

CRIMINAL HIV TRANSMISSION STATUTES AND COVERT ONLINE INVESTIGATIONS: A DUE PROCESS ANALYSIS

Joseph Payne*

TABLE OF CONTENTS

Introduction.....	326
I. History of the Disease—Social, Medical, and Legal Developments	328
A. Historical Background of the Disease and Legislative Responses	328
1. Political Background of Criminal HIV Transmission Statutes	329
2. Current National Landscape of Criminal HIV Transmission Statutes.....	330
B. Social Consequences of Criminal HIV Transmission Statutes	331
C. Medical Developments Since Criminal HIV Transmission Statutes Were Enacted.....	334
1. Antiretroviral Therapy, Post-exposure Prophylaxis, and Pre- exposure Prophylaxis	334
2. Continued Risks Associated with Inadequate or Non-existent Treatment	336
D. Legal Developments Since Criminal HIV Transmission Statutes Were Enacted.....	338
II. Criminal HIV Transmission Statutes in the Age of Online Dating and Undercover Policing.....	340
A. Online Dating and Communication	340
B. Policing in the Digital Age.....	342

* J.D. candidate, class of 2018, Columbia Law School; B.S., B.A. (Hons) 2014, American University. The author would like to thank Professor Elizabeth Emens for her insightful comments on drafts of this Note, the staff of the *Columbia Human Rights Law Review* for their invaluable editing, his family for their support, and Pippa, Michael, and Patrick for reminding him to look up from his books and experience the world.

C. Problems with Undercover Internet Policing of Criminal HIV Transmission Statutes	347
1. Non-verbal Online Miscommunications in Undercover Investigations	348
2. Criminal HIV Transmission Laws and the Plea Bargaining Process	349
3. Effects of Undercover Investigations on Prevention and Testing Efforts	351
III. Previous Proposals to Limit the Negative Effects of Criminal HIV Transmission Statutes	352
A. Proposed Legislative Solutions	352
1. Repealing Criminal HIV Transmission Statutes	352
2. Replacing or Updating Criminal HIV Transmission Statutes	353
3. Reformulating Affirmative Defense Provisions	354
B. Proposed Judicial Solutions	355
1. Constitutional Challenges to Criminal HIV Transmission Statutes	355
2. Revisions to Criminal HIV Transmission Jury Instructions	355
IV. Using Inchoate Crimes and Due Process to Limit the Harm of Covert Investigations and Criminal HIV Transmission Statutes	356
A. Due Process and Weighing Individual and Government Interests	356
1. State Use of Police Power	357
2. Individuals' Interests	357
3. Government Interests	359
4. Historical Examples of Due Process Interest-Balancing in the HIV/AIDS Epidemic	360
5. Balancing Individual Interests with Government Interests in Criminal HIV Transmission Statutes	362
6. Due Process, Inchoate Crimes, and Criminal Transmission Laws	364
B. Proposed Remedy	368
1. Balancing Individual and Government Interests—Requiring Significant Conduct to Satisfy the “Substantial Step” Element of Inchoate Offenses	370
2. Benefits of the Proposed Remedy	371
Conclusion	371

INTRODUCTION

The Human Immunodeficiency Virus (HIV) has been a public health concern for the past thirty years.¹ This concern caused many states to pass criminal HIV transmission statutes at the beginning of the epidemic to stop its spread. HIV transmission statutes impose criminal penalties on those who spread the disease.² Since their enactment, state legislatures have left these statutes largely unchanged.³ Meanwhile, the medical profession has developed treatment to prevent the progression of the disease and prophylactic medication to prevent its spread.⁴ Criminal transmission statutes did not stop the spread of the disease; instead, they undermined treatment and prevention efforts.⁵ Despite the social impact of these statutes and medical developments, most legal challenges to criminal transmission statutes have been unsuccessful.⁶

Criminal transmission statutes provide “disclosure and consent” as an affirmative defense, where a person avoids criminal liability when they disclose their serostatus⁷ and their sexual partner consents.⁸ This defense is rife with problems. Primarily, criminal HIV

1. See THE PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT OF THE PRESIDENTIAL COMMISSION ON HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 5 (1988).

2. 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 (2014) [hereinafter Lehman]; e.g., MO. REV. STAT. § 191.677 (2017) (prohibiting individuals who knowingly have HIV from acting in a reckless manner in several ways by exposing another person to HIV without the knowledge and consent of that person).

3. See C. Galletly et al., *Criminal HIV Exposure Laws: Moving Forward*, 18 AIDS BEHAV. 1011, 1012 (2014) [hereinafter Galletly].

4. See *infra* Section I.C.

5. See *infra* Section I.B.

6. See Developments in the Law, *Chapter Four: Animus and Sexual Regulation*, 127 HARV. L. REV. 1767, 1784 (2014) [hereinafter *Chapter Four*].

7. Serostatus is defined as: “The state of either having or not having detectable antibodies against a specific antigen, as measured by a blood test (serologic test). For example, HIV seropositive means that a person has detectable antibodies to HIV; seronegative means that a person does not have detectable HIV antibodies.” Dep’t of Health & Human Services, *Education Materials*, AIDSINFO, <https://aidsinfo.nih.gov/education-materials/glossary/1632/serostatus> [<https://perma.cc/F3Z9-GA2P>] (last visited Feb. 6, 2018).

8. Lehman, *supra* note 2, at 1001; see, e.g., FLA. STAT. ANN. § 775.0877 (2017) (“[I]t is an affirmative defense to a charge of violating this section that the person exposed knew that the offender was infected with HIV, knew that the action being taken could result in transmission of the HIV infection, and consented to the action voluntarily with that knowledge.”).

transmission statutes do not clarify what qualifies as disclosure or consent for the purposes of an affirmative defense. Both, however, can be ambiguous or misunderstood.⁹ Disclosure and consent are increasingly problematic in the digital era, as each may be communicated non-verbally; implicit in the words; or implicit in the medium, like HIV-specific dating websites.¹⁰ The uncertainty inherent in this form of communication is particularly troubling when combined with increased Internet policing.¹¹

Police can monitor online communication by creating undercover accounts on dating applications (“apps”) or websites and talking to individuals known to have HIV.¹² With technological advances, it becomes easier for police to monitor and investigate HIV-positive individuals. These individuals are thus at an increased risk of criminal liability because they may think, or police may not realize, that disclosure has occurred. In such cases, police can effect an arrest if the individual did not explicitly disclose their serostatus either online or in person, even if the HIV-positive individual thought they sufficiently disclosed their serostatus or that disclosure was implied.¹³

In Part I, this Note discusses the history of the disease, covering the political, social, medical, and legal developments related to HIV and criminal transmission statutes from the 1980s through the present. Part II provides an overview of the different ways in which serostatus information can be miscommunicated through non-verbal

9. Alexandra McCallum, Note, *Criminalizing the Transmission of HIV: Consent, Disclosure, and Online Dating*, UTAH L. REV. 677, 683–87 (2014).

10. *Id.* at 689–96.

11. *E.g.*, *Man with HIV Arrested for Seeking Sex on Social Media*, POZ (July 22, 2015), <https://www.poz.com/article/stlouis-hiv-arrest-27534-4846> [<https://perma.cc/7YCX-HERH>] [hereinafter POZ].

12. *See e.g.*, Benji Douglas, *How Cops Used Grindr to Bust a Menace Meth Dealer*, QUEERTY (July 28, 2016), <https://www.queerty.com/cops-used-grindr-bust-menace-meth-dealer-20160728> [<https://perma.cc/4YAB-5PJF>] (raising the question as to whether the police department maintained an account or received a tip from a user of a network).

13. *See generally* CTR. FOR HIV LAW & POLICY, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008–2017 (2017), <https://www.hivlawandpolicy.org/sites/default/files/Chart%20of%20U.S.%20Arrests%20and%20Prosecutions%20for%20HIV%20Exposure%20in%20the%20United%20States%20%28updated%20November%202017%29.pdf> [<https://perma.cc/P8P8-GGGS>] [hereinafter PROSECUTIONS] (describing prosecutions involving online communication); *e.g.*, Jessica Anderson, *Edgemere Man Faces Rarely Used HIV Criminal Charge*, BALT. SUN (Sept. 12, 2012), <http://www.baltimoresun.com/news/maryland/crime/bs-md-co-hiv-criminal-transmission-20120909-story.html> [<https://perma.cc/U2NP-S5B4>].

online communication. It then explains how these miscommunications are particularly concerning in covert online investigations of violations of criminal transmission statutes. Part III surveys previous legislative and judicial proposals to repeal, replace, or add language to criminal HIV transmission statutes and examines their feasibility and shortcomings. Finally, Part IV suggests a judicial solution to limit the negative effects of criminal HIV transmission statutes in covert online investigations. In the context of inchoate violations of criminal HIV transmission statutes that first arise from non-verbal online communication, courts should continue to apply a due process analysis that weighs individual interests against government interests. This Note concludes that individual privacy interests remain strong, while government interests in protecting public health have waned over time. Balancing these interests, courts should properly find that due process requires significant conduct to meet the substantial step requirement of inchoate violations of criminal transmission statutes. At the least, due process requires that an individual must deny their serostatus in person before a conviction can be obtained.

I. HISTORY OF THE DISEASE—SOCIAL, MEDICAL, AND LEGAL DEVELOPMENTS

This Part provides an overview of the historical background of the human immunodeficiency virus infection and auto immune deficiency syndrome (HIV/AIDS) epidemic, including the political reaction to the disease and current criminal HIV transmission statutes across the country. Next, this Part will summarize the social consequences of these statutes as well as the medical developments in HIV treatment and prevention that have occurred over the last four decades. Lastly, this Part will survey past legal challenges to criminal HIV transmission statutes.

A. Historical Background of the Disease and Legislative Responses

The New York Times reported the first evidence of HIV in 1981 in an article that categorized the disease as a rare cancer found in gay men.¹⁴ It was not until the following year that the Centers for Disease Control published findings showing that the disease was transmitted

14. Lawrence K. Altman, *Rare Cancer Seen in 41 Homosexuals*, N.Y. TIMES (July 3, 1981), <http://www.nytimes.com/1981/07/03/us/rare-cancer-seen-in-41-homosexuals.html> (on file with the *Columbia Human Rights Law Review*).

sexually.¹⁵ While the HIV/AIDS epidemic began in the early 1980s, the federal government waited almost a decade to enact the Ryan White CARE Act, which provided federal funds to states to combat the HIV epidemic, but conditioned funding on a state demonstrating that its criminal laws were adequate to prosecute individuals who intended to spread the disease.¹⁶

1. Political Background of Criminal HIV Transmission Statutes

States used criminal law to try to prevent the spread of the disease before and in response to the Ryan White CARE Act.¹⁷ These laws were intended to deter people from spreading the disease and to punish those who risk spreading it.¹⁸ When these laws were passed, the HIV/AIDS epidemic was at its height.¹⁹ So too was HIV/AIDS hysteria—little was known about the disease and how to avoid its deadly effects.²⁰

15. Stephen Frost, Comment, *HIV Criminalization Laws: A Poor Public Policy Choice in the New Era of PrEP*, 6 WAKE FOREST J.L. & POL'Y 319, 323 (2016).

16. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. 101-381, 104 Stat. 576 (1990).

17. Sarah J. Newman, *Prevention, not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1417 (2013); RENÉ BENNETT-CARLSON, DANIEL FARIA & CATHERINE HANSENS, *ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES* (2010) [hereinafter HANSENS].

18. UNAIDS Secretariat, High Level Policy Consultation on Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Criminalization of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape: Background Paper by the UNAIDS Secretariat 19 (Feb. 14–15, 2012), http://www.unaids.org/sites/default/files/media_asset/JC2322_BackgroundCurrentLandscapeCriminalisationHIV_en.pdf [https://perma.cc/45X9-4NBS] [hereinafter UNAIDS].

19. See Frost, *supra* note 15, at 323–24.

20. See *id.* Criminal HIV transmission statutes were hardly the only way hysteria manifested itself in legal form. Even before most criminal HIV transmission statutes were enacted, numerous public health authorities sought to control the spread of HIV by closing gay bathhouses. See, e.g., Christopher Disman, *The San Francisco Bathhouse Battles of 1984: Civil Liberties, AIDS Risk, and Shifts in Health Policy*, 44 J. HOMOSEXUALITY 71, 108 (2003) (describing the closure order issued in 1984 by the San Francisco Department of Public Health for fourteen bathhouses because “their space encourage[d] and facilitate[d] multiple unsafe sexual contacts”).

2. Current National Landscape of Criminal HIV Transmission Statutes

Thirty-three states currently have HIV-specific criminal transmission statutes.²¹ These statutes proscribe sexual activity that was thought, in the 1980s, to result in transmission.²² Many HIV transmission statutes criminalize behaviors that pose a high risk of HIV transmission, like anal and vaginal intercourse.²³ However, the conduct prohibited in these laws reflects the incomplete understanding of the disease in the early years of the epidemic and, as such, these laws also proscribe sexual activities that pose a low or no risk of transmission.²⁴ For example, a number of HIV transmission statutes criminalize oral sex, which poses a low risk of transmission.²⁵ Fifteen states criminalize behavior that poses a negligible risk of transmission, such as biting, spitting, throwing body fluids, and sharing sex toys.²⁶ Criminal HIV transmission statutes do not require actual transmission²⁷ to obtain a conviction.²⁸ Most states have not changed

21. Lehman, *supra* note 2, at 997.

22. See Newman, *supra* note 17, at 1418 (noting how state HIV-specific statutes failed to target only scientifically established modes of transmission); Frost, *supra* note 15, at 323–24 (describing the misinformation that circulated in the 1980s about how HIV is spread, such as “the idea that HIV could lurk on toilet seats or that someone could contract HIV from kissing on the cheek”); Catherine Hanssens, *HIV Can Still Land You In Jail*, CTR. FOR HIV LAW & POLICY: THE FINE PRINT (May 9, 2014), <http://www.hivlawandpolicy.org/fine-print-blog/hiv-can-still-land-you-jail> [<https://perma.cc/E22S-RHAX>] (explaining how HIV laws reflect myths about HIV, including transmission by spitting and biting).

