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# Decriminalizing Disease: A Health Justice Approach to Infectious Diseases and Criminal Law

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# DECRIMINALIZING DISEASE: A HEALTH JUSTICE APPROACH TO INFECTIOUS DISEASES AND CRIMINAL LAW

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## INTRODUCTION

Infectious diseases, also called communicable diseases, are largely a public health issue and should not be criminalized. These diseases are caused by infectious agents such as viruses or bacteria and can be transmitted from person to person.[1] Due to fears of contagion, public responses to the threat of infectious diseases have relied heavily on punitive approaches placing blame on individuals with these diseases and using the criminal legal system to punish transmission as a purported way to prevent new infections.[2] Health and legal experts have critiqued the criminalization of infectious diseases, i.e., the use of criminal law to prosecute people for the non-disclosure, exposure, or transmission of an infectious disease, as ineffective and harmful.[3]

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1. *Infectious Diseases*, MAYO CLINIC (Feb. 18, 2022), [https://perma.cc/JQ9X-9VBA].

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, 998 (2014).

3. *Id.* at 998-99; Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender, and Consent*, 99 MINN. L. REV. 1231, 1241-1242 (2015) (noting that empirical studies have

This criminalization does not reflect the current scientific and medical evidence around infectious diseases in many instances and conflicts with the goals of public health.[4] Public health focuses on improving population-level health outcomes, but it should also build systems that promote health equity and are responsive to the lives of marginalized populations.[5] In contrast, the criminalization of infectious diseases reveals an enduring punishment mindset. This mindset views retribution and control as central components of public safety and is part of a longstanding tendency to hold individuals responsible for societal problems instead of addressing root causes.

This Article seeks to re-frame the discussion around the legal framework for infectious diseases in a way that moves beyond a punishment mindset and toward a health justice mindset. My focus in this Article is on health justice rather than traditional understandings of public health, defined as the science and practice of improving the health of people and their communities. Public health utilizes a range of tools including disease surveillance and intervention, education, prevention, and treatment, as well as policy and regulation, to reduce the risk of infectious disease transmission. Typically, public health is understood to necessitate constraining individuals and their risk behaviors to protect the health of whole populations. As a result, it can conflict with individual rights and civil liberties. Protecting population health and protecting personal interests are often in

found that HIV-specific criminal laws are unlikely to increase disclosure, reduce risky behaviors, or reduce HIV transmissions). In addition to health and legal scholars, law enforcement, public health, medical, and legal organizations have called for an end to the use of the criminal law as a response to infectious disease exposure, particularly HIV exposure. *See* COLLECTION OF STATEMENTS FROM LEADING ORGANIZATIONS URGING AN END TO THE CRIMINALIZATION OF HIV AND OTHER DISEASES, *microformed on* CHLP (Ctr. for HIV L. & Pol'y), [https://perma.cc/VRV2-M9ZA] (last visited Sept. 16, 2024).

4. *HIV Criminalization and Ending the HIV Epidemic in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 18, 2023), [https://perma.cc/J5R9-BTC6] ("After more than 40 years of HIV research and significant biomedical advancements to treat and prevent HIV, most HIV criminalization laws do not reflect current scientific and medical evidence."); Jonathan Mermin et al., *HIV Criminalisation Laws and Ending the US HIV Epidemic*, 8 LANCET HIV e4, e5 (2021); *HIV Criminalisation Is Bad Policy Based on Bad Science*, 5 LANCET HIV e473, e473 (2018).

5. Lindsay McLaren, *In Defense of a Population-Level Approach to Prevention: Why Public Health Matters Today*, CAN. J. PUB. HEALTH 279, 279-280 (2019).

tension within public health and public health law.[6] While public health can be in synergy with rights and liberties, this Article embraces a health justice approach over a public health approach. Health justice is related to public health, but it is also distinct in making social justice a core value of health law, broadly conceived.[7]

I argue that health justice, when applied to infectious diseases, requires decriminalization. Health justice aligns with the abolitionist project to dismantle carceral practices and implement non-carceral approaches.[8] In contrast to a criminal legal framework, health justice is a framework for understanding and supporting how to better remedy health inequities.[9] It

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6. LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 11-12 (3d ed. 2016).

7. *Id*. Broadly defined, health law not only includes the law of health care and public health, but also many areas of law that are not strictly health-related, such as contract law, tort law, employment law, and business law. Criminal laws and their enforcement affect public health and are part of the ecosystem of health law. *Id*. at 27.

8. *See, e.g.*, ANGELA Y. DAVIS ET AL., ABOLITION. FEMINISM. NOW. 25 (2022); RUTH WILSON GILMORE, ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION 305-06 (2022) (ebook). Abolitionist scholars have argued that abolition is not just about dismantling carceral practices, but about creating safer communities and bringing communities together to center mutual aid projects, transformative justice practices, and community institutions into broader "community infrastructures of care." MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE. A CASE FOR ABOLITION 264, 265 (2022).

9. *See, e.g.*, Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL'Y 47, 47 (2014) (introducing health justice as a framework for the use of law to reduce health disparities); Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U.L. REV. 275, 277-78 (2015) (discussing health justice as a framework for eliminating health inequity and social injustice among low-income communities and communities of color); Lindsay F. Wiley, *From Patient Rights to Health Justice*, 37 CARDOZO L. REV. 833, 837 (2016) (proposing the health justice model as an alternative to existing health law models for examining questions of health care quality and access); Lindsay F. Wiley, *Applying the Health Justice Framework to Diabetes as a Community-Managed Social Phenomenon*, 16 HOUS. J. HEALTH L. & POL'Y 191, 198 (2016) (applying the health justice framework to diabetes disparities); Lindsay F. Wiley, *Tobacco Denormalization, Anti-Healthism, and Health Justice*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 203, 234 (2017) (applying the health justice framework to tobacco-related disparities); ELIZABETH TOBIN-TYLER & JOEL B. TEITELBAUM, ESSENTIALS OF HEALTH JUSTICE: A PRIMER 15 (2018) (defining health justice in terms of "laws, policies, systems, and behaviors that are evenhanded with regard to and display genuine respect for everyone's health and well-being"); Medha D. Makhlouf, *Health Justice for Immigrants*, 4 U. PA. J.L. & PUB. AFF. 235, 240 (2019) (applying the health justice framework to assess public commitments to health care access for immigrants); Yael Cannon, *The Kids Are Not Alright: Leveraging Existing Health Law to Attack the Opioid Crisis Upstream*, 71 FLA. L. REV. 765, 780 (2019) (applying the health justice framework to assess public commitments to meet the needs of people with adverse childhood experiences

recognizes how inequities manifest through structural subordination, prioritizes access to rights, protections, and supports in place of behavioral mandates, and centers collective action grounded in community engagement and empowerment.[10] The framework additionally focuses on evidence-based strategies, prevention, and coordination with a broad range of institutions and actors in sectors relevant to health justice, including not only public health and healthcare, but also law, human services, education and youth development, community development, business, and philanthropy.[11]

A health justice approach requires asking questions that foreground health outcomes and health equity, therefore allowing for a broader way to think about the decriminalization of infectious diseases. From a health justice perspective, decriminalization involves something more than just removing or reforming ineffective or harmful criminal laws. Decriminalization involves creating institutions and institutional practices that address poor health outcomes and inequities as well as their underlying social determinants.[12] It also involves providing legal protections, financial resources, social support, power, and control to individuals and communities most affected by structural discrimination and subordination.[13] As a matter of health justice, what is needed is a move away from criminal law enforcement as a response to infectious diseases. To be successful, this response should be led by institutions, organizations, and individuals knowledgeable about infectious

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across the life-course); Emily A. Benfer et al., *Health Justice Strategies to Eradicate Lead Poisoning: An Urgent Call to Action to Safeguard Future Generations*, 19 YALE J. HEALTH POL'Y L. & ETHICS 146, 153 (2020); Matthew B. Lawrence, *Against the "Safety Net",* 72 FLA. L. REV. 49, 63 (2020) (applying the health justice framework to critique the safety net metaphor for public benefits); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 758 (2020) ("[A]rgu[ing] that a civil rights of health initiative built on a health justice framework can help educate policymakers and the public about the health effects of subordination, create new legal tools for challenging subordination, and ultimately reduce or eliminate unjust health disparities.").

10. Lindsay F. Wiley et al., *What Is Health Justice?*, 50 J.L. MED. ETHICS 636, 636, 638 (2022).

11. *Id*. at 636-38.

12. Keon L. Gilbert & Robert S. Chang, *(Im)Balancing Acts: Criminalization and De-Criminalization of Social and Public Health Problems*, 50 J.L. MED. ETHICS 703, 709 (2022).

13. *Id.* at 708-09.

diseases and conversant in the decades-old struggle for patient-centered care, autonomy, and privacy. Such a response also requires standards and procedures that prioritize evidence-based infectious disease prevention, emphasize the provision of appropriate services, and promote antidiscrimination and equity.

Historically, the response to infectious diseases has not been driven by a health justice approach.[14] Instead, it has been primarily driven by fear, stigma, and moral panic, which contributed to the criminalization of HIV and other infectious diseases.[15] Even though HIV can now be effectively prevented and treated, HIV criminalization still occurs today.[16] In the United States, this criminalization varies substantially by state and has undergone law repeal and reform efforts.[17] While some states have criminal laws that specifically apply to people living with HIV, many states have infectious disease criminal laws that apply more generally to people with an infectious disease, including but not limited to HIV.[18] For example, Iowa imposes criminal penalties on any person who knows they are "infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease" with either the intent or reckless disregard as to whether "the uninfected person contracts the contagious or infectious disease."[19] Even in the absence of HIV-specific criminal laws or infectious disease criminal laws, states have general criminal laws such as assault and reckless endangerment statutes which can be used to prosecute people for infectious disease exposure or transmission.[20] Efforts to end unjust HIV criminalization are ongoing, but most states have not acted to repeal or otherwise reform their laws. States that have acted have taken different

14. Buchanan, *supra* note 3, at 1239.

15. *Id.*

16. *Id.* at 1239-40.

17. CRIMINAL JUSTICE: HIV CRIMINALIZATION LAWS (2023) *microformed on* MAP (Movement Advancement Project) [https://perma.cc/4YH9-KNXC] [hereinafter CRIMINAL JUSTICE: HIV CRIMINALIZATION LAWS]; *Timeline of State Reforms and Repeals of HIV Criminal Laws*, CTR. FOR HIV LAW & POL'Y (June 2022), [https://perma.cc/3SLD-2ZZ5].

18. *See* CRIMINAL JUSTICE: HIV CRIMINALIZATION LAWS, *supra* note 17.

19. IOWA CODE § 709D.3(1)-(4) (2014).

20. *See* CRIMINAL JUSTICE: HIV CRIMINALIZATION LAWS, *supra* note 17.

approaches.[21] However, each decriminalization approach, whether through litigation or legislation, comes with challenges. As a result, criminalization can persist. While it is possible to end infectious disease criminalization, it requires a multi-layered approach.

Legal scholarship must account for this varied legal landscape and examine the challenges, consequences, and limitations of decriminalization approaches. For instance, where decriminalization approaches involve eliminating HIV-specific criminal laws, those approaches may be less effective if they do not also address general criminal laws under which people living with HIV are frequently prosecuted. What is needed is more than just repealing outdated HIV-specific criminal laws or infectious disease criminal laws more generally. In 2022, New Jersey became the third state to completely repeal its HIV-specific criminal laws after Texas and Illinois.[22] Despite the Texas repeal occurring in 1994, people living with HIV have been prosecuted in Texas since then under general criminal laws including attempted murder and aggravated assault.[23] Merely reforming criminal laws by requiring specific intent to transmit HIV or requiring actual transmission of HIV is not enough to end unjust criminalization, and many HIV advocates have previously noted this.[24]

Furthermore, legal scholarship on the criminalization of infectious diseases has centered on the criminalization of HIV.[25] However, criminal laws can be used to prosecute people with

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21. *Timeline of State Reforms and Repeals of HIV Criminal Laws*, *supra* note 17.

22. *Id*.

23. *HIV Criminal Law Reform: Before & After, Texas,* CTR. FOR HIV LAW & POL'Y (2020), [https://perma.cc/LP9L-YQBZ].

24. Bryan Olert, *Redefining Risk: Judicially Heightened Risk Standards and HIV-Specific Criminal Laws*, 43 CARDOZO L. REV. 2037, 2068 (2022). Other criminal law reforms that organizations like the Center for HIV Law and Policy have advanced may be more effective. These include amending sections of criminal codes that define bodily harm to exclude infectious disease status or other health conditions. These would be promising reforms, but they will require legislative changes which would take time and political will to achieve.

25. Buchanan, *supra* note 3, at 1232; Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1518 (2012); Sienna Baskin et al., *Criminal Laws on Sex Work and HIV: A Mapping*, 93 DENVER L. REV. 355, 356 (2016); Tony Ficarrotta, *HIV Disclosure Laws Are Unjustified*, 24 DUKE J. GENDER L. & POL'Y 143, 144 (2017); Joshua D. Blecher-Cohen, *Disability Law and HIV Criminalization*, 130 YALE L.J. 1560, 1563 (2021).

infectious diseases such as viral hepatitis and COVID-19. It is important for legal scholarship to explore the criminalization of infectious diseases other than HIV and examine what decriminalization efforts pursued with HIV in mind mean for these other diseases. As states have reformed their laws, some have shifted away from singling out HIV for criminal punishment. This shift has resulted in updated laws that are not HIV-specific and that contemplate the prosecution of infectious diseases beyond HIV.[26] In other states, legal reform has included making laws reflect the current scientific and medical evidence of HIV transmission.[27] Given these developments, it is important not only to end the ineffective and harmful criminalization of HIV, but also to prevent similar criminalization of other infectious diseases. The need for this broader approach has become apparent considering recent prosecutions involving hepatitis and COVID-19. These infectious diseases are more prevalent and more transmissible than HIV, meaning that many more people could potentially face criminal prosecution.[28] Even so, these infectious diseases have different stigmas and behaviors associated with them and impact different populations. For example, HIV is associated with sexual behaviors and disproportionally impacts stigmatized groups, including gay and bisexual men, transgender individuals, and sex workers, especially those from communities of color.[29] This may contribute to higher rates of criminalization in the HIV context

26. *See infra* Part II.A.

27. *See infra* Part II.C.

28. Compared with 1.2 million people living with HIV in the United States, 2.5-4.7 million people have hepatitis C in the United States, and more than 100 million COVID-19 cases have been confirmed in the United States. *See U.S. Statistics*, HIV.GOV, [https://perma.cc/DAP7-CZ6Q] (last visited Sept. 29, 2024); *Viral Hepatitis in the United States: Data and Trends*, U.S. DEP'T OF HEALTH AND HUM. SERVS., [https://perma.cc/9PTK-3SUM] (last visited Oct. 17, 2024); *Global Covid-19 Tracker*, KAISER FAM. FOUND., [https://perma.cc/9WXB-QKT5] (last visited Sept. 29, 2024). Hepatitis C is more easily transmitted than HIV because hepatitis C is 10 times more concentrated in the blood relative to the concentration of HIV in the blood. *See* John Budd & Roy Robertson, *Hepatitis C and General Practice: The Crucial Role of Primary Care in Stemming the Epidemic*, 55 BRIT. J. GEN. PRAC. 259, 259 (2005).

29. Liz Hamel et al., *HIV/AIDS in the Lives of Gay and Bisexual Men in the United States*, KAISER FAM. FOUND. (Sept. 25, 2014), [https://perma.cc/D5BB-CPBX]; *How HIV Impacts LGBTQ+ People*, HRC FOUND., [https://perma.cc/Z8F3-FRPK] (last visited Sept. 29, 2024).

and explain the fewer criminal prosecutions to date against people with hepatitis or COVID-19 relative to people living with HIV.

Given the prospect of ongoing HIV, hepatitis, and COVID-19 epidemics and of newly emerging epidemics, this Article uses a health justice framework to analyze the criminalization of infectious diseases and to examine various options for changing law enforcement decision-making in ways that support decriminalization. The individual decisions of law enforcement are important because they drive criminalization and contribute to its downstream harm. The United States has often used criminal law to deal with public health issues and has a long history of mass incarceration and social injustice, particularly affecting people of color and other marginalized groups. Given this context, it is important to embrace an approach that prioritizes what makes sense from the perspective of public health and affected communities and that limits the discretion to prosecute people in connection with infectious diseases.

The Article makes three novel contributions. First, it applies a health justice framework to the critique of infectious disease criminalization. The Article explores the origins of the criminalization of infectious diseases through this lens. It surveys the existing landscape of laws and uses HIV as a case study to consider how infectious disease prosecutions exemplify and amplify social hierarchies and undermine public health and health justice.

Second, the Article assesses the implications of recent efforts to repeal or reform laws criminalizing HIV. It draws on scholarship calling into question the justifications for HIV criminalization and argues for decriminalization, but it further argues that most repeal and reform efforts aimed at HIV-specific criminal laws have been insufficient. Eliminating these criminal laws still leaves people subject to prosecution under general criminal laws for conduct where HIV transmission is unlikely. Moreover, excluding people from prosecution based on HIV viral suppression could exacerbate the disparate impact of criminal laws on people of color, unhoused people, transgender people, and other groups with lower levels of viral suppression. Finally, criminal reforms made with HIV in mind may not limit or prevent prosecutions of other infectious diseases.

Third, this Article examines the criminalization of infectious diseases other than HIV, in particular, hepatitis and COVID-19. It is important to consider the details of different infectious diseases and how criminal laws are applied to these diseases to make the full implications of criminalization apparent. The Article ends with a pragmatic analysis of two strategies that center health justice and aim to marginalize the use of criminal law.

The Article will proceed as follows. Part I discusses the history of the criminalization of HIV through the lens of health justice.[30] After introducing the main elements of the health justice framework, the Article uses this framework to critique the criminalization of infectious diseases. In response to the HIV epidemic, state legislatures in the 1980s enacted HIV-specific criminal laws to prosecute the non-disclosure, exposure, or transmission of HIV in ways that are contrary to health justice.

Part II provides an overview of current laws enabling HIV criminalization (in the following referred to as HIV criminalization laws) and describes the use of these laws in recent years.[31] HIV criminalization continues to exist and is still harmful today. This Section first details the various components of existing laws, how they work, and data on their enforcement. It then critically discusses reforms to these laws and explores where criminalization remains a threat despite these reforms. One goal of this article is to update the conversation around HIV criminalization in light of recent developments. Another goal is to glean lessons from past and current infectious disease criminalization for improving the legal and policy landscape.

Part III considers how criminal laws have been applied to infectious diseases such as viral hepatitis and COVID-19 and explores the ramifications of these applications.[32] Given the infectious disease consequences of the enduring opioid crisis and,

30. *See infra* Part I.

31. *See infra* Part II. I use the term "HIV criminalization laws" as an umbrella term that encompasses the terms "HIV-specific criminal laws" and "non-HIV-specific criminal laws" that are used to prosecute people living with HIV. Non-HIV specific criminal laws include the terms "infectious disease criminal laws" and "general criminal laws," such as assault and reckless endangerment statutes. Each of these terms is used through the article.

32. *See infra* Part III.

more generally, the likelihood of more frequent and more severe epidemics in the future, we are likely to see further attempts to use criminal law in response to infectious diseases. I argue that we should resist such attempts. I use a health justice framework to examine and evaluate two potential strategies for limiting criminalization and its harm, even if no single strategy is *the* solution. The Article concludes with some takeaway lessons for public health and criminal law.

