed.

D. Constitutional Challenges and Judicial Deference

Despite sustained criticism from scholars and advocates, courts have consistently upheld HIV criminalization statutes. Plaintiffs have argued that these laws violate the First Amendment (compelled disclosure),[100] the Eighth Amendment (cruel and unusual punishment),[101] and the Equal

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defendant was convicted and sentenced to ten years in prison with hard labor. *Id.* at 598–99, 608.

96. *Compare* COLO. REV. STAT. ANN. § 18-3-415.5(5)(b) (West 2025) (establishing a maximum penalty of life in prison), *with* VA. CODE ANN. §§ 18.2-67.4:1(A), 18.2-10(f) (West 2025) (stating that violating the Virginia HIV transmission statute is a class 6 felony, which is punishable by at least one year in prison).

97. *See* Ginn v. State, 667 S.E.2d 712, 713–14 (Ga. Ct. App. 2008) (affirming the lower court's ruling that there was sufficient evidence for the jury to conclude that Ginn did not disclose her HIV status to the victim before intercourse); *id.* at 714 (discussing the testimony of two witnesses who allegedly heard the conversation between Ginn and the victim regarding her HIV status).

98. *See What HIV Criminalization Means to Women in the U.S.*, *supra* note 66, at 2 ("Most of these cases have occurred among former sex partners. They turn into 'he said/she said' situations because people seldom have proof that they disclosed their HIV status to their partners before sex. Yet the burden of proof is on the accused person. You can be convicted on the basis of a lie by a former lover if you have no evidence showing that the charge is a lie.").

99. *See* Brief of Defendant, *supra* note 5.

100. The Iowa Supreme Court agreed that Iowa's HIV disclosure statute compelled speech the speaker would rather avoid (forcing the individual to reveal their positive status) but concluded the statute nevertheless survived strict scrutiny because the purpose of the statute was to discourage HIV transmission. State v. Musser, 721 N.W.2d 734, 741–45 (Iowa 2006); *see also* People v. Jensen, 586 N.W.2d 748, 759 (Mich. Ct. App. 1998) (government's interest in preventing the spread of AIDS and HIV outweighs any interest that an individual might have in nondisclosure).

101. *Musser*, 721 N.W.2d at 748, 757 (rejecting the argument that Iowa's HIV criminalization law, which carried a twenty-five-year prison sentence, constituted cruel and unusual punishment).

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Protection[102] and Due Process Clauses of the Fourteenth Amendment. Substantive due process challenges, in particular, face significant obstacles after *Dobbs v. Jackson Women's Health Organization*, which sharply limited the recognition of unenumerated rights not "deeply rooted" in the nation's history and tradition.[103] Even before *Dobbs*, however, courts rejected the argument that HIV criminalization statutes infringe on an individual's right to privacy by making their sexual conduct a crime because the states have an "overriding, legitimate[,] and compelling interest in preserving the life of its citizens."[104]

Recent caselaw reinforces this trend. In *United States v. Skrmetti*, the Supreme Court upheld Tennessee's ban on gender-affirming care under an exceptionally deferential form of rational basis review by relying on the state's broad authority to regulate the health of minors.[105] Although *Skrmetti* involved a different context, its reasoning highlights a judicial posture that grants states wide latitude whenever they claim to be protecting public health or vulnerable groups.[106] This approach mirrors the deference courts have long shown toward HIV criminalization statutes,[107] even when those laws impose severe penalties for nondisclosure.[108]

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102. Howton v. State, 619 S.W.3d 29, 36 (Ark. Ct. App. 2021) (compared to other incurable sexually transmitted diseases, "the legislature is justified in treating HIV differently than other diseases because HIV is both incurable and fatal without treatment and because of the significant medical differences between HIV and other diseases").

103. 597 U.S. 215, 231 (2022).

104. *Jensen*, 586 N.W.2d at 756; *see also Musser*, 721 N.W.2d at 748 ("[I]t cannot be disputed that one considering having sexual intercourse with another would want to know whether the other person is [HIV-positive] prior to engaging in such intimate contact. Consent in the absence of such knowledge is certainly not a full and knowing consent as was present in *Lawrence* [*v. Texas*].").

105. 605 U.S. 495, 522–23 (2025) (accepting Tennessee's argument that the challenged statute was grounded in a legitimate interest in protecting minors from physical and emotional harm and characterizing puberty blockers and hormone treatments as experimental interventions that carry significant risks, including the possibility of irreversible effects and later regret).

106. *See id.*

107. *See* State v. Batista, 64 N.E.3d 498, 503 (Ohio Ct. App. 2016) (holding that Ohio's HIV statute withstands strict scrutiny under the First and Fourteenth Amendments); State v. Gamberella, 633 So. 2d 595, 604 (La. Ct. App. 1993) ("No one can seriously doubt that the state has a compelling interest in discouraging the spread of the HIV virus. Forcing an infected person to inform all of his sexual partners so the partner can make an informed decision prior to engaging in sexual activity furthers the state's interest in preventing the spread of the virus.").

108. *See Musser*, 721 N.W.2d at 741, 744–45 (upholding Iowa's HIV law that carried a twenty-five-year prison sentence because it merely compelled a defendant to "privately inform a potential sexual partner of his or her condition" and there was not a "less restrictive way in which the state could accomplish its goal").

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These decisions collectively demonstrate how states have been able to consistently defend their HIV criminalization laws under a purported interest in regulating public health, even though those laws ignore modern science regarding the transmission and treatment of HIV.

II. The Unexamined Consequence: Sex Offender Registration Requirements for HIV Convictions

As demonstrated, legal scholars have consistently attacked HIV criminalization laws as unconstitutional and untethered from medical advancements. In this substantial body of scholarship, though, a striking omission remains. Specifically, too little attention has been given to the devastating requirement in some states that people convicted under HIV-specific laws register as sex offenders.

Currently, five states explicitly mandate sex offender registration for certain HIV-related convictions,[109] and the sixth state leaves the decision to the sentencing court.[110] And because thirty-eight states have reciprocal provisions in their own sex offender registration laws, a person required to register in one state carries that label to any new state where they live.[111] Although formally classified as a civil regulatory measure, sex offender registration operates in practice as a severe punishment, branding people as sexual predators, in some instances, for consensual adult relationships that may not involve any intent to harm or actual risk of transmission.

Despite substantial scholarship critiquing HIV criminalization itself, the devastating impact of sex offender registration in this context remains unexamined. This Part focuses on that overlooked aspect.

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109. Those states are Louisiana, Ohio, South Dakota, Tennessee, and Washington. *See* La. Rev. Stat. Ann. §§ 14:43.5(A), 15:536(A), 15:541(24)(a), 15:542(A)(1)(a) (West 2025); Ohio Rev. Code Ann. §§ 2950.01(G)(1)(c), 2950.07(B)(1) (West 2025); S.D. Codified Laws §§ 22-24B-1(20), 22-24B-2 (2026); Tenn. Code Ann. §§ 40-39-202(19), 40-39-212 (West 2025); Wash. Rev. Code §§ 9.94A.507(1)(a)(ii), 9A.36.011(1)(b), 9A.44.130 (2023). The Washington registration requirement only applies to people who transmit HIV to a child or a vulnerable adult with an intent to harm. Wash. Rev. Code §§ 9A.44.130, 70.24.027(3)(c) (2024).

110. In Arkansas, the decision whether to impose sex offender registration is left to the sentencing court. *See* Ark. Code Ann. §§ 5-14-123, 12-12-903(12)(A), 12-12-905(a)(1)–(4), 12-12-906(a)(1)(A)(ii) (West 2025). For a complete list of registration requirements, see *id.* §§ 12-12-908, 12-12-909(a)(1), 12-12-909(b)(1)(A), 12-12-909(b)(1)(B), 12-12-909(b)(1)(D).

111. *See, e.g.*, Ala. Code § 15-20A-5(38) (West 2026) ("Any offender determined in any jurisdiction to be a sex offender shall be considered a sex offender in this state.").

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A. Sex Offender Registration Laws: Purpose and Scope

Sex offender registration laws emerged in response to horrific crimes against children that shocked the nation.[112] High-profile cases in the 1980s and 1990s caused the public to demand a new way to track and control sexual predators.[113] These registration laws were not intended to track people living with HIV.

Federal legislation, including the Jacob Wetterling Act,[114] Megan's Law,[115] and the Adam Walsh Child Protection and Safety Act,[116]

112. Huffman, *supra* note 36, at 244–45.

113. *Id.*; *see also* Jill S. Levenson & David A. D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIM. JUST. POL'Y REV. 168, 172–74 (2007) (explaining that registration policies were designed to assist law enforcement personnel with tracking and apprehending potential suspects, notification policies were enacted to inform communities, residency restrictions seek to keep sex offenders away from children, and GPS monitoring allows sex offenders to remain in their communities while being under constant surveillance).

114. Eleven-year-old Jacob Wetterling was abducted in front of three other boys in 1989 and was found deceased in 2016. *JWRC History*, ZERO ABUSE PROJECT: JACOB WETTERLING RES. CTR., https://zeroabuseproject.org/victim-assistance/jwrc/who-we-are/history/ [https://perma.cc/7PW5-WKGM]. With the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("JWA") in 1994, Congress established a baseline of standards for how to regulate and monitor sex offenders. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038–42 (1994) (codified at 42 U.S.C. § 14071) (repealed 2006) (establishing federal guidelines for state sex offender registration laws). The JWA required each of the fifty states to adopt sex offender registration laws within three years of the Act's passage. *Id.* § 170101(f). States that did not comply were faced with a decrease in federal funding. *See id*. Although congressional action created national sex offender legislation, there were a few states that passed sex offender registration laws much earlier. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 887 n.4 (1995) (noting that the first states to introduce sex offender registration laws were Alabama, Arizona, Arkansas, California, Illinois, and Nevada, all between 1947 and 1987).

115. Seven-year-old Megan Kanka was sexually assaulted and murdered in 1994 by Jesse Timmendequas, a neighbor who, unbeknownst to Megan's family, had prior convictions for sexual assault against children. State v. Timmendequas, 737 A.2d 55, 64–73, 84 (N.J. 1999). In 1996, under the moniker "Megan's Law," Congress amended the Jacob Wetterling Act to include the dissemination of registration information to the community through community notification statutes. Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996) (codified at 42 U.S.C. § 14071). The Act provided that the designated state law enforcement agency "shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section." *Id.*

116. Six-year-old Adam Walsh was abducted and murdered in 1981. Patricia Davis, *Adam's Story: How His Parents Galvanized a Missing Children's Movement*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN: BLOG (July 26, 2024), https://www.missingkids.org/blog/2024/adams-story-how-his-parents-galvanized-missing-childrens-movement [https://perma.cc/VYG3-5C3B]. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act ("AWA"). Adam Walsh Child Protection

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created nationwide standards[117] and funding incentives[118] for states to implement registration systems.[119] These laws require registrants to provide detailed[120] personal information,[121] to appear regularly in person

and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 42 U.S.C.). The Act has been the subject of considerable scholarly criticism. *See, e.g.*, Steven J. Costigliacci, Note, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 184 (2008) (criticizing the lack of flexibility in determining registrants' status under the AWA); David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 628 (2006) (arguing that residency restrictions have not been proven effective); Emily A. White, Note, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1792–93 (2008) (noting a split among district courts regarding the retroactive applicability of provisions of the AWA).

117. Within the AWA is the Sex Offender Registration and Notification Act ("SORNA"). Sex Offender Registration and Notification Act, Pub. L. No. 109-248, tit. I, 120 Stat. 590 (2006) (codified as amended at 34 U.S.C. §§ 20901–20932). SORNA established "the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program," commemorating three of the most notable victims of sex offenders. *See* 34 U.S.C. § 16902 (2011). SORNA includes a set of regulations and punishments for sex offenders and a comprehensive national system for their registration. *See* 34 U.S.C. §§ 20911–20932.

118. States that did not comply with the federal mandate to create sex offender registries were faced with a decrease in federal funding. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, § 170101(f).

119. *Compare* MICH. COMP. LAWS § 28.728(7) (2025) (The internet registry available to the public "shall provide for a search by name, village, city, township, and county designation, zip code, and geographical area."), *with* N.Y. CORRECT. LAW § 168-l(6)(a) (McKinney 2025) (providing that, for low-risk in-state offenses, law enforcement may disseminate information—including the offender's photograph, crime of conviction, zip code, employment or enrollment at a college, and any "special conditions imposed on the offender"—to entities with "vulnerable populations").