23. Lehman, *supra* note 2, at 1000.

24. The estimated per-act probabilities of getting HIV from an infected source per 10,000 exposures are as follows: blood transfusion: 9,250; receptive anal intercourse: 138; insertive anal intercourse: 11; receptive penile-vaginal intercourse: 8; insertive penile-vaginal intercourse: 4; receptive and insertive oral intercourse: low; biting, spitting, throwing body fluids, and sharing sex toys: negligible. CTRS. FOR DISEASE CONTROL & PREVENTION, HIV RISK BEHAVIORS (Dec. 2015), <http://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> [<https://perma.cc/M39C-6HJ6>]; see also Lehman, *supra* note 2, at 1000 (stating that twenty-five states criminalize low-risk behaviors, twenty-one criminalize oral sex, and eleven criminalize negligible risk behaviors including biting, spitting, or throwing bodily fluids).

25. Lehman, *supra* note 2, at 1000–01.

26. *Id.*

27. Rather, these statutes require that the person engage in certain behavior. See Frost, *supra* note 15, at 324–25.

28. See also Mario Brito, *On an Alternative to a Punitive Standard in Response to a More Modern Understanding of the HIV/AIDS Epidemic in Florida*, 40 NOVA L. REV. 285, 294–95 (2016) (noting that under Florida law the actual transmission of HIV is not required for the crime of criminal transmission of HIV).

or updated criminal HIV laws since their enactment.²⁹ States without HIV-specific statutes still punish HIV transmission using general criminal laws, like battery, aggravated assault, and even attempted murder.³⁰

Criminal HIV transmission statutes contain affirmative defense provisions. These affirmative defenses require an HIV-positive individual who knows their serostatus to disclose that status to sexual partners and obtain consent regarding transmission risks.³¹ If disclosure and consent occur, the elements of the affirmative defense are satisfied and criminal liability will not be imposed. Similarly, some states make non-disclosure and lack of consent an element of the offense that the prosecution must prove to obtain a conviction.³² Few states provide for additional affirmative defenses, like condom use.³³ Disclosure and consent, along with other affirmative defenses, are important because of the extraordinary length of sentences imposed for criminal HIV transmission: the average minimum sentence for these convictions is over fourteen years.³⁴

B. Social Consequences of Criminal HIV Transmission Statutes

While originally enacted to prevent the spread of HIV,³⁵ these statutes have many unintended consequences and may even harm public health.³⁶ Most importantly, these laws have not slowed or stopped the spread of HIV.³⁷ Instead, these statutes increase the

29. See C. Galletly, *supra* note 3, at 1012; see also Lehman, *supra* note 2, at 1000–01 (discussing when various state laws were enacted and what those laws criminalize).

30. Brito, *supra* note 28, at 318; see generally PROSECUTIONS, *supra* note 13 (reviewing prosecutions of individuals accused of spreading HIV, which include battery, aggravated assault, and attempted murder).

31. Lehman, *supra* note 2, at 1000–01.

32. *Id.* at 1001.

33. *Id.* at 1002.

34. Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED & ETHICS 239, 245 (2002) [hereinafter Lazzarini].

35. Frost, *supra* note 15, at 324; Siobhán Elizabeth Stade Murillo, *Twenty-First Century Regression: The Disparate Impact of HIV Transmission Laws on Gay Men*, 30 EMORY INT'L L. REV. 623, 631–34 (2016).

36. U.S. DEP'T OF JUSTICE, BEST PRACTICES GUIDE TO REFORM HIV-SPECIFIC CRIMINAL LAWS TO ALIGN WITH SCIENTIFICALLY-SUPPORTED FACTORS 2 (2014) [hereinafter BEST PRACTICES GUIDE].

37. Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 468 (2007) (“Criminal law is not a clearly useful intervention for promoting disclosure by HIV-positive people to their sex partners.”).

stigma surrounding the disease.³⁸ HIV-positive people are blamed for their disease and are used to reinforce an aversion to sexually transmitted diseases and sexual promiscuity.³⁹ When a state enacts criminal laws, it signals that it agrees with or condones that stigma.⁴⁰ This approbation is problematic for several reasons. These statutes encourage at-risk populations to remain unaware of their serostatus to avoid stigma.⁴¹ As a result, individuals may not want to get tested for HIV, which poses serious public health concerns.⁴² These laws also create distrust between HIV-positive individuals and their healthcare providers by making HIV-positive individuals fearful that their healthcare providers will report their behavior to the police. This fear reinforces the incentive not to get tested.⁴³

Additionally, criminal transmission statutes may cause some HIV-positive individuals to not disclose their serostatus out of fear of criminal charges being brought against them.⁴⁴ HIV-positive individuals may also fear that prosecution could broadcast their serostatus to the community and thus these individuals may seek to avoid social stigma by not disclosing their status.⁴⁵ Non-disclosure also

38. BEST PRACTICES GUIDE, *supra* note 36, at 1; RALF JÜRGENS ET AL., 10 REASONS TO OPPOSE CRIMINALIZATION OF HIV EXPOSURE OR TRANSMISSION 10 (2008) [hereinafter JÜRGENS]. HIV-related stigma extends into employment and housing opportunities in addition to social relationships. See Lisa Steinhauer, *Housing Discrimination Because of HIV/AIDS Is Illegal*, HUDDLE (Apr. 7, 2015), <https://blog.hud.gov/index.php/2015/04/07/housing-discrimination-hiv-aids-illegal/>; HIV & AIDS and Employment Discrimination, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/hiv-aids-and-employment-discrimination> (last visited Apr. 13, 2018); What You Should Know About HIV/AIDS and Employment Discrimination, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/hiv_aids_discrimination.cfm (last visited Apr. 13, 2018); Laurel Sprague, Sara Simon & Courtenay Sprague, *Employment Discrimination and HIV Stigma: Survey Results From Civil Society Organizations And People Living With HIV In Africa*, 10 AFR. J. AIDS RES. 311, 311 (2011).

39. *Chapter Four*, *supra* note 6, at 1787.

40. UNAIDS, *supra* note 18, at 24.

41. Brian Cox, *Turning the Tide: The Future of HIV Criminalization After Rhoades v. State and Legislative Reform in Iowa*, 11 NW. J.L. & SOC. POL'Y 28, 30 (2016).

42. JÜRGENS, *supra* note 38, at 8.

43. *Id.*

44. ADAM BOURNE ET AL., RELATIVE SAFETY II: RISK AND UNPROTECTED ANAL INTERCOURSE AMONG GAY MEN WITH DIAGNOSED HIV 12 (2009) [hereinafter BOURNE]; G. Whitlock et al., *Why Do Men Who Have Sex With Men Who Are at High Risk of HIV Infection Decline HIV Testing*, 12 HIV MED. 65, 65 (2011) (finding that approximately twenty percent of men in the study declined an HIV test out of an awareness of prosecution for HIV transmission).

45. UNAIDS, *supra* note 18, at 26–27.

endangers HIV-negative partners since they will not seek appropriate post-exposure treatment if they do not know they were exposed to HIV.⁴⁶

The negative consequences of criminal transmission statutes disproportionately affect already marginalized communities, including sex workers, incarcerated persons, the LGBT community, and racial minorities.⁴⁷ At the beginning of the HIV epidemic, these groups were stereotyped as quintessential HIV transmitters: “promiscuous sociopath[s] intending to infect innocent victims.”⁴⁸ Included among these stereotyped figures are the fabled bogeyman “Patient Zero,”⁴⁹ a “promiscuous” gay man alleged to have brought HIV to the United States, and Nushawn Williams, an African-American man who continued to have unprotected sex with women even after he was told by state health authorities that he was HIV positive.⁵⁰ Such negative stereotypes persist to this day⁵¹ and may help explain why criminal transmission statutes are still unduly applied to these minority groups.⁵² Criminal HIV transmission statutes have also been excessively enforced against women.⁵³

46. *Id.* at 23.

47. *Id.* at 14, 26; *Chapter Four, supra* note 6, at 1787.

48. Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN’S L.J. 363, 369 (2013).

49. RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 147 (1987).

In fact, Gaétan Dugas, so-called “Patient Zero,” did not bring HIV to the United States. See Donald G. McNeil, Jr., *HIV Arrived in the U.S. Long Before ‘Patient Zero,’* N.Y. TIMES (Oct. 16, 2016), <https://www.nytimes.com/2016/10/27/health/hiv-patient-zero-genetic-analysis.html> (on file with the *Columbia Law Human Rights Law Review*).

50. THOMAS SHEVORY, NOTORIOUS H.I.V.: THE MEDIA SPECTACLE OF NUSHAWN WILLIAMS xv–xvi (2004).

51. See Stephen Thrasher, *A Black Body on Trial: The Conviction of HIV-Positive ‘Tiger Mandingo,’* BUZZFEED (Nov. 30, 2015), https://www.buzzfeed.com/steventhrasher/a-black-body-on-trial-the-conviction-of-hiv-positive-tiger-m?utm_term=.ss9VL8Dye [<https://perma.cc/KZ3L-ERWG>] (recounting the story of Michael Johnson, “a black, gay, HIV-positive college wrestler” charged with lying to sexual partners about his status in “an overwhelmingly white community where anti-gay beliefs are widespread”).

52. UNAIDS, *supra* note 18, at 5, 23; Joseph Rose, *To Tell or Not to Tell*, 22 J. LEGAL MED. 107, 119 (2001); Kathleen Sullivan & Martha Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 156–57, 185 (2001).

53. JÜRGENS, *supra* note 38, at 12–14 (noting that women are more likely to be blamed for HIV infection; could face prosecution for transmitting HIV to their children in utero; and are more likely to know their HIV status, which is a necessary element in criminal transmission prosecutions).

C. Medical Developments Since Criminal HIV Transmission Statutes Were Enacted

While criminal HIV transmission statutes have remained relatively unchanged over the last several decades, medicine has made significant progress in treating and preventing the spread of HIV. The disease is no longer a death sentence for HIV-positive individuals who adhere to a treatment regimen. Still, the disease can be deadly with inadequate treatment. Certain groups, including incarcerated individuals, are particularly at risk of receiving inadequate treatment, both in prison and upon release. Thus, people convicted under criminal HIV transmission statutes who are sentenced to a period of incarceration face an increased risk of negative health consequences.

1. Antiretroviral Therapy, Post-exposure Prophylaxis, and Pre-exposure Prophylaxis

Since the HIV outbreak in the 1980s, scientists have created six types of antiretroviral therapy drugs (ART) to treat HIV.⁵⁴ When a combination of three of these drugs are taken together, ART decreases HIV in the bloodstream to undetectable levels, stopping HIV replication.⁵⁵ At this level, the Centers for Disease Control recognize “that people who take ART daily as prescribed and achieve and maintain an undetectable viral load have effectively no risk of sexually transmitting the virus to an HIV-negative partner.”⁵⁶ When individuals receive proper ART treatment early on, HIV-positive individuals have lifespans that are equal to or exceed the general population in the United States.⁵⁷

Scientists have also developed a drug that prevents the spread of HIV immediately after HIV-negative individuals are exposed to the

54. *HIV Treatment: The Basics*, AIDSINFO (Jan. 18, 2018), <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/21/51/hiv-treatment--the-basics> [<https://perma.cc/X9SF-7LDA>]; Huldrych F. Günthard, *Antiretroviral Treatment of Adult HIV Infection*, 312 J. AM. MED. ASS'N 411, 411 (2014).

55. Günthard, *supra* note 54, at 411, 412; Amanda Mocroft & Jens Lundgren, *Starting Highly Active Antiretroviral Therapy: Why, When and Response to HAART*, 54 J. ANTIMICROBIAL CHEMOTHERAPY 10, 10 (2004).

56. Dr. Eugene McCray & Dr. Jonathan Mermin, *Dear Colleague: Information from CDC's HIV/AIDS Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 27, 2017), <https://www.cdc.gov/hiv/library/dcl/dcl/092717.html> [<https://perma.cc/8V6F-9A2C>].

57. Gus Cairns, *Life Expectancy Now Considerably Exceeds the Average in some People with HIV in the US*, AIDS MAP (Jan. 6, 2014), <http://www.aidsmap.com/Life-expectancy-now-considerably-exceeds-the-average-in-some-people-with-HIV-in-the-US/page/2816267> [<https://perma.cc/FV8A-EXGM>].

disease. Post-exposure prophylaxis (PEP) is a combination of ART drugs given to individuals who have recently been exposed to HIV⁵⁸ that reduces the risk of getting HIV by over eighty percent.⁵⁹

Truvada, or pre-exposure prophylaxis (PrEP), is another drug developed to prevent HIV transmission.⁶⁰ Truvada is a combination of ART drugs given to individuals who have a high risk of getting HIV.⁶¹ It is taken before HIV exposure in order to reduce the risk of transmission.⁶² Taken consistently, Truvada can reduce the risk of getting HIV by between ninety-two and ninety-nine percent.⁶³

ART, PEP, and PrEP help protect many HIV-positive Americans from the effects of the disease and HIV-negative individuals from contracting HIV.⁶⁴ The disease does not pose the harm to public health that it once did and over 1.1 million Americans now live with HIV.⁶⁵ AIDS diagnoses peaked over twenty years ago⁶⁶ and from 2005 to 2014 the number of new HIV diagnoses declined by nineteen percent.⁶⁷ Criminal transmission statutes rarely take these medical

58. Joanna Theiss, *It May Be Here to Stay, But Is It Working? The Implementation of the Affordable Care Act Through an Analysis of Coverage of HIV Treatment and Prevention*, 12 J. HEALTH & BIOMEDICAL L. 109, 120 (2016).

59. *Id.*; *Post-exposure Prophylaxis to Prevent HIV Infection*, WORLD HEALTH ORG., <http://www.who.int/hiv/topics/prophylaxis/info/en/> [<https://perma.cc/KWH4-BMAF>] (last visited Feb. 7, 2018).

60. Jason Burda, *PrEP and Our Youth: Implications in Law and Policy*, 30.2 COLUM. J. GENDER & L. 295, 295 (2016) [hereinafter *Youth*]; Jason Burda, *When Condoms Fail: Making Room Under the ACA Blanket for PrEP HIV Prevention*, 52 SAN DIEGO L. REV. 171, 174 (2015).

61. *Youth*, *supra* note 60, at 295.

62. *Id.*

63. *Id.*; *PrEP Facts*, S.F. AIDS FOUND., <https://men.prepfacts.org/the-basics/> [<https://perma.cc/GW4S-EL5H>] (last visited Feb. 7, 2018).