## I. HISTORY OF HIV CRIMINALIZATION

The United States has long used criminal law to respond to public health issues. Infectious diseases are not the only public health issue that has generated a criminal response. People also face criminal prosecution related to substance use, mental health conditions, and pregnancy, as well as other issues that are not always considered in terms of public health, such as homelessness and sex work.[33] In the context of infectious diseases, the use of criminal law has largely reflected social anxieties and animus toward certain marginalized groups. An example from the early twentieth century is the incarceration of women as part of a government public health campaign known as the "American Plan."[34] Officials suspected these women of engaging in prostitution, having sexually transmitted infections (STIs), or just being promiscuous.[35] Initially conceived during World War I as a federal project to protect soldiers from STIs, the federal campaign lasted into the 1950s and was expanded with state and local governments enacting parallel laws and practices to arrest

33. Jennifer Oliva & Taleed El-Sabawi, *The "New" Drug War*, 110 VA. L. REV. (forthcoming 2024); Valeena Beety & Jennifer Oliva, *Policing Pregnancy 'Crimes'*, 98 N.Y.U. L. REV. ONLINE 29, 29-54 (2023); Michelle Goodwin, *Pregnancy and the New Jane Crow,* 53 CONN. L. REV. 543, 543-568 (2021); MICHELLE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 31-32 (Cambridge Univ. Press 2020); Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 515-526, 529 (2019); Siya Hedge & Carlton Martin, *With Liberty and Justice for All: The Case for Decriminalizing Homelessness and Mental Health in America*, 21 IND. HEALTH L. Rev. 249, 249-259 (2024); India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. Rev. 185, 185-189 (2018).

34. Scott W. Stern, *The Long American Plan: The U.S. Government's Campaign Against Venereal Disease and Its Carriers*, 38 HARV. J.L. & GENDER 373, 374-377 (2015).

35. *Id.*

and examine women whom they suspected of having an STI.[36] If a woman was diagnosed with an STI, "she was placed in isolation for an indeterminate sentence until she was cured or rendered noninfectious."[37] Governments relied on this precedent later when they considered isolation and quarantine of people with HIV/AIDS.[38] It is an important part of the context in which the criminalization of HIV and other infectious diseases began. Most criminal prosecutions for infectious disease exposure or transmission stem from STIs, especially HIV.[39]

After the American Plan, HIV became the focus of criminalization.[40] This phase of criminalization began in the 1980s, when the first cases of what would later become known as HIV were documented.[41] This Section begins with the history of HIV criminalization in the United States. Since the early years of the HIV epidemic, criminal laws have been deployed against people living with HIV. A lack of knowledge about HIV and how it could be transmitted, together with the association of HIV with stigmatized groups, contributed to public health concerns and moral panic. Rather than embracing an approach focused on health justice, this context led states to enact HIV-specific criminal laws as a way to respond to the perceived threat of people with HIV knowingly transmitting the virus. The Section ends with a discussion contrasting the criminal law-oriented approach that was adopted with an alternative health justice approach that was, for the most part, neglected. Some of the proposals made in the 1980s fit within a health justice framework, and in the ensuing decades, this framework has been further developed in important ways.

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36. *Id.*

37. *Id.* at 374-75.

38. *Id.* at 377.

39. Michael Ni'Man & Nikolas P. Lemons, *Covid-19 and the Criminalization of Viral Transmission*, 61 MED. SCI. L. 315, 315 (2021).

40. *See* Stern, *supra* note 34, at 425, 429.

41. *Id.*

### A. Fear and Moral Panic Led to a Response Oriented Toward Criminal Law

The history of HIV began as an immunological mystery, with almost nothing known about the virus and with cause for concern over the number of people dying. HIV criminalization emerged within this context. The first reported cases of what would later become known as HIV occurred in June 1981, when the United States Centers for Disease Control and Prevention (CDC, then called the Center for Disease Control) published an article in its *Morbidity and Mortality Weekly Report (MMWR)* describing a rare lung infection, Pneumocystis carinii pneumonia (PCP), in five gay men in Los Angeles.[42] Soon after, in July 1981, a rare cancer, Kaposi's Sarcoma, was reported among twenty-six gay men in New York, Los Angeles, and San Francisco.[43] All of these men also had other infections, which suggested that their immune systems were not working.[44] This is because HIV attacks the body's immune system by adhering to a susceptible class of white blood cells, known as CD4+ T-lymphocytes or T-cells, which normally operate to fight infections.[45] Much of the mystery at the time was due to medical experts not having identified the HIV virus, not understanding how the virus affects the immune system, and not knowing about the virus's transmissibility. There was further cause for concern because cases of PCP and Karposi's Sarcoma are normally very rare conditions not typically found among young, previously healthy men.[46] During the early years of the HIV epidemic, these cases

42. Ctrs. for Disease Control & Prevention, *Pneumocystis Carinii Pneumonia—Los Angeles,* 30 MORBIDITY & MORTALITY WKLY. REP. 1, 1-2 (1981) [hereinafter *Pneumocystis Carinii Pneumonia—Los Angeles*].

43. Ctrs. for Disease Control & Prevention, *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York and California*, 30 MORBIDITY & MORTALITY WKLY. REP. 305, 305-07 (1981) [hereinafter *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York and California*].

44. *Id.*

45. *What Are HIV and AIDS?*, HIV.GOV (Jan. 13, 2023), [https://perma.cc/4Q82-TUXN].

46. *Pneumocystis Carinii Pneumonia—New York and California*, *supra* note 43, at 1-2.

typically resulted in death.[47] For example, two of the five men with PCP reported in *MMWR* died by the time the report was published, and the other three men died shortly thereafter.[48] In 1981, of the 337 reported cases of individuals with severe immune deficiency in the United States, most of them gay men, 130 had died by the end of the year.[49] Even with this high rate of mortality in the first year of reported cases, no one knew the magnitude or nature of what HIV entailed.

The initial lack of science and understanding around HIV, along with homophobia and racism, played a significant role in spurring fear and stigma.[50] In turn, this shaped the eventual adoption of a criminal law-oriented response to HIV rather than a health justice approach.[51] Researchers first isolated the virus from patients in 1983 and later identified HIV as the cause of AIDS, the late stage of HIV infection when individuals often experience one or more diseases or conditions indicative of severe immunosuppression.[52] Before this discovery, AIDS was called Gay-Related Immune Deficiency (GRID) because it was initially thought to only affect gay men.[53] This term reflected immense stigma since it was associated with a highly marginalized group. Similarly, conditions like Kaposi's Sarcoma quickly "became synonymous with AIDS and carried immense stigma—a mark of an unidentified, deadly disease."[54] Due to a lack of knowledge about how HIV could be transmitted, many people in society were reluctant to have contact with people with AIDS. In the early 1980s, more than one in five people said they were less comfortable around gay men since learning about AIDS in the

47. *A Timeline of HIV and AIDS*, HIV.GOV, [https://perma.cc/557Y-5S2Y] (last visited Sept. 30, 2024).

48. *Id.*

49. *Id.*

50. David W. Purcell, *Forty Years of HIV: The Intersection of Laws, Stigma, and Sexual Behavior and Identity*, 111 AM. J. PUB. HEALTH 1231, 1231-33 (2021).

51. *Id*.

52. Robert C. Gallo & Luc Montagnier, *The Discovery of HIV as the Cause of AIDS*, 349 NEW ENG. J. MED. 2283, 2283-85 (2003).

53. Matthew B. Platt & Manu O. Platt, *From GRID to Gridlock: The Relationship Between Scientific Biomedical Breakthroughs and HIV/AIDS Policy in the US Congress*, 16 J. INT. AIDS SOC., no. 1, 2013, at 1.

54. Devon E. McMahon et al., *25 Years of Kaposi Sarcoma Herpesvirus: Discoveries, Disparities, and Diagnostics*, 6 JCO GLOB. ONCOLOGY 505, 505 (2020).

media.[55] Even doctors and nurses refused to treat patients with the disease, and some only did so while wearing full-body protective suits.[56] In addition to cases in gay men, cases of AIDS were reported in people with hemophilia and other recipients of blood transfusions.[57] Early cases of AIDS were also documented among people who inject drugs and certain racial minority communities. In 1982, when the CDC first used the term AIDS, the first risk factors identified for the disease were colloquially known as the "4 H's": homosexuals, hemophiliacs, heroin users, and Haitian migrants.[58] This kind of language added to the stigmatization of these groups and informed the perception of HIV.

As AIDS cases increased throughout the 1980s, public perception of HIV was framed by panic and prejudice against gay people and other marginalized groups, who were already targets for social and criminal sanction.[59] Fear of AIDS was commonplace. At the same time, the disease received little attention from policymakers because it was seen as only affecting specific groups who were not viewed positively by the general population.[60] After a few years, when it became clear that others were at risk for AIDS, what had been complacency turned into serious concern, hysteria, and ultimately moral panic.[61] Moral panic, which occurs when a "condition, episode, person or group of persons emerges to become defined as a threat to societal

55. Justin McCarthy, *Gallup Vault: Fear and Anxiety During the 1980s AIDS Crisis*, GALLUP (June 28, 2019), [https://perma.cc/SG9Q-U96Z].

56. Jen Cristensen, *AIDS in the '80s: The Rise of a New Civil Rights Movement*, CNN (June 1, 2016), [https://perma.cc/FY98-5SR6]; *see also* Wilmer Todd, *In the 1980s some doctors and nurses refused to treat patients with AIDS*, ST. CHARLES HERALD GUIDE (July 15, 2019), [https://perma.cc/87B2-CZGV]. Discrimination toward people living with HIV continues to exist today. There are medical providers who have refused to treat people living with HIV in recent years. *See* Trent Straube, *Surgeon Refused to Operate Because Patient Had HIV, Claims Lawsuit*, POZ (Dec. 2, 2020), [https://perma.cc/L8NE-9S3Y].

57. *Snapshots of an Epidemic: An HIV/AIDS Timeline*, AMFAR, [https://perma.cc/Z9CK-RC9X] (last visited Sept. 29, 2024).

58. *Stigmatizing the 4 H's*, AVERT, [https://perma.cc/5T34-TWSN] (last visited Sept. 29, 2024).

59. Purcell, *supra* note 50, at 1231.

60. James W. Curran & Harold W. Jaffe, *AIDS: The Early Years and CDC's Response*, 60 MORBIDITY & MORTALITY WKLY. REP. 64, 65 (2011).

61. *Id*. at 65.

values and interests," resulted in an increased emphasis on social control measures.[62] This emphasis was partly responsible for the enactment and enforcement of criminal laws. A health justice approach, which would have aimed at addressing structural determinants of HIV, establishing legal protections against discrimination, increasing financial resources and social supports as part of the HIV response, or engaging and empowering marginalized community stakeholders, was neglected.

Amid moral panic, the United States became the first country to introduce HIV-specific criminal laws. A number of states enacted such laws during the 1980s.[63] In 1986, Florida, Tennessee, and Washington enacted the first state laws specifically designed to criminalize conduct of people living with HIV.[64] Thereafter, other states enacted similar laws, which explicitly imposed criminal penalties on people living with HIV.[65] In fact, most states with HIV-specific criminal laws enacted their first law between 1986 and 1990.[66]

The federal government also played a key role in promoting HIV-specific criminal laws as a response to rising HIV rates. In June 1987, President Ronald Reagan issued an executive order to create the President's Commission on the HIV Epidemic.[67] When the Commission was created, its members were mostly comprised of public health professionals.[68] However, its first chairman, its first vice-chairman, and its senior staff adviser for medical and research affairs, all of whom were physicians, quit before the Commission issued its final report.[69] Ultimately, the Commission's recommendations were made in a final report on

62. STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1 (3d ed. 2002).

63. Lehman et al., *supra* note 2, at 999.

64. *Id*. at 999.

65. *Id*.

66. *Id*. at 1000.

67. Presidential Commission on the Human Immunodeficiency Virus Epidemic, 52 Fed. Reg. 24129 (June 29, 1987).

68. Thomas Morgan, *Members of Federal AIDS Commission Visit Facilities in City*, N.Y. TIMES (Sept. 2, 1987), [https://perma.cc/Z6UQ-JB4P]; *see also* Susan L. Speaker, *The National Commission on AIDS, 1989–1993*, NAT'L LIBR. MED. (Jan. 7, 2022), [https://perma.cc/7PBR-UD5W].

69. Philip M. Boffey, *Leaders of AIDS Panel Quit Amid Feuds and Criticism*, N.Y. TIMES (Oct. 8, 1987), [https://perma.cc/6JZP-5QKZ].

June 24, 1988.[70] They reflected a mixture of a criminal law enforcement approach and a health justice approach. On the one hand, the Commission recommended that states adopt HIV-specific criminal laws, suggesting that existing penalties under assault laws may be too lenient to deter intentional HIV exposure.[71] On the other hand, the Commission recommended legal protections for people with HIV, expanded access to HIV testing and treatment for people with drug addiction, support for HIV research, more equitable and cost-effective financing for HIV care, and the development and implementation of education programs, all of which are in line with a health justice approach.[72]

Regarding HIV criminalization, the President's Commission on the HIV Epidemic urged a different approach than what was adopted in later congressional enactments. While the Commission encouraged continued state efforts to explore the use of criminal law in the face of the ongoing HIV epidemic, it cautioned that criminal sanctions for HIV "must be carefully drawn, must be directed only towards behavior which is scientifically established as a mode of transmission, and should be employed only when all other public health and civil actions fail to produce responsible behavior."[73] Specifically, the Commission noted a number of issues that are no less true today than in the 1980s: First, it was concerned "that criminal sanctions will undermine public health goals by diverting attention and resources from effective prevention policies such as education, testing, counseling, and partner notification and inhibit people from seeking testing."[74] Second, it noted "[t]he view of some that criminal sanctions are primarily punitive rather than preventive."[75] Finally, it pointed out "[f]ear of intrusive policing of private sexual activity and danger of selective prosecution and

70. *See generally* PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (1988) [hereinafter PRESIDENTIAL COMMISSION REPORT].

71. *Id*. at 130.

72. *Id*. at 44, 95, 123, 126, 141.

73. *Id*. at 130.

74. PRESIDENTIAL COMMISSION REPORT, *supra* note 70, at 130.

75. *Id*.

misuse of the criminal law to harass unpopular groups."[76] Given these issues, the Commission recommended that prior to initiating a criminal case against an accused individual for an HIV transmission, prosecutors should consult with public health officials to determine whether public health interventions would be more appropriate.[77] Moreover, the Commission recommended that systems should be set up to facilitate this dialogue.[78]

Ultimately, the final report of the President's Commission on the HIV Epidemic was largely ignored by the federal government and state legislatures at the time.[79] The Reagan administration prioritized cutting government expenditures rather than providing appropriate financial resources and adopting a structurally supportive and empowering response to the epidemic grounded in health justice.[80] States continued with the enactment of HIV-specific laws in line with the recommendations of the Commission, but those laws did not reflect all of its specific recommendations.[81] For example, most state laws did not require or enable consultation with public health officials before a case based on an HIV-related criminal offense was initiated.[82]

With the passage of the federal Ryan White Comprehensive AIDS Resources Emergency (CARE) Act in 1990, Congress further encouraged HIV criminalization by requiring, as a condition of receiving Ryan White funding, that states certify that their criminal laws could prosecute individuals for knowingly and intentionally exposing another person to HIV.[83] This certification requirement spurred the proliferation of state laws that are still

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76. *Id.*

77. *Id.* at 131.

78. *Id.*

79. *See* Baligh Yehia & Ian Frank, *Battling AIDS in America: An Evaluation of the National HIV/AIDS Strategy*, 101 AM. J. PUB. HEALTH, e4, e4 (2012).

80. *See generally The Reagan Presidency*, NAT'L ARCHIVES, [https://perma.cc/5M8T-SQFH] (last visited Sept. 30, 2024); *see also* Martin Tolchin, *Senate, 78-20, Votes $700 Billion Budget*, N.Y. TIMES, May 13, 1981, at A1.

81. Leslie E. Wolf, *Criminal HIV Exposure Statutes and Public Health in the United States*, *in* CRIMINALIZING CONTAGION: LEGAL AND ETHICAL CHALLENGES OF DISEASE TRANSMISSION AND THE CRIMINAL LAW 120, 124-25 (Catherine Stanton & Hannah Quirk eds., 2016).

82. *See generally* Staff of Volume 8, *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary (1999 Edition)*, 8 L. & SEXUALITY 1, 98-99, 302 (1998).

83. *See* Lehman et al., *supra* note 2, at 998.

being used today. While many states enacted HIV-specific criminal laws or sentence enhancements to prosecute people living with HIV, other states certified that their general criminal laws were sufficient to meet the certification requirement.[84] By 2000, all states had met the certification requirement.[85]

### B. Contrasting Paradigms of HIV Criminalization and Health Justice

The criminalization of HIV stands in stark contrast to a health justice approach. HIV-related criminal prosecutions have never been about advancing public health through the prevention of new HIV transmissions. As noted in 1988 by the President's Commission on the HIV Epidemic, such prosecutions are primarily punitive rather than preventive.[86] This has been supported by research indicating that the criminalization of HIV does not prevent HIV transmission.[87] Scholars have found weak evidence that criminal laws change HIV-related behavior; HIV criminalization does not increase disclosure of HIV status by people living with HIV.[88] There is no difference in HIV disclosure or sexual risk-taking between states with HIV-specific laws and states without HIV-specific laws.[89] One reason for this is that many people living with HIV are unaware of how these laws function.[90] Another reason is that HIV-specific criminal laws are associated with increased stigma.[91] HIV stigma, in turn, is associated with people living with HIV feeling less comfortable

84. *See* Wolf, *supra* note 81, at 124-25.

85. *Position Statement: HIV Criminalization Laws and Policies Promote Discrimination and Must be Reformed*, ASS'N OF NURSES IN AIDS CARE (Nov. 2014), [https://perma.cc/92HJ-L53Z].

86. PRESIDENTIAL COMMISSION REPORT, *supra* note 70, at 130.

87. Buchanan, *supra* note 3, at 1234.

88. Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior*? *An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 512 (2007).

89. *Id*. at 505, 507; Carol L. Galletly et al., *New Jersey's HIV Exposure Law and the HIV-related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living with HIV*, 102 AM. J. PUBLIC HEALTH 2135, 2135, 2139 (2012).

90. Carol L. Galletly et al., *HIV-Positive Persons' Awareness and Understanding of Their State's Criminal HIV Disclosure Law,* 13 AIDS & BEHAV. 1262, 1265 (2009).

91. Brad Barber & Bronwen Lichtenstein, *Support for HIV Testing and HIV Criminalization Among Offenders under Community Supervisions*, 33 RSCH. SOCIO. HEALTH CARE 253, 267-68 (2015).

disclosing their status.[92] Criminalization also does not deter people with HIV from engaging in HIV transmission risk behaviors or result in reduced transmissions.[93]

Rather than promoting public health, HIV criminalization undermines effective public health interventions, such as HIV testing campaigns, by discouraging people from knowing their HIV status.[94] Since knowledge of HIV status is often a required element for criminal liability, people who suspect that they have HIV may forgo HIV testing to avoid criminal liability.[95] The National HIV Criminalization Survey conducted by the Transgender Law Center found that 25% of survey respondents living with HIV knew at least one person who did not get tested for fear of criminal prosecution.[96]

Additionally, HIV criminalization is rooted in homophobia and racism and has been implemented in discriminatory ways. HIV-related criminal prosecutions disproportionately fall on marginalized populations, including people of color and sex workers.[97] There is substantial overlap between the populations disproportionately impacted by the HIV epidemic and those disproportionately impacted by the criminal law. Structural racism that drives mass incarceration renders these populations vulnerable to policing and introduction into the criminal legal

92. Haochu Li et al., *Effects of Multiple Types of Stigma on the Probability of HIV Disclosure to Sex Partners: A Systemic Review*, 13 SEXUAL HEALTH 516, 525, 527 (2016); Rachel Smith et al., *A Meta-analysis of Disclosure of One's HIV-positive Status, Stigma, and Social Support*, 20 AIDS CARE 1266, 1272 (2008).