120. Convictions for a sex offense generally require registration. However, the length of time an individual must be registered, how often the individual must attend in-person meetings with law enforcement, and the type of information an offender must disclose depend on the type of sex offense and other factors. *See* 34 U.S.C. §§ 20914, 20915, 20918.

121. SORNA requires every sex offender to register in the jurisdictions where the offender lives, works, and goes to school. 34 U.S.C. § 20913(a). Registration includes providing specified information to law enforcement, which will be included in the jurisdiction's sex offender registry, for a period of fifteen years to life, depending on the level of the offense. *Id.* §§ 20914(a), 20915(a). The Act authorizes the Attorney General to collect certain internet-related information, as determined by the Attorney General, to be included in a federal registry. *See id.* §§ 20914(a)(7), 20916(a). SORNA requires each jurisdiction to make the registry information available to the public on the internet. *Id.* § 20920(a); *see, e.g.*, MICH. COMP. LAWS § 28.728(7) ("The department shall make the public internet website available to the public by electronic, computerized, or other similar means accessible to the public . . . [which] shall provide for a search by name, village, city, township, and county designation, zip code, and geographical area.").

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at local law enforcement offices, and to face criminal penalties for any failure to comply.[122]

Alongside the self-reporting obligations, these laws also established public online databases designed to warn communities of the presence of dangerous sexual offenders.[123] In passing the federal registration laws, legislators sought to protect the public from individuals deemed to be at high risk of committing sexual violence, especially against children.[124] While the exact details vary by jurisdiction,[125] all states now maintain registries and impose extensive obligations on registered offenders.[126] These requirements can last decades or even a lifetime.[127]

B. How the Registry Works and Its Misapplication to HIV-Related Convictions

Statutory schemes often obscure the toll that registration takes on an individual, framing the regulations as nothing more than an administrative formality. What that formality requires, however, is reporting regularly to law enforcement, often in person, and providing extensive personal information, which may include their name, address, photograph,

122. In other words, registration requirements operate as criminal laws in that refusing to comply with a state's registration requirements produces criminal penalties. Under SORNA, if an offender fails to comply with the registration requirements espoused in the Act, the state must provide for a criminal penalty that includes a maximum term of imprisonment that is greater than one year. 34 U.S.C. § 20913(e) ("Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.").

123. SORNA established a national sex offender registry, which is accessible by the public on the internet. 34 U.S.C. §§ 20921–20922.

124. *See* Levenson & D'Amora, *supra* note 113, at 172 (explaining that registration policies were designed, in part, to keep sex offenders away from children); Huffman, *supra* note 36, at 244–45.

125. For example, offenders who are convicted in New York of any "sex offense" enumerated in the Act are required to register under the Sex Offender Registration Act ("SORA"). *See* N.Y. Correct. Law § 168-a(2)(a)–(c) (McKinney 2025). Offenders are classified as either level one (low risk), level two (moderate risk), or level three (high risk). *Id.* § 168-l(6). The risk-level classification determines both the length of time that the offender must register and the type of information about the offender that can be disseminated to law-enforcement agencies and the public under SORA's notification provisions. *Id.* §§ 168-h, l(6). For example, level two and level three offenders are included in a public directory of sex offenders accessible via the internet, while level one offenders are not. *Id.* § 168-q(1).

126. *See All Registries*, Dep't of Just.: Dru Sjodin Nat'l Sex Offender Pub. Website (Aug. 17, 2023), https://www.nsopw.gov/all-registries [https://perma.cc/BH3E-H25H].

127. 34 U.S.C. § 20915(a) (providing that "[a] sex offender shall keep the registration current for the full registration period[,]" which is fifteen years, twenty-five years, or a lifetime period depending on the severity of the crime, "excluding any time the sex offender is in custody or civilly committed").

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fingerprints, DNA, employment information, travel documents, school enrollment, and more.[128] Much of this information is posted on public websites.[129] And failing to comply perfectly with the rules is itself a serious crime, often carrying felony penalties.[130]

The consequences of sex offender registration are not limited to government monitoring. The public nature of these registries ensures that named offenders face enduring social stigma in their communities.[131] Stigma endangers a person's sense of self and can lead them to adopt the very "deviant" label that public shaming has forced onto them.[132] Simply being labeled a sex offender, with all its negative associations, can push someone to see that label as central to their identity, potentially encouraging further offending in a kind of self-fulfilling prophecy.[133] Further, once registered, a person is branded as a sexual threat in their community.[134] Neighbors may shun them, and families may fracture

128. *See, e.g.*, N.Y. CORRECT. LAW § 168-l(6)(a) (McKinney 2024) (providing that, for low-risk in-state offenses, law enforcement may disseminate information—including the offender's photograph, crime of conviction, zip code, employment or enrollment at a college, and any "special conditions imposed on the offender"—to entities with "vulnerable populations").

129. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 137, 138–39 (2007) (summarizing various state registration laws that establish databases of sex offender registries online and states' different dissemination practices).

130. SORNA requires that every jurisdiction provide for a criminal penalty that includes a maximum term of imprisonment that is greater than one year for a failure to comply with the registration requirements espoused in the Act. 34 U.S.C. § 20913(e); *see, e.g.*, 730 ILL. COMP. STAT. § 150/7 (2025) ("The registration period for any sex offender who fails to comply with any provision of the Act shall extend the period of registration by 10 years beginning from the first date of registration after the violation.").

131. *See* Douglas N. Evans & Michelle A. Cubellis, *Coping with Stigma: How Registered Sex Offenders Manage Their Public Identities*, 40 AM. J. CRIM. JUST. 593, 593–96 (2014) (explaining the "harsh stigmatization" that sex offenders face in society); *see also* Rachel Brown, *When the Body Is a Weapon: An Intersectional Feminist Analysis of HIV Criminalization in Louisiana*, 35 BERKELEY J. GENDER L. & JUST. 91, 129–30 (2020).

132. *See* Elizabeth L. Jeglic, Cynthia Calkins Mercado & Jill S. Levenson, *The Prevalence and Correlates of Depression and Hopelessness Among Sex Offenders Subject to Community Notification and Residence Restriction Legislation*, 37 AM. J. CRIM. JUST. 46, 55 (2012) (finding that perceived negative impact from sex offender laws increases feelings of hopelessness and depression among sex offenders and, consequently, "that community protection legislation may in fact be destabilizing to sex offenders, thus operating counter to the intended goal of decreasing sex offender recidivism."); Huffman, *supra* note 36, at 252 (citing John Braithwaite, *Shame and Criminal Justice*, 42 CANADIAN J. CRIMINOLOGY 281, 281–82 (2000)).

133. Huffman, *supra* note 36, at 252.

134. Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 79 (2005) ("[I]t is clear that the collateral consequences of sex offender registration as a criminal sanction may be quite serious and harmful,

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under the weight of shame, demonstrating the consequences of registration affect far more than the individual offender.[135]

In addition to government monitoring and a damaged reputation in the community, registration can also lead to severe restrictions on where someone can live,[136] travel,[137] or work.[138] It can bar people from entire neighborhoods and block access to jobs.[139]

It is no surprise then that scholars have repeatedly challenged certain aspects of registration. Some critics have even called for abolishing sex offender registries entirely, but this Article does not adopt that position.[140] As a former prosecutor, I recognize the registry can serve important public safety goals when applied to genuinely dangerous sexual offenses.[141] However, extending registration requirements to

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for individual offenders, for their families and loved ones, and for communities in general.").

135. *See* Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 JUST. RSCH. & POL'Y 59, 65 (2007) ("More than a third (37%) reported that they were unable to live with supportive family members."); Huffman, *supra* note 36, at 269.

136. *See generally* Levenson & Hern, *supra* note 135 (discussing how individuals placed on sex offender lists struggle to obtain housing).

137. *See* Bret R. Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 GA. L. REV. 961, 963–64 (2006) (noting that some states have enacted laws that ban sex offenders from working or traveling in certain areas); *see, e.g.*, ALA. CODE § 15-20A-15(a) (2015) (requires completion of a "travel notification document" to leave "his or her county of residence for a period of three or more consecutive days"); 730 ILL. COMP. STAT. 150/3(a) (2025) (individual must provide a travel itinerary if traveling for three or more days); IOWA CODE § 692A.105 (2026) (requires the individual to notify the "sheriff of the county of principal residence" if traveling for more than five days).

138. *See, e.g.*, Evans & Cubellis, *supra* note 131, at 593, 599, 608 (examining the high unemployment rate among registered sex offenders); Jill S. Levenson, David A. D'Amora & Andrea L. Hern, *Megan's Law and Its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 590–91 (2007); Tewksbury, *supra* note 134, at 68; Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 319–21 (2006).

139. Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & L. 375, 381–82 (2000); *see also* Keri B. Burchfield & William Mingus, *Not in My Neighborhood: Assessing Registered Sex Offenders' Experiences with Local Social Capital and Social Control*, 35 CRIM. JUST. & BEHAV. 356, 367, 369–70 (2008).

140. *See infra* Part IV.

141. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 164 (2011) ("[N]otification laws were designed to reduce recidivism . . . but notification may also reduce crime by enhancing the punishment for first-time or nonregistered sex offenders . . . ."); *see also* Mary Maguire & Jennie Kaufman Singer, *A False Sense of Security: Moral Panic Driven Sex Offender Legislation*, 19 CRIT. CRIMINOLOGY 301, 303 (2011) (reporting that "South Carolina's initial SORN policy had a general deterrent effect, with a nearly 11 percent reduction in the monthly rate of first time sex offense arrests").

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HIV-related convictions (often involving consensual adult conduct with no intent to harm and no significant transmission risk) represents a fundamental distortion of the system's purpose. Registries emerged in the 1980s and 1990s in response to horrific sexual crimes involving minors, propelled by public demand for heightened surveillance of dangerous offenders.[142] Nothing about that origin story applies to the typical HIV criminalization case.

Of course, it is understandable to be concerned about any risk of HIV transmission, but as Part I explained, HIV-specific criminal statutes often lack any element of coercion or intent to harm.[143] Many require no proof of actual transmission, or even any realistic risk of transmission.[144] Yet the act of failing to disclose HIV status can result in a felony conviction that triggers mandatory sex offender registration,[145] even though proving disclosure or consent is especially challenging in private relationships.[146] In other words, these statutes brand individuals as sex offenders on account of their positive status (which they may have even disclosed to their partner), rather than because of any predatory conduct. This misalignment on its own is sufficient to warrant further examination of these laws.

However, this misalignment is exacerbated when considering the medical advances that have transformed HIV into a manageable condition, with effective treatment reducing transmission risk to near-zero levels.[147] Despite what the science demonstrates, individuals living with HIV can be classified and monitored as sex offenders for behavior that poses no meaningful danger to anyone. Indeed, they are subjected to

142. *See* Levenson & D'Amora, *supra* note 113, at 172–74; *supra* Section II.A.

143. *See supra* Section I.C.

144. *Id.*

145. *See supra* note 94 (discussing how most laws criminalizing HIV turn on a defendant's disclosure of their status).

146. *See, e.g.*, State v. Gamberella, 633 So. 2d 595, 598–99 (La. Ct. App. 1993) (convicting a person with HIV of intentional exposure despite that man's testimony that he disclosed his HIV status to his girlfriend and wore condoms during sex). The man's girlfriend testified that after she became pregnant by the defendant following a condom use failure, they engaged in unprotected sexual intercourse on multiple occasions. *Id.* She testified that she didn't know his HIV status during the entire relationship. *Id.* The defendant was convicted and sentenced to ten years in prison with hard labor. *Id.*; *see also* Ginn v. State, 667 S.E.2d 712, 713–14 (Ga. Ct. App. 2008) (affirming the lower court's ruling that there was sufficient evidence for the jury to conclude that Ginn did not disclose her HIV status to the victim before intercourse); *id.* at 714 (discussing the testimony of two witnesses who allegedly heard the conversation between Ginn and the victim regarding her HIV status). Legislators did not envision the sex offender designation being applied to people living with HIV whose only "crime" was failing to navigate confusing disclosure laws. *See* Kenney, *supra* note 16, at 271.

147. *See supra* Section I.B.

the same public shaming, residency bans, employment prohibitions, and community suspicion as people convicted of violent sexual assault.[148]

Even where states classify HIV-related offenses at lower risk levels, registrants still face lasting reputational harm. They may struggle to secure employment and housing, and the damage to their social relationships cannot fully be understood. Friends, neighbors, and potential employers who search public databases see them branded as sex offenders, a label that carries the worst imaginable connotations.[149] And once imposed, registration follows individuals wherever they go. Reciprocity provisions mean that a person labeled a sex offender in one state is almost always required to register in any state they move to, often without any individualized risk assessment or consideration of local law. Further, there is rarely a meaningful avenue for review or removal of the designation, even when the underlying conduct involved no intent to harm and posed zero risk, as is often the case when the underlying offense is a violation of an HIV-specific law.