64. *Youth*, *supra* note 60, at 295; Mocroft & Lundgren, *supra* note 55, at 10; Theiss, *supra* note 58, at 118.

65. *HIV in the United States: HIV at a Glance*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/statistics/overview/ataglance.html> [<https://perma.cc/NZV5-ACLZ>] (last visited Feb. 21, 2018) [hereinafter *HIV at a Glance*].

66. Dennis H. Osmond, *Epidemiology of HIV/AIDS in the United States*, HIV INSITE (2003), <http://hivinsite.ucsf.edu/InSite?page=kb-01-03#S1.4X> [<https://perma.cc/86LK-FDRZ>] (showing that over the period 1991–2001 diagnoses peaked in 1994 at 72,266); CTRS. FOR DISEASE CONTROL & PREVENTION, 28 HIV SURVEILLANCE REPORT 1, 19 (2016), <https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-2016-vol-28.pdf> [<https://perma.cc/6HXJ-M9TX>] (showing that diagnoses per year continued to decline from 2011 to 2016).

67. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC FACT SHEET: TRENDS IN U.S. HIV DIAGNOSES, 2005–2014 (Feb. 2016), <https://www.cdc.gov/nchhstp/>

regimens into account when assessing criminal liability and few have been updated since these medicines have been developed.⁶⁸

2. Continued Risks Associated with Inadequate or Non-existent Treatment

HIV continues to pose some risk to public health. The Centers for Disease Control estimate that 162,500 Americans with HIV have not been diagnosed.⁶⁹ Left untreated, the virus progresses to AIDS.⁷⁰ In 2016, over 18,000 people were diagnosed with AIDS in the United States. The year prior, 6,721 people died from AIDS in the United States.⁷¹

Without adequate treatment, AIDS can seriously impact a person's physical wellbeing⁷² and, while the symptoms of AIDS can be treated, there is no cure.⁷³ The disease can also cause psychological

newsroom/docs/factsheets/hiv-data-trends-fact-sheet-508.pdf [https://perma.cc/9YHU-NSKL].

68. BEST PRACTICES GUIDE, *supra* note 36, at 4; see Graham White, *Pre-exposure Prophylaxis (PrEP) and Criminal Liability Under State Laws*, 126 YALE L.J. F. 77, 82–84 (2016) (predicting that current criminal HIV transmission statutes in states largely will not allow PrEP to be used as a defense to the crime); *but see* IOWA CODE § 709.D2(c) (2015) (creating an affirmative defense as “[p]ractical means to prevent transmission’ [which] means substantial good faith compliance with a treatment regimen prescribed by the person’s health care provider, if applicable, and with behavioral recommendations of the person’s health care provider or public health officials, which may include but are not limited to the use of a medically indicated respiratory mask or a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease”); MINN. STAT. ANN. § 609.2241(d) (2015) (“‘Transfer’ means to engage in behavior that has been demonstrated epidemiologically to be a mode of direct transmission of an infectious agent which causes the communicable disease.”).

69. *HIV at a Glance*, *supra* note 65, at 3.

70. As the disease progresses, the disease continues to attack the body's immune system, and without treatment, the disease will progress to AIDS, where the immune system will be unable to fight even the most basic infections. Without proper treatment, people with AIDS live approximately three years. In the absence of treatment, life expectancy for people with AIDS who also have an opportunistic illness is about one year. *Id.*

71. *Id.*

72. *Symptoms and Stages of HIV Infection*, AVERT (Sept. 21, 2017), <https://www.avert.org/about-hiv-aids/what-hiv-aids> [https://perma.cc/R3XU-S2AD]. At early stages of infection, HIV-positive individuals can experience fever, swollen glands, sore throat, rash, muscle and joint aches and pains, and headache. *Id.*

73. *Is There a Cure for HIV and AIDS?*, AVERT (June 30, 2017), <https://www.avert.org/about-hiv-aids/what-hiv-aids> [https://perma.cc/X776-T25A].

symptoms. Depression is common among those with HIV.⁷⁴ People diagnosed with HIV may become depressed either from learning of their positive serostatus or from experiencing the reactions of their friends and family.⁷⁵

HIV-positive individuals who are incarcerated are particularly at risk for gaps in HIV treatment.⁷⁶ Prisons must provide incarcerated individuals with medical treatment while they are incarcerated,⁷⁷ but standardized care for HIV-positive persons is not the norm⁷⁸ and many facilities do not have onsite physicians, let alone HIV specialists.⁷⁹ Further, even if prisons provide adequate treatment to incarcerated individuals, this treatment usually ends when they leave the facility.⁸⁰ These gaps in treatment can have disastrous health consequences for the person incarcerated as well as the general community.⁸¹ Any period of incarceration for an HIV-positive individual can disrupt ART and have a negative impact on their health.

74. Hongjie Liu et al., *Psychological Impacts Among Older and Younger People Living with HIV/AIDS in Nanning, China*, 2014 J. AGING RES. 4 (2014); Hannah Webster, *Living with the Psychological Effects of HIV*, U.S. NEWS & WORLD REP. (Jan. 2, 2015), <http://health.usnews.com/health-news/patient-advice/articles/2015/01/02/living-with-the-psychological-affects-of-hiv> (on file with the *Columbia Human Rights Law Review*).

75. Webster, *supra* note 74.

76. Sarah E. Wakeman & Josiah D. Rich, *HIV Treatment in US Prisons*, 4 HIV THERAPY 505, 507 (2010), http://www.hivlawandpolicy.org/sites/default/files/HIV_Treatment%20-US_Prisons-HIV_Ther_%202010-Medscape.pdf [<https://perma.cc/GZ76-FVTK>] (“Interruption to therapy is a very real dilemma in caring for incarcerated individuals with HIV.”).

77. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding that the Eighth Amendment’s prohibition of cruel and unusual punishment requires the government to provide medical care to the incarcerated).

78. Jacques Baillargeon et al., *Antiretroviral Therapy Prescribing Patterns in the Texas Prison System*, 10.7 ANNALS EPIDEMIOLOGY 474, 474 (2000) (finding that one-third of incarcerated persons in Texas who met the criteria for anti-retroviral therapy were not receiving medication).

79. Sandra Springer & Frederick Altice, *Managing HIV/AIDS treatment in correctional settings*, 2 CURRENT HIV/AIDS REP. 165, 166 (2005).

80. Jacques Baillargeon et al., *Accessing Antiretroviral Therapy Following Release From Prison*, 301 JAMA 848, 848 (2009).

81. *Id.* at 849 (“Those who discontinue ART at this time are at increased risk of developing a higher viral burden, resulting in greater infectiousness and higher levels of drug resistance, potentially creating reservoirs of drug resistant HIV in the general community.”).

D. Legal Developments Since Criminal HIV Transmission Statutes Were Enacted

HIV-positive individuals and HIV advocates have mounted challenges to criminal HIV transmission statutes in states across the nation. All constitutional challenges to these statutes have been unsuccessful. In *Rhoades v. State*,⁸² the Iowa Supreme Court did provide relief to a man convicted under Iowa's criminal HIV transmission statute, but this result did not invalidate the underlying criminal transmission statute and cannot be easily replicated in other states. With these unsuccessful challenges, the policy concerns surrounding criminal transmission statutes remain unaddressed.

Criminal HIV transmission statutes have been challenged on several grounds. HIV-positive individuals and HIV advocates have attempted to challenge these statutes on vagueness and overbreadth grounds, First Amendment grounds, equal protection grounds, Eighth Amendment grounds, and challenges based on due process privacy interests.⁸³ All of these challenges, primarily grounded in federal constitutional law, have failed. Of particular relevance to this Note, in rejecting due process privacy interest challenges, courts have either defined the right at issue to be outside the protection of the Due Process Clause⁸⁴ or determined that a state's interest in protecting public health outweighs an individual's fundamental right to privacy.⁸⁵

In one recent case, an HIV-positive individual was able to overturn his criminal HIV transmission conviction—a rare feat. In *Rhoades v. State*,⁸⁶ Nick Rhoades was convicted under the Iowa criminal HIV transmission statute.⁸⁷ He engaged in consensual, unprotected oral sex and protected anal sex with another man, without

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

83. *People v. Russel*, 630 N.E.2d 794, 796 (Ill. 1994) (declining to overturn Illinois criminal transmission statute on First Amendment grounds); *People v. Dempsey*, 610 N.E.2d 208, 223 (Ill. App. Ct. 1993) (declining to overturn Illinois criminal transmission statute on vagueness or overbreadth grounds); *State v. Musser*, 721 N.W.2d 734, 747–50 (Iowa 2006) (declining to overturn Iowa criminal transmission statute on Eighth Amendment grounds and due process privacy grounds); *State v. Gamberella*, 633 So. 2d 595, 603 (La. Ct. App. 1993) (declining to overturn Louisiana criminal transmission statute based on equal protection grounds); see also *Chapter Four*, *supra* note 6, at 1784 (noting that, as of 2014, no legal challenges to HIV criminalization statutes had been successful).

84. *Musser*, 721 N.W.2d at 747–48.

85. *People v. Jensen*, 586 N.W.2d 748, 757–58 (Mich. Ct. App. 1998).

86. *Rhoades v. State*, 848 N.W.2d.

87. *Frost*, *supra* note 15, at 326–27.

revealing his serostatus.⁸⁸ However, Rhoades had an undetectable viral load, which essentially eliminated all risk of transmission.⁸⁹ In overturning Rhoades' conviction, the court found that his guilty plea was not supported by an adequate factual basis because his plea merely tracked the language of the statute.⁹⁰ To support the plea, the trial court had also taken judicial notice of the fact that an individual can transmit HIV when an HIV-positive individual engages in protected anal sex or unprotected oral sex. The Iowa Supreme Court held that the trial court erred in taking judicial notice of this fact, because, given advances in HIV treatment and prevention, it was no longer true.⁹¹ The Court found counsel to be ineffective because counsel allowed Rhoades to enter into a plea without a sufficient underlying factual basis.⁹²

The *Rhoades* case prompted the Iowa legislature to revise their criminal transmission statute by creating a sliding scale of culpability and updating affirmative defenses to account for changes in medical knowledge, treatment, and prevention.⁹³ While *Rhoades* stands as one of the few successful challenges to criminal HIV transmission statutes, the Iowa Supreme Court's reasoning may be difficult to extend to statutes in other states. First, *Rhoades* involved a *Strickland* claim for ineffective assistance of counsel. As the dissent in *Rhoades* pointed out, *Strickland* claims examine whether counsel's representation was ineffective as of the time of counsel's conduct.⁹⁴ At the time Rhoades entered the plea, existing case law held that a person need not admit to exchanging bodily fluids in order to establish a sufficient factual basis for a guilty plea.⁹⁵ Thus, other states might not view similar conduct as ineffective. Furthermore, *Strickland* claims are not helpful for effecting systemic change, since they relate to representation that one individual received in a single case.⁹⁶ Any

88. *Id.* at 326.

89. *See id.* at 326–27.

90. *Rhoades*, 848 N.W.2d at 30.

91. *Id.* at 32–33.

92. *Id.* at 33.

93. Alison Gowans, *New HIV Transmission Law makes Iowa model for nation*, GAZETTE (June 3, 2014) <http://www.thegazette.com/subject/news/new-hiv-transmission-law-makes-iowa-model-for-nation-20140529> [<https://perma.cc/PA96-GXFN>].

94. *Strickland v. Washington*, 466 U.S. 668 (1984); *Rhoades*, 848 N.W.2d at 37.

95. *Id.*

96. *See e.g.*, *Hurell-Harrington v. State*, 930 N.E.2d 217, 221 (N.Y. 2010) (noting that ineffective counsel claims are not a good vehicle to “remediate systemic deficiencies”).

additional change in other cases will have to be litigated on a one-off basis. Since *Rhoades*, very few criminal HIV transmission convictions have been successfully challenged on this or any other basis.⁹⁷

II. CRIMINAL HIV TRANSMISSION STATUTES IN THE AGE OF ONLINE DATING AND UNDERCOVER POLICING

Part II describes how HIV-positive individuals communicate their serostatus in non-verbal online communication. Particular attention is given to how this non-verbal online communication is ripe with ambiguity and opportunity for miscommunication. This Part discusses covert online investigative tactics and the problems created by non-verbal online communication. Next, this Part explores how criminal HIV transmission laws can impact the plea-bargaining process and how covert online investigations may impede treatment and prevention efforts. Finally, this Part discusses the decreased need to use covert online investigations.

A. Online Dating and Communication

Technology, developed after criminal transmission laws were passed, has changed the way people date. Millions of people now pursue relationships and sexual activity through dating websites and apps.⁹⁸ Criminal HIV transmission statutes have always failed to define or consider how disclosure and consent are negotiated in practice.⁹⁹ Online, however, such communication becomes even more complicated. In this setting, it is possible for HIV-positive individuals to disclose their serostatus by using non-verbal online communication.¹⁰⁰ This information can be disclosed by: explicitly disclosing their serostatus directly to the person with whom they are

97. See generally *Cases*, HIV JUSTICE NETWORK, <http://www.hivjustice.net/site/cases/?casetype=338&country=234&from-month=-1&from-year=-1&to-month=-1&to-year=-1> [https://perma.cc/2WRM-X3VP] (last visited Mar. 3, 2018) (tracking HIV-related cases and reporting very few cases in which individuals successfully challenged convictions under criminal HIV transmission statutes).

98. Eli Finkel et al., *Online Dating: A Critical Analysis from the Perspective of Psychological Science*, 13 PSYCHOL. SCI. PUB. INT. 3, 4–5 (2012); see also AZIZ ANSARI & ERIC KLINENBERG, MODERN ROMANCE 85 (2015) (finding that seventy percent of LGBT couples meet online).

99. Russell Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1515, 1520–21 (2009) (discussing several scenarios in which, arguably, both partners have some obligation to discuss HIV and safe sex, which run contrary to the perpetrator-victim dichotomy inherent in criminal HIV transmission statutes).