93. Buchanan, *supra* note 3, at 1234; *see also* Carol L. Galletly et al., *A Quantitative Study of Michigan's Criminal HIV Exposure Law*, 24 AIDS CARE 174, 175, 178 (2012) (finding mixed impact of law).

94. Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & BEHAV. 451, 458 (2006).

95. *See id.* at 453, 455; *but see* Sun Goo Lee, *Criminal Law and HIV Testing: Empirical Analysis of How At-risk Individuals Respond to the Law*, 14 YALE J. HEALTH POL'Y L. & ETHICS 194, 194-238 (2014) (showing that at-risk individuals residing in states with HIV-specific statutes are no less likely to report having been tested for HIV than those who live in other states).

96. *HIV Criminalization Discourages HIV Testing, Disclosure and Treatment for Transgender and Third Sex Individuals*, TRANSGENDER L. CTR. (July 2, 2013), [https://perma.cc/S5DK-QDV7].

97. Amira Hasenbush et al., *HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS*, 1, 2-3, 17-19 (Dec. 2015), [https://perma.cc/W6LC-WTFW].

system.[98] This perpetuates social hierarchies and ties into larger patterns of subordination.

With respect to HIV and other infectious diseases, a health justice approach has several important advantages over a criminal law approach. Health justice is defined as a framework for understanding how to better remedy health inequities through recognizing the way they manifest in systems of subordination.[99] The framework provides a mechanism to advocate for and guide systems-level change to achieve health equity by eradicating the effects of racism, sexism, homophobia, transphobia, poverty, and other forms of subordination as well as the effects of laws, policies, and institutions in which subordination is embedded.[100] This framework emphasizes three broad principles that should be applied where criminal laws are deployed or when efforts are made to move away from the use of criminal laws: (1) structural remediation; (2) prioritization of financial resources, legal protections, social supports, and other accommodations over interventions aimed at mandating individual behaviors; and (3) community engagement and empowerment.[101] Health justice is consistent with a public health approach. A public health approach requires following evidenced-based research, focusing on disease prevention, addressing societal attitudes and behaviors that contribute to undesirable health outcomes, and strengthening coordination among different stakeholders in a broad range of sectors.[102] Health justice offers a framework not only for understanding the social determinants of diseases and problems caused by criminalization, but also for imagining how to transform health care, public health, and criminal legal systems.[103]

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98. Devin English et al., *Intersectional Social Control: The Roles of Incarceration and Police Discrimination in Psychological and HIV-related Outcomes for Black Sexual Minority Men*, 258 SOC. SCI. & MED. 1, 7-8 (2020).

99. Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS 122, 128, 136 (2021).

100. *Id*. at 137; Wiley, *supra* note 10, at 636-37.

101. Benfer, *supra* note 99, at 136-41.

102. Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 448 (2011).

103. Wiley, *supra* note 10, at 636, 639.

The first principle of health justice is that legal and policy responses must address the structural determinants of inequities. Structural determinants are "social and political mechanisms that generate, configure and maintain social hierarchies."[104] These determinants include the role of structural racism, which refers to the way laws are used to create broad disadvantages for racial and ethnic minorities, thus reinforcing hierarchies and contributing to the disproportionate burden of criminalization on communities of color and other marginalized groups.[105] Addressing structural determinants requires taking action within and outside the health system. It requires attention to the relationship between public health and criminal laws, as well as to larger patterns of subordination throughout society.

An application of the structural remediation principle within a health justice framework is the consultation with public health officials before any HIV criminalization case. Such consultation was proposed by the President's Commission on the HIV Epidemic but was subsequently ignored.[106] Health justice includes a concern for public health and involves strengthening coordination between sectors, focusing on prevention, and implementing appropriate interventions based on evidence-based research. There is value in ensuring that law enforcement engage with public health officials and evaluate the appropriateness of health interventions as an alternative to filing criminal charges. Such medical-legal partnerships (which I will discuss further in Part III) can support effective measures that advance health equity, and, if adopted in the right way, they are a promising way to respond to HIV and other infectious diseases without defaulting to criminalization.[107] This could keep people out of prison and instead provide education about transmission risk, counseling about risk reduction, triage to other supportive services such as mental health or substance use services, and an emphasis on social healing.

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104. Benfer, *supra* note 99, at 126. (citing COMM'N ON THE SOC. DETERMINANTS OF HEALTH, WORLD HEALTH ORG., *A Conceptual Framework for Action on the Social Determinants of Health* 9 (2010)).

105. *Id.* at 126-27.

106. PRESIDENTIAL COMMISSION REPORT, *supra* note 70, at 131.

107. *See infra* Section III.C.

The second principle of health justice is that financial resources, legal protections, social support, and other accommodations should be prioritized over interventions that mandate individual behaviors. Interventions that mandate individual behaviors include criminal laws that require people with infectious diseases to either disclose their status to others or refrain from behaviors that expose others.[108] From a health justice perspective, the use of these laws should be marginalized. However, if criminal laws can be used to prosecute people with infectious diseases who do not behave as mandated, such laws must be accompanied by supports and protections that address inequities in the intermediary determinants of health. Intermediary determinants refer to the material and environmental circumstances in which people live and work and their access to and treatment within the health system.[109] Examples of intermediary determinants include financial resources, legal protections, and social supports that enable compliance with the law and minimize harms.[110] Maintaining legal protections and providing access to services and supports are critical. For instance, privacy of individually-identifiable health information is an important legal protection that minimizes harms.[111] Similarly, laws that prohibit discrimination based on health status as well as sexual orientation, gender identity, race, and national origin are also needed. The ability to comply with interventions mandating healthy behaviors varies sharply depending on poverty, employment, housing status, and access to health care at both the individual and community levels, so financial resources that promote access to health care and address broader determinants can enable compliance.[112] More can also be done to combat stigma and discrimination by expanding social support services and scaling up evidence-based stigma reduction programs. Unless laws that enable the criminalization of

108. Lehman, *supra* note 2, at 999.

109. Benfer, *supra* note 99, at 138.

110. *Id.*

111. COMM. ON HEALTH RSCH. & THE PRIV. OF HEALTH INFO.: THE HIPAA PRIV. RULE, INST. OF MED., BEYOND THE HIPAA PRIVACY RULE: ENHANCING PRIVACY, IMPROVING HEALTH THROUGH RESEARCH 18 (Sharyl J. Nass et al. eds., 2009).

112. Benfer, *supra* note 99, at 168-70.

infectious diseases are accompanied by supports and protections, these laws will be unjust.

The third principle of health justice is that community stakeholders are engaged and empowered to take the lead in shaping laws, policies, and other interventions. Health justice requires centering the needs of the community and supporting collective reform to ensure that the design and implementation of interventions intended to protect or promote health, such as infectious disease criminalization, actually achieve their goals.[113] This includes providing meaningful pathways for continued accountability to affected communities during and after implementation. Health justice aims to empower historically marginalized communities such as racial and ethnic minorities, LGBTQ communities, sex workers, and people who have experience with the criminal legal system.[114] The voices of these communities are important for informing how to best address structural and intermediary determinants in connection with the first two principles of health justice. Community engagement and empowerment, therefore, are needed to make infectious disease prevention successful.

The history of HIV criminalization shows that a punishment mindset won out over a health justice mindset. The adoption of HIV-specific criminal laws in the 1980s and 1990s did not consider the principles of the health justice framework. In more recent years, the use of these laws and general criminal laws for the prosecution of people living with HIV continues to violate health justice principles. The next Section analyzes this ongoing HIV criminalization.

## II. HIV CRIMINALIZATION STILL EXISTS AND REMAINS HARMFUL

HIV criminalization is ongoing today. This Section provides an overview of current HIV criminalization laws and demonstrates how these laws are being deployed. Criminal laws that are used to penalize people living with HIV for HIV non-

113. Wiley, *supra* note 10, at 636-39.

114. *Id.* at 638.

disclosure, exposure, or transmission differ by state.[115] A shared feature among these laws is imposing criminal penalties on people who know they have HIV and who engage in certain conduct, such as failing to disclose their HIV status to sexual partners or otherwise exposing others to HIV.[116] Many prosecutions under HIV criminalization laws do not reflect the best available scientific and medical evidence on HIV transmission.[117] Furthermore, sentences under these laws are regularly felony punishment and reflect an outdated, incorrect belief that HIV is a death sentence.[118]

HIV criminalization laws in many states do not require proof of intent to transmit HIV or proof of actual transmission.[119] Moreover, they criminalize behaviors where there is little or no risk of transmission. While the most common target of HIV criminalization is the sexual behavior of people living with HIV, a considerable number of prosecutions involve people living with HIV spitting, biting, or throwing bodily fluids, despite there not being a risk of HIV transmission from these behaviors.[120] With respect to sexual behaviors, policymakers, prosecutors, and the general public often mistakenly believe that people living with HIV pose a significant risk of transmission to sexual partners. In fact, the risk of transmitting HIV varies widely depending on the type of sexual behavior. People living with HIV are regularly prosecuted for sexual activity that does not pose a significant risk of HIV transmission to sexual partners, including oral sex, sex with a condom, sex involving a sexual partner on pre-exposure prophylaxis (PrEP), or any sexual activity where the person living with HIV has achieved viral suppression or an undetectable viral load by taking antiretroviral therapy as prescribed.[121] While

115. *See infra* Section II.A.

116. *See infra* Section II.A.

117. Lehman, *supra* note 2, at 1002-04.

118. Sarah J. Newman, *Prevention, not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U.L. REV. 1403, 1411, 1434 (2013).

119. *See infra* notes 133-148 and accompanying text.

120. Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010*, 17 AIDS & BEHAVIOR 2624, 2626-28, 2631 (2013).

121. *Id.* at 2630-32; Robert W. Eisinger et al., *HIV Viral Load and Transmissibility of HIV Infection: Undetectable Equals Untransmittable*, 321 J. AM. MED. ASS'N 451, 451-52 (2019).

scientists rarely speak in absolutes, research and policy recognize that an individual with HIV who is virally suppressed cannot pass HIV sexually.[122] Even if a person living with HIV engages in sex without being on HIV antiretroviral treatment and without using condoms, there is a relatively small chance of transmitting HIV when engaging in sex once or a few times.[123] In particular, it does not necessarily mean that the person living with HIV intended to transmit HIV. The person may intend to engage in sex, but intending to engage in sex is different from intending to transmit HIV. In some cases, people living with HIV assume that their sexual partner may already have HIV or that the risk is not a major concern to their sexual partner.

Various efforts to repeal or reform HIV criminalization have been pursued. This Section discusses these efforts, including those that have succeeded and those that have not. It describes the potential advantages, disadvantages, and limitations of repeal and reform efforts.

### A. Overview of HIV Criminalization Today

HIV criminalization is predominately a matter of state law. Since the 1980s, several states enacted laws known as HIV-specific criminal laws, which explicitly impose criminal penalties on people living with HIV.[124] Other states use general criminal laws, including assault and reckless endangerment laws, to criminalize some conduct by people living with HIV. As of 2022, 25 states have HIV specific criminal laws, and 25 states prosecute people living with HIV under general criminal laws.[125] There is some overlap because more than a dozen states with HIV-specific criminal laws also have had prosecutions under general criminal laws.[126] Moreover, nine states have HIV-specific sentence enhancements that are applicable to people living with HIV who

122. Eisinger, *supra* note 121, at 451-52.

123. *HIV and AIDS: Basic Facts*, UNAIDS, [https://perma.cc/9ZJV-M8XG] (last visited Oct. 7, 2024).

124. Lehman, *supra* note 2, at 999-1000.

125. *HIV Criminalization in the United States*, CTR. FOR HIV L. & POL'Y (June 2022), [perma.cc/LP9L-YQBZ].

126. *Id.*

commit certain other offenses, such as assault, battery, rape, or prostitution.[127]

Thousands of people in the United States have been criminalized for behavior related to their HIV status, and incidents of HIV-related arrests and prosecutions have not decreased in recent years.[128] From 2008 to 2021, in five states alone—Arkansas, Mississippi, Nevada, Ohio, and Virginia—there were 652 incidents of HIV-related arrests and criminal charges.[129] In addition, during the period from 2008 to 2017, 324 people living with HIV in Florida were arrested for HIV-specific offenses,[130] and during the same 10-year period, 234 people living with HIV in Georgia were arrested under the state's HIV-specific laws.[131] Nationwide, most states had at least one HIV-related prosecution from 2008 to 2019.[132] In fourteen states, violations of HIV-specific or general criminal laws can result in people living with HIV receiving maximum sentences of more than 10 years, and some states have maximum sentences of more than twenty years or up to life.[133] Six states have punishments under their HIV-specific criminal laws that require registration as a sex offender.[134] When people living with HIV are prosecuted under similar laws in other states, sex offender registration is still possible, even if it is not mandatory.

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127. *Id.*

128. Nathan Cisneros et al., *Enforcement of HIV Criminalization in Ohio: Analysis of Criminal Incidents from 2000 to 2022*, 19 (Feb. 2024), [https://perma.cc/GXK4-TG79].

129. *Id.* at 24 (399 incidents); Nathan Cisneros et al., *Enforcement of HIV Criminalization in Mississippi*, 12 (Feb. 2024), [https://perma.cc/P27M-R6BV] (47 incidents); Nathan Cisneros et al., *Enforcement of HIV Criminalization in Arkansas*, 14 (Aug. 2023), [https://perma.cc/JU4M-38PM] (53 incidents); Nathan Cisneros & Brad Sears, *Enforcement of HIV Criminal Laws in Virginia*, 4 (Dec. 2021), [https://perma.cc/W32H-QJTR] (82 incidents); Nathan Cisneros & Brad Sears, *Enforcement of HIV Criminalization in Nevada*, 3 (May 2021), [https://perma.cc/Y83R-MV3J] (71 incidents).

130. Amira Hasenbush, *HIV Criminalization in Florida: Penal Implications for People Living with HIV/AIDS*, 9 (Oct. 2018), [https://perma.cc/MFY9-MJMQ].

131. Amira Hasenbush, *HIV Criminalization in Georgia: Penal Implications for People Living with HIV/AIDS*, 8 (Jan. 2018), [https://perma.cc/QV24-A2U2].

132. *Arrests and Prosecutions for HIV Exposure in the United States, 2008-2019*, CTR. FOR HIV L. & POL'Y (June 2019), [https://perma.cc/NMD3-8Q8S].

133. *HIV Criminalization and Ending the HIV Epidemic in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 18, 2023), [https://perma.cc/YFQ4-2VM4].

134. *Sex Offender Registration*, CTR. FOR HIV L. & POL'Y, [https://perma.cc/RUY4-8KPF] (last visited Oct. 15, 2024).

Criminalization through HIV-specific laws or other laws takes different forms. One form of HIV-specific laws are those that criminalize people with HIV who are aware of their HIV status and who do not disclose their HIV status before engaging in specified conduct, such as sexual contact with another person, donating bodily fluids, or sharing injection drug paraphernalia. [135] For example, under Ohio's felonious assault statute, it is a second-degree felony punishable by up to eight years of imprisonment for a person with a known HIV infection to engage in sexual conduct with another person without disclosing their HIV status to the other person prior to engaging in sexual conduct.[136] Intent to transmit HIV and actual transmission of HIV are not required under the statute. Using condoms or other effective HIV prevention methods is not a defense to prosecution.[137] The only affirmative defense is disclosure of HIV status to sexual partners prior to engaging in sexual conduct.[138] The statute defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another."[139] As a result of this definition, the statute criminalizes behaviors that pose little to no risk of HIV transmission. Oral sex, which is referred to as fellatio and cunnilingus within the definition of sexual conduct, and sharing sex toys, which is referred to as the insertion of an instrument, apparatus, or other object into the vaginal or anal opening of another, are punishable under Ohio's felonious assault statute even though these activities carry a rate of transmission deemed low or negligible according to the CDC.[140]

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135. *See, e.g.*, TENN. CODE ANN. § 39-13-109(a) (2011).

136. OHIO REV. CODE ANN. § 2903.11(B)(1) (2018).

137. *See id*.

138. *See*, *e.g.,* State v. Gonzalez, 796 N.E.2d 12, 23 (Ohio App. 2003) (acknowledging that some state statutes do offer an affirmative defense when the person exposed is aware of accused's HIV status).

139. OHIO REV. CODE ANN. § 2903.11(E)(4) (2018); *see also* § 2907.01(A) (2022).

140. *HIV Risk Behaviors*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/8BJ9-MGUS] (last visited Sept. 29, 2024). The CDC's definition of negligible means theoretically possible, but not clinically documented in practice.

Like the felonious assault statute in Ohio, HIV-specific criminal laws in other states single out people living with HIV—and only such persons—for criminal sanction for engaging in sexual conduct without first disclosing their status.[141] In these states, persons with other infectious diseases that can be sexually transmitted are not required to disclose their status prior to sexual conduct in order to avoid felony prosecution.[142] This means that persons who know that they have herpes, human papillomavirus (HPV), or another STI cannot be prosecuted under the statutes in these states for non-disclosure of their status prior to sexual activity. Only persons living with HIV must disclose their status under threat of criminal law. However, Ohio's felonious assault statute differs from other HIV-specific statutes in that it criminalizes only the sexual conduct of a person living with HIV and does not explicitly criminalize people living with HIV when they share drug paraphernalia with another person or otherwise transfer bodily fluids outside of the context of sex, such as for blood donation.[143]

The category of HIV-specific criminal laws also includes laws that impose penalties on people living with HIV, but do not do so exclusively. Such laws apply to HIV as well as other specified infectious diseases, especially hepatitis B, hepatitis C, and various STIs.[144] States with these HIV-specific criminal laws include Florida, Mississippi, Tennessee, and Indiana. As with laws that exclusively criminalize people living with HIV, these HIV-specific laws often require disclosure before engaging in certain conduct such as sexual activities or sharing drug paraphernalia.[145] This requirement may be direct, such as when a law directly states that a person with HIV or other specified

141. *See, e.g.,* ARK. CODE ANN. § 5-14-123 (1989); IDAHO CODE ANN. § 39-608 (1988); LA. STAT. ANN. § 14:43.5 (2018); N.D. CENT. CODE ANN. § 12.1-20-17 (1989).

142. *See* ARK. CODE ANN. § 5-14-123 (1989) (criminalizing only the transfer of HIV, and no other diseases).

143. *Compare* OHIO REV. CODE ANN. § 2903.11(B) (2018), *with* IDAHO CODE ANN. § 39-608(2)(b) (1988).