As demonstrated, HIV-specific laws criminalize conduct that poses negligible or nonexistent risk even when there is no intent to harm. Requiring individuals who violate such laws to register as sex offenders reflects a systemic failure of proportionality and fairness in our criminal punishment system and doubles down on the moral panic that led to HIV criminalization in the first place.[150] The next Section examines the states that impose sex offender registration for HIV-related convictions.

C. Six-State Case Study: Common Patterns and Problems

While sex offender registration laws exist in every state, six states specifically mandate or permit registration for people convicted under HIV-specific criminal statutes: Arkansas, Louisiana, Ohio, South Dakota, Tennessee, and Washington.[151] Despite variations in their statutory language, these states share troubling patterns that highlight

148. *See, e.g.*, Evans & Cubellis, *supra* note 131, at 593–96 (explaining the "harsh stigmatization" that sex offenders face in society).

149. While some of the most severe residency restrictions are often tied to higher-level sex offense classifications, even lower-level registration imposes real constraints. Registrants may be barred from living near schools or childcare centers, subject to curfews, or required to notify law enforcement about travel and housing changes. Even where residency restrictions are less common in HIV-related cases, the core reality remains: Registration is a form of state control over where people can go and how they live. In the context of HIV criminalization laws, it can transform consensual adult relationships with no criminal intent or risk of transmission into grounds for lifelong surveillance. *See supra* Section II.B.

150. *See* Huffman, *supra* note 36, at 244–45.

151. *See supra* notes 109–10.

the broader injustices of applying sex offender registration to HIV-related offenses.

First, in all six states, the triggering conduct often involves consensual activity between adults.[152] The statutes do not require the defendant to have intended to transmit HIV, or even that actual transmission occurred.[153] Instead, criminal liability often rests on the failure to disclose HIV-positive status, regardless of the risk of transmission.[154] This criminalization of nondisclosure turns private sexual relationships into potential grounds for felony prosecution.[155]

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152. *See, e.g.*, LA. STAT. ANN. § 14:43.5 (2018); OHIO REV. CODE ANN. § 2903.11(B) (West 2025) (criminalizing the failure to disclose one's HIV status to another person before partaking in sexual conduct).

153. In *State v. Roberts*, the Fourth Circuit of Louisiana's Court of Appeal held that the state is only required "to prove that the defendant intentionally committed an act proscribed by the statute which exposed the victim to the AIDS virus," *not* that the defendant "acted with the specific intent to expose the victim to the AIDS virus." 2002-2520 (La. App. 4 Cir. 3/26/03), 844 So. 2d 263, 272. Similarly, in *State v. Gamberella*, the First Circuit of Louisiana's Court of Appeal held that, "[b]y use of the word 'expose' rather than the word 'transmit,' the legislature obviously intended that the element of the offense be the risk of infection, rather than actual transmission of the virus." 633 So. 2d 595, 602 (La. Ct. App. 1993). Moreover, *Gamberella* reaffirmed the constitutionality of Louisiana's intentional exposure statute despite its lack of clarity. *See id.* at 601–04 (finding that the statute is not unconstitutionally vague). *But see* WASH. REV. CODE §§ 9.94A.507(1)(a)(ii), 9A.36.011(1)(b) (after a major overhaul of its HIV-criminalization laws, the Washington law now only applies sexual offender treatment to individuals who intentionally transmit HIV to a child or a "vulnerable adult"). Tennessee defines "intimate contact with another" as contact between "the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV . . . transmission." TENN. CODE ANN. § 39-13-109(b)(2) (West 2025).

154. Similar to Louisiana's statute, Ohio's felonious assault statute requires neither intent to transmit HIV nor actual transmission for prosecution. OHIO REV. CODE ANN. § 2903.11(B)(1) (West 2025). Like Louisiana, Ohio's felonious assault statute has also withstood multiple constitutional challenges. *See* State v. Batista, 151 Ohio St. 3d 584, 2017-Ohio-8304, 91 N.E.3d 724, at ¶ 21 (holding that Ohio's HIV criminalization law does not unconstitutionally compel speech). And in South Dakota, a person living with HIV may not "intentionally expose[]" another to infection by engaging in sexual intercourse or "other intimate physical contact" with that person. S.D. CODIFIED LAWS § 22-18-31 (West 2025). If found guilty under the statute, the defendant faces a Class 3 felony, which is punishable by up to 15 years in a state correctional facility and a $30,000 fine. *Id.* §§ 22-6-1(6), 22-18-31 (2018). While the statute requires intent to expose, neither the intent to transmit nor actual transmission is required. *Id.* §§ 22-18-31, 22-18-34 (2018). Accordingly, this suggests that only the intent to engage in sexual intercourse or "other intimate physical contact" while living with HIV satisfies the intent element.

155. In Arkansas, though the HIV-specific criminal exposure statute does not require registration as a sex offender, the sentencing court may order registration. *See supra* note 110; *see also* ARK. CODE ANN. § 12-12-903(13)(i)–(vi) (2024) (defining a number of offenses as sex offenses, including attempt, solicitation, or conspiracy to commit any of the enumerated offenses, including HIV exposure). Under a separate provision, a "danger to the public exists" when individuals engage in sexual conduct and fail to disclose their HIV-positive status or when they participate in parenteral transfer

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Second, these laws frequently adopt sweeping or vague definitions of "sexual contact" or "exposure."[156] For example, they can include acts that pose no realistic risk of transmission, such as certain forms of touching or conduct where viral suppression makes transmission impossible.[157] These overly broad statutes create legal uncertainty for people living with HIV who engage in consensual intimate relationships.

Third, affirmative defenses based on disclosure or partner consent exist in some states but are notoriously difficult to prove.[158] Private

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of blood or blood products. *See id.* § 5-14-123(b) (2024). Similar to the aforementioned states, however, Arkansas' statute does not account for actual transmission and explicitly provides that "emission of semen is not required." *Id.* § 5-14-123(c)(2). Thus, if an individual engages in the proscribed acts and knows their positive status, they may be held criminally liable and be charged with a Class A felony, which includes a prison sentence of six to thirty years and a fine up to $15,000. *Id.* §§ 5-4-201(a)(1), 5-4-401(a)(2) (2024).

156. For example, Louisiana criminalizes nondisclosure of an infected person's status through "sexual contact," but the statute fails to define this term. *See* La. Stat. Ann. § 14:43.5 (2018).

157. The term "sexual contact" is not defined anywhere within Louisiana's Criminal Code. *See id.* § 14:2. The term "sexual contact" is defined, however, in the Louisiana Code of Military Justice. Nonetheless, the definition in the Code of Military Justice is overly broad for use in La. Rev. Stat. Ann. § 14:43.5(A) as it includes actions such as "touching . . . through the clothing, the . . . breast . . . of any person." 10 U.S.C. § 920(g)(2) (2023). Further, section 14:43.5 includes the term "any means or contact," which further suggests that Louisiana's statute encompasses sexual activities that pose no or very low risk of transmission. La. Rev. Stat. Ann. § 14:43.5(B). Consequently, people living with HIV are at risk of violating section 14:43.5 and subsequently registering as a sex offender by committing acts that would never transfer HIV.

158. *See HIV Criminalization Fact Sheet*, Ctr. for HIV L. & Pol'y, https://www.hivlawandpolicy.org/sites/default/files/PJP%20fact%20sheet_11.14.2012.pdf [https://perma.cc/SN87-MSS4] (outlining how disclosure of HIV status is often the only affirmative defense available in HIV prosecutions but is difficult to prove). In 2018, the Louisiana legislature amended its statute to encompass three affirmative defenses. The affirmative defenses are: (1) if a defendant can prove, by a preponderance of the evidence, that the exposed person was aware of the defendant's HIV status, knew that the action could result in HIV transmission, and consented to the action with that knowledge; (2) if the "transfer of bodily fluid, tissue, or organs" occurred following advice from a licensed physician that the defendant was noninfectious and the defendant had disclosed their HIV status to the complainant (note that "transfer" is not a term that appears or is defined elsewhere in the intentional exposure statute); and (3) if a defendant disclosed their status and took "practical means to prevent transmission as advised by a physician or other healthcare provider" or is themselves a "healthcare provider who was following professionally accepted infection control procedures." *See* La. Stat. Ann. § 14:43.5(F) (2018). All three affirmative defenses are contingent on an individual having first disclosed their HIV status to the individual alleging exposure to the virus. *Id.* In Ohio, the only affirmative defense is disclosure of the defendant's HIV status prior to the first act of conduct. The use of condoms or any form of protection is not a defense. *See* Ohio Rev. Code Ann. § 2903.11(B) (West 2025). While Tennessee's statute does have an affirmative defense, the affirmative defense does not provide many opportunities for people to avoid conviction. A defendant charged under the law may avoid conviction by demonstrating by a preponderance of the evidence that the

conversations about HIV status are rarely documented, and disputes often arise in the aftermath of failed relationships.[159] These evidentiary challenges give prosecutors significant leverage to secure guilty pleas, regardless of actual risk or intent.[160]

Fourth, once imposed, sex offender registration in these states is often severe and long-lasting.[161] Individuals must regularly report to law enforcement, provide extensive personal data, and face strict residency, employment, and travel restrictions.[162] They are then placed on public databases originally designed for violent sexual predators, exposing them to community hostility.

Finally, while the problem would still be grave even if sex offender registration were confined to only these six states, these states do not operate in isolation. Because most states have reciprocity

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exposed party was aware of the defendant's status, knew the activity would result in transmission, and gave consent prior to the activity. TENN. CODE ANN. § 39-13-109(c)(1) (West 2025). Thus, an individual living with HIV may only prevent conviction with clear evidence that they informed their partner of their HIV status prior to intimate contact.

159. Bennett has described how his case arose after a breakup turned hostile, leading his former partner to report him to the police. Brief of Defendant, *supra* note 5, at 4.

160. *See* Carol L. Galletly & Jula Dickson-Gomez, *HIV Sero-positive Status Disclosure to Prospective Sex Partners and Criminal Laws That Require It: Perspectives of Persons Living with HIV*, 20 INT. J. STD & AIDS 6 (2009) (author manuscript), https://pmc.ncbi.nlm.nih.gov/articles/PMC4097389/ [https://doi.org/10.1258/ijsa.2008.008417] (noting how, when an HIV-positive person discloses their positive status to their partner in private, "[t]here are often only two witnesses to the [disclosure] . . . and there is likely to be little evidence with which to prove that the HIV-positive person indeed disclosed.").

161. In Louisiana, registered offenders are ineligible for diminished sentences for good behavior. LA. REV. STAT. ANN. § 15:537(A) (West 2025). If a person living with HIV is convicted under Ohio's felonious assault statute, the individual must register as a sex offender and must register as a Tier III offender when found guilty of committing a felonious assault with a sexual motivation. OHIO REV. CODE ANN. §§ 2903.11(B)(2), 2950.01(G)(1)(c), 2950.07(B)(1) (West 2025). "Sexual motivation" is interpreted as an act that was committed to gratify the sexual needs or desires of the offender and has been applied to instances of consensual sex. *See id.* §§ 2950.01(A)(4), 2950.01(G)(1)(c) (West 2025); *see also* State v. Gonzalez, 154 Ohio App. 3d 9, 2003-Ohio-4421, 796 N.E.2d 12, at ¶¶ 34, 116. Once a person is convicted, the individual is required to comply with the sex offender registry requirements until their death. OHIO REV. CODE ANN. § 2950.07(B)(1) (West 2025).

162. In Ohio, these requirements include registering with the sheriff in the county where they were convicted immediately after sentencing occurs and before transfer to a correctional facility. OHIO REV. CODE ANN. § 2950.04(A)(1)(a) (West 2025). Additionally, after the individual is released, they must register with the sheriff within three days of arriving in the county where they will reside, whether permanently or temporarily, for more than three days. *Id.* § 2950.04(A)(2)(a) (West 2025). Other regulations that offenders must comply with are complex and carry penalties that vary in severity. *See id.* §§ 2950.04–.06 (West 2025).