100. McCallum, *supra* note 9, at 689.

communicating, explicitly displaying their serostatus on a dating profile, disclosing their serostatus through code-words, joining an HIV-specific dating site, or thinking that their sexual partner assumes the risk when engaging in sex with someone they met online.¹⁰¹

While HIV-positive individuals may now disclose their serostatus in many new ways, criminal HIV transmission statutes do not give guidance as to which methods of disclosure and consent are sufficient to avoid conviction.¹⁰² Compounding this problem, non-verbal online communication can easily create uncertainty as to whether there is sufficient disclosure and consent to remove criminal liability for HIV-positive individuals, even more so than in other contexts.¹⁰³

An HIV-positive individual can be certain that disclosure has occurred by explicitly disclosing their serostatus through a direct message to other individuals. However, some may think this is unnecessary if their serostatus is displayed on their e-dating profile. Here, the danger is that a potential partner will not read the e-dating profile, so there is no certainty disclosure actually occurred.¹⁰⁴

HIV-positive individuals may also use certain words or phrases to communicate their serostatus.¹⁰⁵ These phrases include descriptions about the frequency with which safe sex is practiced, like “sometimes” or “never” instead of “always” safe. Many people may recognize that these words communicate that a person is HIV positive, based on norms and common parlance in the online dating community, though others may not.¹⁰⁶ More explicit code-words can still cause confusion. For example, some in the online dating community may not be familiar with the meaning of the term “poz.”¹⁰⁷ In both code-word scenarios, the danger is that the HIV-positive individual believes sufficient disclosure and consent have occurred, but the HIV-negative individual does not recognize what these code-words mean and therefore has not consented.

HIV-specific dating websites pose similar dangers.¹⁰⁸ HIV-negative individuals may not realize the nature of the dating platform,

101. *Id.* at 689–96. Online sexual partners may not know code-words, may not realize that they are visiting an HIV-specific dating site, or may not realize or assume that their behavior is introducing them to risk of HIV infection. *Id.*

102. *Id.* at 685, 689–96.

103. *Id.* at 682.

104. *Id.* at 690–91.

105. McCallum, *supra* note 9, at 691–92.

106. *Id.*

107. *Id.* at 692 (explaining that “poz” means that a person is HIV positive).

108. *Id.* at 694–96.

while HIV-positive individuals assume that disclosure is unnecessary because everyone visiting a site for HIV-positive individuals understands and consents to the risks. The same holds true for HIV-positive individuals that believe disclosure is unnecessary because others in the online dating community assume the risk of contracting HIV.¹⁰⁹

B. Policing in the Digital Age

Police increasingly turn to the Internet to conduct undercover investigations to bring charges for inchoate crimes. Officers can employ technology to help them investigate, using online platforms that allow them to communicate anonymously with suspects and witnesses. For example, police use websites like Craigslist to find, investigate, and arrest individuals suspected of crimes.¹¹⁰ While websites like Craigslist have been an invaluable tool in Internet-based investigations, Craigslist investigations typically focus on prostitution, sex trafficking, and solicitation of minors.¹¹¹

New technology and online platforms provide police with much more data about individuals suspected of committing crimes.¹¹² Police

109. *Id.* at 693–94.

110. Aisling Steele, *Arguing an Attempted Rape Charge Within the Complex World of Pedophiles and Internet Chat Rooms*, 42 NEW ENG. J. ON CRIM. & CONFINEMENT 229, 242 (2016); Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 455 (2016); Erin I. Kunze, *Sex Trafficking via the Internet: How International Agreements Address the Problem and Fail to Go Far Enough*, 10 J. HIGH TECH. L. 241, 247 (2010).

111. *E.g.*, Steele, *supra* note 110, at 242; Kunze, *supra* note 110, at 241–42; Elana T. Jacobs, *Online Sexual Solicitation of Minors: An Analysis of the Average Predator, His Victims, What is Being Done and Can Be Done to Decrease Occurrences of Victimization*, 10 CARDOZO PUB. L. POLY & ETHICS J. 505, 521–22 (2012).

112. Michael Lackey, Jr. & Joseph Minta, *The Ethics of Disguised Identity in Social Media*, 24 ALB. L.J. SCI. & TECH. 447, 448–54 (2014); Karen Levy, *Intimate Surveillance*, 51 IDAHO L. REV. 679, 679, 682 (2015); Junichi Semitsu, *Arresting Development: Facebook Searches and the Information Super Highway Patrol*, 65 ARK. L. REV. 99, 101 (2012); *see* United States v. Jones, 565 U.S. 400, 403 (2012) (“By means of signals from multiple satellites, the device established the vehicle’s location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.”).

use surveillance cameras¹¹³ and cellphones¹¹⁴ as critical tools to help further investigations. Police also monitor social media sites¹¹⁵ and dating apps¹¹⁶ to investigate or detect crime.¹¹⁷ These crimes might be as innocuous as underage drinking¹¹⁸ or as serious as threats to security and safety, like terrorism.¹¹⁹

Undercover police officers have investigated HIV transmission since the beginning of the epidemic.¹²⁰ In recent years, police have used

113. Stephen Rushin, *The Legislative Response to Police Surveillance*, 79 BROOK. L. REV. 1, 7 (2013).

114. See *Riley v. California*, 134 S. Ct. 2473, 2480 (2014) (searching a cell phone incident to arrest); Brian Owsley, *Cellphone Tracking in the Era of United States v. Jones and Riley v. California*, 48 TEX. TECH L. REV. 207, 207–09 (2015).

115. Junichi Semitsu, *From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291, 318 (2011) [hereinafter *Facebook*]; see, e.g., Julie Masis, *Is this Lawman your Facebook Friend?*, BOS. GLOBE (Jan. 11, 2009), http://archive.boston.com/news/local/articles/2009/01/11/is_this_lawman_your_facebook_friend/ (on file with the *Columbia Human Rights Law Review*) (showing how police have used Facebook to investigate underage drinking, to obtain information about the source of drugs that killed a heroin user, and to help solve child pornography cases).

116. Douglas, *supra* note 12.

117. *Facebook*, *supra* note 115, at 318–27 (listing the ways police use social media sites to further investigations, which include: friend lists that may provide information about accomplices or witnesses, photos depicting contraband or proceeds from criminal activity, establishing identity and connections between individuals, collecting statements to use against individuals, finding phone numbers, using subpoenas to obtain subscriber information, and creating fake identities to obtain information or other evidence from witnesses or the accused person).

118. Masis, *supra* note 115.

119. See, e.g., Brian Mastroianni, *Could Policing Social Media Help Prevent Terrorist Attacks?*, CBS NEWS (Dec. 15, 2015, 6:00 AM), <https://www.cbsnews.com/news/could-policing-social-media-prevent-terrorist-attacks/> [<https://perma.cc/B5F3-KUXM>] (discussing how evidence related to the San Bernardino massacre, which revealed an accomplice's support for violent jihad, was found on private Facebook chats).

120. Scott Bronstein, *4 New York Bathhouses Still Operate Under City's Program of Inspections*, N.Y. TIMES (May 3, 1987), <http://www.nytimes.com/1987/05/03/nyregion/4-new-york-bathhouses-still-operate-under-city-s-program-of-inspections.html> (on file with the *Columbia Human Rights Law Review*); Samantha Walker, *The New York City Bathhouse Battles of 1985: Sex and Politics in the AIDS Epidemic* 49 (Apr. 2010) (unpublished B.A. honors thesis, Rutgers University) (on file with Rutgers University at <http://history.rutgers.edu/docman-docs/undergraduate/honors-papers-2010/224-the-new-york-city-bathhouse-battles-of-1985/file> [<https://perma.cc/KCS6-KRKS>]) (stating that “[c]ity inspectors would enter bathhouses undercover, and if evidence of unsafe sexual activity [including anal or vaginal intercourse or fellatio] were found, the city would close the

technology to conduct Internet-based investigations for a similar purpose.¹²¹ Police now go undercover on websites and dating apps by creating fake identities online.¹²² Fake identities can be necessary for investigations because even though individuals do voluntarily disseminate information about themselves, some online websites and apps allow those users to restrict who can see the information.¹²³ These fake identities give police access to information that individuals create and share about themselves.¹²⁴ Local law enforcement agencies and federal agencies increasingly employ these tactics in online investigations.¹²⁵

In addition to fake identities, police also use electronic databases in covert investigations. Police now have access to a database that contains the photographs of over 117 million Americans' faces and can use the database to match its photographs with an image of a specific face.¹²⁶ On top of this, the FBI also has a database containing over 400 million photographs of people's faces from mugshots and pictures taken for civil purposes.¹²⁷

establishment.”). Undercover bathhouse investigations were so common that nine such investigations took place at only one bathhouse over a one-month period. *Id.* at 56.

121. See, e.g., POZ, *supra* note 11.

122. Facebook, *supra* note 115, at 322–23.

123. Facebook's privacy policy restricts which users can see certain information:

Profile information you submit to Facebook will be available to users of Facebook who belong to at least one of the networks you allow to access the information through your privacy settings (e.g., school, geography, friends of friends). Your name, school name, and profile picture thumbnail will be available in search results across the Facebook network unless you alter your privacy settings.

Id. at 303.

124. *Id.* at 323–27.

125. Eric Lichtblau & William Arkin, *More Federal Agencies Are Using Undercover Operations*, N.Y. TIMES (Nov. 15, 2014), https://www.nytimes.com/2014/11/16/us/more-federal-agencies-are-using-undercover-operations.html?_r=0 (on file with the *Columbia Human Rights Law Review*); Facebook, *supra* note 116, at 323.

126. Stephen Nelson, *Half of US Adults Are in Police Facial Recognition Networks*, U.S. NEWS & WORLD REP. (Oct. 18, 2016), <https://www.usnews.com/news/articles/2016-10-18/half-of-us-adults-are-in-police-facial-recognition-networks> (on file with the *Columbia Human Rights Law Review*).

127. *Id.*

Police can use these techniques when investigating violations of criminal HIV transmission statutes.¹²⁸ Fake profiles on social media websites allow undercover officers to contact people known to be HIV positive in order to determine whether they disclose their HIV status.¹²⁹ The same is true with dating websites and apps.¹³⁰ Since these investigations are covert by nature, it is hard to tell how the police learned that a particular individual was HIV positive before the individual became the target of the investigation.¹³¹

The databases mentioned above may be one possible means for police to discover which individuals in the community are HIV positive.¹³² Police may be able to investigate whether HIV-positive

128. Tony Gordon, *Police: Men Were Trying to Meet Boys Two Charged With Child Solicitation*, CHI. DAILY HERALD (Aug. 4, 2007) (on file with the *Columbia Human Rights Law Review*) (recounting a story in which police, posing as an underage boy on a dating website, agreed to meet up with two HIV-positive men and arrested them at the meet-up point); POZ, *supra* note 11 (recounting a similar story: an undercover police officer used a dating website and agreed to meet an HIV-positive man that denied he was HIV positive).

129. See *Facebook*, *supra* note 115, at 322–23.

130. E.g., POZ, *supra* note 11.

131. Police sometimes discover that a particular individual is HIV positive after receiving information from that individual's sexual partners. E.g., Harrison Barrus, *Police: Man Did Not Tell Partner of HIV Status*, NEWS4JAX (May 5, 2015), <https://www.news4jax.com/news/florida/clay-county/police-man-did-not-tell-partner-of-hiv-status> [<https://perma.cc/2LYY-5CCR>] (discussing how a woman had reported the defendant to the police when the defendant disclosed his HIV status after they already had multiple sexual encounters and, upon arrest, police learned that the man was a sex offender who had failed to register in the state); Satoko Harada, *Additional Barriers to Breaking the Silence: Issues to Consider when Representing a Victim of Same-sex Abuse*, 41 U. BALT. L.F. 150, 158 (2011) (finding that threat of reporting an HIV-positive individual to the police can be used to control HIV-positive victims of domestic abuse).

132. See e.g., Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> (reporting how a data firm improperly used data it stripped from the accounts of millions of Facebook users); Azeen Ghorayshi & Sri Ray, *Grindr is Letting Other Companies See User HIV Status and Location Data*, BUZZFEED (Apr. 2, 2018), https://www.buzzfeed.com/azeenghorayshi/grindr-hiv-status-privacy?utm_term=.puMZl3le8#.bjooLALrP (detailing how Grindr shared users' HIV status and location data with third parties and the potential security concerns this action created). After the BuzzFeed report, Grindr released a statement saying it would no longer provide information about users' HIV status to third-party analytics companies. Azeen Ghorayshi, *Grindr Will Stop Sharing Users' HIV Data with Other Companies*, BUZZFEED (Apr. 2, 2018), https://www.buzzfeed.com/azeenghorayshi/grindr-stopped-sharing-hiv-status?utm_term=.stKzgBgaG#.jy7vwVw58. Nonetheless, the initial BuzzFeed

individuals are disclosing their status online using different databases. In some states, persons convicted under criminal HIV transmission statute are required to register as sex offenders.¹³³ Sex offender registries frequently require the individual to submit a photograph of their face.¹³⁴ An undercover police officer could open an

report provides an example of how a database or list of HIV-positive individuals might be maintained (by law enforcement) as well as the dangers of creating and sharing such a list.

133. *E.g.*, HANSSENS, *supra* note 17, at 83, 187–89 (discussing Iowa’s criminal HIV transmission statute and how *Rhoades* overturned the defendant’s conviction but kept intact his status as a sex offender and listing defendants in Oregon that have been required to register as a sex offender or undergo sex offender counseling as a result of criminal HIV transmission charges brought under general criminal law); ARK. CODE ANN. § 12-12-903(12)(A)(i)(p) (2014) (defining registerable sex offenses to include criminal HIV transmission, if the judge orders the defendant to register); LA. STAT. ANN. § 15:541(24)(a) (2014) (defining the intentional transmission of HIV in § 14:43.5 of the Annotated Louisiana Statute as a registerable sexual offense); S.D. CODIFIED LAWS §§ 22-24B-1(20) (2014) (defining criminal HIV transmission as a registerable sex offense); TENN. CODE ANN. § 40-39-202(30) (2014) (requiring sex offender registration upon a conviction under a criminal HIV transmission statute); *see also* PROSECUTIONS, *supra* note 13 (listing instances where persons convicted of criminal transmission of HIV were required to register as sex offenders).