144. IND. CODE ANN. § 16-41-7-1(a) (2020); TENN. CODE ANN. § 39-13-109(a) (2011); FLA. STAT. ANN. § 384.24 (1997).

145. FLA. STAT. ANN. § 384.24 (1997); MISS. CODE ANN. § 97-27-14(1) (2007); TENN. CODE ANN. § 39-13-109(a) (2011); IND. CODE ANN. § 16-41-7-1(a) (2020).

infectious diseases must disclose their status under stated criteria.[146] It may also be indirect, such as when a law prohibits conduct and imposes penalties unless the person has disclosed their status.[147] In Mississippi, for example, it is unlawful for any person to knowingly expose another person to HIV, hepatitis B, or hepatitis C, but willing consent to the exposure with knowledge of the person's status is a defense.[148] Similarly, in Tennessee, a person may be prosecuted under the state's criminal exposure statute if they know they have HIV, hepatitis B, or hepatitis C and engage in "intimate contact," defined as "exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk" of transmission.[149] Under Tennessee's statute, it is an affirmative defense to prosecution if a person exposed to HIV, hepatitis B, or hepatitis C was aware of the defendant's status, knew that the activity could result in transmission, and provided "advance consent" to the activity.[150] Neither intent to transmit nor actual transmission is required for prosecution under the HIV-specific criminal laws in states like Florida, Mississippi, Tennessee, and Indiana.[151]

Beyond HIV-specific criminal laws, states also use general criminal laws to criminalize HIV non-disclosure, exposure, or

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146. *See, e.g.,* IND. CODE ANN. § 16-41-7-1 (2020) (Carriers' duty to warn persons at risk). People with HIV or hepatitis B must disclose their health status to sexual or needle-sharing partners with whom they have engaged or will engage in activities that have been "epidemiologically. demonstrated, as determined by the federal Centers for Disease Control and Prevention, to bear a significant risk of transmitting" HIV or hepatitis B.

147. *See, e.g.,* FLA. STAT. ANN. § 384.24(2) (1997) ("It is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse."); FLA. STAT. ANN. § 384.24(1) (1997). People who know they have "chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis (NGU), pelvic inflammatory disease (PID)/acute salpingitis, or syphilis" and have been informed that these infections may be transmitted through sexual intercourse may be prosecuted unless their sexual partner has been informed of the presence of the sexually transmissible disease and "has consented to the sexual intercourse."

148. MISS. CODE ANN. § 97-27-14(1) (2007).

149. TENN. CODE ANN. § 39-13-109(a)(1), (b)(2) (2011).

150. § 39-13-109(c)(1)-(3).

151. § 39-13-109(a), (d); FLA. STAT. ANN. § 384.24(1) (1997); MISS. CODE ANN. § 97-27-14(1) (2007); IND. CODE ANN. § 16-41-7-1 (2020).

transmission. These include general infectious disease criminal laws which impose criminal penalties on people who expose others to communicable diseases without explicitly mentioning HIV or any specific diseases, as well as general criminal laws used to prosecute people living with HIV.[152] With respect to infectious disease criminal laws, Iowa imposes criminal penalties on any person who knows they are "infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease" with either the intent that or a reckless disregard as to whether "the uninfected person contracts the contagious or infectious disease."[153]

States like Oregon and Texas do not have HIV-specific criminal laws or an infectious disease criminal law but have prosecuted people living with HIV under general criminal laws. Oregon has done so under attempted murder, assault, and reckless endangerment laws for having sex without HIV disclosure to sexual partners or for otherwise exposing others to HIV.[154] Similarly, Texas has prosecuted people with HIV for aggravated assault and aggravated sexual assault, with courts classifying the seminal fluid of a person with HIV as a deadly weapon.[155] People with HIV have also been prosecuted in Texas for attempted murder for spitting on and/or biting another person, despite spitting and biting presenting a negligible risk of transmitting HIV.[156]

Several states impose more severe penalties on people living with HIV for other crimes posing a risk of HIV transmission. In Massachusetts, a person living with HIV may receive enhanced sentences of life imprisonment or a prison term not less than fifteen years if the person "has sexual intercourse or unnatural sexual intercourse with a child under 16 . . . in a manner in which the victim could contract a sexually transmitted disease or infection of which the defendant knew or should have known."[157]

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152. *See, e.g.,* IOWA CODE ANN. § 709D.3 (2014); Oregon v. Hinkhouse, 912 P.2d 921, 922 (Or. Ct. App. 1996).

153. IOWA CODE ANN. § 709D.3(1)-(4) (2014).

154. *Hinkhouse*, 912 P.2d at 922.

155. Mathonican v. State, 194 S.W.3d 59, 69 (Tex. App. 2006).

156. *See, e.g.,* Weeks v. State, 834 S.W.2d 559, 561 (Tex. App. 1992).

157. MASS. GEN. LAWS ch. 265 § 22B(f) (2008).

Likewise, Colorado establishes mandatory minimum incarceration sentences for a person convicted of certain sexual offenses when the person "had notice of the HIV infection prior to the date the offense was committed and the infectious agent of the HIV infection was in fact transmitted."[158]

## B. What Enforcement of HIV Criminalization Looks Like in Practice

While it is important to understand the various categories of laws that have been the basis of HIV criminalization, it is equally important to understand how these laws have been enforced. Enforcement often reflects ignorance about HIV among different actors within the criminal legal system, from prosecutors to judges and juries. These actors typically do not consider different risk behaviors, risk reduction strategies, culpable mental states, and partner consent to transmission risks. Additionally, enforcement reflects the role of prosecutorial discretion and bias and the effect of racism and homophobia in spurring HIV criminalization. HIV criminalization laws have also often been enforced with harsh punishment disproportionate to the level of risk or injury.

Not all HIV criminalization cases involve people living with HIV who engage in or intend to engage in sexual activity. A considerable percentage of cases deal with spitting, biting, or otherwise throwing bodily fluids. There are legal tools to sanction spitting and biting. However, in the legal sanctioning of these behaviors, there is no legitimate basis for distinguishing between people based on their HIV status and allowing sentence enhancements for people living with HIV. It is difficult to ascertain an exact percentage of cases dealing with spitting, biting, or otherwise throwing bodily fluids because there is no nationwide system for reporting violations of HIV-specific criminal laws or for reporting HIV criminalization cases more generally. Relatively little was known about how these laws are actually enforced until the last decade. However, a 2013 study examined comprehensive data on all those charged with HIV

158. COLO. REV. STAT. § 18-3-415.5(5)(b) (2016).

exposure and aggravated prostitution (i.e., solicitation by someone who knows he or she has HIV) within the Nashville, Tennessee prosecutorial region over an 11-year period from 2000 to 2010.[159] Of the twenty-seven charges for criminal HIV exposure identified in the study, approximately 40 percent were for scratching, spitting, biting, or flinging blood.[160] These instances generally involved a police officer or hospital emergency staff.[161] This represents an issue of racial equity when these charges are considered within a context of policing Black people who are disproportionately subjected to police violence. If, after spitting or a similar exposure, an individual discloses their HIV status to prevent further escalation of violence, or is later discovered to have HIV, they could face felony charges for HIV exposure in addition to charges for resisting arrest or assault.[162] Such behavior may put the individual and the arresting officers in danger, but not from HIV. At the time of the study, "[p]enalties for violating Tennessee's HIV exposure law include[d] imprisonment for 3 to 15 years and fines up to $10,000."[163]

Arrests, charges, or convictions involving people living with HIV who spit or throw bodily fluids at other people occur in many jurisdictions, and the penalties can be severe even if there is no risk of HIV transmission. In Texas, after a jury found that a man with HIV used a "deadly weapon" when he spat at a police officer,[164] the man was sentenced to thirty-five years in prison even though saliva has never been documented to transmit HIV.[165] Other jurisdictions have had similar cases in more recent years, under both HIV-specific criminal laws and general criminal laws such as an assault statute. In Louisiana in 2017, a person living with HIV allegedly spat in an elderly woman's face

159. Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010*, 17 AIDS & BEHAVIOR 2624, 2625 (2013).

160. *Id.* at 2626.

161. *Id.*

162. *See HIV and STD Criminal Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2023), [https://perma.cc/DW3Q-HAPY].

163. Galletly & Lazzarini, *supra* note 159.

164. Campbell v. State, No. 05-08-00736-CR, 2009 WL 2025344, at *1 (Tex. App. 2009).

165. *Ex parte* Campbell, No. AP-76,969, 2013 WL 458063, at *1 (Tex. Crim. App. 2013).

and was arrested pursuant to the state's intentional exposure law, an HIV-specific law that exclusively criminalizes people living with HIV.[166] In Kentucky in 2018, a person living with HIV was arrested on charges of wanton endangerment and assault after he allegedly spat at first responders.[167] In Alabama in 2018, a person living with HIV was charged with felony "assault with bodily fluids" after he allegedly sprayed a police deputy with feces.[168] Like saliva, feces is not a known route of HIV transmission.[169]

Most HIV criminalization cases involve people living with HIV who engage in or intend to engage in sexual activity. In these cases, HIV transmission can actually occur, but it is not a requirement for charges or convictions.[170] For example, in South Carolina, in November 2009, a man living with HIV "was sentenced to six years in prison and four years of probation for knowingly exposing his wife to HIV," but she did not contract HIV.[171] In Mississippi in January 2015, a man living with HIV was charged for not disclosing his HIV status before having sex with a casual sexual partner whom he met on Craigslist.[172] His partner never contracted HIV.[173] While these instances still involve some risk of transmission, there are also cases in which people living with HIV engage in sexual activity and are prosecuted despite having an undetectable viral load, which means they cannot pass HIV to their sexual partners. In Maryland in March 2015, a man living with HIV who reportedly had an undetectable viral load pled guilty to two counts of reckless

166. Bridget Mire, *Gibson Man Accused of Exposing Woman to AIDS*, HOUMATODAY (Dec. 19, 2017), [https://perma.cc/S35W-Y3ZD].

167. Chris Chandler, *Man with HIV Arrested for Spitting on First Responder*, WLKY.COM (Mar. 4, 2018), [https://perma.cc/W3S7-93NU].

168. Carol Robinson, *Gadsden Drug Suspect Stomps Bag of Feces, Splashes Deputy, Records State*, AL.COM (June 12, 2018), [https://perma.cc/2A6B-HRDF].

169. *How Is HIV Transmitted?*, HIV.GOV (June 16, 2022), [https://perma.cc/H585-VZQV].

170. *See HIV and STD Criminal Laws*, *supra* note 162.

171. *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, *South Carolina*, CTR. FOR HIV L. & POL'Y (2022), [https://perma.cc/J7NN-QF88].

172. *Mississippi Man Charged for Knowingly Exposing Woman to HIV*, WDAM (Jan. 20, 2015), [https://perma.cc/UYY3-R4X7].

173. *Id.*

endangerment for having unprotected sex with two women.[174] Condoms, PrEP, and other forms of HIV prevention also significantly reduce HIV transmission risk, but even when these effective prevention methods are used, people living with HIV can face arrest and prosecution. In Florida in August 2014, a man was arrested after allegedly not disclosing his HIV status to a sexual partner, even though condoms were always used during the course of the sexual relationship.[175] Many cases involve discrepancies between the testimony of the person living with HIV and the complaining sexual partner's testimony regarding whether or not HIV disclosure took place and sometimes regarding whether a condom was used. In such cases, it can be hard to know what took place. However, the result is generally still imprisonment for the person living with HIV either from a conviction or often from a plea deal.

The prosecution of Michael Johnson in Missouri has drawn national attention. It not only involved contradictory trial testimony and little-to-no questioning of the credibility of complaining sexual partners, but also reflected racism and homophobia in the enforcement of HIV criminalization.[176] Michael Johnson was a student athlete who won the National Junior Wrestling Championship in 2012 and was later recruited to wrestle and continue his education at Lindenwood University in St. Charles, Missouri.[177] During his time at Lindenwood University, Michael, a Black gay man, introduced himself as "Tiger Mandingo" on social media platforms and dating profiles, and due to his appearance and athleticism, he attracted many admirers, including men with whom he had consensual sex.[178] Michael acknowledged that he had been diagnosed with HIV on January 7, 2013.[179] On October 10, 2014, Michael was pulled out of class and arrested for engaging in sexual acts with five different

174. Debra Alfarone, *Man with HIV Admits to Knowingly Having Unprotected Sex*, WUSA 9 NEWS (Mar. 10, 2015), [https://perma.cc/5X49-F3C2].

175. Jeff Weiner, *HIV-positive Man Charged with Having Sex Without Alerting Partner*, ORLANDO SENTINEL (Aug. 6, 2014, 4:00 AM), [https://perma.cc/3ZA8-CTNS].

176. Steven Thrasher, *How College Wrestling Star "Tiger Mandingo" Became an HIV Scapegoat*, BUZZFEED (July 7, 2014), [https://perma.cc/TAD2-JM2N].

177. *Id.*

178. *Id.*

179. *Id.*

men, all of whom claimed Michael lied about his HIV status.[180] He was charged "with one count of 'recklessly infecting another with HIV' and four counts of 'attempting to recklessly infect another with HIV.'"[181] After Michael was arrested and his HIV status was widely known, he was publicized in the media as "Tiger Mandingo" and became the subject of racialized tropes about the danger of Black male sexuality.[182] Many of Michael's sexual partners were white.[183] During his trial, much of the testimony against Michael was discredited, and several of his sexual partners made crucial statements that contradicted police reports while being cross-examined.[184] While the jury found Michael not guilty on all charges involving one of his accusing sexual partners, it found him guilty of exposing or attempting to expose four partners to HIV and of recklessly transmitting HIV to one of them.[185] On July 13, 2015, Michael was sentenced to 30 years in prison.[186] In December 2016, the Missouri Court of Appeals overturned Michael's conviction and demanded a new trial after it determined that the prosecution in the case had knowingly withheld evidence in order to "gain a strategic advantage" over the defense.[187] Ultimately, the case was not re-tried because Michael entered a no-contest plea and accepted a 10-year sentence.[188] He was released on parole in 2019.[189]

Michael Johnson's case is not exceptional. HIV criminalization is regularly enforced in discriminatory ways with Black people and other marginalized groups disproportionately prosecuted.[190] Much of what is now known about the enforcement of HIV criminalization laws comes from reports

180. *Id.*

181. Thrasher, *supra* note 176.

182. Steven Thrasher, *A Black Body on Trial: The Conviction of HIV-Positive "Tiger Mandingo*," BUZZFEED (Nov. 30, 2015, 7:26 PM), [https://perma.cc/TAD2-JM2N].

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. State v. Johnson, 513 S.W.3d 360, 365, 369 (Mo. Ct. App. 2016).

188. John Paul Brammer, *Former College Wrestler Sentenced to 10 Years for Spreading HIV*, NBC NEWS (Sept. 23, 2017, 11:48 AM), [https://perma.cc/29R7-QLGC].

189. Catherine Hanssens, *Michael Johnson Released on Parole, Heads Back to Indiana (2019)*, CTR. FOR HIV L. & POL'Y (July 9, 2019), [https://perma.cc/2Z5L-6FY4].

190. *See* Hasenbush, supra note 97, at 3, 11, 18.

published by the Williams Institute at the University of California Los Angeles. The first major report from the Williams Institute was published in December 2015 and examined the enforcement of HIV criminalization in California, with subsequent reports examining HIV criminalization in other states including Georgia, Florida, Missouri, Virginia, Kentucky, Tennessee, Louisiana, Arkansas, and Maryland.[191] In California, the Williams Institute documented that 800 people in 1,174 incidents were arrested, charged, or prosecuted under one of four HIV criminalization laws between 1998 and 2014.[192] A major finding from the California report was that 95% of all HIV-specific criminal incidents involved "people engaged in sex work" or "suspected of engaging in sex work."[193] Also, Black and Latino individuals were disproportionately targeted for HIV criminalization in California. Despite Black and Latino individuals representing just 51% of the people living with HIV in California at the time, 67% of people targeted for HIV criminalization in the state were Black or Latino.[194] Lastly, the California report demonstrates how important the discretion of individual prosecutors is. In California, 57% of HIV criminalization incidents occurred in Los Angeles County, even though only 37% of people with HIV in California lived in Los Angeles County.[195] Whether and to what degree a person living with HIV is prosecuted under HIV criminalization laws is shaped by the decisions in prosecutors' offices as well as by racism, homophobia, and other forms of ignorance or bias. The Williams Institute's reports have been instrumental in demonstrating the actual enforcement of HIV criminalization in California and several other states, and they have continued to inform efforts to reform HIV criminalization laws.

The discussion in this Article focuses on the overwhelming majority of cases in which people living with HIV are arrested, charged, or prosecuted. In these cases, criminal laws are enforced

191. *HIV Criminalization*, WILLIAMS INST., [https://perma.cc/6X5T-3RDY] (last visited Oct. 14, 2024).

192. Hasenbush et al., *supra* note 97, at 11.

193. *Id.* at 2.

194. *Id.* at 3.

195. *Id.*

contrary to scientific and medical evidence, and prosecutions do not effectively respond to the underlying HIV epidemic. Readers may be concerned about cases in which a person living with HIV behaves in a morally reproachable way (for example, having sex without using effective HIV prevention methods and without disclosing their HIV status) and ends up harming another person because transmission occurs. Such cases are rare. First, HIV transmissions occur less often than is commonly assumed,[196] and most cases in which people living with HIV are criminalized do not involve transmission.[197] Second, whether a person disclosed their status may be in dispute, and such disputes can be hard to resolve in court.[198] Moreover, there are many reasons why people living with HIV do not disclose their status. They may assume that their sexual partner is already living with HIV or is fine with having sex with someone living with HIV.[199] There are also major privacy and safety concerns when a person discloses their HIV status.[200] That information may be shared with others, and as a result, the person living with HIV may face stigma, discrimination, or physical violence.[201] Even if non-disclosure or other aspects of a person's behavior may be morally reproachable to some people, that alone does not warrant criminal punishment. Third, having sex does not imply an intent to transmit or another culpable state of mind, even if condoms or other forms of HIV

196. *See HIV Risk Behaviors*, CTRS. FOR DISEASE CONTROL & PREVENTION, [perma.cc/8BJ9-MGUS] (last visited Oct. 14, 2024).

197. *See* Galletly & Lazzarini, *supra* note 159, at 2625, 2628, 2630 (finding in the Nashville, Tennessee prosecutorial region from 2000-2010 that HIV transmission was alleged in only three of the twenty-five criminal case reports for people living with HIV charged with HIV exposure and that HIV transmission was not alleged at all in twenty-three criminal case reports for those charged with aggravated prostitution).

198. *See, e.g.*, *State v. Smith*, No. M2007-00932-CCA-R10-CO, 2008 WL 544603, at *2 (Tenn. Crim. App. May 5, 2008) (noting that the defendant testified that he disclosed his HIV status to the complainant before they engaged in anal sex, whereas the complainant testified that the defendant never disclosed his status). While credibility of testimony is for the jury to determine, it is likely that most jurors are not living with HIV and may be more sympathetic to complainants. *See* Carl W. Rush, *A Spectacle of Stigma: A First-hand Account of a Canadian Criminal HIV Exposure Trial*, at 4, 6-8, HIV JUST. WORLDWIDE (2012), [https://perma.cc/X8M9-8QE8].

199. Julianne M. Serovich & Katie E. Mosack, *Reasons for HIV Disclosure or Nondisclosure to Casual Sex Partners*, 15 AIDS EDUC. & PREVENTION 70, 71 (2003).

200. Andrea Carlson Gielen et al., *Women Living with HIV: Disclosure, Violence, and Social Support*, 77 J. URB. HEALTH 480, 481 (2000).