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provisions, a sex offender registration imposed in Louisiana or Ohio will follow a person moving to New York or California.[163] In that second jurisdiction, there is no meaningful mechanism for reviewing whether the underlying offense (and thus offender) actually represents a sexual threat, and this is true even if the second state does not criminalize the same conduct itself. Consequently, people convicted of HIV nondisclosure in one state may spend decades on registries across the country, labeled as dangerous sex offenders without any individualized assessment of risk.[164]

163. Thirty-eight states and the District of Columbia have a reciprocity provision for sex offenders. *See* ALA. CODE 1975 § 15-20A-5(38) (2024) (Alabama); ALASKA STAT. § 12.63.100(6)(A) (2024) (Alaska); ARK. CODE ANN. § 12-12-906(2)(A)(i) (2024) (Arkansas); CAL. PENAL CODE § 290(4)(B) (West 2024) (California); COLO. REV. STAT. § 16-22-103(3)(a) (2024) (Colorado); CONN. GEN. STAT. § 54-253(c) (2024) (Connecticut); D.C. CODE ANN. § 22-4001(8)(G), (9)(D) (2024) (District of Columbia); FLA. STAT. ANN. § 775.21(5)(d) (West 2024) (Florida); GA. CODE ANN. § 42-1-12(20)(B) (2025) (Georgia); HAW. REV. STAT. § 846E-2(b) (2024) (Hawaii); IDAHO CODE § 18-8303(11) (2024) (Idaho); IND. CODE § 11-8-8-4.5(b)(1) (2024) (Indiana); IOWA CODE ANN. § 692A.103(1) (West 2024) (Iowa); KAN. STAT. ANN. § 22-4906(k) (2024) (Kansas); KY. REV. STAT. ANN. § 17.520(5) (West 2024) (Kentucky); ME. REV. STAT. ANN. tit. 34-A, § 11283 (2024) (Maine); MD. CODE ANN., CRIM. PROC. § 11-704(a)(4) (West 2024) (Maryland); MICH. COMP. LAWS ANN. § 28.722(a)(i) (West 2024) (Michigan); MISS. CODE ANN. § 45-33-25(1)(a) (2024) (Mississippi); MO. REV. STAT. § 589.400(7) (2024) (Missouri); MONT. CODE ANN. § 46-23-502(10)(a)(xix) (2025) (Montana); NEB. REV. STAT. § 29-4003(1)(a)(iv) (2024) (Nebraska); NEV. REV. STAT. § 179D.097(1)(v) (2025) (Nevada); N.H. REV. STAT. ANN. § 651-B:1VIII(c), IX(c), X(e) (2026) (New Hampshire); N.J. REV. STAT. § 2C:7-2(c)(6) (2024) (New Jersey); N.M. STAT. ANN. § 29-11A-3(H)(2) (West 2024) (New Mexico); N.C. GEN. STAT. ANN. § 14-208.7(a)–(a1) (West 2023) (North Carolina); OHIO REV. CODE ANN. § 2950.01(E)(1)(g), (F)(1)(i), (G)(1)(h) (West 2025) (Ohio); OR. REV. STAT. § 163A.020(1)(a), (6)(b) (2023) (Oregon); 42 PA. CONS. STAT. § 9799.14(b)(23) (2024) (Pennsylvania); 1956 R.I. GEN. LAWS § 11-37.1-3(a) (2024) (Rhode Island); S.C. CODE ANN. § 23-3-430(A) (2024) (South Carolina); S.D. CODIFIED LAWS § 22-24B-1(18) (West 2025) (South Dakota); TENN. CODE ANN. § 40-39-212(a) (West 2025) (Tennessee); TEX. CODE CRIM. PROC. ANN. art. 62.052(a), (c) (West 2024) (Texas); UTAH CODE ANN. §§ 53-29-202(1)(c), 53-29-304(3) (West 2025) (Utah); VT. STAT. ANN. tit. 13, § 5407(a)(1) (2024) (Vermont); VA. CODE ANN. § 9.1-902(A)(4) (2023) (Virginia); WIS. STAT. § 301.45(1g)(g) (2024) (Wisconsin).

164. Most states automatically require people convicted of registrable offenses in other jurisdictions to register if they move in-state. This occurred in the Bennett case. [Redacted case name]. In ten states, registration is triggered if the underlying offense is substantially similar to a registrable offense under local law. *See* ARIZ. REV. STAT. ANN. § 13-3821(A) (2025) (Arizona); DEL. CODE ANN. tit. 11, § 4120(e)(2) (2024) (Delaware); 730 ILL. COMP. STAT. 150/2(A)(1) (2024) (Illinois) (registration requirement included by cross-reference); LA. CODE CRIM. PROC. ANN. § 15:542.1.3(A) (2024) (Louisiana); MASS. GEN. LAWS ANN. ch. 6, § 178C (West 2023) (Massachusetts) (registration included by cross-reference); MINN. STAT. ANN. § 243.166(1b)(b)(1) (West 2024) (Minnesota); N.D. CENT. CODE § 12.1-32-15(1)(g), (2) (2024) (North Dakota); OKLA. STAT. ANN. tit. 57, § 583(B) (West 2024) (Oklahoma); W. VA. CODE § 15-12-2(b) (2024) (West Virginia); WYO. STAT. ANN. § 7-19-301(a)(viii)(B) (2025) (Wyoming) (registration included by cross-reference).

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Taken together, these six states illustrate the most extreme (but not isolated) examples of a legal system that punishes people living with HIV for consensual sex rather than predatory or violent conduct. In doing so, these laws not only subvert the original purpose of sex offender registries, but they also undermine public health goals by discouraging disclosure for fear of prosecution. Further, reciprocity provisions compound the injustice of applying sex offender registration to HIV-related offenses. They spread the punishment far beyond the original jurisdiction, turning what may have been a state-level injustice into a national phenomenon. This national reach underscores the urgent need to rethink whether sex offender registration is appropriate for HIV-related convictions.

III. Sex Offender Registration for HIV Offenses Fails Theories of Punishment

Scholars have argued that sex offender registration regimes fail to comport with criminal punishment theory. These critiques have largely focused on the harsh consequences of registering as a sex offender as well as the registry's effectiveness at deterring crime; as such, they provide a critical foundation for evaluating the special case of HIV criminalization laws that mandate registration. This Article builds on that body of scholarship to argue that imposing sex offender registration for HIV-specific convictions does not align with the core principles of proportionality, deterrence, blameworthiness, and public safety. By applying this punishment theory framework, the analysis highlights how the concerns that have plagued scholars in the broader sex offender scheme are compounded in the context of HIV criminalization.

A. Punitive vs. Civil Remedy

As an initial matter, federal and state courts often describe sex offender registration as a civil remedy designed to protect the public rather than as a criminal punishment.[165] Legislatures, too, frame registries as tools to inform communities and monitor potential threats, not to punish.[166] Yet, this formal distinction has grown increasingly

165. *See, e.g.*, Femedeer v. Haun, 227 F.3d 1244, 1249 (10th Cir. 2000) (declaring that the intent of the legislature "was clearly to establish a civil remedy"); Commonwealth v. Baker, 295 S.W.3d 437, 443 (Ky. 2009) (analyzing the express and implied intent of the legislature to conclude that the registration scheme was civil); State v. Haskell, 784 A.2d 4, 10–16 (Me. 2001) (adopting the legislature's express statement that SORNA was intended to be civil).

166. *See, e.g.*, Rodriguez v. State, 93 S.W.3d 60, 68–69 (Tex. Crim. App. 2002) (relying on the legislative intent to confirm that the statute was enacted with a civil

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hollow when one examines what registration actually requires.[167] Indeed, courts in states like Indiana, Maine, and Ohio have recognized that, as registration requirements have increasingly become more severe, they have crossed the line from civil regulation into punishment.[168]

For people convicted under HIV-specific criminal laws, registration is unequivocally punitive. They are forced onto registries even though they did not commit sexual assault or prey on minors, their partners consented to sex, no transmission of the disease occurred, and modern medicine made transmission impossible. The state's choice to apply sex offender registration in these cases cannot plausibly be defended as a regulatory measure narrowly tailored to public safety. It is, in substance and effect, a form of punishment aimed at people living with a particular medical condition. Therefore, principles of punishment theory should apply.[169]

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purpose); *see also* ARK. CODE ANN. § 12-12-902 (2024) ("[P]rotecting the public from sex offenders is a primary governmental interest," and "the privacy interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety."); LA. REV. STAT. ANN. § 15:540 (2024) ("[P]rotection of the public from sex offenders, sexually violent predators, and child predators is of paramount governmental interest."); ME. REV. STAT. tit. 34-A, § 11201 (2024) ("The purpose of this chapter is to protect the public from potentially dangerous registrants and offenders by enhancing access to information concerning those registrants and offenders."); MICH. COMP. LAWS § 28.721a (2024) ("The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state."); MISS. CODE ANN. § 45-33-21 (2024) ("The Legislature finds that the danger of recidivism posed by criminal sex offenders and the protection of the public from these offenders is of paramount concern and interest to government.").

167. *See* Doe v. State, 189 P.3d 999, 1007–08, 1019 (Alaska 2008) (refusing to analyze the law under the first step of the intent-effects test because the law was punitive in its effect); Wallace v. State, 905 N.E.2d 371, 379 (Ind. 2009) (observing that the legislature's intent was not clear from the record); *In re* Reed, 663 P.2d 216, 222 (Cal. 1983) (finding that sex offender registration is punitive as applied to certain misdemeanants); *see also* Carpenter & Beverlin, *supra* note 35, at 1101–22.

168. *See Wallace*, 905 N.E.2d at 379; State v. Letalien, 985 A.2d 4, 26 (Me. 2009); State v. Williams, 952 N.E.2d 1108, 1113 (Ohio 2011).

169. *See* State v. Noble, 829 P.2d 1217, 1223 (Ariz. 1992) (holding that the Arizona registration requirement serves the traditional deterrent function of punishment, reasoning that "a convicted sex offender is less likely to commit a subsequent offense if his whereabouts are easily ascertained by law enforcement officials"); Bruns, *supra* note 35, at 186–87 (applying punishment theories of retribution and deterrence to analyze Virginia's sex offender registration statute); *cf.* Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747, 748 (2018) (arguing that sex offender registration laws as applied to juvenile offenders fail principles of criminal punishment theory); *see also* Brandon Sparks, *Attitudes Toward the Punishment of Juvenile and Sexual Offenders in Canada: The Roles of Sentencing Goals and Criminal Justice Motivations*, 30 J. CHILD SEXUAL ABUSE 125, 125–39 (2021).

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Against that backdrop, the registration requirement for HIV-related offenses violates fundamental principles of criminal law in four key respects. First, it imposes a punishment that is grossly disproportionate to the harm and culpability involved. Second, rather than deterring future crime, it deters individuals from seeking treatment for fear of prosecution. Third, it reflects society's moral judgment, echoing the fear-driven origins of HIV criminalization rather than any legitimate penological aim. And fourth, it fails to advance any valid public safety rationale given the current understanding of HIV transmission risk.

B. Registration Fails Each Theory of Criminal Punishment

As an initial matter, some scholars have questioned whether HIV criminalization laws serve any legitimate purpose, arguing that criminal law is less effective at curbing transmission than public health-based interventions.[170] These critiques focus on the laws' failure to promote safer behavior and their potential to erode trust in health systems.[171] This Article engages with those public health-oriented concerns but primarily argues that the use of criminal punishment—particularly the imposition of sex offender registration for HIV-specific crimes—cannot be justified under any recognized theory of punishment and, in fact, undermines the legitimacy of the criminal justice system itself.

Criminal statutes define the types of conduct society considers sufficiently harmful to warrant punishment.[172] In doing so, they reflect a range of social objectives, including the protection of individuals from physical harm, the safeguarding of property and public health, the regulation of sexual conduct, the integrity of the justice system, and the maintenance of public order.[173] Theories of punishment help explain why we punish and when punishment is justified, but they also demonstrate when criminal sanctions become punitive without principle.

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170. *See* Wolf & Vezina, *supra* note 27, at 859–61; *see also* J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 Conn. L. Rev. 1035, 1035, 1039–40 (2016) (concluding that no real empirical evidence supports the claim that sex offender registries are effective at reducing sex offender recidivism).

171. *See* Wolf & Vezina, *supra* note 27, at 833 (arguing that HIV criminalization laws undermine public health approaches because HIV-infected individuals are unlikely to voluntarily come forward and "provide necessary partner notification information if they believe that the information will be used against them").

172. Charles E. Torcia, Wharton's Criminal Law §§ 1–5 (15th ed. 1993) (identifying protection of the community and of its moral code, retribution and reprobation, deterrence, and reformation as the primary purposes of the criminal law).

173. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law §§ 1.5, 22–23 (2d ed. 1986).

Punishment must serve purposes that can be justified against the harm it causes, and there are several distinct goals of punishment.[174] First, punishment may further the goals of retribution and denunciation, allowing society to express its belief that the offender deserves punishment while morally condemning the offense.[175] Second, punishment is intended to deter individuals from engaging in conduct society deems unacceptable.[176] Third, it aims to rehabilitate offenders and reduce their likelihood of reoffending.[177] Finally, it protects the public by incapacitating those who pose a threat.[178] In proscribing conduct, criminal law seeks to advance one or more of these underlying objectives.[179]

These classic theories of criminal punishment—retribution, deterrence, rehabilitation, incapacitation, and denunciation—each seek to align punishment with moral blameworthiness, deter future harm, reintegrate the offender into society, incapacitate dangerous individuals, and express society's condemnation of wrongful acts.[180] Proponents of registration claim that registries serve four of these goals (retribution, deterrence, denunciation, and incapacitation) by monitoring and restricting those who pose a real risk of sexual violence in the community.[181] However, applying this system to people convicted under

174. *See, e.g.*, Douglas Husak, Overcriminalization: The Limits of the Criminal Law 82 (2008) ("Penal liability is unjustified unless it is imposed for an offense designed to proscribe a nontrivial harm or evil, and may not be inflicted unless the defendant's conduct is (in some sense) wrongful."); Graham v. Florida, 560 U.S. 48, 67, 71 (2010) (identifying retribution, deterrence, incapacitation, and rehabilitation as "legitimate penological goals," and stating that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense").

175. Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 Tul. L. Rev. 298, 331, 332 n.134 (1990) ("Denunciation, when identified by commentators, is often grouped with the retributive theory of punishment."); LaFave & Scott, Jr., *supra* note 173, at §§ 1.5(a)(6), 25–26.

176. LaFave & Scott, Jr., *supra* note 173, at §§ 1.5, 23.

177. *Id.* at §§ 1.5(a)(3), 1.5(a)(5), 24–25 (noting that education and reformation function as methods for preventing future crimes).

178. *Id.* at §§ 1.5(a)(2), 23–24.

179. *See, e.g.*, *Graham*, 560 U.S. at 71.

180. Grupp, *supra* note 38, at 3–8; Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 70–73 (2005).

181. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 384–85 (1997) (asserting that shaming penalties are worthwhile sanctions because they are low cost and are effective in conveying condemnation); *supra* note 141. Scholars have observed that rehabilitation is not one of the goals of the sex offender scheme as registration denies offenders the "opportunities and resources vital for successful rehabilitation and reintegration." *See* Huffman, *supra* note 36, at 289. Indeed, the registry emphasizes retributive principles as opposed to "rehabilitation or supportive treatment for offenders." *Id.* at 291. For this reason, this Article does not discuss the rehabilitation theory as it relates to sex offender registration in the context of HIV criminalization and instead focuses on the other four theories of criminal punishment.

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HIV-specific nondisclosure laws fails these theoretical justifications. It turns registration into a blunt instrument[182] that punishes people for having a chronic medical condition rather than intentional harm or predatory behavior. This Section argues that, under major theories of criminal punishment, this approach is fundamentally unjust.

1. Retribution and Proportionality

At its core, retributive justice grounds punishment in the concept of moral desert.[183] It insists that offenders should suffer consequences equal to their blameworthiness, a proposition embodied in Immanuel Kant's claim that punishment must be an end in itself, not merely a means to achieve other goals.[184]

Scholars have argued that sex offender registration regimes undermine fundamental principles of retribution by erasing distinctions in blameworthiness and ignoring individual culpability. These laws typically fail to account for mental state or intent, applying the same severe consequences to people with vastly different levels of culpability, often operating as mechanisms for vengeance rather than retribution.[185]

Moral culpability aside, critics of sex offender registration regimes have persuasively argued that the penalties imposed are also grossly disproportionate to the underlying conduct. Proportionality is often analyzed alongside retribution, and it is frequently invoked as a constitutional limit under the Eighth Amendment.[186] Registration requirements routinely extend the punitive reach of the state in ways untethered from the severity of the offense, subjecting individuals

182. Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 Ariz. St. L.J. 467, 484 (2007).

183. Grupp, *supra* note 38, at 5 ("The retributivist defends the desirability of a punitive response to the criminal by saying that the punitive reaction is the pain the criminal deserves . . . ."); LaFave & Scott, Jr., *supra* note 173, at §§ 1.5(a)(6), 26.

184. *See, e.g.*, Immanuel Kant, The Metaphysics of Morals 6:331 (1797); Michael Tonry, *Sentencing in America, 1975–2025*, *in* 48 Crime and Justice in America, 1975–2025, at 171–72 (Michael Tonry ed., University of Chicago Press 2013); D.J.B. Hawkins, *Punishment and Moral Responsibility*, 7 Mod. L. Rev. 205 (1944); Grupp, *supra* note 38, at 15 ("For Kant it is an evident moral principle requiring no justification outside itself that crime deserves punishment, and a punishment equivalent in kind to the evil done.").

185. *See* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L. Rev. 2157, 2217, 2219 (2001) (denying the retributive value of shaming punishments and arguing that, "[b]ecause shaming punishments have as their goal the destruction of a person's reputation and dignity, the shaming punishment denies the very dignity of moral agency that the retributive encounter is designed to uphold").

186. *See* Graham v. Florida, 560 U.S. 48, 71–72 (2010) (describing proportionality alongside retribution in Eighth Amendment jurisprudence).

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to public shaming, housing and employment barriers, and lifelong surveillance for conduct that may not warrant such severity.[187] This overreach is evident because registration regimes adopt a "one-size-fits-all" approach that fails to differentiate between levels of harm or culpability, thereby violating fundamental principles of proportionality.[188]

When applied to HIV exposure laws, retributive theory demands a clear articulation of culpability.[189] And for punishment to be proportionate, it must track an offender's mental state alongside the severity of the harm.[190] Yet, as discussed in Part I, many HIV criminal statutes impose severe penalties for conduct that involves no intent to transmit HIV and no actual transmission of the disease.[191]

Moreover, HIV-related offenses are disproportionately harsh compared to more severe criminal offenses. For instance, in North Dakota, someone convicted of HIV exposure can face up to twenty years in prison, even though a reckless endangerment charge, defined as showing "extreme indifference to the value of human life," has a maximum penalty of just five years.[192] On average, HIV exposure crimes carry maximum sentences of around eleven years,[193] while reckless endangerment offenses usually have maximum sentences in the two-year range.[194]

The requirement to register as a sex offender compounds this disproportionality. As discussed in Part II, sex offender registration

187. *See* Wayne A. Logan, Knowledge as Power: Criminal Registration and Community Notification Laws in America xii, xiv–xv (2009) (describing the effects of registration laws on individuals); Zevitz & Farkas, *supra* note 139, at 381–82; *see also* Burchfield & Mingus, *supra* note 139, at 369–70.

188. *See* Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. Crim. L. & Criminology 969, 1000–03 (2011) (explaining how the term "sex offender" encompasses "people convicted of rape, indecent exposure (including some public urinators), possession of child pornography, voyeurism, production or distribution of obscenity, bestiality, solicitation of a prostitute, statutory rape, distribution of child pornography (including what has become known as 'sexting' by teenagers), incest, and lower degrees of sexual assault including groping").

189. *See* Husak, *supra* note 174, at 85 ("A retributivist must specify *why* criminals deserve to be punished; he must identify *what* it is about criminal conduct that makes punishment deserved.").

190. *See* Frase, *supra* note 180, at 68, 73.

191. *See generally* Sourcebook, *supra* note 12 (providing an overview of state criminal HIV statutes); *see also supra* Section I.C.

192. *See* Sarah J. Newman, Note, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 Nw. U. L. Rev. 1403, 1426 (2013) (quoting N.D. Cent. Code § 12.1-17-03 (2012)).

193. *See id.*; La. Stat. Ann. § 14:43.5(E)(2) (2018).

194. Ctr. for HIV L. & Pol'y, Comparative Sentencing Chart on HIV Criminalization in the United States 1–5 (2012); *Animus*, *supra* note 15, at 1783.

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is a public mark of moral condemnation, designed to signal to the community that an individual is inherently dangerous.[195] By labeling individuals convicted of HIV nondisclosure as sex offenders, the law equates them with people convicted of rape and sexual assault, whose crimes involve coercion and violence.[196] In doing so, it severs the essential connection between punishment and moral blameworthiness, extending the registry's harshest sanctions to conduct that may involve little or no culpable mental state. Such punishment is grossly disproportionate to the individual's moral blameworthiness and does not further retributive aims.

2. Deterrence

Unlike retribution, the deterrence theory justifies punishment by what punishment prevents rather than by what offenders deserve.[197] Stated differently, it aims to prevent future harms by discouraging offenders and others from committing similar acts. Utilitarians, for instance, view punishment as a justified evil if it prevents greater harm.[198] However, even this consequentialist approach demands empirical accountability;

195. *See* LOGAN, *supra* note 187, at xiv (noting that registration and "community notification single[] out individuals for public scrutiny and disdain, with manifold negative effects for registrants and those with whom they associate, perhaps for their lifetimes").

196. In this Article, I challenge the appropriateness of registering individuals convicted under HIV criminal statutes as sex offenders, but I also want to acknowledge the growing scholarly debate over the registry's broader application. Terms like "rapist" carry immense rhetorical weight, but they often obscure the legal and factual diversity of offenses that trigger registration requirements. *See* Ummni Khan, *The Rhetoric of Rape Culture*, CTR. FOR FREE EXPRESSION: BLOG (Dec. 5, 2016), https://cfe.torontomu.ca/blog/2016/12/rhetoric-rape-culture [https://perma.cc/2BKA-GQAG]; ROXANE GAY, BAD FEMINIST 132 (2014) ("We talk about rape, but we don't carefully talk about rape."). Courts and legislatures have increasingly used these labels as shorthand for dangerousness, even when the underlying conduct may be nonviolent, non-coercive, or involve limited culpability. *See* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 752–53 (2010) (discussing the possibility of creating a separate offense for nonconsensual but nonforcible sexual intercourse and explaining critical backlash to that idea). I do not mean to suggest that HIV-related offenses are categorically distinct from other crimes that may suffer from the overinclusive nature of the registry itself.

197. *See* Daniel J. Wood, Sex Offender Registry Acts: Deterrence or Moral Panic? 36–42 (Nov. 13, 2017) (Master's Thesis, Eastern Michigan University) (on file with the N.Y.U. Journal of Legislation & Public Policy).

198. *See, e.g.*, H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 5 (2d ed. 2008) ("[T]he utilitarian claim [concerning punishment is] that the practice of punishment is justified by the beneficial consequences resulting from the observance of the laws which it secures.").

punishment must plausibly reduce harmful behavior for the deterrent model to succeed.[199]

States have often justified HIV criminal statutes on deterrence grounds, arguing that fear of prosecution will encourage disclosure or reduce transmission.[200] But, critically, studies have undermined these claims.[201] And rather than discouraging future crime, fear of prosecution only discourages testing because knowledge of one's status is often an element of the HIV-specific crimes.[202] It may also deter people from seeking treatment that can suppress viral load and eliminate transmission

199. *See* Franklin E. Zimring & Gordon Hawkins, Deterrence: The Legal Threat in Crime Control 91 (1973) ("For the degree to which threats can effectively be used as a means of inducing compliance to law is determined by the responses of threatened audiences of potential criminals."); *see also* U.S. Dep't of Just., Ctr. for Sex Offender Mgmt., Recidivism of Sex Offenders 6 (2001) (citing and discussing studies showing lower recidivism rates of sex offenders compared to other offender sub-populations); *but see* Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 Ohio St. J. Crim. L. 335, 350 (2020) (noting that "[a]ll available research indicates no link between registries and either general or specific deterrence" in the juvenile context); Elizabeth L. Jeglic, *Sex Offender Registries: Are They Keeping Our Children Safe?*, Psych. Today (Aug. 9, 2019), https://www.psychologytoday.com/us/blog/protecting-children-sexual-abuse/201908/sex-offender-registries [https://perma.cc/BKM4-T6LW] (same).