134. *E.g.*, SOUTH DAKOTA SEX OFFENDER REGISTRY, <http://sor.sd.gov/> [<https://perma.cc/JC36-EWZW>] (last visited Feb. 27, 2018); SEX OFFENDER REGISTRY SEARCH, ARK. CRIME INFO. CTR., <http://www.acic.org/sex-offender-search> [<https://perma.cc/24QF-V6EC>] (last visited Feb. 27, 2018). Recently, as part of a research study, Michael Kosinski and Yilun Wang designed a computer algorithm that could correctly distinguish with a relatively high degree of accuracy between gay and straight men, as well as lesbian and straight women, based solely on facial recognition software. Sam Levin, *New AI Can Guess Whether You’re Gay or Straight From a Photograph*, *GUARDIAN* (Sept. 7, 2017), https://www.theguardian.com/technology/2017/sep/07/new-artificial-intelligence-can-tell-whether-youre-gay-or-straight-from-a-photograph?CMP=share_btn_tw [<https://perma.cc/7SVQ-5MPV>] (correctly distinguishing between gay and straight men eighty-one percent of the time and lesbian and straight women seventy-four percent of the time); *Advances in AI Are Used To Spot Signs of Sexuality*, *ECONOMIST* (Sept. 9 2017), <https://www.economist.com/news/science-and-technology/21728614-machines-read-faces-are-coming-advances-ai-are-used-spot-signs> [<https://perma.cc/72K8-SKRZ>]. The program could predict whether a particular individual was gay or straight at rates significantly above those at which humans can. In some cases, the software could predict a person’s sexuality up to ninety-one percent of the time. Levin, *supra*. “With billions of facial images of people stored on social media sites and in government databases, the researchers suggested that public data could be used to detect people’s sexual orientation without their consent.” *Id.* Researchers conducted the study as a demonstration and a warning to policymakers about the potential harmful implications of facial recognition software. *Advances in AI, supra*. However, this study remains concerning because this type of software could be repurposed to cross-reference databases containing the facial images of HIV-

online dating website or app and examine e-dating profiles to determine whether any individual on the dating platform was on the sex offender registry or convicted under the criminal HIV transmission statute. The officer could open a covert investigation into such a person to determine whether they would disclose their serostatus. The suspect might be arrested if they do not disclose their serostatus or if disclosure was miscommunicated or ambiguous.¹³⁵

As technology develops, it will only become easier for police to monitor social media, online dating websites, and dating apps to investigate these violations, which could then increase the frequency of these types of investigations.

C. Problems with Undercover Internet Policing of Criminal HIV Transmission Statutes

Covert investigations create dangers for HIV-positive individuals when used to police violations of criminal HIV transmission statutes online. Online communication, especially communication of serostatus, can be ambiguous and misunderstood. These issues may lead police to arrest people who thought sufficient disclosure of their serostatus occurred. Non-verbal online miscommunications can also have a negative impact on plea negotiations. The specter of criminal HIV transmission charges pressures individuals to plea or cooperate and impacts marginalized communities. Undercover investigations also interfere with prevention

positive persons with social media and online dating apps, making it easier for police to target these individuals with covert online investigations. *Id.* (explaining the risks the software may pose).

135. Some dating apps also allow users to determine how far apart the two users are. See Rick Noack, *Could Using Gay Data App Grindr Get You Arrested in Egypt?*, WASH. POST (Sept. 12, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/09/12/could-using-gay-dating-app-grindr-get-you-arrested-in-egypt/?utm_term=.93a7f03d8f5b (on file with the *Columbia Human Rights Law Review*). It could be possible for police to use the GPS component of dating apps to track the location of users. Ultimately, the gravest concern is not that these practices are already prevalent, but that they one day could be. Criminal HIV transmission statutes are enforced in arbitrary, unfair, and biased ways. See *supra* Section I.B. For example, in 2017, there was a string of arrests for violating criminal HIV transmission statutes based on biting, spitting, and even punching. See PROSECUTIONS, *supra* note 13. If police have the ability and opportunity to make arrests under criminal transmission statutes, they will continue to do so, regardless of whether certain behaviors actually transmit HIV. Technology simply makes it easier for police to act in these unfair and biased ways.

and testing efforts. With the decreased dangers of HIV, covert policing of non-verbal online communication may do more harm than good.

1. Non-verbal Online Miscommunications in Undercover Investigations

Undercover investigations of criminal HIV transmission statutes could be particularly problematic because of ambiguities inherent in non-verbal online communication. No court or legislature has affirmatively stated whether verbal disclosure and consent are necessary under criminal HIV transmission statutes.¹³⁶ The ambiguities inherent in non-verbal online communication also exist when HIV-positive individuals communicate with undercover police officers. Undercover officers may not realize the context or implications of HIV-specific websites, where HIV-positive persons might assume that, by visiting, disclosure and consent have occurred because of existing community norms.¹³⁷

Officers face further difficulty in determining whether disclosure and consent occurred online. Criminal HIV transmission statutes do not define standards for what constitutes disclosure and consent for non-verbal online communication nor establish whether verbal disclosure and consent are required.¹³⁸ Without courts

136. See McCallum, *supra* note 9, at 682.

137. *Id.* at 682–83; Margo Kaplan, *Re-thinking HIV Exposure Crimes*, 87 IND. L.J. 1517, 1550–51 (2012) (noting that “in some communities of gay men, the ‘code of the condom’ provides an unspoken framework for sexual interaction in which condom use exempts partners from discussing HIV and disclosing their status”).

138. Catherine Dodds et al., *Responses to Criminal Prosecutions for HIV Transmission Among Gay Men in England and Wales*, 17 REPROD. HEALTH MATTERS 135, 143 (2009) (finding that without clear statutory definitions for disclosure and consent, some HIV-positive individuals will place themselves at risk of prosecution because they do not understand what would constitute appropriate disclosure or may prioritize avoiding stigma associated with their serostatus). Robinson also discusses the consequences of overly simplified HIV-specific criminal laws:

HIV continues to be viewed primarily as a problem of gay men and IV drug users, nongay-identified MSM [men who have sex with men] and their female partners may not see themselves as at risk . . . HIV prevention and testing efforts remain highly concentrated in gay communities. Under current law, this underinclusive approach to HIV testing is paired with HIV-specific criminal laws. Criminal laws in many states impose strong penalties on people who know they are HIV positive and fail to disclose their status to a sexual partner. But, as I explain below, these laws have done little to stem HIV transmission,

or legislatures weighing in, and without proper guidance, officers are left in the dark as to what must occur before an arrest can be made.

Further, criminal HIV transmission statutes require both disclosure and consent.¹³⁹ Even if serostatus disclosure does occur, it still may remain ambiguous whether consent occurs. Someone who explicitly discloses their status may assume that the individual with whom they are speaking has consented to any risk of exposure.¹⁴⁰ This misunderstanding creates a risk of arrest even for individuals that explicitly display or disclose their status online. Without realizing disclosure has occurred or without explicitly consenting, undercover officers might still make an arrest. This risk only increases for HIV-positive individuals who implicitly disclose their status online.¹⁴¹

Criminal HIV transmission statutes create substantial dangers for HIV-positive individuals without actually protecting the public. At bottom, criminal HIV transmission statutes were enacted to protect the public from those who intentionally tried to spread the virus.¹⁴² Undercover tactics could ensnare people with culpability far afield from that mental state; mistakes and misunderstandings are inherent in non-verbal online communication. Thus, these covert online investigations do not necessarily target the most dangerous individuals or individuals that criminal HIV transmission statutes were designed to punish.

2. Criminal HIV Transmission Laws and the Plea Bargaining Process

Criminal HIV transmission laws can wreak havoc in the plea bargaining process. Prosecutors have discretion over how to charge a criminal offense and what plea offers will be made.¹⁴³ This discretion allows prosecutors to threaten to bring criminal HIV transmission charges against individuals who violate the statute but offer a plea to

partly because they fail to engage the complex dynamics of many sexual relationships and reflect a simplistic perpetrator-victim dichotomy

Robinson, *supra* note 99, at 1515.

139. See generally HANSENS, *supra* note 17 (listing statutory provisions for criminal HIV transmission statutes, all of which require disclosure and consent).

140. See McCallum, *supra* note 9, at 695–96.

141. *Id.*

142. See Perone, *supra* note 48, at 369; Shilts, *supra* note 49, at 165.

143. Trevor Alexander Hoppe, *From Sickness to Badness: Michigan HIV Law as a Site of Social Control* 23 (2014) (unpublished Ph.D. dissertation, University of Michigan) (on file with the *Columbia Human Rights Law Review*); Lazzarini, *supra* note 34, at 240.

an offense with substantially less jail time.¹⁴⁴ Prosecutors also can use this leverage to reduce the charge from criminal HIV transmission in exchange for witness cooperation.

These plea bargaining practices are frequently used to target an already vulnerable community—sex workers.¹⁴⁵ A prosecutor can agree not to bring criminal transmission charges against a sex worker or, where statutorily available, can agree not to request a sentencing enhancement for solicitation by an HIV-positive individual.¹⁴⁶ As sex work continues to shift to online platforms to solicit clients,¹⁴⁷ plea bargaining involving criminal HIV transmission charges will increasingly center on non-verbal online communication. The trend towards online solicitation creates an increased risk of serostatus miscommunication between police and sex workers.¹⁴⁸

There are several known instances of prosecutors using the threat of a criminal HIV transmission statute to obtain a guilty plea.¹⁴⁹ However, it is unknown how frequently criminal transmission statutes are used to secure guilty pleas or cooperation agreements¹⁵⁰ because plea negotiations are not a public matter and the public or media usually cannot discover the substance of these negotiations.¹⁵¹ The information that does exist documents formal criminal HIV transmission charges that are later reduced as part of a plea agreement.¹⁵² However, given the nature of plea bargaining, it is likely

144. See Lazzarini, *supra* note 34, at 240 (explaining that if a state has a statute that makes HIV exposure a minor felony, a prosecutor typically cannot charge an individual with a more serious crime, like attempted murder, but that the prosecutor may still be able to charge them with lesser offenses, like “simple assault or violation of a misdemeanor STD exposure statute”).

145. See generally Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in Nashville, Tennessee Prosecutorial Region 2000-2010*, 17 AIDS BEHAV. 2624 (2013) (reporting charges under Tennessee’s criminal HIV transmission statute and aggravated prostitution statute, which criminalizes engaging in sex work while knowingly HIV positive).

146. See Hoppe, *supra* note 143, at 23; e.g., TENN. CODE ANN. § 39-13-516 (2016) (“A person commits aggravated prostitution when, knowing that such person is infected with HIV, the person engages in sexual activity as a business or is an inmate in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity.”).

147. See Scott Cunningham & Todd D. Kendall, *Prostitution 2.0: The Changing Face of Sex Work*, 69 J. URB. ECON. 273, 273 (2010).

148. See McCallum, *supra* note 9, at 689–96 (discussing serostatus miscommunication in the context of online dating generally).

149. Galletly & Lazzarini, *supra* note 145, at 1–2.

150. *Id.*

151. *Id.*

152. *Id.*

that any reports or records of criminal HIV transmission plea negotiations understate the extent to which these statutes are used as a tool to secure a plea agreement or to pressure a witness to cooperate.

3. Effects of Undercover Investigations on Prevention and Testing Efforts

Covert online investigations could negatively impact public health in other ways. Criminal transmission statutes already create HIV-related stigma,¹⁵³ decrease the motivation to get tested for HIV,¹⁵⁴ and decrease the motivation to disclose one's serostatus.¹⁵⁵ These effects could be exacerbated by such investigations.¹⁵⁶ Individuals may be even more reluctant to get tested or disclose their serostatus with increased police invasion of online safe spaces.¹⁵⁷

Medical developments also diminish the need for covert online investigations into serostatus disclosure. ART, PEP, and PrEP help treat and prevent the spread of the disease.¹⁵⁸ With these advances in medicine, HIV is not the same public health risk it once was, decreasing the need for undercover officers to probe individuals in e-dating spaces. Although the need for these investigations has decreased, covert online investigations will continue to contribute to the number of people incarcerated with HIV. If convictions are obtained, these investigations could put more people at risk of receiving inadequate HIV treatment, creating additional medical burdens for these individuals during long periods of incarceration.¹⁵⁹

153. See JÜRGENS, *supra* note 38, at 10.

154. *Id.*

155. BOURNE, *supra* note 44, at 27.

156. See JÜRGENS, *supra* note 38, at 5, 11. It should be noted that while criminal HIV transmission statutes generally incentivize concealment of serostatus, some men are incentivized to disclose when they otherwise would not out of fear of legal repercussions. *Id.*

157. *Id.*

158. Theiss, *supra* note 58, at 120; Youth, *supra* note 60, at 296–97.

159. See Wakeman & Rich, *supra* note 76, at 507; e.g., MO. REV. STAT. § 191.667.2 (2017) (“Violation of the provisions of subdivision (1) or (2) of subsection 1 of this section is a class B felony unless the victim contracts HIV from the contact in which case it is a class A felony.”); MO. REV. STAT. § 558.011.1(1) (2017) (imposing a term of “not less than ten years and not to exceed thirty years, or life imprisonment” for a class A felony).

III. PREVIOUS PROPOSALS TO LIMIT THE NEGATIVE EFFECTS OF CRIMINAL HIV TRANSMISSION STATUTES

Part III examines several proposals to repeal, replace, or update criminal transmission statutes through the legislature and through the judiciary. There is currently no political will to repeal or replace criminal transmission statutes; by extension, there is little possibility of reformulating affirmative defense provisions in criminal transmission statutes. Additionally, as discussed in Part I, constitutional challenges to criminal transmission statutes have been unsuccessful. Judicial revisions to criminal transmission jury instructions may alleviate some problems. However, the proposed jury instructions only work in tandem with legislative efforts to revise existing statutes and still allow jurors to factor in subjective bias into the adjudication of guilt. All previous proposals to repeal, replace, or update transmission statutes are poor solutions to the challenges posed by non-verbal online communication and covert online investigations.

A. Proposed Legislative Solutions

State legislatures could repeal or replace existing criminal transmission statutes. Alternatively, they could reformulate affirmative defense provisions to take recent medical developments into account.