201. *Id.*

prevention are not used.[202] Also, while most HIV-specific criminal laws place the responsibility for preventing transmission on the person living with HIV, this responsibility should arguably be on all consensual sexual partners. Fourth, even when HIV transmission occurs, not every harm deserves criminal sanction. This is especially the case in the context of HIV, which (as I discuss in greater detail in Section II.C.4)[203] is not transmitted very efficiently, so that the risk of transmission from a single sexual act is low.[204] Moreover, after HIV transmission, a newly diagnosed person with HIV can live a long, healthy life.[205] In any case, an approach motivated by a concern for health justice should not focus on a small minority of cases. Rather, such an approach needs to take seriously that HIV criminalization in most cases targets behavior with little or no risk of transmission, and it should focus on the implications of criminalization for public health and health equity. As noted above, HIV criminalization is ineffective at preventing transmissions, undermines effective public health interventions, and disproportionately harms marginalized groups.

### C. Analysis of HIV Criminalization Reform Efforts

With growing recognition that HIV criminalization laws both reflect and perpetuate HIV stigma and are enforced most often against marginalized populations, the movement to change these laws has grown. As a result, in 2010, the first National HIV/AIDS Strategy recommended that state legislatures consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support public health approaches aimed at preventing and treating

202. *See infra* note 254 and accompanying text. The reformed law in California notes that not taking steps to limit transmission risk is insufficient on its own to establish that a person acted with specific intent to transmit HIV. *Id.*

203. *See* discussion *infra* Section II.C.4.

204. *HIV and AIDS – Basic Facts*, UNAIDS, [https://perma.cc/MU4G-U6VS] (last visited Oct. 14, 2024).

205. *Living with HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 26, 2024), [https://perma.cc/J2SY-2CWT]; Adam Trickey et al., *Life Expectancy After 2015 of Adults with HIV on Long-Term Antiretroviral Therapy in Europe and North America: A Collaborative Analysis of Cohort Studies*, 10 LANCET HIV E295, E295, E305 (2023).

HIV.[206] Over the past decade, several states have repealed or modernized their HIV criminalization laws, including Iowa (2014), Colorado (2016), California (2017), North Carolina (2018), Michigan (2018), Washington State (2020), Illinois (2021), Indiana (2021), Missouri (2021), Nevada (2021), Virginia (2021), New Jersey (2022), and Georgia (2022).[207] While modernizations have taken different forms, they generally represent a move away from requiring disclosure of HIV status to focusing on risk of HIV transmission, intent to transmit HIV, and/or actual transmission of HIV.[208] In some states, the modernized laws reduced the potential criminal charge that a person could face to a Class D felony or a misdemeanor.[209] Many, but not all, states also broadened their laws so that the laws avoid singling out HIV for criminalization and also apply to several other diseases.[210]

Various approaches have been pursued to address the criminalization of HIV. This Section of the Article explores both litigation and legislative approaches and discusses the advantages and limitations of each. With respect to litigation approaches, this Article distinguishes constitutional challenges from disability discrimination challenges to HIV criminalization laws. To date, these challenges have not been successful. Legislative approaches can broadly be divided between approaches focused on repealing HIV-specific criminal laws and approaches focused on reforming these laws. Legislative approaches have been successful in several states. Two kinds of legislative reforms are particularly noteworthy: (1) reforms that make substantial risk of HIV transmission, specific intent to transmit HIV, and actual HIV transmission elements of statutes, and (2) reforms that impose lower-level misdemeanor punishment rather than felony punishment.[211] However, even if HIV criminalization laws are struck down in court, repealed, or otherwise reformed, the

206. *National HIV/AIDS Strategy for the United States*, at 36-37, HIV (July 2010), [https://perma.cc/HR7M-LX5C].

207. *Timeline of State Reforms and Repeals of HIV Criminal Law*, *supra* note 21.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

criminal prosecution of people living with HIV is still possible under general criminal laws.[212]

*1. Constitutional Challenges to HIV Criminalization*

HIV-specific criminal laws have consistently been upheld against challenges under state constitutions and the federal constitution.[213] Most recently, in *Ohio v. Batista*, the Supreme Court of Ohio upheld the constitutionality of Ohio's felonious assault statute that criminalizes sexual conduct by people living with HIV who know their status and do not disclose it to sexual partners prior to the sexual conduct.[214] The court concluded that the statute does not violate the First Amendment because it regulates conduct, not speech, by prohibiting people living with HIV from engaging in sexual conduct without disclosing their HIV status.[215] According to the court, any speech compelled by the statute is incidental to the regulated conduct.[216] The court also concluded that the statute did not violate the Equal Protection Clauses of the United States Constitution or the Ohio Constitution because it is rationally related to the state's legitimate interest in preventing the transmission of HIV to sexual partners who may not be aware of the risk.[217]

The reasoning of the Supreme Court of Ohio mirrors the reasoning of other state supreme courts. However, rational basis review arguably should not apply to such an Equal Protection claim. The defendant, Batista, argued that Ohio's HIV exposure law should be subject to strict scrutiny review for the First Amendment and Equal Protection claims because the law compels content-based speech and implicates a fundamental

212. *HIV and STD Criminal Laws*, *supra* note 162.

213. *See* State v. Batista, 91 N.E.3d 724, 726 (Ohio 2017); *see also* Guevara v. Superior Court, 73 Cal. Rptr. 2d 421, 422-23 (Cal. Ct. App. 1998); State v. Musser, 721 N.W.2d 734, 740-41 (Iowa 2006); State v. Turner, 927 So. 2d 438, 439 (La. Ct. App. 2005); State v. Gamberella, 633 So. 2d 595, 598, 607-08 (La. Ct. App. 1993); People v. Flynn, No. 199753, 1998 WL 1989782, at *4 (Mich. Ct. App. 1998); People v. Jensen, 564 N.W.2d 192, 194-95 (Mich. Ct. App. 1997).

214. *See Batista*, 91 N.E.3d. at 730.

215. *Id.*

216. *Id.* at 729.

217. *Id.* at 729-30.

right, the right to free speech.[218] In a concurring opinion, Judge Dewine wrote that a higher level of scrutiny was warranted because the United States Supreme Court has determined that compelled speech is content-based.[219] While Judge Dewine ultimately agreed with the majority in finding no equal protection violation, his reasoning is different in finding that the statute is narrowly tailored to serve a compelling governmental interest and therefore passes muster even under strict scrutiny.[220]

Contrary to Judge Dewine's reasoning, however, the statute should not survive strict scrutiny because it singles out people living with HIV for differential treatment and because the use of HIV classification to compel speech is not narrowly tailored to achieve a compelling government interest. Narrow tailoring is not satisfied for at least two reasons. First, the statute disregards differences between sexual activities and is overinclusive in criminalizing behaviors that carry little to no risk of HIV transmission, such as oral sex or sex involving a person on effective HIV treatment or PrEP.[221] Second, the statute has no population-level impact on HIV prevention and is in fact counterproductive to achieving public health goals. As such, the statute could be found to violate constitutional rights.

Framing HIV-specific criminal laws as laws affecting fundamental free speech rights within an equal protection analysis can be useful for making an effective constitutional challenge. However, this argument has not succeeded in court to date. Also, such framing is not possible where HIV-specific criminal laws do not require disclosure of HIV status to sexual or drug-using partners. In those instances, other litigation approaches may be preferred.

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218. *Id.* at 727.

219. *Id.* at 730-31.

220. State v. Batista, 91 N.E.3d. 724, 731-32 (Ohio 2017).

221. *See* OHIO REV. CODE ANN. § 2903.11(B)(1) to (C)(4) (2018); *see also* OHIO REV. CODE ANN. § 2907.01(A) (2022) (defining "sexual conduct").

*2. Disability Discrimination Challenges to HIV Criminalization*

Some legal scholars and advocates have argued that many states' HIV-specific criminal laws violate the Americans with Disabilities Act's (ADA) ban on discrimination by public entities.[222] This is because HIV-specific criminal laws single out people living with HIV who are protected by the ADA, for unique and uniquely onerous punishment for otherwise legal conduct based on beliefs about HIV that are scientifically unsupported.[223] Federal and state disability laws offer an additional litigation route to strike down HIV-specific criminal laws where constitutional challenges have failed. In February 2024, the United States Department of Justice filed a lawsuit against the State of Tennessee and the Tennessee Bureau of Investigation for violating the ADA by enforcing the state's aggravated prostitution statute against people living with HIV.[224] Specifically, the Department of Justice concluded that because of their HIV status, people living with HIV were subjected to harsher felony penalties under the aggravated prostitution statute for conduct that would otherwise be a misdemeanor.[225] However, like constitutional challenges, disability discrimination challenges may leave open the possibility that people living with HIV can still be prosecuted under general criminal laws.[226]

222. *See, e.g.*, Joshua D. Blecher-Cohen, *Disability Law and HIV Criminalization*, 130 YALE L.J. 1560, 1565 (2021).

223. *Id.*; Anne Kelsy, *The Power of the ADA to Challenge HIV Criminal Laws,* CTR. FOR HIV L. & POL'Y (Apr. 13, 2021), [https://perma.cc/9P83-YJQ3].

224. Complaint at 1-2, United States of America v. Tennessee (W.D. Tenn. 2024) (No. 2:24-cv-2101), [perma.cc/8QEJ-VPSH].

225. *Id.*

226. In addition to being a way to strike down HIV-specific criminal laws, disability anti-discrimination laws can also be the basis for challenging discriminatory enforcement of general criminal laws. While it can be difficult to succeed on such legal challenges, prosecutions rooted in false assumptions about people living with HIV as a group or about HIV itself may constitute disability-based discrimination. Federal disability anti-discrimination laws, such the Americans with Disabilities Act and the Rehabilitation Act of 1973, prohibit singling out a disability for disparate, negative treatment under the law. *Guide to Disability Rights Laws*¸ ADA.GOV (Feb. 28, 2020) [perma.cc/PQN7-VJQ7]. If the enforcement of general criminal laws is biased against people living with HIV, that would violate federal law as well as disability anti-discrimination laws in many states.

*3. Repeal of HIV-Specific Criminal Laws*

Repealing outdated HIV-specific criminal laws is an approach that has been recommended in legal scholarship and put into practice in the real world. It is important to repeal ineffective and harmful laws in order to eliminate sources of harm to people living with HIV. Most states that have taken a legislative approach to HIV criminalization have repealed older laws but have done so as part of a modernization process with other reforms. For example, Colorado repealed two statutes related to sex workers living with HIV.[227] One of the repealed statutes required HIV testing for people arrested for prostitution offenses and, if the person tested positive for HIV, allowed prosecutors to access health records to see whether they had been previously diagnosed with HIV.[228] The other repealed statute had made it a felony for a person living with HIV to engage in prostitution.[229] In addition to these statutory repeals, Colorado enacted a modernizing reform to reduce the maximum sentence enhancement for people living with HIV who commit an underlying sex offense during which transmission occurs.[230] Similarly, California repealed its statute making it a felony for someone living with HIV to engage in sex without disclosure of HIV status and with intent to transmit HIV, and it repealed a statute making it illegal for people living with HIV to donate blood, organs, or tissue.[231] California also repealed heightened penalties for people living with HIV who engage in solicitation or sex work and a law requiring disclosure related to a person's HIV status in a criminal investigation.[232] These statutory repeals were coupled with further legislative modernization of California's infectious disease laws, which is discussed in the next Section.

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227. Victoria Law, *Activists Win Legislative Overhaul of Colorado's HIV Criminalization Laws, Await Governor's Signature*, THEBODY (May 24, 2016) [https://perma.cc/EJU9-ZQDS].

228. COLO. REV. STAT. ANN. § 18-7-201.5(1)(a)-(2) (repealed 2016).

229. § 18-7-201.7(1)-(2) (repealed 2016).

230. *Compare* COLO. REV. STAT. ANN. § 18.3-415.5(5)(b) (2010) (amended 2016), *with* COLO. REV. STAT. ANN. § 18.3-415.5(5)(b) (2016).

231. *The 2017 Modernization of California's HIV Criminal Exposure Laws: What Did It Do, Who Will It Affect?*, CTR. FOR HIV LAW & POL'Y at 1 (Nov. 2017), [https://perma.cc/N796-4LKX].

232. *Id.*

In contrast to states like Colorado and California, which have both repealed and modernized their HIV criminalization laws, other states have only repealed their HIV-specific criminal laws. A repeal-only approach without accompanying modernization could still allow prosecution of people living with HIV under general criminal laws. Texas, for example, repealed its HIV-specific criminal statute in 1994, but since then people living with HIV have been prosecuted in Texas under general criminal laws, including attempted murder and aggravated assault.[233] In 2022, New Jersey became the third state after Texas and Illinois to completely repeal its HIV-specific criminal laws, along with its STI-specific criminal laws.[234] While New Jersey no longer has specific reference to HIV and STIs in its criminal law, it still allows for prosecutions to continue under the state statute that criminalizes endangering another person.[235] A statement accompanying the bill approved by the New Jersey Senate explicitly stated that prosecutions involving the transmission of infectious or communicable diseases can still proceed under the endangerment statute.[236] Repeal of HIV-specific laws may be less effective if the use of general criminal laws to prosecute people with HIV is not addressed.

*4. Modernization of HIV-Specific Criminal Laws*

Another approach is to enact modernized laws containing very specific statutory elements that are narrowly tailored to prosecute only cases in which a person had the clear and specific intent to transmit HIV. While several states have modernized their HIV-specific criminal laws, most states have not done so, and the pace of reform is slow.[237] Critical reforms may include making substantial risk of HIV transmission, specific intent to transmit HIV, and actual HIV transmission elements of statutes. In some cases, reforms have only focused on prosecuting

233. *HIV Criminal Law Reform Before and After: Texas*, CTR. FOR HIV L. & POL'Y (Nov. 2020), [perma.cc/LP9L-YQBZ].

234. *Timeline of State Reforms and Repeals of HIV Criminal Law, supra* note 21.

235. N.J. STAT. ANN. § 2C:24-7.1 (2016).

236. S. Budget and Appropriations Comm., S. 3707, at 1 (N.J. 2022).

237. *See Timeline of State Reforms and Repeals of HIV Criminal Law*, *supra* note 21.

activities that pose a high risk of transmission without incorporating other critical reforms. HIV advocates have pointed out problems with such limited reforms and have raised concerns about felony punishment, equity issues, and the expansion of criminalization to apply to infectious diseases generally.[238]

Felony punishment and other severe penalties are often not closely related to the level of injury when a person living with HIV is prosecuted under HIV criminalization laws. Most commonly, HIV-specific laws focus on HIV disclosure or exposure rather than on a substantial risk of HIV transmission.[239] As a result, hundreds of people have faced prosecution for engaging in oral sex, for having sex when they were virally suppressed or had an undetectable viral load, or even for having sex when a condom or PrEP was used.[240] Despite many cases in which the transmission risk was low and no actual transmission occurred, people living with HIV have been punished with felonies and faced several years of imprisonment. In Iowa, before the state modernized its HIV-specific criminal law in 2014, defendants routinely received the maximum sentence of 25 years in prison.[241] More recently, Virginia and Georgia modernized their HIV-specific criminal laws in 2021 and 2022, but the laws in those states maintain felony-level punishment.[242] These laws treat any risk of HIV transmission as the equivalent of murder or manslaughter. Whereas murder and manslaughter cases involve

238. *See Catherine Hanssens on HIV Criminalization in the U.S.*, AIDSVU (May 10, 2021), [https://perma.cc/SXQ8-B6SP] (last visited Oct. 14, 2024); *see also* S. Mandisa Moore-O'Neal, *What Does Abolition Have to Do with HIV Decriminalization and Modernization?*, POSITIVELY AWARE (Oct. 29, 2020), [https://perma.cc/MH9X-WFLU].

239. Lehman et al., *supra* note 2, at 999-1001.

240. *Id*. at 998, 1002-1004.

241. IOWA CODE ANN.§ 709C.1(1)(a), (3), repealed by Acts 2014 (85 G.A.) S.F. 2297, § 9, eff. May 30, 2014, § 902.9(1)(b). Before the reform, it was a Class B felony, punishable by up to 25 years in prison, for a person living with HIV who knew their HIV status to engage in intimate contact with another. In 2008, Nick Rhoades, who had an undetectable viral load and was unable to transmit HIV to his partner with whom he had a one-time sexual encounter in which a condom was used for anal sex, pleaded guilty under Iowa's old HIV-specific criminal exposure statute, was sentenced to 25 years in prison, and was required to register as a sex offender. *See* Rhoades v. State, 848 N.W.2d 22, 25-26 (Iowa 2014). Rhoades's conviction was later overturned by the Iowa Supreme Court. *See Id.* at 32-33 (reversing the district court's conviction in part because the defendant had a nondetectable viral load during the time period at issue).

242. *Timeline of State Reforms and Repeals of HIV Criminal Laws*, *supra* note 21.

instances in which a person dies, HIV transmission usually means that a person with a new HIV diagnosis will have a lifelong chronic condition. With appropriate treatment, that person can live a long, healthy life.[243] From a health justice perspective, reforms to HIV-specific criminal laws must prioritize ensuring that people living with HIV do not face disproportionately severe punishment. Such reforms necessitate moving away from felony prosecutions to alternatives. Some of the most common alternatives include misdemeanor punishments, civil remedies such as a fine or tort liability, and non-prosecution. I will argue that adopting health justice-oriented strategies is preferrable to using either the criminal or civil legal systems.

Beyond addressing felony punishments in connection with HIV criminalization, it is important to consider what legal requirements must be met before a person can face consequences. While I discuss strategies that go beyond legal reforms at the end of this Article, tailoring legal requirements to the medical realities of HIV transmission would improve many existing laws, which often do not reflect the current scientific and medical evidence related to HIV transmission. There is often an assumption that sexual contact with a person living with HIV involves a significant risk of HIV transmission. However, that assumption is not generally true. Even if someone living with HIV is not on antiretroviral therapy or does not use risk reduction practices, HIV is not easy to transmit. The per-act risk of HIV transmission through sexual activity is 138 per 10,000 exposures, or 1.38% per exposure, for receptive anal sex, which is the sexual activity most likely to result in HIV transmission.[244] The risk of HIV transmission is significantly lower for other types of sexual activity: 11 per 10,000 exposures for insertive anal sex (0.11%), 8 per 10,000 for receptive vaginal sex (0.08%), and 4 per 10,000 exposures for insertive vaginal sex (0.04%).[245]

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243. *Living with HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION, [perma.cc/J2SY-2CWT] (last visited Oct. 14, 2024); Adam Trickey et al., *Life Expectancy after 2015 of Adults with HIV on Long-Term Antiretroviral Therapy in Europe and North America: A Collaborative Analysis of Cohort Studies*, 10 LANCET HIV E295-E307 (2023).

244. Pragna Patel et al., *Estimating Per-Act HIV Transmission Risk: A Systematic Review,* 28 AIDS 1509, 1512-1513, 1515 (2014).

245. *Id.* at 1512.

Moreover, it is well-established that when a person living with HIV has a sustained undetectable viral load or is virally suppressed, they do not pass HIV to their sexual partners.[246] This means undetectable equals untransmittable, also referred to as "U=U".[247] The evidence of U=U provides an opportunity to show that HIV criminalization does not reflect scientific and medical evidence and to reform criminal laws accordingly.[248] However, it would be short-sighted to simply exempt individuals with an undetectable viral load from criminal penalties, or provide a defense against prosecution based on level of viral suppression. Doing so would mean that many other vulnerable people who do not have an undetectable viral load could still face criminal penalties, often in circumstances that are not likely to result in HIV transmission.[249] The result would be to exacerbate the discriminatory impact of criminal laws and the criminal legal system on Black people and other people of color, low-income persons, transgender persons, sex workers, and other marginalized persons who have lower levels of viral suppression due to social factors.[250] This would be contrary to a central goal of the health justice approach, which is to remedy health inequities.