200. *See* Donald H.J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 St. Louis U. Pub. L. Rev. 351, 353 (1990) ("Criminal statutes are effective to deter individuals from engaging in HIV transmitting behavior to the extent statutes specify proscribed behavior which is likely to spread the virus, to the extent violations of such statutes will be reported and prosecuted, and to the extent such statutes have explicit penalties established for their breach."); *see also* Zita Lazzarini, Sarah Bray & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. Med. & Ethics 239, 239 (2002); Amy M. Decker, Comment, *Criminalizing the Intentional or Reckless Exposure to HIV: A Wake-Up Call to Kansas*, 46 U. Kan. L. Rev. 333, 357 (1998) ("[F]or those defendants who are not already in prison at the time of their acts, the thought of spending their last months or years in prison could be a very effective deterrent. Facing death is far more comfortable when surrounded by the love and support of family and friends, rather than being surrounded by strangers and criminals in a penal institution. Additionally, the medical treatment in prison is far less adequate than what one could receive on [sic] the outside world.").

201. *See* Prescott, *supra* note 170, at 1035, 1039–40 (concluding that no real empirical evidence supports the claim that sex offender registries are effective at reducing sex offender recidivism, and instead, such registries increase sex offender recidivism).

202. *See, e.g.*, *HIV Criminalization Reform in California: What Does It Mean for Me?*, *supra* note 41 ("[L]aws which unnecessarily criminalize HIV are a disincentive to testing and engaging in care. You can't be prosecuted for knowingly spreading HIV if you never knew that you were HIV-positive in the first place!"); Jürgens et al., *supra* note 41, at 165–66 ("Applying criminal law to HIV transmission could discourage people from getting tested and finding out their HIV status, as lack of knowledge of one's status could be the best defence [sic] in a criminal lawsuit.").

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risk.[203] Thus, HIV criminalization chills testing and drives people away from treatment—both of which undermine prevention efforts.[204]

Mandatory sex offender registration further highlights how the goals of deterrence are not served in these cases. Instead of incentivizing safer behavior, registration promises ostracization even for those attempting disclosure in good faith.[205] People may fear testing or disclosure precisely because the legal (and social) consequences are so drastic and do not reflect actual transmission risk.[206] Therefore, these laws can drive people away from the exact medical treatments that make transmission impossible for the individual and, consequently, reduce the spread of the virus among the general public.[207] Deterrence cannot justify punishment that achieves the opposite of its claimed goal.

3. Denunciation

Under the denunciation theory, punishment reveals what society deems wrongful, and, in doing so, it reaffirms community values. The theory provides that punishment acts as a moral judgment by condemning certain conduct that does not align with majority views in order to advance society's idea of justice.[208]

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203. *See* Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & BEHAV. 451, 457–58 (2006); Burris et al., *supra* note 182, at 467–68 (an empirical study of 490 individuals at elevated risk of HIV in Chicago and New York City found no meaningful difference in sexual risk behavior between those living in states with HIV-specific criminal laws and those without; additionally, belief in the existence or requirements of such laws did not correlate with safer behavior, undermining claims that criminalization promotes disclosure or reduces risk).

204. *See, e.g.*, Erin M. O'Toole, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, 10 J.L. & HEALTH 183, 200 (1995); Perone, *supra* note 26, at 383–85; Wainberg, *supra* note 41, at 108.

205. *But see* State v. Noble, 829 P.2d 1217, 1223 (Ariz. 1992) (holding that the Arizona registration requirement serves the traditional deterrent function of punishment, reasoning that "a convicted sex offender is less likely to commit a subsequent offense if his whereabouts are easily ascertained by law enforcement officials"); *In re* Reed, 663 P.2d 216, 219 (Cal. 1983) (finding that California's registration requirement served to deter recidivism).

206. *See* Godsoe, *supra* note 199, at 350 (discussing how sex offender registration can deter reporting sexual assault of children "out of fear of the consequences to offenders").

207. *See Animus*, *supra* note 15, at 1781–83.

208. *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 401–02 (1965); COHEN, *supra* note 22, at 2. Under the denunciation theory, "[s]ociety is the proper entity to inflict the punishment because it was the victim of the crime." Rychlak, *supra* note 175, at 301; *see id.* at 331 ("The denunciation theory of punishment says those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents.").

Of course, the state may condemn sexual violence and coercion through punishment. Indeed, sex offender registries are a paradigmatic tool of denunciation; they publicly label individuals as dangerous sexual predators.[209] In theory, these registries inform the public about people whose past acts suggest future predatory risk, especially toward children, reflecting public condemnation of such conduct. Moreover, legislatures explicitly designed these laws to manage high-risk offenders whose crimes demonstrate an ongoing threat to society.[210]

However, for denunciation to be justified, it must truthfully express the gravity of the wrong and match society's moral judgment. Imposing sex offender registration on people living with HIV for consensual sex expresses condemnation of nothing more than their status as HIV-positive.[211] It tells the public that these individuals are dangerous simply because of a medical diagnosis,[212] regardless of their behavior or risk level, which contradicts the majority's idea of justice being served.[213]

Society may have a moral right to punish wrongdoers, but that moral judgment is flawed when it requires sex offender registration for individuals convicted of HIV laws that fail to account for criminal intent or actual risk. Registration sends a false signal to the public that these individuals are sexual predators, collapsing meaningful distinctions among types of offenses and contradicting the registry's original purpose. Worse, requiring registration in this context perpetuates dangerous misinformation about HIV itself, reinforcing stigma that public health agencies work tirelessly to eradicate. Instead of fostering

209. *See generally* Christopher Lobanov-Rostovsky, *Chapter 8: Sex Offender Management Strategies*, *in* U.S. Dep't of Just., Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Tracking, Sex Offender Management Assessment and Planning Initiative (2017) (discussing how sex offender registries impart stigma on listees).

210. U.S. Dep't of Just., Off. of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking, Sex Offender Registration and Notification in the United States: Current Case Law and Issues 5 (2019) (noting that recidivists are subject to heightened registration requirements).

211. *See* Newman, *supra* note 192, at 1426 ("Given the broad range of sexual activity that HIV-exposure statutes typically cover, disproportionate sentences suggest that it is the person's HIV status, rather than her specific conduct, that is criminalized.").

212. *See* Taylor, *supra* note 27, at 1239 ("HIV criminalization statutes prosecute [individuals] for criminal exposure, not for the *actual* potential of exposure to HIV or *actual* transmission of HIV, but for their HIV *status* in conjunction with everyday activities.").

213. *See* Rychlak, *supra* note 175, at 307 (describing how despite its obligations to the majority, society also has obligations to the individual, and conflicts may arise with the majority's understanding of "justice . . . being served"); *see generally* Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2005) (describing how federal, state, and local governments have criminalized a greater swath of activity with little justification).

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community values, denunciation furthers divisions in society, especially among already marginalized communities.

4. Incapacitation and Public Safety

Finally, the incapacitation theory justifies punishment when it prevents future harm by restraining dangerous offenders. Sex offender registration regimes are explicitly justified as tools of incapacitation; they keep tabs on those likely to reoffend so communities can protect themselves.[214]

Notably, scholars have forcefully challenged the claim that sex offender registries effectively protect public safety.[215] Scholars argue that registries often lack an empirically demonstrable connection to crime prevention, functioning instead as symbolic expressions of condemnation.[216] In that regard, research shows that registration and notification laws do not reduce recidivism and may even undermine public safety by exacerbating housing instability and social isolation.[217]

Even setting aside these broader critiques, the rationale for incapacitation relies on the idea that registries target individuals who pose a clear, ongoing threat of sexual violence or predation. The goal is to enable law enforcement and communities to monitor those at genuine risk of reoffending.[218] This logic collapses when applied to HIV-related convictions that often involve consensual adult sexual conduct with no intent to harm and no meaningful risk of transmission. The supposed danger that registries are meant to manage simply does not exist in these cases. Further still, once virally suppressed, an HIV-positive person cannot sexually transmit the virus.[219] Even in the absence of treatment, transmission risk depends on specific sexual acts and is dramatically lower with condoms or other risk-reduction strategies.[220] There is no

214. Prescott, *supra* note 170, at 1042.

215. *See* Huffman, *supra* note 36, at 245; Godsoe, *supra* note 199, at 349–50 (arguing that the sex offender registry has not been shown to increase public safety); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & Econ. 207, 207–08 (2011).

216. *See* Prescott, *supra* note 170, at 1039–40 (concluding that no real empirical evidence supports the claim that sex offender registries are effective at reducing sex offender recidivism).

217. *See id.*; Godsoe, *supra* note 199, at 349–50.

218. LaFave & Scott, Jr., *supra* note 173, at §§ 1.5(a)(2), 23–24.

219. Advances in medical treatment, especially the principle of "undetectable equals untransmittable" ("U=U"), mean that individuals adhering to treatment pose no meaningful transmission risk. *Undetectable = Untransmittable*, Ctrs. for Disease Control & Prevention (Aug. 19, 2024), https://www.cdc.gov/global-hiv-tb/php/our-approach/undetectable-untransmittable.html [https://perma.cc/44V5-VSJM].

220. Ctrs. for Disease Control & Prevention, HIV Criminalization Legal and Policy Assessment Tool: Legal, Health, and Equity Considerations

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evidence that those convicted under these laws represent an ongoing sexual danger.

Thus, registration for people convicted under HIV-related offenses does not rationally serve a public safety purpose. It simply imposes surveillance and social exclusion on people who do not present a meaningful threat. Moreover, imposing registration on people with no demonstrated predatory intent or harm dilutes the system's surveillance resources and damages its credibility.[221] Rather than protecting the public and preventing future harm, registration burdens law enforcement with tracking people who pose no risk of sexual violence, diverting resources from genuine threats to public safety.

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None of the core justifications for criminal punishment support the sex offender registration of people convicted under HIV-specific nondisclosure statutes. The sex offender registry defies the goals of rehabilitation and prevents reintegration to society. The registry does not further retributive goals because the punishment far exceeds moral culpability. Registration fails deterrence theory because it discourages testing and treatment while doing little to prevent harm. Society's denunciation function fails because the registry stigmatizes disease rather than wrongful conduct. Finally, the theory of incapacitation fails because, in the vast majority of cases, the people prosecuted under HIV nondisclosure statutes do not pose a meaningful sexual threat.

Sex offender registration is among the most severe penalties in American law, intended for those who pose a serious sexual danger to the public. Using it against people living with HIV for engaging in consensual sex is unjust, disproportionate, and contrary to the values that should guide punishment in a liberal society.

While this Article focuses on HIV-related prosecutions, it does not claim that these laws are uniquely flawed. Rather, they reveal broader systemic problems in the criminal legal system's treatment of sexual conduct. For instance, the evidentiary challenges in nondisclosure cases (such as proving or disproving consent or disclosure of HIV) mirror those in many sexual assault cases.[222] And the stigma faced by people

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Related to HIV Criminalization, Public Health Surveillance, and Data Privacy 9 (2022); *see also* Lehman et al., *supra* note 53, at 997–98.

221. *See, e.g.*, Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, 989 Ann. N.Y. Acad. Sci. 335, 345 (2003).

222. *See* David M. Ring & Natalie Weatherford, *Seven Key Evidentiary Issues in Sexual Assault, Abuse and Harassment Cases*, Advocate (Oct. 2015), https://www.advocatemagazine.com/article/2015-october/seven-key-evidentiary-issues-in-sexual-assault-abuse-and-harassment-cases [https://perma.cc/J5GD-7DV3].

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living with HIV echoes the moral judgment imposed on anyone labeled a sex offender, regardless of the conduct involved. This critique is not meant to draw a sharp line between "legitimate" and "illegitimate" uses of the registry. On the contrary, it calls for a more intentional approach to classification and punishment. Ultimately, a fair system of punishment should distinguish between intentionally harmful behavior and consensual adult intimacy. By focusing registration requirements on genuinely predatory conduct, the law can better serve the principles of punishment that theoretically guide our understanding of justice.

IV. The Need for Reform: A Theory-Grounded Prescription

No single solution can completely relieve public anxiety about sexual offending, nor can one specific strategy address the varied risks posed by different offenders.[223] However, applying a one-size-fits-all label of "sex offender" to people convicted under HIV-specific laws categorically misfires. Requiring registration under these laws ignores the unique context of consensual adult sexual activity where no intent to harm and minimal or no actual transmission risk exists. Instead of meaningfully protecting the public, such overinclusive branding sweeps people managing a chronic health condition into a punitive system designed for truly predatory behavior. Reform is needed to restore culpability and proportionality to an area of the law that currently punishes status rather than conduct.