1. Repealing Criminal HIV Transmission Statutes

The best approach to eliminating the negative consequences of criminal HIV transmission statutes would be to repeal them. Doing so would eliminate the stigma associated with an HIV-specific statute and aid prevention and testing efforts.¹⁶⁰ In their place, states could use general criminal law to prosecute those who intentionally spread the disease. In fact, seventeen states and the District of Columbia have no HIV-specific statute, but use general criminal law to prosecute persons who intentionally transmit HIV.¹⁶¹ Too few states have explored this option. Texas, which repealed its HIV-specific statute in 1994,¹⁶² is one of the few. In other states, there appears to be

160. See *supra* notes 38–40 and accompanying text.

161. Lehman, *supra* note 2, at 999–1000.

162. See HANSSENS, *supra* note 17, at 161 n.711; Miranda Leitsinger, *Sex Offenders No More? Iowa Reconsiders Tough Law on HIV Exposure*, NBC NEWS (Mar. 29, 2014), <https://www.nbcnews.com/news/us-news/sex-offenders-no-more-iowa-reconsiders-tough-law-hiv-exposure-n53081> [<https://perma.cc/7N4A-TJWZ>].

little political will to repeal these statutes. In fact, the opposite seems to be true; several states continue to pass additional criminal transmission laws.¹⁶³ Without the political will to act, legislatures will not repeal criminal transmission statutes.

2. Replacing or Updating Criminal HIV Transmission Statutes

Legislatures could also replace criminal HIV transmission statutes with new legislation. These new laws could create graded offenses to punish different levels of culpability accordingly. With this proposed modification, juries could find individuals guilty of a lesser-included offense if the jury found that the person either recklessly or negligently did not disclose their serostatus.¹⁶⁴ Legislatures could also

163. 720 ILL. COMP. STAT. ANN. 5/12-5.01 (2017) (including condom use as an affirmative defense, but not requiring actual transmission in order to be convicted of criminal HIV transmission); TENN. CODE ANN. § 39-13-109 (2017) (updating the criminal HIV transmission statute to include hepatitis B and hepatitis C); FLA. STAT. ANN. § 775.0877 (2017) (updating the criminal HIV transmission statute without changing its substance); IOWA CODE § 709D.3 (2018) (grading statutory maximums based on different *mens rea* requirements).

164. Kaplan, *supra* note 137, at 1551. Iowa, for example, grades the offense of exposing another person to a contagious or infectious disease based on the person's knowledge and intent:

1. A person commits a class "B" felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease with the intent that the uninfected person contract the contagious or infectious disease, and the conduct results in the uninfected person becoming infected with the contagious or infectious disease.
2. A person commits a class "D" felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease with the intent that the uninfected person contract the contagious or infectious disease, but the conduct does not result in the uninfected person becoming infected with the contagious or infectious disease.
3. A person commits a class "D" felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease acting with a reckless disregard as to whether the uninfected person contracts the contagious or infectious disease, and the conduct results in the uninfected person becoming infected with the contagious or infectious disease.
4. A person commits a serious misdemeanor when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious

reduce the statutory maximum period of incarceration or eliminate the sex offender registration requirement for violations of criminal transmission laws.

Few legislatures have modified existing criminal transmission laws. Iowa recently changed its criminal transmission statute to create graded offenses and to eliminate the sex offender registration requirement upon conviction.¹⁶⁵ These modifications occurred shortly after *Rhoades*, discussed in Part I, in which the Iowa Supreme Court overturned a conviction for criminal HIV transmission.¹⁶⁶ This approach is not easily replicable in other states because legislatures lack the political will to replace or update criminal transmission statutes.

3. Reformulating Affirmative Defense Provisions

Legislatures could redraft criminal HIV transmission statutes to include more robust affirmative defenses. Legislatures could also make distinctions between behavior that poses a high and low risk of HIV transmission. Lastly, criminal transmission statutes could be redrafted to include affirmative defense provisions that incorporate medical developments, like ART, PEP, and PrEP. This approach also helps separate high-risk and low-risk behavior. Iowa and Minnesota have both incorporated medical advances into their affirmative defense provisions to criminal HIV transmission.¹⁶⁷

Outside these states, there is little legislative will to take another look at affirmative defenses to criminal transmission, so redrafting affirmative defense provisions remains unrealistic. This approach would be problematic even if the legislature had the will to act. Due to the subjective nature of risk perceptions, some jurors may be more inclined to perceive greater risks in sexual activity than those jurors who are HIV positive or more familiar with transmission risks.¹⁶⁸

disease acting with a reckless disregard as to whether the uninfected person contracts the contagious or infectious disease, but the conduct does not result in the uninfected person becoming infected with the contagious or infectious disease.

IOWA CODE § 709D.3 (2018).

165. IOWA CODE § 709D.3 (2018).

166. See *Rhoades v. State*, 848 N.W.2d 22, 23 (Iowa 2014).

167. MINN. STAT. § 609.2241(d) (2015); IOWA CODE § 709.D3 (2018).

168. See, e.g., BOURNE, *supra* note 44, at 7 (detailing how men's risk perceptions change after being diagnosed with HIV); Kristin A. Liska, Note, *Experts In the Jury Room: When Personal Experience is Extraneous Information*, 69 STAN.

B. Proposed Judicial Solutions

Courts could strike down criminal HIV transmission laws or provide jury instructions that would educate jurors about the nature of disclosure and consent in online communication. However, constitutional challenges to criminal transmission statutes have thus far been unsuccessful and proposed jury instructions still leave room for potential juror bias to skew verdicts.

1. Constitutional Challenges to Criminal HIV Transmission Statutes

Criminal defendants and HIV advocates have mounted many constitutional challenges to criminal HIV transmission statutes, as discussed in Part I, but none have been successful.¹⁶⁹ *Rhoades* invalidated one conviction under a criminal HIV transmission statute on a claim of ineffective assistance of counsel,¹⁷⁰ but it will be difficult to extend this reasoning to other contexts. With long established precedent, courts will be reluctant to invalidate these statutes on constitutional grounds. Even if *Rhoades* could be applied elsewhere, this approach would leave criminal transmission statutes on the books. The *Rhoades* approach would also fail to eliminate the statutes' stigma and effects on treatment and prevention efforts.

2. Revisions to Criminal HIV Transmission Jury Instructions

Courts could also modify jury instructions when disclosure and consent are negotiated on the Internet.¹⁷¹ A judge could instruct the jury that they can find disclosure and consent occurred in Internet communication, factoring in the mode and context when determining whether a person recklessly or negligently did not disclose their serostatus.¹⁷²

This proposal faces many of the same problems as the proposed legislative solutions above. First, this approach is dependent on legislatures revising HIV transmission statutes to include graded offenses for different mental states, which is improbable. Second, modified jury instructions still allow for differences in risk perception

L. REV. 911, 934 (2017) (describing how jurors might use personal experiences problematically, that is, as "sources of extraneous information").

169. See *supra* Section I.D.

170. *Rhoades*, 848 N.W.2d at 23.

171. McCallum, *supra* note 9, at 700–01.

172. *Id.*

to affect the jury verdict. Some jurors may still perceive different amounts of risk than someone more familiar with Internet norms. While a step in the right direction, this modified jury instruction is not a viable proposal and would not cure all the negative effects of covert online investigations of HIV transmission.

IV. USING INCHOATE CRIMES AND DUE PROCESS TO LIMIT THE HARM OF COVERT INVESTIGATIONS AND CRIMINAL HIV TRANSMISSION STATUTES

While repealing criminal transmission statutes would be the best solution, it is not a feasible one. With that reality in mind, this Note proposes a novel judicial solution to the problems raised by covert online investigations and non-verbal online communication. In the context of inchoate violations of criminal HIV transmission statutes that first arise from non-verbal online communication, courts should continue to apply a due process analysis that weighs individual interests against government interests. Judges must balance individual interests against government interests to determine the constitutional limits to state police powers. On one hand, individuals have a right to privacy in consensual, private sexual activity. On the other, states have an interest in protecting public health. Part IV examines an historical example of due-process-interest balancing in the HIV/AIDS epidemic. It then compares this example to the balance of interests appropriate for criminal HIV transmission statutes, focusing on how government interests have shifted since the beginning of the epidemic. Undercover investigations frequently result in arrests for inchoate crimes. Thus, this Part discusses how inchoate crimes are connected to due-process-interest balancing. Balancing these interests, courts should properly find that due process requires significant conduct to meet the substantial step requirement of inchoate violations of criminal transmission statutes. Finally, Part IV proposes that due process requires that an individual must deny their serostatus in person before a conviction can be obtained when individuals use non-verbal online communication to relay their serostatus in covert police investigations.

A. Due Process and Weighing Individual and Government Interests

Courts balance individual interests against those of the government when determining whether legislation falls within the constitutional scope of a state's police power. Individual privacy

interests play an important role in criminal HIV transmission statutes. State governments do have an interest in protecting the public from the spread of HIV, but today these concerns are drastically different than at the onset of the HIV epidemic. Government interests in protecting the public from HIV are substantially less pressing than in the 1980s, while individual privacy interests remain as important as ever. Covert online investigations frequently result in arrest for inchoate offenses. Due process requires courts to weigh individual and government interests when determining the appropriate amount of conduct necessary to satisfy the substantial step requirement of inchoate offenses. This requirement exists regardless of how the jurisdiction defines inchoate offenses. Thus, in any jurisdiction, due process would require courts to increase substantial step requirements in the context of inchoate violations of criminal HIV transmission statutes that first arise from non-verbal online communication.

1. State Use of Police Power

States may use their police power to enact health policy within the state.¹⁷³ When courts determine whether such statutes are constitutional, courts must balance the government's interests against the interests of the individual.¹⁷⁴ Courts generally uphold health regulations where the regulations bear a "reasonable, if not substantial, relationship to a legitimate state interest in protecting the health of its citizens."¹⁷⁵ However, state laws can be subject to heightened scrutiny when the laws implicate a fundamental federal constitutional right.¹⁷⁶

2. Individuals' Interests

Individuals have liberty interests that "include the right to not be subjected to overly vague and broad laws, the right to privacy, the right to equal protection under the law, the right not to have speech compelled, the right to be free of discrimination, and the right to care

173. Rose, *supra* note 52, at 116.

174. Lawrence Gostin & James Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 56 (1998).

175. Rose, *supra* note 52, at 117 (quoting Gostin & Hodge, *supra* note 174, at 52).

176. McCallum, *supra* note 9, at 688.

for their own body.”¹⁷⁷ Individuals also have privacy interests, which encompass private, consensual relations.¹⁷⁸

Criminal HIV transmission statutes implicate all these interests, but an individual’s right to privacy is of particular relevance in covert online investigations.¹⁷⁹ Properly understood, the Fourteenth Amendment could protect an individual’s right to privacy when disclosing their serostatus online. The right to privacy was first recognized by the Supreme Court in *Griswold v. Connecticut* and later reaffirmed in *Lawrence v. Texas*, where the Court held that the right to privacy included private, consensual relations.¹⁸⁰ While the *Lawrence* Court did not hold the right at issue to be fundamental, scholars believe that laws that infringe on this right should receive heightened scrutiny.¹⁸¹ Under heightened scrutiny, a law infringing upon a person’s liberty interests must either be narrowly tailored to a compelling state interest,¹⁸² as is the case with strict scrutiny, or reasonably related to a substantial state interest,¹⁸³ as is the case with intermediate scrutiny. Criminal HIV transmission laws may violate the due process clause of the Fourteenth Amendment in two ways: first, because state governments no longer have the necessary interest

177. Rose, *supra* note 52, at 119. While individuals do have these liberty interests, courts have largely rejected challenges to criminal HIV transmission statutes based on these grounds. *Id.* For a proposal to challenge criminal HIV transmission statutes on equal protection, animus-centered grounds, see *Chapter Four*, *supra* note 6.

178. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (holding the due process clause right to privacy encompasses private, consensual relations).

179. McCallum, *supra* note 9, at 688.

180. *Lawrence*, 539 U.S. at 564.

181. See *Witt v. U.S. Dep’t of the Air Force*, 444 F. Supp. 2d 1138, 1142 (W.D. Wash. 2006) (“In 2003, the Supreme Court’s opinion in *Lawrence* expressly overruled *Bowers* . . . without making clear whether a new, higher standard of review is to be applied in cases involving regulation of homosexual conduct.”); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 868 (4th ed. 2011) (suggesting that heightened scrutiny should apply because *Lawrence* relies on privacy cases where strict scrutiny was applied and the state’s moral-interest justification normally would survive rational basis review).

182. *E.g.*, *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 843 (9th Cir. 2016) (“In order to survive strict scrutiny, a regulation must be ‘narrowly tailored to serve a compelling interest.’”).

183. *E.g.*, *United States v. Hosford*, 843 F.3d 161, 168 (4th Cir. 2016) (quoting *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)) (“To satisfy intermediate scrutiny, the government must show that ‘there is a ‘reasonable fit’ between the challenged regulation and a ‘substantial’ government objective.’”).

to regulate individual privacy rights, and second because there are less restrictive alternatives to criminal transmission statutes.

3. Government Interests

An individual's liberty interests, including the right to privacy, are not absolute.¹⁸⁴ In the context of privacy, an individual's liberty interests must be weighed against the government's interests in protecting public health.¹⁸⁵

States have a general interest in advancing policies through their police power, which includes enacting laws to protect health.¹⁸⁶ These interests can, in certain cases, outweigh an individual's liberty interest.¹⁸⁷ A government may advance its interest in enacting criminal HIV transmission statutes under one of two theories: a normative theory or a consequentialist theory.¹⁸⁸ Under a normative theory, states enact criminal HIV transmission statutes in order to ensure HIV-positive individuals disclose their serostatus. HIV-negative individuals can thus make a full and informed decision when engaging in sexual activity with an HIV-positive person.¹⁸⁹ In that respect, criminal HIV transmission statutes help promote individual autonomy.¹⁹⁰ Under a consequentialist theory, criminal HIV transmission statutes balance the interests of HIV-positive individuals with the interest of HIV-negative individuals in a way that provides maximum benefits for society.¹⁹¹ This theory should factor in the negative social effects of criminal HIV transmission laws and the medical developments since the creation of these laws.¹⁹²

184. Rose, *supra* note 52, at 121.

185. *Id.* at 116 (noting that no court has yet found that this state interest is outweighed by an individual's right to privacy); see, e.g., *Musser*, 721 N.W.2d at 748 (quoting *Lawrence*, 539 U.S. at 578) (distinguishing from *Lawrence*, because *Lawrence* did not "involve persons who might be injured or coerced").