Rather than making exceptions from criminal prosecution for people who have an undetectable viral load, or those who have sex using a condom or PrEP, more deliberate reform is preferable from a health justice perspective. HIV-specific reforms could make substantial risk of HIV transmission, specific intent to transmit HIV, and actual HIV transmission elements of statutes. However, while such reforms would address some of the concerns associated with more limited reforms, they are also not without their challenges. One challenge is that it may not always be politically possible to enact such reforms. While advocates and others may hope to secure all the reforms needed to properly

246. *See* Eisinger, *supra* note 121, at 451-452.

247. *Id.* at 451.

248. *Id*. at 451-452.

249. *See Consensus Statement on HIV "Treatment as Prevention" in Criminal Law Reform*, THE CONSENSUS STATEMENT ON HIV "TREATMENT AS PREVENTION", [https://perma.cc/3S9W-J2Z5] (last visited Oct. 14, 2024).

250. *Id.*

modernize HIV criminalization laws, the process often involves compromise. This was the case in North Carolina, where the state's public health regulations were amended in 2018 to provide that there is no obligation to refrain from sexual intercourse, use condoms, or inform one's sex partner of one's status if "the person living with HIV is in HIV care, is adherent with the treatment plan of the attending physician, and has been virally suppressed for at least 6 months (HIV levels below 200 copies per milliliter) at the time of sexual intercourse."[251] During and after this process, advocates expressed concerns because people living with HIV who did not meet the criteria of the public health regulations could still face criminal prosecution, contributing to a "viral divide" in how the law treats people who are virally suppressed and those who are not virally suppressed.[252] A health justice perspective urges us to consider how laws can reinforce social hierarchies.

The modernization of laws criminalizing HIV exposure or transmission in California offers a relatively good model from a health justice perspective. California modernized its HIV/communicable diseases laws in 2017 (effective January 1, 2018), providing for imprisonment of not more than six months if a person with an infectious or communicable disease: (1) engages in conduct that poses a substantial risk of transmission; (2) with knowledge of their infectious or communicable disease; (3) with specific intent to transmit the disease; (4) without the knowledge of the individual exposed that the person had the disease; and (5) transmits the infectious or communicable disease to that person.[253] Importantly, the law allows consideration of condom use, medical treatment, or other practices that limit transmission risk to negate a finding of specific intent to transmit, but also indicates that not taking such measures is insufficient on its own to establish that a person acted with specific intent to transmit.[254] The California law also provides for misdemeanor punishment of

251. 10A N.C. ADMIN. CODE 41A.0202 (2024).

252. *What Does Abolition Have to Do with HIV Decriminalization and Modernization?*, *supra* note 235; *Catherine Hanssens on HIV Criminalization in the U.S.*, *supra* note 235.

253. CAL. HEALTH & SAFETY CODE § 120290 (2018).

254. *Id.* § 120290(a)(1)(B), (b), (c), (e)(3).

not more than six months of imprisonment and, if actual HIV transmission does not occur, the maximum punishment is up to 90 days in jail.[255] The statutory elements in the new California law reflect some aspects of health justice, which emphasizes an evidenced-based public health approach and aims to redress the disproportionate burden of criminalization on marginalized groups.

This Section discussed critical reforms of HIV-specific criminal laws. Such reforms, however, are not without their limitations. Even modernized laws raise questions and concerns. It is unclear whether the enacted reforms will disrupt disparities in HIV prosecutions by race, gender, or other characteristics. While HIV criminalization in the United Kingdom has resembled the elements of the modernized California law for some time, gender disparities in HIV prosecutions have persisted.[256] Moreover, by moving away from singling out HIV, states that broaden their laws open the door to more prosecution of infectious diseases beyond HIV. Separate from their modernized law, California and other states continue to grant broad restrictive powers to public health officials.[257] The final Section of this Article considers these additional concerns and discusses how a health justice approach can respond to them.

## III. MOVING FORWARD: APPLYING THE HEALTH JUSTICE FRAMEWORK TO THE CRIMINALIZATION OF INFECTIOUS DISEASES

The previous Section provided an overview of the criminalization of HIV, identified a number of problems with this criminalization, and critically considered reform efforts to date. The last Section of this Article considers ramifications of the criminalization of infectious diseases more broadly. It first explores the criminalization of other infectious diseases, such as

255. *Id.* § 120290(g)(2).

256. Buchanan, *supra* note 3, at 1340.

257. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 120290. Under current California law, a health officer may issue order requiring that someone with a highly infectious disease be isolated from others for a specified period of time. Violating such an order from a health officer's is a misdemeanor. *See* CAL. HEALTH & SAFETY CODE § 120275 (2024).

viral hepatitis and COVID-19. It then explores strategies for applying health justice principles to minimize criminalization and its harms. A full exploration of how to solve the problem of infectious disease criminalization exceeds the scope of this Article. Here, I sketch and analyze two strategies. These strategies may not be *the* solution, but they reflect in broad strokes future directions for policy and further research in line with health justice. The article ends with takeaway lessons from the discussion for public health and criminal law.

### A. Criminalization of Other Infectious Diseases

This Section discusses data on the criminalization of viral hepatitis and COVID-19. It also compares this criminalization to levels of HIV criminalization that have been documented over the years.

#### *1. Hepatitis Criminalization*

Viral hepatitis is a group of infectious diseases that cause inflammation of the liver.[258] There are five types of viral hepatitis, but the most common types in the United States are hepatitis A, B and C.[259] An estimated 2.4 million people in the United States are living with hepatitis C, although there may be as many as 4.7 million people living with hepatitis C.[260] Approximately 862,000 people in the United States are living with hepatitis B, and more than 44,000 people have been infected in hepatitis A outbreaks affecting 37 states since 2016.[261]

People living with hepatitis also are subjected to criminal prosecution. Laws that criminalize the exposure of others to hepatitis exist in more than a dozen states.[262] As with HIV

258. *Viral Hepatitis Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION [https://perma.cc/F4DR-DUTR] (last visited Oct. 14, 2024).

259. *Id.*; *see also Hepatitis*, WORLD HEALTH ORG., [https://perma.cc/23FN-72MZ] (last visited Oct. 14, 2024).

260. *Viral Hepatitis in the United States: Data and Trends*, U.S. DEP'T OF HEALTH & HUM. SERVICES, [https://perma.cc/9PTK-3SUM] (last visited Oct. 15, 2024).

261. *CDC's Viral Hepatitis Work Saves Lives and Money*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/9G5M-CWLP] (last visited Oct. 15, 2024).

262. *The Criminalization of Viral Hepatitis*, O'NEILL INST. FOR NAT'L & GLOB. HEALTH L., [https://perma.cc/RX64-SP77] (last visited Oct. 15, 2024).

criminalization laws, hepatitis criminalization laws generally do not require prosecutors to prove intent to transmit or actual transmission.[263] These laws also criminalize conduct posing no or negligible risk and impose severe penalties relative to the harm of exposure or transmission.[264]

While relatively little is known about hepatitis criminalization in comparison to HIV criminalization, what is known suggests it mirrors many of the same dynamics seen in the prosecution of people living with HIV. People living with hepatitis, especially those from marginalized populations such as those who are unhoused and those who have substance use or mental health problems, are prosecuted under infectious disease laws or general criminal laws, with the potential for felony punishment that often does not relate to the level of transmission risk.[265] As of 2023, there have been no published studies with comprehensive data on the application of criminal laws to hepatitis across the country or within a jurisdiction of the United States. The information that does exist has largely been collected from media reports. For example in 2018, news articles reported that a man with hepatitis C in Ohio was charged with harassment with a bodily substance for spitting at police officers and paramedics.[266] In Ohio, it is a third-degree felony punishable by up to three years in prison for people who know they have HIV, viral hepatitis, or tuberculosis to "cause or attempt to cause [another person] to come into contact with blood, semen, urine, feces, or another bodily substance" with "intent to harass, annoy, threaten, or alarm another person."[267] Police officers found the man on a sidewalk in downtown Cleveland and suspected that he was drunk or on drugs.[268] When the police officers together with

263. *Id.*

264. *Id.*

265. *See generally If You've Got Hep C, Spitting Can Be a Felony*, KFF HEALTH NEWS [https://perma.cc/4QVG-GE7M] (last visited Oct. 15, 2024).

266. Sony Salzman, *US: Hepatitis C Criminalisation on the Rise, a Worrying Echo of HIV Criminalisation Laws*, HIV JUST. NETWORK (Feb. 27, 2018), [https://perma.cc/77K8-UK7E]; *see also* Michelle Andrews, *Laws That Criminalize Spread of Infectious Diseases Can Increase Their Stigma*, NAT'L PUB. RADIO (June 22, 2018), [https://perma.cc/KHQ3-D653].

267. OHIO REV. CODE ANN. § 2921.38 (West 2024).

268. Andrews, *supra* note 266.

paramedics tried to take the man away on a stretcher, he resisted and spat at them, hitting a police officer in the eye with saliva.[269] Facing four counts and up to twelve years of imprisonment, the man agreed to a plea deal and was sentenced to eighteen months in prison, even though spitting does not pose a risk of hepatitis C transmission.[270] Hepatitis C is a blood-borne virus that is transmitted when someone comes into contact with the blood of a person with the virus.[271] It is not transmitted through saliva.[272] Even if, as alleged, saliva was mixed with the blood of a person with hepatitis C and it hit an officer in the eye, viral transmission would be very unlikely and would require a considerable amount of blood.[273]

Like Ohio, other states have similarly enforced criminal laws against people living with hepatitis C. In Pennsylvania in 2021, a man who was known to be unhoused and who later tested positive for hepatitis C was charged with aggravated assault after biting and spitting on a nurse who was caring for him in the emergency room of a hospital.[274] In Tennessee in 2021, a woman with hepatitis C was "charged with felony assault on a first responder for spitting in the eye of a police officer" while being disorderly and resisting medical care in an emergency room.[275] Despite hepatitis C not being transmitted by spitting, the woman faced felony punishment.[276] Also in Tennessee, a man with hepatitis C who had been walking in the middle of traffic and appeared intoxicated and suicidal was charged in 2017 with

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269. *Id.*

270. Salzman, *supra* note 266; *see also* Cory Shaffer, *Cleveland Officers Sue Avon Lake Man with Hepatitis C who Spat in Their Faces*, CLEVELAND (Jan. 22, 2019), [https://perma.cc/9HZ7-J5C6]; Hannah Pintilie & Gary Brook, *Commentary: A Review of Risk of Hepatitis B and C Transmission Through Biting or Spitting*, 25 J. VIRAL HEPATITIS 1423, 1426-27 (2018) (discussing the negligible risk of transmission of Hepatitis C through saliva).

271. *Hepatitis C Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 30, 2024), [https://perma.cc/E5K7-RN35].

272. Pintilie & Brook, *supra* note 270, at 1423, 1426-27.

273. Dr. Alice Lam, *Spitting is gross, but it doesn't spread hepatitis B or C*, HEPATITIS AUSTL. (Sept. 4, 2022), [https://perma.cc/7C4J-GMS9].

274. Steve Marroni, *Homeless Man with Hepatitis C Accused of Biting, Spitting on Nurse in Pa.: Report*, PENN LIVE (May 12, 2021), [https://perma.cc/TTH7-NL7T].

275. Michael Moser, *Woman with Hepatitis C Spits in Deputy's Eye During ER Ruckus*, CROSSVILLE CHRON. **(**Oct. 11, 2021), [https://perma.cc/G9C5-L8QR].

276. *Id.*; *see also* Pintilie & Brook, *supra* note 270, at 1426-27.

exposing four police officers to hepatitis C during an arrest.[277] The man was sentenced to four years in prison after pleading guilty to aggravated assault and criminal exposure to hepatitis C as well as public intoxication and disorderly conduct.[278] The severity of this sentence treats the risk of hepatitis C infection as equivalent to or worse than voluntary manslaughter or vehicular homicide by intoxication. A common sentence for vehicular homicide by intoxication in Tennessee is one year in prison.[279] While an untreated hepatitis C infection can result in death, it can be treated and cured in eight to twelve weeks with direct-acting antiviral medications.[280] The cure rates of newer medications approach 100%.[281]

While it is difficult to draw conclusions based on a handful of collected media reports, further evidence, although preliminary in nature, suggests that hepatitis criminalization occurs regularly and often does not reflect the current scientific and medical evidence. In Indiana, there were eighty-two instances of hepatitis criminalization involving eighty individuals from 2015 to 2022.[282] Most individuals charged were living with hepatitis C, with a smaller percentage of those charged having hepatitis A or B.[283] All of the individuals were charged under the general criminal statute of battery, but each charge was enhanced because the individual had hepatitis.[284] A person commits battery in Indiana if they knowingly or intentionally touch another person in a rude, insolent, or angry manner or place any bodily fluid or waste on another person in a rude, insolent, or angry manner.[285]

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277. *Stroud Sentenced to Four Years for Criminal Exposure to Hepatitis, Other Charges*, CITIZEN TRIB. (July 12, 2017), [https://perma.cc/2HZK-H5KY].

278. *Id.*

279. Becky Campbell, *Vehicular Homicide Statute Allows Little Jail Time*, JOHNSON CITY PRESS (July 5, 2020), [https://perma.cc/B4PZ-VCND].

280. Vy H. Nguyen et al., *Characteristics and Treatment Rate of Patients With Hepatitis C Virus Infection in the Direct-Acting Antiviral Era and During the COVID-19 Pandemic in the United States*, 5 J. AM. MED. ASS'N, 2022, at 3.

281. *Id.* at 2.

282. Carrie Foote, *Criminalization of Viral Hepatitis in Indiana*, HIV MODERNIZATION MOVEMENT IND., [https://perma.cc/3QRZ-FM94](last visited Oct. 15, 2024).

283. *Id.*

284. *Id.*

285. IND. CODE § 35-42-2-1(c) (West 2024).

Such a battery is a class B misdemeanor but it becomes a level 6 felony if the person "knew or recklessly failed to know that the bodily fluid or waste placed on another was infected with hepatitis, tuberculosis, or human immunodeficiency virus."[286] Of the eighty-two charges with felony enhancement for hepatitis exposure, 73% involved spitting, which poses no risk of hepatitis transmission.[287]

Drug use epidemics including opioids and other drugs may be fueling a rise in hepatitis criminalization, with the prospect for continued or increased criminalization in the future. Given substantial increases in hepatitis cases at various points over the last decade amid the opioid crisis,[288] it is not surprising that criminalization has been part of the response to hepatitis, echoing the growth of HIV criminalization when AIDS cases increased throughout the 1980s. Recent cases of hepatitis C have largely been attributed to intravenous drug use that involves the sharing of needles, syringes, or other supplies contaminated with infected blood.[289] The criminalization of hepatitis C in this context is not unique to states like Ohio, Pennsylvania, Tennessee, and Indiana, which were discussed above. Although these states have been especially hard-hit by the opioid crisis[290] and represent four of the seven states that comprised more than half of all reported cases of acute hepatitis C in the United States in 2019,[291] other parts of the country have also been affected by intersecting issues of opioids and hepatitis C. In Indiana from November 2014 to November 2015, a major outbreak of HIV and hepatitis C tied to injection of

286. *Id.* § 35-42-2-1(c)(f).

287. *Criminalization of Viral Hepatitis in Indiana*, HIV MODERNIZATION MOVEMENT IND., [https://perma.cc/3QRZ-FM94] (last visited Oct. 15, 2024).

288. *See, e.g.*, *Hepatitis C Outbreaks in People Who Inject Drugs*, CTRS. FOR DISEASE CONTROL & PREVENTION [https://perma.cc/99PH-595U] (Sept. 26, 2018); *Hepatitis A Outbreaks Linked to Food Sources and Person-to-Person Contact*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 8, 2024) [https://perma.cc/2TV9-N8U2].

289. *Hepatitis C Prevention and Control*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 16, 2024) [https://perma.cc/7PQZ-8JQR].

290. *Opioid Dispensing Rate Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 7, 2024) [https://perma.cc/L5L2-XZFJ].

291. Zia Sherrell, *Hepatitis C: Prevalence, Statistics, and More*, MEDICALNEWSTODAY (May 31, 2022) [https://perma.cc/M7V5-76DD].

the opioid oxymorphone garnered national attention.[292] One county in the state, Scott County, which typically had about five HIV infections per year, experienced 181 HIV infections over this twelve-month period.[293] More than 92% of those infected with HIV were also infected with hepatitis C.[294] Since then, the CDC identified 220 U.S. counties in 26 states at high risk for similar outbreaks, some of which have subsequently occurred.[295] The risk of hepatitis outbreaks remains and increases with rising rates of injection drug use as part of the opioid crisis, and this could mean more hepatitis criminalization.

The criminalization of hepatitis demonstrates that criminalization of infectious diseases is not limited to HIV. From the perspective of health justice, this criminalization is bad for public health outcomes and bad for marginalized populations like unhoused people and people who use drugs. It also suggests that getting rid of HIV-specific laws or even infectious disease criminal laws is not a sufficient solution for the problems arising from criminalization. General criminal laws are still being enforced, and even without sentence enhancements, their use in response to infectious diseases reflects a punishment mindset.

### *2. COVID-19 Criminalization*

The response to the COVID-19 epidemic has also included the use of law enforcement and the criminalization of disease exposure. Early in the COVID-19 epidemic, law enforcement ticketed and arrested persons for failing to follow COVID-19 shelter-in-place orders, and there were arrests for people not

292. Jeffrey S. Crowley & Gregorio A. Millett, *Preventing HIV and Hepatitis Infection Among People Who Inject Drugs: Leveraging an Indiana Outbreak Response to Break the Impasse*, 21 AIDS & BEHAV. 968, 969 (2017).

293. *Id.*

294. *Id.*

295. Michelle M. Van Handel et al., *County-Level Vulnerability Assessment for Rapid Dissemination of HIV or HCV Infections Among Persons Who Inject Drugs, United States*, 73 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 323, 328 (2016); Sheryl B. Lyss et al., *Responding to Outbreaks of Human Immunodeficiency Virus Among Persons Who Inject Drugs—United States, 2016–2019: Perspectives on Recent Experience and Lessons Learned*, 2020 J. INFECTIOUS DISEASES S239, S239-241 (2020).

wearing masks.[296] Persons with a COVID-19 diagnosis have been arrested and prosecuted for assault and other criminal offenses in connection with disease exposure.[297] According to data from the COVID-19 Policing Project, hot spots in the enforcement of COVID-19-related orders emerged in many cities and states with law enforcement issuing thousands of citations for COVID-19 violations as well as making thousands of related arrests.[298] The most common charges at the beginning of the COVID-19 epidemic were "violations of stay-at-home orders and gathering limits, as well as 'exposure as a biological weapon.'"[299] Face mask violations became the most common violation by mid-2020.[300] However, in the six months following stay-at-home orders in 2020, police made significantly fewer arrests in all neighborhoods compared to earlier months.[301] Black people and other people of color have been disproportionately prosecuted with laws that criminalize exposing others to COVID-19.[302]

However, despite heightened policing accompanied by arrests and prosecutions, the response to COVID-19 has largely not been a matter of criminalization. Even though COVID-19 cases and deaths in the United States over the past four years surpassed HIV cases and deaths over the past forty years, there was not the same or greater use of criminalization and severe penalties for COVID-19 in comparison to what occurred and continues to occur for HIV.[303] Possible reasons for this arguably include structural racism, homophobia, transphobia, and the

296. Pascal Emmer et al., *Unmasked: Impacts of Pandemic Policing*, COVID-19 POLICING PROJECT 16-17 (Oct. 2020), [https://perma.cc/U8XL-449M].