Part III explained that mandatory sex offender registration for HIV-related convictions fails basic principles of punishment theory. This Part advances a two-tiered reform proposal. First, it argues that HIV-specific criminal statutes that mandate sex offender registration should be repealed. These laws ignore contemporary medical science and punish conduct that is neither harmful nor culpable. Second, where criminal laws remain in place, this Part argues that the statutes should be fundamentally narrowed to reflect intent and actual risk of transmission. Registration is a severe penalty that bears no rational relationship to the conduct typically prosecuted under these statutes. These reforms seek to realign HIV-related criminal policy with principles of proportionality, culpability, deterrence, and public safety.

One might argue that reforming HIV-specific registration requirements does too little to confront the deeper flaws of the sex offender registry itself. Scholars have criticized the registry as stigmatizing and empirically unsupported, a critique discussed in Part III. From that abolitionist perspective, narrowing HIV-related mandates

223. *See* Huffman, *supra* note 36, at 248–49, 302–03.

is insufficient; the entire regime should be dismantled as a system of punishment without principle.

While I share concerns about these systemic flaws, this Article stops short of endorsing wholesale abolition. As a former prosecutor, I recognize that sex offender registration laws were often enacted with the goal of protecting communities from serious harm.[224] Still, even well-intentioned systems can yield unjust outcomes. And critically, full abolition remains politically remote, as it requires broad legislative consensus that appears unlikely in the near term. In contrast, reforming these mandates is achievable, as demonstrated by recent reform movements that have gained traction in certain states. HIV-specific laws impose one of the harshest penalties available in American law on individuals who often pose no sexual threat, have no intent to harm, and engage in consensual adult conduct. Applying the registry in this context distorts the fundamental principles of criminal punishment and undermines public health.

The reforms that follow focus on two levels: eliminating mandatory sex offender registration as a collateral consequence of HIV-related convictions and modernizing or repealing HIV-specific criminal statutes that punish low- or no-risk conduct. The next Sections outline these reforms in turn.

A. Repealing Mandatory Registration Requirements

Legislatures should repeal HIV-specific criminal statutes that impose strict liability or mandate sex offender registration. The most direct and effective solution is eliminating the statutory provisions that automatically classify people living with HIV as sex offenders for their consensual adult conduct. Public health experts and human rights advocates have argued that criminal law is a blunt and counterproductive tool for managing communicable diseases.[225] Repealing these statutes

224. The problem lies not in the existence of registries themselves but in the ways they have been expanded beyond any principled justification, sweeping in offenses and individuals for whom such extraordinary sanctions are neither necessary nor proportionate. *See, e.g.*, LOGAN, *supra* note 187, at xvi ("Although premised on empirical certitudes of recidivism, and the expectations that they assist police, deter recidivism, and empower communities with information to self-protect, it remains unclear whether registration and notification actually work as intended.").

225. Burris et al., *supra* note 182, at 507 ("[T]here is no indication that criminal law steers enough people towards safety to reduce the rate of infection. If the prime task of prevention is to shift the at-risk population in the direction of having safer sex with fewer partners, detecting, punishing, and incapacitating a handful of bad actors is not a wise use of prevention resources."); *id.* at 484 ("[C]riminal law may simply be too blunt a tool for achieving change in peoples' sexual risk behavior.").

would acknowledge the scientific reality of HIV transmission and reduce the stigma that continues to fuel the epidemic.

Opponents of repealing such statutes might argue that mandatory sex offender registration is a necessary precaution to protect public safety, even in HIV cases.[226] Legislatures have broad discretion to protect citizens from communicable diseases, particularly sexually transmitted ones.[227] And in theory, the registry informs potential partners and communities of risk. Indeed, public notification laws were explicitly justified as empowering citizens with knowledge to protect themselves.[228] Therefore, critics might argue that removing HIV-related registration would jeopardize public health because some people might not disclose their status to their partners, may fail to adhere to treatment, or they could have undiagnosed co-infections that increase transmission risk.[229]

These concerns, while understandable, do not justify maintaining mandatory registration. The registry mislabels individuals as sexual predators regardless of actual transmission risk or intent, and it ignores the scientific reality that proves virally suppressed individuals cannot transmit HIV.[230] Scholars have pointed out that empirical research consistently shows registries have no clear deterrent effect on sexual offending,[231] let alone on disease transmission. Repealing the requirement would eliminate a severe (and often unwarranted) punishment that studies have demonstrated is ineffective at curbing transmission rates.

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226. *See* Hermann, *supra* note 200, at 353 ("Criminal statutes are effective to deter individuals from engaging in HIV transmitting behavior to the extent statutes specify proscribed behavior . . . .").

227. *See* Lawrence O. Gostin, *Public Health Law in a New Century Part I: Law as a Tool to Advance the Community's Health*, 283 JAMA 2837, 2840 (2000) (explaining that the government can require conformance with publicly established standards of conduct so that others will not be placed at risk of harm).

228. Logan, *supra* note 187, at xii ("[C]ommunity notification, which rather than providing registrants' identifying information to police alone, as before, disseminated it to the public at large, to guard against recidivist criminality," creating a new "type of power.").

229. However, empirical findings "cast doubt on a public health benefit arising from prosecutions for HIV-related behavior under general criminal law." Burris et al., *supra* note 182, at 506.

230. Undetectable = Untransmittable ("U=U"). *See Undetectable = Untransmittable*, *supra* note 219.

231. *See* Prescott, *supra* note 170, at 1039–40 (concluding that no real empirical evidence supports the claim that sex offender registries are effective at reducing sex offender recidivism); Godsoe, *supra* note 199, at 349–50 (arguing that the sex offender registry has not been shown to increase public safety); Burris et al., *supra* note 182, at 511.

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One additional reform worth noting is limiting or eliminating interstate reciprocity for HIV-related registration, which could further mitigate the severe collateral consequences faced by people living with HIV. Under current law, an individual required to register in one state must typically register in every state to which they relocate, even when the receiving state does not identify the underlying conduct as a registrable offense. Although restricting reciprocity could mitigate some of the harshest collateral consequences, doing so implicates a complex set of administrative and federalism considerations that warrant deeper treatment than this Article can provide.[232]

Repealing HIV-specific registration mandates is an essential first step toward realigning criminal law with principles of a just system of punishment. The subsequent Sections turn to reforms of the underlying criminal statutes themselves.

B. Incorporating an Intent Requirement

Where full repeal is not immediately feasible, legislatures should, at a minimum, reform existing laws to align with universal principles of punishment theory. This means introducing clear intent requirements that only punish conduct undertaken with a specific purpose to harm.

Not all HIV-related conduct should be treated equally under the law. Those individuals who engage in sex without disclosing their HIV-positive status are not blameless, nor should they escape legal scrutiny altogether. However, the current regime of sex offender registration, which collapses all nondisclosure cases into one category of criminal liability, fails to meaningfully distinguish between levels of culpability.[233] Individuals who act with clear intent to harm, such as by knowingly attempting to transmit HIV or by engaging in sexual activity with deceptive or coercive motives, may justifiably be subject to criminal penalties under traditional principles of intent-based criminal law.[234] These are cases that implicate autonomy and consent in ways that more closely resemble assaultive conduct.

But many HIV criminalization statutes, particularly those that impose strict liability or presume intent based solely on nondisclosure, are overbroad. They ensnare individuals who, while HIV-positive, may be virally suppressed and therefore pose no realistic risk of

232. Those questions are the focus of my next work.

233. *See supra* Section III.B.1.

234. *See* Case Comment, *Rape-Specific or General Intent Crime?*, 15 Wash. & Lee L. Rev. 128, 128 (1958) (discussing culpability needed for specific and general intent crimes).

transmission,[235] or who use protection,[236] or who disclose their status but cannot prove that because it happened during a private conversation without any witnesses. In these cases, there may be some risk-based conduct worthy of regulatory attention or even civil sanction, but that conduct does not rise to the level of criminal culpability, and it certainly does not justify decades-long registration as a sex offender. By failing to differentiate between malicious transmission attempts and nondisclosure absent intent to harm, the law imposes punishment that does not fit the "crime," effectively undermining the entire criminal justice system.

Critics might argue that requiring proof of specific intent to harm would make these laws ineffective because many HIV transmission cases are inherently private and difficult to prove,[237] with no third-party witnesses. As a result, intent requirements might effectively decriminalize nondisclosure, even in cases of knowing or reckless transmission. Some scholars may warn against imposing evidentiary burdens so high that they cannot address genuinely dangerous conduct.[238]

However, contrary to that argument, adding an intent requirement would restore basic fairness and proportionality, ideals inherent to our system of punishment. A sanction as severe as sex offender registration should be reserved for truly blameworthy conduct and proving intent is far from impossible; prosecutors regularly establish intent in assault and fraud cases,[239] often with circumstantial evidence. Requiring proof of

235. *Undetectable = Untransmittable*, *supra* note 219.

236. *Id.*

237. *See supra* Section I.C.

238. *See* Burris et al., *supra* note 182, at 483–84 (pointing out the view that criminalization is a "necessary and appropriate response to self-evidently dangerous behavior," even for people who have no intent to infect others but who do not disclose their status or take other precautions against transmission, i.e., those who act in reckless or negligent ways).

239. Texas became the first state to repeal its HIV criminalization statutes in 1994. So far, only Illinois and New Jersey have followed suit. *See* SOURCEBOOK, *supra* note 12, at Texas 1, Illinois 1, and New Jersey 1. Although Texas has repealed its HIV-specific criminalization statute, an individual can be prosecuted under general criminal laws such as attempted murder or aggravated assault. *See id.* at Texas 1. Texas courts have determined that an infected person's seminal fluid constitutes a deadly weapon for purposes of the aggravated assault and sexual assault statutes. *See id.* (citing Mathonican v. State, 194 S.W.3d 59, 67–71 (Tex. App. 2006)). Under Texas's aggravated assault statute, an individual faces a second-degree felony for causing serious bodily injury to another or using a deadly weapon. TEX. PENAL CODE ANN. § 22.02(a) (West 2016). Notably, a person violates Texas's aggravated sexual assault statute when the individual engages in sexual acts without their partner's consent and faces a first-degree penalty, which includes a five-to-ninety-nine-year imprisonment or life in prison with a $10,000 fine. *See id.* §§ 22.021, 12.32 (West 2016). Consequently, individuals still face significant penalties for failing to gain full consent from their partner.

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intent ensures the law targets deliberate harm,[240] rather than consensual sex without disclosure that may involve negligible transmission risk due to effective treatment, and where fear of stigma or even violence can complicate disclosure.[241] Such a reform would prevent overcriminalization while still allowing the prosecution of intentionally harmful transmission.

Moreover, heightened mens rea requirements serve an important institutional function by narrowing the cases that reach juries in the first place.[242] Broad nondisclosure statutes often hinge on credibility contests between complainant and defendant in contexts shaped by fear and moral judgment.[243] By contrast, statutes that require proof of specific intent to transmit limit criminal liability to cases where culpability can be established through objective evidence, therefore reducing the extent to which outcomes turn on implicit biases of the jurors, including their assumptions about HIV, sexuality, and risk.[244] In this way, intent requirements not only align HIV criminalization with punishment theory, but also mitigate structural concerns associated with jury decision-making in highly stigmatized cases.[245]

C. Addressing Reckless Conduct While Preserving Proportionality

One significant counterargument to requiring an intent element in HIV criminal statutes is that it may undercut the state's ability to address reckless conduct that creates a substantial risk of transmission. Critics may contend that limiting criminal liability to those who act

240. Relatedly, imposing the full weight of sex offender registration on people who may have disclosed their positive status but were not believed, who posed no real transmission risk due to treatment, or who engaged in consensual adult sex without malicious intent does not improve public safety. Instead, it pushes people away from the health care systems that reduce transmission risk most effectively. *See supra* Section III.B.2; *see also HIV Criminalization Reform in California: What Does It Mean for Me?*, *supra* note 41 ("[L]aws which unnecessarily criminalize HIV are a disincentive to testing and engaging in care. You can't be prosecuted for knowingly spreading HIV if you never knew that you were HIV-positive in the first place!").

241. *See What HIV Criminalization Means to Women in the U.S.*, *supra* note 66, at 3 (explaining that research indicates disclosure of HIV-positive status may provoke violence in intimate relationships).

242. *See* MODEL PENAL CODE § 2.02 (identifying culpable mental states as central limiting principles of criminal liability).

243. *See HIV Criminalization and Women*, *supra* note 94.

244. *See* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833 (2012) ("'Implicit biases' are discriminatory biases based on either implicit *attitudes*—feelings that one has about a particular group—or implicit *stereotypes*—traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do.").