186. Rose, *supra* note 52, at 117.

187. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (finding that a state properly exercised its police power when it enacted a law that requires vaccinations for smallpox).

188. Gostin & Hodge, *supra* note 173, at 66–67.

189. Rose, *supra* note 52, at 117–18.

190. *Id.*

191. *Id.* at 118–19.

192. *Id.*

4. Historical Examples of Due Process Interest-Balancing in the HIV/AIDS Epidemic

Criminal HIV transmission statutes would not be the first instance in which courts have balanced individual and government interests in the HIV/AIDS epidemic. At the beginning of the epidemic, courts in New York and San Francisco considered the due process implications of the regulation and closure of gay bathhouses. This interest-balancing analysis placed serious weight on individual privacy interests.

a. Legal Battles over Bathhouse Closures

In the early days of the HIV/AIDS epidemic, several gay rights activists called for the closure of gay bathhouses in an attempt to slow the spread of the disease.¹⁹³ Advocates, like Dr. Mervyn Silverman, Director of Health for the City of San Francisco, investigated bathhouses to gather evidence of unsafe sex practices.¹⁹⁴ He documented these practices and ordered fourteen bathhouses in San Francisco to close.¹⁹⁵ At this point, the bathhouse battles were brought to the courthouse.¹⁹⁶ The City of San Francisco filed a complaint in California Superior Court to obtain a temporary and permanent injunction against the bathhouse operations.¹⁹⁷

b. Individual and Government Interests

Activists who sought bathhouse closures acknowledged that there were competing individual and government interests.¹⁹⁸ The bathhouse owners also acknowledged this tension:

Precious freedoms are at stake here. A dreaded disease is on the move. People are dying and it is incumbent upon the government to stop the devastation that is taking place. The action which government decides to take, however, cannot be based on guesses or unproven assumptions. The liberties at stake are too precious to

193. Disman, *supra* note 20, at 80–81.

194. *Id.* at 106.

195. RONALD BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH 43 (1989).

196. *Id.* at 46.

197. *Id.*

198. For example, Dr. Silverman acknowledged in his campaign to close gay bathhouses during the HIV/AIDS crisis that bathhouse closures implicated “individual rights,” but that “health [is] our uppermost priority.” Disman, *supra* note 20, at 104.

risk. The patrons are not only in jeopardy of losing their constitutional liberties if the city succeeds in closing the baths, they are in addition precisely the men who are at risk of losing their lives if truly effective measures against AIDS are sacrificed out of too great deference to their associational and privacy rights.¹⁹⁹

While both parties recognized the tension between individual and government rights, they still disputed the benefits such a ban would impose.²⁰⁰ City officials believed that bathhouse closure would be a significant step in the campaign to stop the spread of the disease.²⁰¹ Conversely, the bathhouses presented evidence from other public health officials around the country that a ban, while a significant intrusion into an individual's right to privacy, would not significantly aid the fight against HIV.²⁰²

c. Due Process Interest-Balancing

Judge Roy Wonder heard arguments from both parties. After the City and the bathhouses presented evidence and after a rehearing, Judge Wonder took the middle road between complete closure and no restrictions on bathhouse operations. He struck a balance between privacy and public health by refusing to close the bathhouses but requiring several modifications to bathhouse practices.²⁰³ Bathhouses were to ensure that their patrons did not engage in high-risk sexual behavior, in order to help stop the spread of the disease.²⁰⁴ Under the final order, the city could define high-risk sexual behavior and could close bathhouses where this behavior occurred.²⁰⁵ New York City health officials reached a similar result.²⁰⁶

199. BAYER, *supra* note 195, at 51.

200. *Id.*

201. *Id.* at 49.

202. *Id.* at 51.

203. Disman, *supra* note 20, at 114–16; BAYER, *supra* note 195, at 51; *Court Limits Activity in Homosexual Bathhouses in San Francisco*, N.Y. TIMES (Nov. 29, 1984), <http://www.nytimes.com/1984/11/29/us/court-limits-activity-in-homosexual-bathhouses-in-san-francisco.html> (on file with the *Columbia Human Rights Law Review*).

204. Disman, *supra* note 20, at 112; BAYER, *supra* note 195, at 51.

205. Disman, *supra* note 20, at 114–15; BAYER, *supra* note 195, at 51.

206. David Axelrod, Comm'r of Health for N.Y. State, presented recommendations to the State Public Health Counsel that encouraged the counsel to invoke its emergency powers to combat the public health threat of the HIV/AIDS epidemic. The council adopted regulations that would allow Axelrod to close establishments where high-risk sexual behavior took place. BAYER, *supra* note 195, at 61; Maurice Carroll, *State Permits Closing of Bathhouses to Cut AIDS*, N.Y.

This due process analysis is important because it took place at the beginning of the HIV epidemic. Judge Wonder's due process analysis took place at a time when hysteria surrounding the disease was at its peak, medical knowledge of the disease was limited, and when there was no treatment available for the disease. Even with these concerns, he still recognized that individuals have significant privacy interests. More importantly, his order distinguished between high-risk and low-risk sexual behavior, a distinction absent in many criminal HIV transmission statutes.²⁰⁷ Government interests have significantly changed since.²⁰⁸

5. Balancing Individual Interests with Government Interests in Criminal HIV Transmission Statutes

Judge Wonder's due process analysis provides guidance for a due process analysis of criminal transmission statutes. In some cases, the right to privacy guaranteed by the Fourteenth Amendment outweighs state police powers to enact criminal transmission statutes that reach private, consensual activity online. One author notes:

[T]he ambiguities surrounding the consent and disclosure provisions in the HIV-exposure statutes may offend constitutional principles. Because the right to consensual sexual activity is protected, thus demanding some form of heightened scrutiny, HIV-exposure laws need to be narrowly tailored such that only culpable behavior is punished. Online dating sites make nonverbal disclosure and consent possible. With no guiding standards as to whether nonverbal consent and disclosure is legally permissible, prosecutors may bring charges against HIV-positive individuals for engaging in private, consensual sexual activity—constitutionally protected behavior. Given the stigma that already accompanies HIV, the chances are greater that wholly nonculpable behavior will become subject to selective, morality-based prosecutions.²⁰⁹

Criminal HIV transmission statutes continue to implicate individual privacy rights. Privacy rights are at issue in covert online

TIMES (Oct. 26, 1985), <http://www.nytimes.com/1985/10/26/nyregion/state-permits-closing-of-bathhouses-to-cut-aids.html> (on file with the *Columbia Human Rights Law Review*).

207. See Lehman, *supra* note 2, at 1000.

208. See *supra* Sections I.B–C, IV.A.5.

209. McCallum, *supra* note 9, at 688.

investigations because, as discussed in Part II.A, disclosure and consent can be ambiguous and occur through non-verbal online communication. Due process privacy rights would be at issue if communication in covert online investigations actually involved consensual, private activity.²¹⁰ Since this would trigger heightened scrutiny, it will be more difficult for the government to justify covert investigations that intrude on these interests.

Government public health interests have waned since the beginning of the epidemic. Under the consequentialist theory, government interests have diminished to the point where the harm these statutes cause outweighs the protections they provide.²¹¹ Even under a normative theory, government interests in promoting awareness and autonomy have diminished. Most criminal HIV transmission statutes were passed at a time when HIV research was in its infancy, fear of the disease was acute, and the disease was fatal.²¹² Legislatures and scientists did not have an adequate understanding of the transmission risks of the disease.²¹³ At the beginning of the HIV epidemic, the government had strong interests in regulating these public health concerns. However, much has changed since.²¹⁴ The medical community can treat and prevent the spread of the virus. Now, instead of helping prevent the spread of HIV, these laws stigmatize the disease and discourage HIV testing.²¹⁵ Thus, the government's interest in protecting people from the spread of HIV is not as compelling as it once was. Additionally, criminal transmission statutes might not be sufficiently tailored to that end; there are many ways in which the laws could be rewritten to create less of a burden on the right to private, consensual relations and still allow states to prevent the spread of HIV.²¹⁶

210. State v. Musser, 721 N.W.2d 734, 748 (Iowa 2006).

211. Rose, *supra* note 52, at 118–19; *see supra* Sections I.A–D.

212. Frost, *supra* note 15, at 323–24.

213. *Id.*

214. *See supra* Sections I.A–D.

215. JÜRGENS, *supra* note 38, at 8.

216. For alternatives to a criminal approach to preventing the spread of HIV, *see* Robinson, *supra* note 99, at 1531–32 (proposing public health intervention in place of criminal transmission statutes, which would include expanded testing and counseling outside of groups stereotypically associated with HIV). Public health intervention may be at odds with criminal prosecutions under HIV transmission statutes. *Id.* at 1531; *e.g.*, OR. REV. STAT. § 135.139 (2017), https://www.oregonlegislature.gov/bills_laws/ors/ors135.html [<https://perma.cc/T2WS-VFDV>] (requiring HIV testing in certain circumstances and post-test counseling when an HIV test is positive for the disease, but also requiring notification of this status to potential victims, linking criminal and civil measures);

6. Due Process, Inchoate Crimes, and Criminal Transmission Laws

Undercover investigations will result in, at most, an arrest for attempting to violate criminal transmission laws. Courts have applied due process analysis to inchoate crimes.²¹⁷ Specifically, due process considerations shape the overt act requirements for inchoate crimes.²¹⁸ An “overt act,” or “substantial step,” is a term of art in criminal law and comprises the *actus reus* element of inchoate crimes.²¹⁹ This requirement helps ensure that “mere talk” can be separated from a

Lynne Terry, *HIV-positive Portland Man, 37, Arrested, May Have Infected Young Child*, OREGONIAN (Apr. 3, 2013), http://www.oregonlive.com/portland/index.ssf/2013/04/hiv-positive_portland_man_37_f.html [https://perma.cc/5YAQ-ZXWC] (describing a case in which criminal charges were brought against an HIV-positive man after he engaged in sexual activity with a young child); Scott Graves, *Man with HIV facing charges of assault and endangering*, CURRY COSTAL PILOT (July 24, 2012), <http://www.currypilot.com/csp/mediapool/sites/CurryPilot/News/story.csp?cid=4304398&sid=919&fid=151> [https://perma.cc/V3KK-U35B] (detailing a case in which man was charged with numerous assault charges after having unprotected sex with a woman and not disclosing his status); Karen Pate, *Man sentenced after sexual partner contracts HIV*, OREGONIAN (July 17, 2009), http://www.oregonlive.com/washingtoncounty/index.ssf/2009/07/man_sentenced_after_sexual_par.html [https://perma.cc/HJC2-QSRB] (describing a case in which an individual pleaded guilty to second-degree attempted assault and third-degree assault after he had unprotected sex with a woman and did not disclose his status). Oregon has no HIV-specific transmission statute and prosecutes criminal HIV transmission under general criminal law provisions. HANSENS, *supra* note 17, at 137.

217. Kaitlyn Elk, *Conspiracy and the Fantasy Defense: The Strange Case of the Cannibal Cop*, 64 DUKE L.J. 901, 941–45 (2015) (discussing how due process requires an overt act element to be proven in conspiracies, to separate out mere thought from more dangerous conduct); David Simpson, *Involuntary Civil Commitment: The Dangerousness Standard and Its Problems*, 63 N.C. L. REV. 241, 251 (discussing how an overt act requirement satisfied due process by balancing government and individual interests in involuntary commitment proceedings).

218. In involuntary commitment proceedings, the overt act must show that it is extremely likely that an individual is imminently dangerous. In conspiracy prosecutions, the overt act requirement is much weaker, merely requiring that the overt act be consistent with the alleged conspiracy in some way. Interest balancing is at work in both of these definitions. Individual interests weigh more heavily in the former, while government interests in efficient and effective prosecutions weigh heavily in the latter. Compare Elk, *supra* note 217, at 943 (articulating lower constituency standard for overt acts in conspiracy), with Simpson, *supra* note 217, at 248–49 (tracing out the requirements of imminent dangerousness for overt acts in involuntary commitment).

219. Reed Groethe, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 562 n.2 (1977) (defining “overt act”).

purpose to achieve an unlawful goal, ensuring that only those who are sufficiently culpable are convicted.²²⁰ Substantial step requirements also can strike an appropriate balance between an individual's privacy interests and the government's interests in protecting public health.²²¹ Increasing *actus reus* requirements provides additional safeguards to individuals' privacy rights.²²² States are still able to investigate and prosecute inchoate crimes, but additional conduct requirements provide more protection to an individual's privacy interests.

Covert online investigations can be used to bring attempted transmission charges against HIV-positive persons. States will almost never be able to charge HIV-positive persons with the underlying offense in this situation; an undercover officer would have to meet up with a suspect and engage in conduct sufficient to satisfy the language of criminal transmission statutes. Depending on the jurisdiction, this could encompass activities like sex without a condom, exchanging bodily fluids, or high-risk sexual behavior.²²³ As a practical matter, police departments will not allow their force to engage in these behaviors and police officers will not readily volunteer to do so. An analysis of inchoate violations of criminal HIV transmission statutes will cover most, if not all, charges resulting from covert online investigations. A due process analysis focused on inchoate crimes is thus an effective way of addressing police conduct in covert online investigations of criminal HIV transmission statutes.

Generally, to commit an inchoate criminal offense, a person must intend to commit the underlying offense and commit an overt act, also referred to as a substantial step, towards the underlying offense.²²⁴ The conduct required to satisfy the substantial step element of an inchoate crime can vary depending on the circumstances and the jurisdiction.²²⁵

220. Elk, *supra* note 217, at 933 (citing *United States v. Gigante*, 982 F. Supp. 140, 169 (E.D.N.Y. 1997), *aff'd*, 166 F.3d 75 (2d Cir. 1999)).

221. *Cf. id.* at 944 ("A redefinition of the requirement could be formulated a number of ways to balance the constitutional need for the overt act to be more significant with the government's in effective prosecution and enforcement."); Simpson, *supra* note 217, at 254 ("There are people who are so dangerous to themselves or others, that the interests of society in safety outweighs the individuals' interest in personal freedom.").