297. *Id.* at 41-44.

298. *Id.* at 32.

299. *Id.* at 29. "Exposure as a biological weapon" "refers to cases where individuals were charged under terrorism laws for alleged exposure of a police officer or civilians to the coronavirus, now deemed to be a biological weapon by the federal government." *Id.*

300. *Id.*

301. Jaquelyn L. Jahn et al., *Racial Disparities in Neighborhood Arrest Rates during the COVID-19 Pandemic*, 99 J. URB. HEALTH 67, 73 (2022).

302. Emmer, *supra* note 296, at 30-31.

303. Doug Donovan, *U.S. Surpasses 100 Million Reported Covid-19 Cases*, JOHNS HOPKINS COVID RSCH. CTR. (Dec. 21, 2022), [perma.cc/9GG9-WN7L]; *The Global HIV/AIDS Epidemic*, KAISER FAM. FOUND. (July 25, 2024), [https://perma.cc/F9HQ-G7DT]; Steven W. Thrasher, *Why COVID Deaths Have Surpassed AIDS Deaths in the U.S.*, SCI. AM. (Dec. 1, 2021), [https://perma.cc/E3T6-BBQV].

stigmas related to sexual behavior and drug use.[304] While anyone can be diagnosed with HIV, the overwhelming majority of HIV cases are among LGBTQ people and people of color, and this is due to a number of social factors that include homophobia, transphobia, and racism.[305] HIV is also connected to stigmatized conduct, which likely led to more HIV criminalization. In contrast, while COVID-19 disproportionately impacted many of the most marginalized communities, the fact that it has been so widespread could be a reason that criminalization was disfavored.[306]

### B. Future Ramifications of Continued Infectious Disease Criminalization

There will be more epidemics in the future. Epidemics like HIV, hepatitis C, and COVID-19 are no longer new and do not dominate front-page news, but they are not over. While significant progress has been made in the response to HIV over the past four decades, HIV remains a serious public health concern in the United States, with 1.2 million people living with HIV and roughly 32,000 new HIV diagnoses each year.[307] The United States also continues to face a hepatitis C epidemic, with rising rates of hepatitis C transmission fueled by the ongoing opioid crisis.[308] In 2023, the CDC declared an end to characterizing COVID-19 as a public health emergency, but spikes in COVID-19 cases and hospitalizations continue to occur

304. Thrasher, *supra* note 303.

305. *See Fast Facts: HIV and Gay and Bisexual Men*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 24, 2024) [https://perma.cc/M72A-PT2R]. 63% of all people living with HIV in the United States are gay and bisexual men. *Id. See also Impact of HIV on Racial and Ethnic Minorities*, HIV.GOV, [https://perma.cc/7GFA-GEV8] (last visited Oct. 15, 2024). In 2021, Black/African American individuals aged 13 and older represented approximately 12% of the U.S. population, but accounted for 40% of people with HIV, and Hispanic/Latino persons aged 13 and older represented 18% of the population but accounted for 25% of people with HIV. *Id.*

306. Thrasher, *supra* note 303.

307. *U.S. Statistics*, HIV.GOV (Aug. 15, 2024), [https://perma.cc/7SGX-BVKK].

308. *Hepatitis C Surveillance 2022*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 3, 2024), [https://perma.cc/MC4J-HDLZ].

in the United States.[309] More than 50,000 COVID-19 deaths in the United States were reported in the first half of 2023.[310]

Beyond these continuing epidemics, the risk of newly emerging epidemics is high. Infectious disease epidemics have increased over the past century.[311] Recent examples of outbreaks in the United States include the 2022-2023 mpox (monkeypox) outbreak and the 2021-2023 meningococcal disease outbreak.[312] Despite scientific and medical advances, the potential for disease outbreaks as well as the risk of outbreaks escalating into epidemics or even pandemics is growing.[313] Some factors contributing to the increased occurrence of epidemics include more international travel, greater urbanization, climate change, increased human-animal contact, and health worker shortages.[314] Both infectious disease outbreaks and epidemics are projected to become more frequent and severe over time.[315]

One aim of the discussion in this Article is to offer a forward-looking analysis. The reality of more epidemics occurring in the future raises the specter of responding to infectious diseases with criminal law. Such a response cannot be ruled out as a result of recent decriminalization efforts. First and foremost, most states have not taken steps to repeal or reform their HIV-specific or

309. Brian Michael Jenkins, *Pandemics Don't Really End—They Echo*, TIME (Aug. 28, 2023) [https://perma.cc/K9N7-B339].

310. *Id.*

311. B. Adam Williams et al., *Outlook of Pandemic Preparedness in a Post-COVID-19 World*, 8 NATURE PARTNER J. VACCINES 1, 1 (2023); Kate E. Jones et al., *Global Trends in Emerging Infectious Diseases*, 451 NATURE 990, 990 (2008).

312. *See 2022-2023 Outbreak Cases and Data*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 5, 2024),
[https://perma.cc/X89U-RX96]; *Meningococcal Disease Outbreak among Gay, Bisexual Men in Florida, 2021–23*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/59KY-UKVB] (last visited Oct. 17, 2024).

313. A recent study estimated that the likelihood of an infectious disease epidemic is highly probable and could double in the coming decades. *See* Marco Marani et al., *Intensity and Frequency of Extreme Novel Epidemics*, 118 PROC NAT'L ACAD. SCI. USA, no. 35, 2021, at 1 (2021) (noting that probability of another pandemic similar to COVID-19 occurring within one's lifetime is roughly 38% and that it could become double in the coming decades).

314. Abraham Haileamlak, *Pandemics Will be More Frequent*, 32 ETHIOPIAN J. HEALTH SCI. 228, 228 (2022).

315. *Id.*; *see also* Marani et al., *supra* note 313, at 3.

infectious disease criminal laws.[316] Where states have attempted to strike down laws or otherwise modernize their approach to infectious disease criminalization, the result has not always been successful.[317] Even successful efforts may not prevent the punitive prosecution of HIV or other infectious diseases.

Reforms to infectious disease criminalization have been made largely with HIV criminalization in mind.[318] When reformed laws are applied to other infectious diseases, they may not prevent the punitive prosecution of those diseases. This is because the science of transmission of HIV differs from that of other sexually transmitted infections, viral hepatitis, or the COVID-19 virus. For example, hepatitis C is more easily transmitted than HIV because hepatitis C is ten times more concentrated in the blood relative to the concentration of HIV in the blood.[319] Similarly, COVID-19 virus is very easily transmittable through airborne infection, whereas HIV transmission relies on contact with infected bodily fluids.

Regardless of whether infectious disease criminal laws exist, law enforcement can still apply general criminal laws to infectious diseases. This is not a hypothetical. As previously mentioned, Texas is an example of a state that eliminated its HIV-specific criminal law in 1994, but people living with HIV in Texas have since been prosecuted for HIV non-disclosure, exposure, or transmission under general criminal laws.[320]

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316. *HIV Criminalization and Ending the HIV Epidemic in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Jan. 2023), [https://perma.cc/KGC5-AQR6].

317. Joseph Garmon, *The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of HIV/AIDS*, 57 HOW. L. REV. 665, 697 (2014).

318. Even though concerns about HIV criminalization have been the major impetus for reforming infectious disease criminal laws, many organizations, such as the Center for HIV Law and Policy and the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy, have also raised concerns about hepatitis criminalization and the criminalization of health conditions more generally, including other STIs and addiction. Moreover, advocates have not always agreed with enacted reforms because they did not amount to the full scale of what advocates sought.

319. John Budd & Roy Robertson, *Hepatitis C and General Practice: The Crucial Role of Primary Care in Stemming the Epidemic*, 55 BRITISH J. GEN. PRAC. 259, 259 (2005).

320. *HIV Criminal Law Reform Before and After: Texas*, *supra* note 233.

### C. Pragmatic Analysis of Health Justice-Oriented Strategies

Health justice offers a framework to re-think previous strategies for the decriminalization of infectious disease exposure or transmission. The central problem with the existing criminal law approach is that it is primarily punitive and ineffective at preventing infectious diseases.[321] Criminal law repeal and reform strategies are critical to move toward decriminalization of infectious diseases, but decriminalization must happen from multiple angles. Merely abolishing or reforming existing laws is insufficient for moving beyond a punishment mindset and for improving public health. It does not prevent prosecutors from bringing criminal charges under general criminal laws for infectious disease exposure or transmission. Nor does it bring about a greater focus on health outcomes and health equity. From a health justice perspective, we must pay attention to what fills the void when criminal laws are eliminated or reformed. This requires being realistic about the flexibility of criminal law, which can be used in many ways that reflect a punishment mindset. It also means creating institutions and institutional practices that address poor health outcomes and inequities as well as their underlying social determinants.

To move away from a law enforcement response to infectious diseases, we do not need to choose between criminal law repeal and reform strategies on the one hand and other strategies consistent with health justice principles on the other hand. Decriminalization of infectious diseases requires a multi-layered approach. Criminal law repeal and reform strategies are part of what it takes to achieve health justice, but the repeals and reforms that have been enacted to date are not enough.

In discussing strategies other than criminal law repeal and reform, my desire is not to continue or further entrench criminal law enforcement in the response to infectious diseases or public health problems more generally. This desire is echoed by the Association of Prosecuting Attorneys (APA), a national association representing elected and deputy or assistant prosecutors and city attorneys. In connection with a roundtable

321. Buchanan, *supra* note 3, at 1341.

meeting hosted by the White House Office of National AIDS Policy in June 2022, Dave LaBahn, the President and Chief Executive Officer of APA, stated, "We want to get law enforcement out of health."[322] But while Dave LaBahn and other prosecutors are in favor of getting law enforcement out of public health issues, individual prosecutors may disagree with this position and may specifically support a law enforcement response to infectious diseases. Such positions can also change over time, with the pendulum potentially swinging toward or away from the use of criminal law as epidemics intensify or subside. Considering additional strategies is therefore imperative.

This Section explores two concrete strategies that implement a health justice approach. These strategies aim to marginalize the use of criminal law, but I also highlight problems with these strategies that illustrate the enduring power of a punishment mindset. I discuss whether and how strategies institutionalizing public health-law enforcement partnerships and community engagement practices can help avert infectious disease criminalization and promote health equity. These strategies are informed by the decades-long work of HIV and criminal justice advocates. In the past, outreach to law enforcement officials from law and policy organizations like the Center for HIV Law and Policy has had a positive, real-world impact.[323] It has led to relationships that have allowed for engagement and collaboration between officials and organizations and for the sharing of accurate information about infectious diseases from evidence-based sources. Going forward, partnerships between law enforcement officials and public health institutions may be particularly helpful for ensuring that criminal law is not used in

322. *White House Office of National AIDS Policy Hosts Historic Prosecutor Roundtable on HIV Criminal Law*, ASS'N OF PROSECUTING ATT'YS, [https://perma.cc/6ZGG-UZ67] (last visited Oct. 15, 2024).

323. *See It's Time to Replace Arrests with a Public Health Response to Covid-19*, CTR. FOR HIV L. & POL'Y (June 18, 2020), [https://perma.cc/G8WR-8G3Y]; *Prosecutors, Criminal Defense Lawyer, and Public Health Law Organizations Call for Criminal Legal and Detention Systems as Covid-19 Vaccination Priority*, ASS'N OF PROSECUTING ATT'YS (Dec. 3, 2020), [https://perma.cc/S65K-3R7A]; *CHLP and APA Host Prosecutors Roundtable in New York City*, CTR. FOR HIV L. & POL'Y (July 26, 2021), [https://perma.cc/VLJ6-7FJG]; *Law Enforcement Plays A Key Role in Ending HIV Criminalization*, CTR. FOR HIV L. & POL'Y (July 29, 2013), [https://perma.cc/4LPJ-54V4].

the many instances in which infectious disease transmission is not possible. Such partnerships could be either a short-term solution prior to criminal law reforms being enacted in a jurisdiction or a meaningful addition to reforms that have already been enacted. However, they alone may not end the use of criminal law enforcement in response to infectious diseases. Like law enforcement officials, public health officials frequently hold biases and ignorance about infectious disease responses and may not value individual rights. This means that law enforcement should also foster connections with community stakeholders and advocates with an understanding of health privacy and civil liberties.

### *1. Institutionalizing Public Health-Law Enforcement Consultation and Partnership*

The first health justice-oriented strategy is akin to a medical-legal partnership, whereby prosecutors establish institutional relationships and consult with public health officials or other professionals with the requisite public health expertise before they consider using criminal laws to prosecute a person based on their infectious disease status. Medical-legal partnerships bring health and legal professionals together to integrate knowledge and practices from health and law in pursuit of health equity.[324] They can be a powerful tool to remedy the adverse social conditions underlying health inequities. Typically, a medical-legal partnership involves embedding legal expertise and services into medical settings such as clinics to improve patient health outcomes by addressing health-harming legal needs.[325] A medical partner first identifies patients with health-harming legal needs and connects them to legal assistance by referring them to a legal partner.[326] A classic example of a health-harming legal need is a low-income individual with asthma who lives in a mold-

324. Omar Martinez et al., *Medical-Legal Partnerships: An Integrated Approach to Advance Health Equity and Improve Health Outcomes for People Living with HIV*, 4 FRONTIERS IN REPROD. HEALTH, 2022, at 2.

325. Elizabeth Tobin Tyler, *Medical-Legal Partnership in Primary Care: Moving Upstream in the Clinic*, 13 AM. J. OF LIFESTYLE MED. 282, 283 (2019); *see also* Martinez, *supra* note 324, at 2.

326. Martinez, *supra* note 324, at 5.

or cockroach-infested apartment that exacerbates their health condition.[327] Without legal assistance, the individual may have no ability to force their landlord to remove the environmental health risk and no ability to move to better housing. Asthma may seem to be purely a health issue requiring a medical expert, but it actually raises a legal issue that requires a legal expert to resolve it.

This Article considers medical-legal partnerships in a slightly different way to apply this model to the context of infectious diseases and criminal law. While the traditional understanding of a medical-legal partnership involves either the placement of lawyers in a medical clinic or referrals from medical clinics to lawyers, there have also been partnerships between law enforcement and public health departments.[328] Public health and law enforcement departments have roughly similar goals. Both exist to protect the health, safety, and welfare of the public. However, public health departments focus on disease and injury prevention at the population level, whereas law enforcement engages in the apprehension and prosecution of criminal suspects as a way to support community safety. Over the past several decades, public health and law enforcement agencies have collaborated on violence prevention.[329] Identifying and implementing appropriate responses to infectious diseases present opportunities for cooperation between public health and law enforcement. Rather than law enforcement responding with criminal punishment as the default, the medical-legal partnership model would enable a greater focus on infectious disease prevention by emphasizing evidence-based public health interventions and addressing the social and structural determinants of health.

The idea of public health-law enforcement partnerships is similar to one of the recommendations in the 1988 report of the President's Commission on the HIV Epidemic.[330] The fact that

327. *See, e.g.*, Rebecca L. Huston et al., *Medical-Legal Partnerships*, 13 AM. MED. ASS'N J. ETHICS 555, 555 (2011).

328. Jonathan Hall et al., *Public Health and Law Enforcement: Future Directions*, 32 J.L., MED. & ETHICS 52, 53 (2004).

329. *Id.*

330. PRESIDENTIAL COMMISSION REPORT, *supra* note 70, at 131.

this report is from the 1980s does not mean that its recommendations are without value. While the Commission can certainly be subjected to criticism, it took a more sensible approach on the criminalization of HIV exposure and transmission than the approach adopted by later congressional enactments. The Commission recommended that prior to instituting a criminal case related to HIV, prosecutors should consult with local public health officials to determine whether public health interventions would be more appropriate.[331]

Taking this recommendation as a starting point, a public health-law enforcement partnership has the potential to alleviate concerns about continued infectious disease criminalization and to remedy health inequities. An assessment of this potential requires considering possible barriers to and facilitators of partnership and analyzing their benefits and drawbacks. One obstacle to public health-law enforcement coordination stems from a lack of understanding of the capabilities of public health departments and their personnel.[332] Public health officials have many interventions at their disposal, including health education, evidence-based prevention strategies, and the issuance of quarantine, isolation, or other public health orders, and law enforcement may not be aware of these interventions.[333] Another obstacle may stem from the lack of legal authority or a formalized structure for coordination.[334] Successful coordination requires clear legal authority for officials to partner with each other. This can be achieved through memoranda of understanding between prosecutors and their public health counterparts, institutionalizing a process for consultation with public health officials. Further systems should also be set up to facilitate a culture of consultation and collaboration.

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331. *Id.*

332. ROBERT WOLF, LAW ENFORCEMENT AND PUBLIC HEALTH: SHARING RESOURCES AND STRATEGIES TO MAKE COMMUNITIES SAFER 14-15 (2012).

333. FIELD TRIALS OF HEALTH INTERVENTIONS: A TOOLBOX 8 (Peter Smith et al. eds., 3d ed., Oxford Univ. Press 2015); Stefan K. Lhachimi et al., *Evidence-Based Public Health*, 2017 BIOMED RSCH. INT'L, 2017, at 1; Michael A. Soto & Leon E. Cosler, *Evaluation of Public Health Interventions, in* PUBLIC HEALTH ADMINISTRATION: PRINCIPLES FOR POPULATION-BASED MANAGEMENT 495, 535 (Lloyd F. Novick et al., eds. 2d ed., 2008).

334. Martinez, *supra* note 324, at 8.

Institutionalizing law enforcement consultation and partnerships with public health officials and other professionals has numerous advantages. First, it brings important public health expertise to prosecutors before they initiate a criminal case against an individual for infectious disease exposure. If prosecutors consult with public health experts, they may be less likely to move forward with criminal charges in situations where there is no or low risk of infectious disease transmission.[335] An example of such criminalization still occurring is the prosecution of people living with HIV or hepatitis C for spitting.[336] Consultation with public health experts would confirm to prosecutors that HIV and hepatitis C cannot be transmitted through spitting and would help prevent arrests and prosecutions. As another example, if police officers consulted public health experts, they might be convinced not to arrest a person with HIV and an undetectable viral load for having sex without a condom because there is no risk of HIV transmission to the person's partner. Second, consultations can be an occasion to educate prosecutors about the fact that arrests and prosecutions can be counterproductive to public health, for example, by disincentivizing people from getting tested for infectious diseases or by undermining trust in government officials and their efforts to promote health and safety.

Third, institutionalizing consultation and partnerships between law enforcement and public health re-orients attention to actually preventing infectious diseases. A purported justification for HIV-specific criminal laws is that these laws reduce the rate of HIV transmission.[337] However, it is well known that HIV-specific criminal laws are not in fact effective at reducing the rate of HIV transmission. In the case of HIV, effective evidence-based interventions that achieve population-level prevention include HIV testing and counseling, HIV treatment as prevention, STI prevention, condoms, PrEP, clean syringes for injection drug

335. Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1352 (2013).

336. *See, e.g.*, Salzman, *supra* note 266.