245. *See id.*

with specific intent to infect others overlooks the reality that harmful behavior can occur without that express purpose. For example, a person who knows they are HIV-positive and engages in unprotected sex without disclosure (even without malicious motives) still exposes another person to undesirable health risks.[246]

Opponents of a strict intent-based approach also point to the broader public health goal of encouraging disclosure and safer sex practices.[247] They argue that only criminalizing purposeful transmission may remove important incentives for risk reduction and weaken the state's ability to deter irresponsible behavior.[248] In their view, the law should not only respond to those who intend harm, but also to those whose reckless behavior demonstrates a disregard for the well-being of others.[249]

These critiques raise an important question: How should the law respond to reckless but unintentional acts that create transmission risk? The answer often depends on two interrelated factors—assumptions about the actual risk posed and normative judgments about whether that risk is acceptable. As Scott Burris has framed it: "Sure, this is undesirable behavior—but is it a crime?"[250] That is the first question. The one I am specifically answering is the second unasked question: Is it a sex offense that warrants treatment on the sex offender registry?

While intent is a critical threshold for criminal culpability, it does not capture the full range of conduct that may warrant punishment. Individuals who act with reckless disregard for the risk of transmission, particularly where there is actual harm, may be appropriately subject to legal sanction. However, treating all nondisclosure or condom use failure as inherently criminal, let alone as sex offenses, goes too far. As discussed, most HIV criminal statutes do not require intent to harm. Instead, they often criminalize the mere act of engaging in sexual behavior while knowing one's HIV-positive status—even if the person consistently uses condoms.[251] Under such broad standards, even an

246. *See* Wolf & Vezina, *supra* note 27, at 841.
247. *See* Burris et al., *supra* note 182, at 483–84 ("[C]riminalization of such negligence or recklessness is a necessary and appropriate response to self-evidently dangerous behavior.").
248. *See id.* at 483–84, 484 n.79.
249. *See id.* at 483–84.
250. *Id*. at 469 ("Exposing others to a significant risk of infection . . . is indefensible conduct for one who knows of his or her infection, negligent at best and homicidal at worst.").
251. Wolf & Vezina, *supra* note 27, at 880.

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individual who takes precautions could face prosecution following a condom failure.[252]

A better approach, one that is consistent with modern punishment theory, is a more tailored mens rea standard. Indeed, several states have already revised their HIV criminalization statutes in ways that better align with this more principled framework. These updated laws tailor penalties to the individual's mental state and conduct, require actual transmission in some cases, and incorporate scientific understandings of risk. These reforms represent an important change away from strict liability and categorical punishment toward a more individualized and proportionate approach.

For example, California,[253] Virginia,[254] and Georgia[255] now require specific intent to transmit HIV and, in some cases, actual transmission

252. *See id.*

253. In 2017, California revised its HIV-specific statutes criminalizing transmission. Previously, a person who knew they had HIV would be convicted of a felony, punishable by up to three, five, or eight years in prison for engaging in condomless sex without first disclosing their HIV positive status and with specific intent to transfer. *See* CAL. HEALTH & SAFETY CODE § 120291 (repealed 2018); *see also* SOURCEBOOK, *supra* note 12, at California 1. Now, under the updated statute, a person is guilty of the intentional transmission of HIV if the person has the "specific intent" to transmit the virus and "transmits" the disease to the third party. CAL. HEALTH & SAFETY CODE § 120290(a)(1) (West 2018). If found guilty, the individual is charged with a misdemeanor punishable by up to ninety days in prison. *Id.* § 120290(g)(2) (West 2018). Accordingly, California modernized its statute by no longer criminalizing the failure to disclose and changing the necessary elements to having the "specific intent" to expose a person to HIV with actual transmission resulting. *See id.* § 120290(a)(1); *see also* Y. Tony Yang et al., *Rethinking Criminalization of HIV Exposure – Lessons from California's New Legislation*, 378 NEW ENG. J. MED. 1174, 1174–75 (2018) (discussing how California's new HIV legislation, unlike typical HIV criminalization statutes, reflects up-to-date science and works in favor of the traditionally stated rationales of such laws: deterrence and retribution).

254. Virginia revised the state's HIV criminalization laws in 2021. Currently, there are no HIV-specific statutes criminalizing exposure in the state. Nonetheless, Virginia criminalizes individuals with sexually transmitted infections who engage in sexual acts that pose a "substantial risk of transmission." VA. CODE ANN. § 18.2-67.4:1(A) (2016). However, the person must have the "intent to transmit" their infection and must actually transmit it to be found guilty. *Id.* Accordingly, a person living with HIV cannot be found guilty of infected sexual battery unless the individual has specific intent to transmit HIV and the virus is successfully transmitted to their partner. *Id.*

255. Under Georgia's revised statute, it is a felony for a person to engage in sexual acts with the "intent to transmit HIV" and without "disclos[ing] his or her status." GA. CODE ANN. § 16-5-60(c)(1) (2025). If convicted, the offender faces up to five years in prison. *Id.* § 16-5-60(c)(2). Additionally, there must be a "significant risk of transmission," which is based on "scientifically supported levels of risk of transmission." *Id.* § 16-5-60(c)(1). While Georgia's revised statute is silent on other preventative methods, such as the use of condoms, the statute nonetheless does include a substantial risk element based on levels of transmissibility. *Id.* This provision is most analogous to California's, which includes an affirmative defense where the defendant cannot be found to have

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as a condition for liability. California's modernized statute further provides an affirmative defense when the person took or attempted to take precautions to prevent transmission.[256] Washington has narrowed its law to criminalize only intentional and actual transmission to children or "vulnerable adults."[257] Iowa,[258] Missouri,[259] and New Jersey[260] have adopted tiered statutes that distinguish between intent, recklessness, and actual harm, with graduated penalties based on mens rea and transmission risk. Nevada has integrated a public health framework, requiring a prior written warning before criminal liability attaches and allowing affirmative defenses based on preventive measures.[261] North Carolina, though lacking an HIV-specific statute, still criminalizes violations of administrative public health regulations.[262] Collectively, these reforms reflect a growing recognition that criminal law should not apply categorically to all HIV nondisclosure, but instead should

specific intent if the person took, or attempted to take, preventative measures. *See* CAL. HEALTH & SAFETY CODE § 120290(b), (e)(3) (West 2018).

256. Under California's reformed statute, the person cannot be found guilty of acting with "specific intent" if the defendant took or attempted to take practical means to prevent transmission. CAL. HEALTH & SAFETY CODE § 120290(a)(1), (b), (e)(3) (West 2018).

257. WASH. REV. CODE § 9A.36.011(1)(b) (2023); *id.* § 9A.36.011(1) (2025).

258. IOWA CODE § 709D.3 (2014) (person living with HIV faces: a Class B felony if the individual acted with intent to transmit the virus and successfully transmitted the virus, a Class D felony if the individual acted with intent to transmit the virus but did not transmit the virus, a Class D felony if the individual acted with a reckless disregard as to whether the third party was infected with the virus and that person became infected, or a serious misdemeanor if the person acted with a reckless disregard as to whether the third party was infected with the virus but that person did not become infected).

259. Under Missouri's amended statute, it is unlawful to "[k]nowingly expose" a person to HIV or "[a]ct in a reckless manner" by exposing a person to HIV through activities that create a "substantial risk" of transmission, which is determined by medical or epidemiological evidence. MO. REV. STAT. § 191.677(2)(2)–(3) (2021). If a person is found guilty of either knowingly exposing a person to HIV or acting in a reckless manner by exposing a person to HIV, the individual faces a Class D felony, but a Class C felony if the person contracts HIV. *Id.* § 191.677(3)(1) (2021). Additionally, a person may be convicted of a Class A misdemeanor if they act in a "reckless manner" that creates a substantial risk of transmitting HIV. *Id.* § 191.677(2)(3), (3)(2) (2021).

260. New Jersey's criminal endangerment statute has tiered punishments depending on the defendant's mens rea: An individual commits a disorderly persons offense if they recklessly engage in conduct that creates a substantial risk of bodily injury to another, a fourth-degree crime if they knowingly engage in conduct that creates a substantial risk of serious bodily injury to another, and a third-degree crime if they knowingly engage in conduct that creates a substantial risk of death to another. *See* N.J. STAT. ANN. § 2C:24-7.1(a) (West 2023).

261. NEV. REV. STAT. § 441A.180(2), (6) (2021).

262. *See* N.C. GEN. STAT. § 130A-25(a) (2017); *see also* SOURCEBOOK, *supra* note 12, at North Carolina 1.

account for culpability, risk, and harm in ways consistent with punishment theory.[263]

D. Emphasizing Evidence-Based Public Health Strategies

Finally, states should invest in evidence-based public health approaches. These include expanding access to HIV testing, treatment, education, and support services that reduce transmission risk and promote well-being.[264] Criminal law should not substitute for public health policy, nor should it exacerbate stigma and fear. Instead of isolating and punishing people living with HIV, reforms should focus on actual transmission risk and intent, while encouraging honest communication and engagement with medical care.

Critics could argue that criminal law must remain part of the toolkit to promote public health goals. They could maintain that though testing and educational reforms are vital, some deterrence is nevertheless necessary to encourage disclosure. They could point out that public anxiety about sexual risk is real and politically powerful.[265] Indeed, legislators may prefer visible punitive tools like the registry to reassure voters and worry that decriminalizing nondisclosure sends the wrong message about the seriousness of HIV.

However, as demonstrated, relying on criminal law for public health goals often produces the opposite of its intended effect.[266] Criminal law is a blunt and counterproductive instrument for managing infectious disease.[267] Evidence shows that fear of prosecution discourages testing and disclosure,[268] while stigma drives people away from health services. Meanwhile, public health approaches, such as free testing, treatment access, and education campaigns, are empirically

263. *See* Wolf & Vezina, *supra* note 27, at 880–81 (suggesting a stricter standard that requires a showing of recklessness).

264. *See* Burris et al., *supra* note 182, at 514–15 ("The sad irony of criminalization and public health is that there is another way, a way that demonstrably works: the combination of education, persuasion and social support pursued in traditional public health interventions. We don't *need* criminal law, and to the extent criminalization in any manner detracts from the attention to or funding for measures that do work, it hurts HIV control." (emphasis in original)).

265. *See* Elizabeth J. Letourneau et al., *The Effects of Sex Offender Registration and Notification on Judicial Decisions*, 35 Crim. Just. Rev. 295, 297 (2010) (finding that "there is widespread public and political support for policies that purport to protect women and children from sexual violence").

266. Burris et al., *supra* note 182, at 467–68 (empirical study indicating criminal law has no real place in controlling the spread of HIV).

267. *Id.* at 484, 487–88.

268. *Id.* at 487–88; *see* Edwin Cameron, *Criminalization of HIV Transmission: Poor Public Health Policy*, 14 HIV/AIDS Pol'y & L. Rev. 1, 1 (2005) (arguing that HIV criminalization undermines public health goals).

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proven to reduce transmission.[269] Therefore, redirecting resources from punishment to public health initiatives strengthens public safety in the most meaningful sense.

Ultimately, these reforms aim to restore legitimacy to the law by ensuring that criminal sanctions reflect intentional or reckless conduct, are proportional to the harm caused, honor the medical advancements that have improved the quality of life for those living with HIV, and actually align with public safety.

Conclusion

The requirement that individuals convicted under HIV criminal statutes register as sex offenders represents punishment without principle. It transforms consensual sexual relationships into grounds for state surveillance and lifelong stigma, imposing consequences harsher than many violent crimes. By subjecting people living with HIV to sanctions designed for predatory sexual offenses, these laws misuse the registration system in ways that were never intended. They perpetuate the same prejudice that led to their enactment decades ago and discourage testing and medical treatment. This approach undermines public health while eroding the legitimacy of the criminal justice system.

Requiring sex offender registration for HIV-specific offenses cannot be justified under any theory of punishment and must be repealed or fundamentally reformed because these laws sever the crucial link between culpability and penalty and fail to advance any genuine public safety goal. Legislators should embrace evidence-based, public health-oriented strategies that focus on actual risk and criminal intent. Punishment theory places real limits on the state's power to condemn and exclude. To honor those limits, the law must abandon this unjust and ineffective punishment and fulfill its promise of fairness.

269. *See* Burris et al., *supra* note 182, at 514–15 ("The sad irony of criminalization and public health is that there is another way, a way that demonstrably works: the combination of education, persuasion and social support pursued in traditional public health interventions.").

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