222. Elk, *supra* note 217, at 943–44.

223. See Lehman, *supra* note 2, at 1000–01.

224. Vincent Chiao, *Intention and Attempt*, 4 CRIM. L. & PHIL. 37, 37–38 (2010); Elk, *supra* note 217, at 926.

225. See Groethe, *supra* note 219, 569–74 (examining how different lower courts have applied the overt dangerous behavior requirement in involuntary

The Model Penal Code (MPC) provides one definition of attempt.²²⁶ Under this definition, for a person to be convicted of attempt, they must:

- 1) act with the purpose of committing the underlying offense; and 2) the act must constitute a substantial step in a course of conduct planned to commit the underlying offense.²²⁷

To constitute a substantial step, the conduct in question must strongly corroborate the actor's criminal purpose.²²⁸ This approach focuses on what the person has already done to commit the crime.²²⁹ Some states' laws track the language contained in the MPC.²³⁰

Several other states define attempt in terms of proximity to the commission of the offense.²³¹ These jurisdictions analyze inchoate crimes by looking at whether an individual's act is sufficiently proximate to the intended crime.²³² For example, in Massachusetts,

commitment); Elk, *supra* note 217, at 931–32 (discussing how minor a qualifying overt act in furtherance of a conspiracy can be); United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007) (“As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct.”).

226. MODEL PENAL CODE § 5.01 (A.L.I. 1962).

227. *Id.* The MPC also gives several examples of a substantial step that may, as a matter of law, be sufficient to satisfy the overt act requirement for attempt. These examples include the following, if strongly corroborative of the actor's criminal purpose: lying in wait, searching for or following the contemplated victim of the crime; enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; reconnoitering the place contemplated for the commission of the crime; unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; soliciting an innocent agent to engage in conduct constituting an element of the crime. *Id.*

228. *Id.*

229. Steele, *supra* note 111, at 239 n.71.

230. *E.g.*, N.J. STAT. ANN. § 2C:5-1 (West 2017) (tracking the language in the MPC).

231. *E.g.*, WASH. REV. CODE ANN. § 9A.28.020 (West 2016) (“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”).

232. 2 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW, SUBST. CRIM. L. § 11.4 (2d ed. 2016).

conviction of an inchoate offense focuses on how much additional conduct a person would have needed to engage in to commit the offense.²³³ While this approach still contains mental state and act requirements, the person must be much closer to the completion of the offense than under the MPC definition of attempt.²³⁴ In New York, a person must come “very near to the accomplishment of the intended crime.”²³⁵ Specifically, New York courts apply a proximity test to determine whether the person was “so near to [the crime’s] accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference.”²³⁶ Only acts that create this reasonable probability may be used when considering whether a person is guilty of an attempt crime.²³⁷ These proximity tests require more conduct to satisfy the substantial step element of an inchoate offense than the Model Penal Code.

Some jurisdictions examine inchoate crimes using a *res ipsa loquitur* analysis. Under this approach, attempt is viewed as an act that is itself “evidence of the criminal intent with which it is done.”²³⁸ The test views ambiguous conduct as ambiguous intent. Wisconsin employs this approach when evaluating the substantial step requirements for inchoate crimes.²³⁹ This analysis requires significantly more conduct for a conviction than the Model Penal Code because it functions as a “‘stop the film’ test,” where a person may only be convicted of an inchoate offense if, when the film is stopped, their behavior unequivocally corroborates their intention.²⁴⁰

Courts also evaluate inchoate crimes by using a probable desistance analysis. In jurisdictions such as Mississippi, courts assess whether the person would have committed the crime except for some intervening factor.²⁴¹ In order to be convicted of an inchoate crime, the

233. Commonwealth v. Buswell, 468 Mass. 92, 97 (2014) (quoting Commonwealth v. Bell, 455 Mass. 408, 415 (2009)) (“When an individual prepares to commit a crime but has not undertaken the last act necessary to accomplish it, the preparation will qualify as an attempt only if it ‘comes very near to the accomplishment of the [crime such that] the intent to complete it renders the crime [sufficiently] probable.’”).

234. Steele, *supra* note 111, at 239 n.71.

235. People v. Rizzo, 158 N.E. 888, 889 (N.Y. 1927).

236. *Id.*

237. *Id.*

238. LAFAVE, *supra* note 232, §11.4(d).

239. *E.g.*, State v. Stewart, 420 N.W.2d 44, 45 (Wis. 1988).

240. *Id.* at 50.

241. *E.g.*, Ishee v. State, 799 So. 2d 70, 73 (Miss. 2001); West v. State, 437 So. 2d 1212, 1214 (Miss. 1983); *see also* LAFAVE, *supra* note 232, § 11.4(c) (discussing other jurisdictions that rely on probable desistance analysis).

person must pass a point where most individuals would reconsider their conduct and desist.²⁴² This analysis is not functionally different from the proximity test.²⁴³

While inchoate crimes are addressed differently in the above jurisdictions, under any of these standards courts should properly find that due process privacy interests limit covert online investigations for criminal HIV transmission. A failure to disclose one's serostatus online is not necessarily strongly corroborative of a criminal purpose. This failure to disclose is also entirely consistent with a desire for privacy; some HIV-positive persons may only feel comfortable disclosing their serostatus through verbal communication or in the privacy of a home.²⁴⁴ Additionally, this failure to disclose could also be consistent with the ambiguities, miscommunications, and misunderstandings inherent in non-verbal online communication. Due process requires more conduct and communication to establish the substantial step element of attempted HIV transmission. This ensures that the conduct is strongly corroborative of a criminal purpose and sufficiently protects individual privacy interests. This result would necessarily limit, but not eliminate, police use of covert investigations in these forums.

B. Proposed Remedy

Courts have played a large role in regulating police conduct throughout the twentieth and twenty-first centuries.²⁴⁵ Beginning with the rampant police corruption in early twentieth-century policing, criminal procedure increasingly required courts to supervise police-initiated and police-conducted investigations in an attempt to reign in police discretion.²⁴⁶ When legislatures have been unable or unwilling to create a workable solution to police supervision, the Supreme Court has extended judicial regulation over police conduct and investigative techniques.²⁴⁷ Courts have focused on the use of certain investigative

242. LAFAVE, *supra* note 232, § 11.4(c); West, 437 So. 2d at 1214.

243. LAFAVE, *supra* note 232, § 11.4(c).

244. Julianna Serovich et al., *Methods of HIV Disclosure by Men Who Have Sex with Men to Casual Sexual Partners*, 19 AIDS PATIENT CARE & STDS 823, 826 (2005) (stating that “among our participants, however, the most common form of point blank disclosures were those that occurred in-person (57%)”).

245. Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 759 (2013).

246. Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 493 (2010).

247. *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1707 (2009) (encouraging the Supreme Court to embrace its historical role of judicial regulation of police conduct in the face of legislative indifference); e.g.,

techniques, bringing some modes of investigation—like police stops and cell phone searches—under the purview of judicial supervision.²⁴⁸ Though it can be controversial, courts are no strangers to regulating police conduct. Police and prosecutors use inchoate offenses to bring charges against HIV-positive individuals where undercover officers first interact with suspects through non-verbal online communication. Courts can be used to reign in these practices by challenging covert online investigations on due process grounds. Courts should apply a due process analysis to inchoate violations of criminal transmission statutes and find that due process requires that individuals engage in additional and significant conduct to satisfy the substantial step element of the crime. This approach will help ensure that a suspect's conduct evinces an intent to transmit HIV and is not merely a misunderstanding.

Due process requires more conduct for these inchoate violations because the balance of interests in a due process analysis has shifted: government interests have waned since the beginning of the epidemic, individual privacy interests remain strong, and HIV laws are no longer sufficiently tailored to a state's interest in public health.²⁴⁹ Due process at least mandates that an individual must deny their serostatus in person before a conviction can be obtained.

Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to illegally obtained evidence in state court); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (defining a Fourth Amendment search as a government intrusion on a subjective expectation of privacy that society considers reasonable); United States v. Jones, 565 U.S. 400, 404 (2012) (extending Fourth Amendment searches to include attaching a GPS tracking device to monitor long-term movement of a vehicle); City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000) (using the Fourth Amendment to regulate police checkpoints).

248. See, e.g., Terry v. Ohio, 392 U.S. 1, 16 (1968) (holding that a seizure occurs whenever a police officer accosts an individual and restrains his freedom to walk away); Riley v. California, 134 S. Ct. 2473, 2486–88 (2014) (discussing the scope of police officers' ability to seize and gather evidence from an arrestee's cell phone). Notably, the Supreme Court uses judicial review of police checkpoints in order to ensure that police do not use investigative techniques that violate the Fourth Amendment. Matthew Radler, *Privacy Is the Problem: United States v. Maynard and a Case for a New Regulatory Model*, 80 GEO. WASH. L. REV. 1209, 1222–25 (2012). In response to judicial review of police checkpoints, police modify their investigative techniques to be in compliance with the judicial rule. *Id.*

249. See *supra* Part I; see also Lawrence v. Texas, 539 U.S. 558, 564 (2003) (concluding that a Texas law criminalizing same-sex sexual conduct violated the Due Process Clause of the Fourteenth Amendment).

1. Balancing Individual and Government Interests— Requiring Significant Conduct to Satisfy the “Substantial Step” Element of Inchoate Offenses

Disclosure and consent that occur through non-verbal online communication may be misunderstood or ambiguous.²⁵⁰ Individual privacy rights are implicated because this communication could involve private, consensual activity, like in *Lawrence*.²⁵¹ Privacy rights have remained strong since the beginning of the HIV epidemic and increasing the amount of conduct necessary to satisfy the substantial element of an inchoate crime would pay those rights their due respect. Additionally, a due process analysis should not completely eliminate the use of covert online investigations for criminal transmission violations; governments continue to have real, albeit diminished, public health concerns.

States continue to maintain an interest in protecting public health, but this interest has waned as HIV is no longer the death-sentence it once was.²⁵² The proposal suggested by this Note will still allow police to conduct undercover investigations into criminal transmission violations. However, new substantial step requirements will limit the possibility that police arrest HIV-positive individuals over a miscommunication issue.

Requiring additional conduct to satisfy the substantial step element of inchoate violations would strike an appropriate balance between individual and government interests. This change is especially needed, given diminished government interests. First, a suspect must do more than fail to disclose their serostatus, miscommunicate their status, or ambiguously communicate their serostatus through non-verbal online communication. If an HIV-positive individual were talking to an undercover police officer and one of the previous scenarios occurred, non-disclosure or ambiguous disclosure would not be strongly corroborative of a purpose to carry out a violation of a criminal HIV transmission statute.

Second, the suspect must explicitly deny their serostatus in person to an undercover officer. Individuals may be hesitant to disclose their serostatus online.²⁵³ Some may prefer to disclose this sensitive

250. McCallum, *supra* note 9, at 689–96.

251. *Lawrence*, 539 U.S. at 564.

252. See *supra* Section IV.A.5.

253. Mark Davis et al., *E-dating, Identity and HIV Prevention: Theorising Sexualities, Risk and Network Society*, 28 SOC. HEALTH & ILLNESS 457, 470 (2006).

information in person.²⁵⁴ An individual may well have disclosed this information before engaging in sexual activity, even if an individual did not disclose their serostatus on a dating app.²⁵⁵ Non-disclosure in this conduct isn't corroborative of a criminal purpose either.

Due process requires that the above conduct and communication occur before a court finds that the substantial step element of an inchoate crime is satisfied. This approach will help limit undercover investigations and arrests only to those who spread HIV purposefully. Thus, police discretion can be limited using a due process analysis that affords appropriate weight to both individual privacy interests and government interests. If an even more robust substantial step requirement would be needed to effectively limit covert online investigations, this proposed due process analysis still provides ample justification to impose such a requirement. This approach allows state and individual interests to be balanced appropriately in each jurisdiction.

2. Benefits of the Proposed Remedy

This proposal is better than the legislative or judicial proposals in Part III in several ways. First, a due process analysis is not hamstrung by a lack of interest from state legislatures. Second, this approach avoids potential juror bias,²⁵⁶ because juries would only need to determine whether objective conduct or communication did or did not occur. Alternatively, juror bias could completely be avoided by removing the issue from the jury, where the conduct and communication is undisputed and is not legally sufficient to support an attempted transmission charge. Lastly, a due process approach can easily dovetail with other legislative and judicial solutions, allowing HIV advocates to continue to lobby state legislatures to repeal or replace existing criminal HIV transmission statutes.

CONCLUSION

Much has changed since criminal HIV transmission laws were enacted to help prevent the spread of the disease. Medical developments make those laws less necessary to protect public health, such that criminal HIV transmission statutes are simply not as crucial to protect the public from the spread of HIV as they once were. At the

254. Serovich, *supra* note 244, at 826.

255. *Id.* at 826–27.

256. Kaplan, *supra* note 137, at 1550–51.

same time, these laws have continued to have terrible social consequences for already marginalized groups. Criminal transmission statutes require HIV-positive individuals to disclose their serostatus. When this communication occurs online, it can be ambiguous or misunderstood. Police are beginning to use social media, online websites, and dating apps as part of covert investigations into violations of these statutes. The opportunity for ambiguity in non-verbal online communication creates the risk that police will target HIV-positive individuals in covert investigations, even when these individuals disclosed or thought they disclosed their serostatus.

Past proposals to address the problems with criminal HIV transmission statutes are stalled by a lack of political will and unfriendly constitutional precedent. The proposed due process analysis does not face the same constraints. Due process requires courts to reconsider the balance between individual and government interests when extending criminal transmission statutes to inchoate violations based on non-verbal online communication. Courts should consider the due process implications of these laws and, in so doing, properly balance individual and government interests in this new medium. Due process mandates that an individual deny their serostatus in person before a conviction is obtained. This approach allows for additional substantial step requirements to be imposed, if necessary, to correctly balance individual and government interests. When this balance is properly struck, covert investigations can be effectively limited, individual privacy interests can be respected, and the police can still be allowed to use covert investigations as a tool to prevent the spread of the disease.

This Note focuses on one issue at the intersection of policing, new technology, and private relationships or activity. As it becomes increasingly easier for police to investigate the most private details of people's lives, society can and should reevaluate how much discretion it affords police officers to conduct undercover investigations. Absurd results could occur if courts, without due consideration for individual rights, apply existing statutes and law to changes in policing, technology and social interaction. Due process requires courts to instead chart a new course when the relationship between policing, technology, and social interaction changes and to reevaluate individual and government interests when determining whether and how to extend laws.