337. *HIV and STD Criminalization Laws,* CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2023), [https://perma.cc/CCT2-UGLF].

use, and blood supply screening.[338] In addition, effective prevention includes addressing social and structural factors such as poverty, housing insecurity, racism, stigma, and trauma as root causes of infectious disease outcomes and disparities. Responding with evidence-based interventions and addressing social and structural factors should be prioritized over putting time and resources into criminalization. Where there is an immediate threat to public health, public health departments also have regulatory powers that "allow certain individual liberties . . . to be temporarily abridged to enable officials to respond quickly and flexibly to health emergencies."[339] These powers include the authority to order quarantine and isolation.[340] Public health regulatory powers can resemble criminal law powers, but the purpose of administrative restrictions on liberty pursuant to public health authority is to prevent future harm and not to punish individuals for their past actions.[341] The distinction between allowable restrictions and forbidden punishment is not always significant, but it can be an alternative to criminalization resulting in the stigma of being labelled as a criminal, an arrest record, and various collateral consequences of criminal convictions such as barriers to employment and housing, ineligibility for public benefits, disenfranchisement from voting, and denial of immigration relief. Deploying public health interventions, approaches, and powers should be considered before criminal enforcement, and consultation between public health and law enforcement can encourage this.

While requiring prosecutors to consult with public health counterparts in government has benefits, it is not without disadvantages. When public health departments use their

338. Robert W. Eisinger et al., *Ending the HIV Pandemic: Optimizing the Prevention and Treatment Toolkits*, 69 CLINICAL INFECTIOUS DISEASES 2212, 2212-13 (2019); *Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 2, 2022), [https://perma.cc/QRJ7-8UV9].

339. GOSTIN & WILEY, *supra* note 6, at 369, 398; *see also* Michelle M. Mello, *Modernizing Public Health Emergency Powers Laws—Again*, COMMONWEALTH FUND (Mar. 30, 2023), [https://perma.cc/A2YL-Z6UJ].

340. GOSTIN & WILEY, *supra* note 6, at 401.

341. Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HAST. CONST. L.Q. 329, 338-340 (1989).

regulatory powers, there can be fewer legal protections compared to legal protections available to defendants in the criminal legal system.[342] Moreover, public health officials and other health professionals share many of the same biases as law enforcement.[343] In fact, the use of criminal laws is often supported by health professionals; for example, a large number of pregnancy-related prosecutions are triggered by health care providers.[344] Many health professionals have also been complicit in supporting the criminal prosecution of people living with HIV. Public health surveillance can enable criminalization when data is shared with law enforcement to use in prosecutions.[345] Public health officials engage in racist, homophobic, and transphobic discrimination just like prosecutors do within the criminal legal system.[346] Moreover, not all public health officials are medically trained, and in any case, they may have limited knowledge about the latest scientific evidence and could benefit from scientific expertise outside of the health department.[347] As was apparent in the early response to COVID-19, public health officials were learning the science in real time. In addition, they may not be aware of community needs and challenges or how best to address community knowledge gaps, misinformation, or mistrust. Finally, trust in and the perceived legitimacy of public health are

342. Michal Buchhandler-Raphael, *Overmedicalization of Domestic Violence in the Noncarceral State*, 94 TEMPLE L. REV. 589, 645 (2022) ("[N]o court has held that indigent civil litigants are entitled to court appointed attorneys when their freedoms might be curtailed as a result of noncarceral measures.").

343. Monica B. Vela et al., *Eliminating Explicit and Implicit Biases in Health Care: Evidence and Research Needs*, 43 ANN. REV. PUB. HEALTH 477, 477-78 (2022).

344. *See* MICHELLE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 191-93, 198 (2020).

345. Alexander McClelland et al., *The Rise of Molecular HIV Surveillance: Implications on Consent and Criminalization*, 30 CRITICAL PUB. HEALTH, 487, 492 (2020).

346. *Compare* Vela, *supra* note 343, at 478 ("Health care providers hold negative . . . biases against . . . marginalized groups of people, including racial and ethnic minoritized populations, disabled populations, and gender and sexual minorities, among others."), *with* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795, 796 ("The idea that prosecutors might be . . . responsible for propagating inequality in the criminal justice system is far from new.").

347. Molly A. Sauer et al., *A Failure to Communicate? How Public Messaging Has Strained the COVID-19 Response in the United States*, 19 HEALTH SEC. 65, 68-69 (2021).

low.[348] Given these problems with public health departments and their officials, an effective strategy would include consultation with a broader array of people, including medical or public health experts outside of the public health department, advocates with an understanding of health privacy and civil liberties, and community stakeholders.

*2. Institutionalizing Community Engagement*

The second health justice-oriented strategy is institutionalizing community engagement. Centering community perspectives and needs is key to improving health outcomes and health equity. Community engagement is also an important aspect of abolitionist projects focused on incorporating mutual aid, transformative justice practices, and community institutions into broader "community infrastructures of care."[349] It is important to consider what structures exist for supporting community engagement with respect to infectious disease decriminalization. The Ryan White HIV/AIDS Program's Planning Councils are a mechanism for regularly gathering input from people living with HIV and ensuring that input informs policymakers and other officials.[350] While the Ryan White HIV/AIDS Program is not and should not be the only mechanism for engaging community stakeholders in the context of infectious disease decriminalization, this already existing structure is particularly well positioned for institutionalizing such community engagement.

The Ryan White HIV/AIDS Program is a federal program that provides primary medical care, HIV treatment, and support services to more than a half million uninsured and underinsured people living with HIV in the United States.[351] A central feature

348. Michelle M. Mello & Lawrence O. Gostin, *Public Health Law Modernization 2.0: Rebalancing Public Health Powers and Individual Liberty In The Age Of COVID-19*, 42 HEALTH AFFAIRS 318, 320 (2023).

349. MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE: A CASE FOR ABOLITION 265-66 (2022).

350. AMY KILLELEA, RYAN WHITE HIV/AIDS PROGRAM PART A PLANNING COUNCILS: ADDRESSING THE NEEDS OF INDIVIDUALS AGING WITH HIV 4, 7 (2021).

351. HEALTH RES. & SERVS. ADMIN., RYAN WHITE HIV/AIDS PROGRAM ANNUAL DATA REPORT 2022 1 (2023).

of the Ryan White Program is that much of the decision-making is done through state and local planning bodies.[352] Ryan White funding is allocated and services are prioritized at the state and local levels. By federal statute, membership in a Ryan White Planning Council must reflect the local HIV epidemic in terms of characteristics such as race/ethnicity, gender, and age.[353] Members include people living with HIV and community stakeholders as well as doctors, public health professionals, and faith-based leaders.[354] These members meet regularly, usually several times a year, within most jurisdictions. At least 33% of planning council members must be "unaligned" consumers, that is, persons who receive Ryan White services and who have no conflicts of interest.[355] Ryan White Planning Councils also represent diverse areas of expertise, including health care services, substance use, mental health treatment, incarcerated populations, and housing for unhoused people.[356] No other federal health or human services program has a legislatively required planning body that has such a defined membership composition and that requires such a high level of community participation.

Given that HIV is a lifelong condition and is not going away any time soon, people living with HIV, and those who support them, are a continuing group that can be tapped for engagement. They have relevant life experience and knowledge concerning HIV and other infectious diseases. For example, around 20% of people with HIV have co-infection with hepatitis C.[357] Many people living with HIV have experienced other infectious diseases. Risk factors that lead one to get HIV (i.e., sexual behavior or injection drug use) are the same risk factors for some

352. JSI RSCH. & TRAINING INST., INC., RYAN WHITE HIV/AIDS PROGRAM PART A: PLANNING COUNCIL PRIMER 5, 7 (2018) [hereinafter PLANNING COUNCIL PRIMER].

353. *Id.* at 15-16.

354. *See generally* HEALTH RES. & SERVS. ADMIN., HEALTH RESOURCES AND NAT'L RYAN WHITE CONFERENCE ON HIV CARE & TREATMENT (2022).

355. JSI RSCH. & TRAINING INST., INC., *supra* note 352, at 16.

356. HEALTH RES. & SERVS. ADMIN., RYAN WHITE HIV/AIDS PROGRAM PART A: GRANTS TO ELIGIBLE METROPOLITAN AND TRANSITIONAL GRANT AREAS 2 (2023).

357. *HIV and Hepatitis C Coinfection: HRSA Progress and Efforts Around Curing Hepatitis C Among People Living With HIV*, HEALTH RES. & SERVS. ADMIN. (2017), [https://perma.cc/7D5P-YPCE]; Sian Ferguson, *Common HIV-Related Illnesses*, HEALTHLINE (July 29, 2024), [https://perma.cc/8LXU-ZMP9].

other infectious diseases such as STIs and hepatitis C.[358] Because people with HIV have compromised immune systems, they may be more vulnerable to getting other infections if their HIV infection is not effectively managed.[359] Evidence related to COVID-19 also suggests that people living with HIV may face worse health outcomes from COVID-19 infection.[360]

As a group, people living with HIV reflect diversity in race, ethnicity, sexual orientation, gender identity, and other characteristics. Various infectious diseases disproportionately occur among populations most impacted by HIV. Gay men are severely impacted by STIs like syphilis.[361] They were the first group in which the recent wave of mpox was documented and were particularly impacted, even though other groups were later impacted as well.[362] People of color are also disproportionately affected by various infectious diseases. For example, they make up the majority of people living with HIV.[363] Black and Latinx people as well as LGBTQ people are well-represented on Ryan White Planning Councils.[364] However, other groups such as unhoused people and sex workers may be less represented, and it is important to engage these groups.

HIV medical and service providers involved with the Ryan White Planning Councils also have experience relevant to responding to a range of infectious diseases. Many of them have been at the frontlines of responding to COVID-19, and they are

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358. *HIV and Opportunistic Infections, Coinfections, and Conditions*, NAT'L INSTS. OF HEALTH (Aug. 13, 2021), [https://perma.cc/MKY4-YAEK].

359. *Human Immunodeficiency Virus (HIV)*, YALE MED., [https://perma.cc/953Q-PWSF] (last visited Oct. 15, 2024).

360. *See* Sarah L. Braunstein, *COVID-19 Outcomes Among People with HIV and COVID-19 in New York City*, 228 J. INFECTIOUS DISEASES 1571, 1571 (2023) (finding that patients living with HIV were at increased risk for poor COVID-19-related outcomes, especially those with low CD4+ counts and underlying conditions). *But see* Kai Wei Lee et al., *COVID-19 in People Living with HIV: A Systematic Review and Meta-Analysis*, 18 INT'L. J. ENV'T. RSCH. PUB. HEALTH 3554, at 1-2 (2021) (finding no increased risk of worse COVID-19 outcomes among people living with HIV).

361. *STD Facts – What Gay, Bisexual and Other Men Who Have Sex with Men Need to Know About Sexually Transmitted Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/466P-5V45] (last visited Oct. 15, 2024).

362. John P. Thornhill et al., *Monkeypox Virus Infection in Humans Across 16 Countries — April–June 2022*, 387 NEW ENG. J. MED. 679, 680 (2022).

363. *See What Is the Impact of HIV on Racial and Ethnic Minorities in the U.S.?*, HIV.GOV (Oct. 8, 2024), [https://perma.cc/Q5EM-PHFZ].

364. *Id.; see also* PLANNING COUNCIL PRIMER, *supra* note 352, at 17.

also part of the response to hepatitis, mpox, and STIs.[365] Within health departments, leaders of HIV programs have knowledge around contact tracing and infectious diseases generally, and they understand the role of addressing social determinants of health as part of public health responses.[366]

The Ryan White Planning Councils are already established bodies that include relevant communities and other voices with expertise in infectious diseases.[367] Engaging with these planning councils or other similar bodies can help law enforcement and public health officials figure out the best approach for responding to current or emerging epidemics. This might lead to a shift from infectious disease criminalization toward a health justice approach. Hopefully, it will encourage law enforcement officials to not arrest, charge, or prosecute in particular cases. In addition to this immediate effect within the current legal landscape, community engagement can also play a more transformative role in moving beyond a punishment mindset.

Affected communities have significant expertise about what matters for achieving health justice. They know, for example, what social and other factors influence the infectious disease outcomes in their localities and where resource investments or other changes are most needed. Community engagement is more than just seeking input from affected communities. It is a collaborative relationship with community members that takes seriously their knowledge and empowers them to identify and address priority concerns.[368]

Empowering communities is an important aspect of health justice. Health justice is not simply about removing unjust and ineffective laws, but rather emphasizes creating the necessary capacities, institutions, and relationships for improving health and

365. *See* PLANNING COUNCIL PRIMER, *supra* note 352, at 17; *see also Improving HIV Health Outcomes with Innovative Initiatives to Reduce Health Disparities and Address Stigma*, HEALTH RES. & SERVS. ADMIN. (2021), [https://perma.cc/DPN7-NFC4]; *see also The Ryan White HIV/AIDS Program: The Basics*, KFF (Nov. 3, 2022), [https://perma.cc/GST6-XGV5].

366. *See Members & Staff*, HIV.GOV (Aug. 12, 2024), [https://perma.cc/GHQ3-X43A].

367. *See* PLANNING COUNCIL PRIMER, *supra* note 352, at 17.

368. *See What is Community Engagement?*, PENN. STATE COLL. OF AGRIC. SCIS., [https://perma.cc/YB6C-38H4] (last visited Oct. 15, 2024).

remedying inequities.[369] This may also involve adopting restorative justice practices to respond to people who make mistakes, act irresponsibly, and sometimes harm others.[370] For example, people might think that we should use criminal law to punish someone with a COVID-19 diagnosis who knowingly puts others at risk by entering a crowded restaurant and, as a result, infects others. As I have discussed in this Article, there are good reasons not to use criminal law in response to infectious disease exposure and transmission, even in a case like this.[371] Restorative justice practices can be an alternative process outside the criminal legal system to hold people accountable for their actions by acknowledging the harm caused and figuring out how to take action to repair the harm and avoid future harm.[372] Community engagement can broaden the conversation around decriminalization by centering more productive ways of pursuing health justice.

Community engagement, however, is not a silver bullet and may not always marginalize the use of criminal law in response to infectious diseases. Many people living with HIV are proponents of HIV criminalization.[373] Most people living with HIV acquired HIV from having sexual intercourse or sharing injection drug equipment with someone else, and some of them support criminal laws being used in cases of HIV exposure or transmission.[374] They may make inaccurate assumptions that criminalization deters or changes HIV-related behaviors. Just because communities are engaged, it does not mean they will

369. *Id.*; *see also* Wiley, *supra* note 10 at 636, 638.

370. *See* Carrie Menkel-Meadow, *Restorative Justice: What is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 162 (2007).

371. *See supra* Part II.

372. *See* Thalia Gonzalez, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1152, 1197 (2020); *see also* Menkel-Meadow, *supra* note 370, at 162, 175.

373. *See* Michael Carter, *Majority of US Gay Men Support HIV Transmission Laws*, AIDSMAP (Sept. 21, 2010), [https://perma.cc/KPP2-E5A5] (noting that 38% of HIV-positive men endorsed criminalization).

374. *Id.*; *see also Fast Facts: HIV in the United States*, CTRS. DISEASE CONTROL & PREVENTION (Apr. 22, 2024), [https://perma.cc/ZX38-UDNY] (showing that approximately 96% of new HIV infections in 2022 resulted from sexual contact or drug injections, and the number of new infections per year caused by sexual contact or drug injections has been consistent since 2018).

come up with a decriminalization response or a response consistent with health justice principles. For example, since people living with HIV may face severe consequences from disease caused by the COVID-19 virus, some may be particularly supportive of mask or other mandates, such that they would support the enforcement of mandates with criminal punishment for those who do not use masks or who cough on others.

While community engagement may not always limit criminalization, it is an important strategy for advancing health equity and for setting priorities around infectious disease decriminalization. Community stakeholders may view other non-criminal options as equally, if not more, important. These options may include addressing the root causes of health inequities, which would further align with a health justice approach. While institutionalizing community engagement can be thought of as a supplemental decriminalization strategy in addition to criminal law repeal and reform and other efforts, it can also have a more transformative impact in giving power to communities to take on the work of health justice. The state has empowered itself to take on public health and law enforcement, but there is an important role for affected communities to play. Community engagement alone will not prevent all unjust criminalization of infectious diseases, but it has the potential to create capacities and build communities to move away from a punishment mindset and toward a health justice mindset.

## CONCLUSION

The criminalization of infectious disease largely emerged from fear and moral panic around HIV and STIs due to ignorance about disease transmission and associations with stigmatized groups.[375] Infectious disease criminalization continues to occur today. Criminalization is not the right way to deal with infectious diseases because it is not an effective prevention approach and it is harmful to both public health goals and vulnerable communities.[376]

375. *See supra* Section I.A.

376. *See supra* Section II.A-B.

A health justice approach is the more appropriate way for responding to infectious diseases. This approach requires decriminalization of infectious diseases to dismantle subordination as a root cause of health inequities, but it also involves creating institutions and institutional practices that support public health and social justice.[377] To think strategically and effectively about decriminalization from a health justice perspective, attention must be given to what fills the void when infectious disease criminal laws are eliminated or to whether and how reformed criminal laws are used.[378] Reform efforts addressing HIV criminalization have been successfully implemented in some states and are being considered in more states.[379] However, as I have shown in this Article, eliminating or modernizing criminal laws does not necessarily end the criminalization of HIV.[380] The criminal law is flexible enough that law enforcement can use general criminal laws. Public health authorities can also act in ways that reflect a punishment mindset.

This insight into the flexibility of criminal law is important when considering the government response to infectious diseases and other public health issues. Infectious disease criminal laws and general criminal laws have been applied to hepatitis and COVID-19. On the one hand, the United States did not embrace the most severe uses of criminal law in response to COVID-19.[381] On the other hand, in the right circumstances, criminal law could return as a response to other infectious diseases, especially when marginalized and stigmatized groups are predominantly affected.[382] That is why scholarly attention needs to be paid to how criminal laws have been and continue to be used to prosecute people with infectious diseases and to criminalize public health issues more generally. Without a full reckoning with the harms caused by the criminalization of public health problems, we risk perpetuating them.

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377. *See supra* Section III.C.
378. *See supra* Section III.C.
379. *See supra* Section II.C.
380. *See supra* notes 233-236 and accompanying text.
381. *See supra* Section III.A.2.
382. *See supra* Section III.B.

Since criminal law and carceral practices are not going away, it is important for activists and legal academics to consider health justice-oriented strategies for moving away from a punishment mindset.[383] The priority must be achieving effective prevention and remedying health inequities. This would likely mean responding with evidence-based strategies and institutionalizing critical consultation and partnerships, such as between law enforcement and public health and between government officials and community stakeholders.[384] Legal protections, financial resources, and social support also should be prioritized over criminalization.[385] There may be a few, rare instances when the use of criminal law would be appropriate, for example, when a person has the specific intent to transmit a disease. Even then, it is important to lead with health justice principles. In the context of COVID-19, where criminalization may have been contemplated for seemingly good reasons at the height of the epidemic, a better approach is to address the social determinants of health.[386] This would mean providing access to personal protective equipment (PPE) and health care, income and housing assistance, and paid sick and family leave.[387] Community engagement and empowerment are also key.[388] When communities are heard, it becomes clear that people often do not intend to transmit infectious diseases, but rather lack needed education, resources, and support. Health justice provides a framework not only for understanding the social determinants of diseases and the problems caused by criminalization, but also for imagining how to transform health care, public health, and criminal legal systems.

383. *See supra* Section III.C.
384. *See supra* Section III.C.
385. *See supra* notes 99-103 and accompanying text.
386. *See supra* Section III.A.2, C.
387. *See supra* notes 108-112 and accompanying text.
388. *See supra* Section III.C.2.