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CRIMINALIZING THE TRANSMISSION OF HIV: CONSENT, DISCLOSURE, AND ONLINE DATING

Alexandra McCallum*

I. INTRODUCTION

Ever since Human Immunodeficiency Virus (HIV) was first recognized as a widespread public health problem, policymakers and legal scholars have considered how criminal law should be used to influence the sexual behavior of people with HIV.¹ Surely, HIV is a problem that affects the general health, safety, and welfare of citizens. Thus, as most cases of HIV are transmitted through sexual conduct,² states can regulate this conduct pursuant to their police powers.³ Generally, states that criminalize the transmission of HIV through sexual conduct provide an exception for HIV-positive individuals who disclose their status⁴ and obtain consent⁵ from their partners. However, these statutes tend to be drafted broadly and contain ambiguous disclosure and consent language.

The ambiguities surrounding the consent and disclosure exceptions pose novel problems for HIV-positive online daters. Internet dating sites provide a unique medium for an individual to contextually communicate his or her serostatus.⁶ This raises a question: Within the meaning of the transmission statutes, does

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¹ Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1408 (2013) (“The criminalization of HIV exposure has . . . received considerable treatment in legal scholarship.”).

² Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 239 (2002).

³ *See id.* at 241.

⁴ *E.g.*, OHIO REV. CODE ANN. § 2903.11(B)(1) (LexisNexis Supp. 2013) (“No person, with knowledge that the person has tested positive as a carrier of a virus that causes [AIDS], shall knowingly . . . [e]ngage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct.”).

⁵ *E.g.*, FLA. STAT. ANN. § 384.24(2) (West 2007) (“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.”).

⁶ Serostatus is defined as follows: “The state of either having or not having detectable antibodies against a specific antigen, as measured by a blood test (serologic test). For example, HIV seropositive means that a person has detectable antibodies to HIV; seronegative means that a person does not have detectable HIV antibodies.” *Education Materials*, AIDSINFO, <http://www.aidsinfo.nih.gov/education-materials/glossary/search/sero-status> (last updated Mar. 12, 2014).

communicating serostatus nonverbally constitute disclosure? Can an HIV-positive individual assume he or she obtained partner consent by displaying serostatus on an online profile? Relatedly, can the nature of the dating site itself—for example, a site for HIV-positive individuals—serve as disclosure and create a presumption of consent? Unfortunately, these answers are unknown. The behavioral complexities inherent in negotiating disclosure and consent,⁷ coupled with assumptions about Internet dating community norms, increase the likelihood that good-faith mistakes will occur. However, the current state statutory scheme does not punish according to a defendant’s degree of culpability.⁸

Part II of this Note briefly tracks the history of criminal statutes specific to HIV transmission. It also surveys the statutes that criminalize sexual transmission of HIV but provide exceptions for consent and disclosure. Lastly, Part II surveys the world of online dating and the reasons why e-dating may be particularly attractive to those living with HIV. Part III looks at the inherent flaws in state disclosure and consent provisions and raises substantive-due-process concerns relative to these flaws. Next, the analysis section provides four scenarios—the first three demonstrate how assumptions about online community norms increase the opportunity for good-faith mistakes, and the fourth presents a scenario where substantive-due-process rights may be implicated. Lastly, this Note presents a model statute and jury instruction that aim to address these problems.

II. BACKGROUND

This Part briefly surveys the United States’s legal response to the HIV epidemic. Next, it looks at the statutes that criminalize sexual transmission of HIV but provide specific exceptions for consent and disclosure. Lastly, this Part explores the world of online dating and the reasons why e-dating may attract those living with HIV.

A. *The Legal Response to HIV*

Acquired Immune Deficiency Syndrome (AIDS) is caused by HIV, a virus that is transmitted through sexual fluids, blood, and breast milk.⁹ The virus was first discovered among homosexual males in California and New York in 1981.¹⁰ As reported cases of HIV escalated and researchers gained a better scientific

⁷ Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 469 (2007) (describing sex as a complex behavior where “[HIV] disclosure and safe sex are negotiated non-verbally and contextually”).

⁸ Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1532–33 (2012).

⁹ *Can You Get HIV From . . . ?*, AVERT, <http://www.avert.org/can-you-get-hiv.htm> (last visited Mar. 19, 2014).

¹⁰ *Origins of HIV & AIDS*, AVERT, <http://www.avert.org/origin-hiv-aids.htm> (last visited Mar. 19, 2014); *History of AIDS Up to 1986*, AVERT, <http://www.avert.org/history-aids-1986.htm> (last visited Mar. 19, 2014).

understanding of the virus, policymakers took initiatives to address the growing epidemic. In September 1987, President Reagan created the Presidential Commission on the Human Immunodeficiency Virus Epidemic to advise the White House on the public health dangers resulting from the spread of HIV/AIDS.¹¹ One year later, the commission released a report on its findings and encouraged states to examine the possible need for criminal statutes specific to HIV transmission.¹² Further, by conditioning federal funding for HIV/AIDS prevention programs on the ability of state criminal laws to effectively prosecute the knowing transfer of HIV, the 1990 Ryan White Comprehensive AIDS Resources Emergency Act imposed further pressure on states to criminalize the transmission of HIV.¹³ By 1993 nearly half of the states had criminal statutes that targeted HIV transmission in some way.¹⁴

B. HIV-Specific Transmission Statutes That Target Consensual Sexual Conduct and Provide Disclosure and Consent Exceptions

Presently, twenty-four states have criminal statutes that target HIV-infected individuals who—while aware of their HIV-positive status—knowingly engage in consensual sexual relations.¹⁵ These statutes differ in construction with respect to how disclosure of one’s HIV-positive status and partner consent are addressed. Fourteen states include nondisclosure and/or lack of consent as an element of the crime and, thus, require the prosecutor to prove these elements beyond a reasonable doubt.¹⁶ Eight states afford the charged individual the opportunity to

¹¹ James B. McArthur, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 713 (2009).

¹² *Id.* at 713–15.

¹³ *Id.* at 715 (“[S]tates [must] prove the adequacy of their laws for criminal prosecution of intentional transmission of HIV before they could receive federal funding for HIV/AIDS prevention.”).

¹⁴ *Id.*

¹⁵ See ARK. CODE ANN. § 5-14-123 (2006); CAL. HEALTH & SAFETY CODE §§ 120290–91 (West 2012); FLA. STAT. ANN. § 384.24(2) (West 2007); GA. CODE ANN. § 16-5-60(c) (2011); IDAHO CODE ANN. § 39-608 (2011); 720 ILL. COMP. STAT. ANN. 5/12-16.2 (West 2002); IND. CODE ANN. §§ 16-41-7-1 (LexisNexis 2011), 35-42-1-9 (LexisNexis 2009); IOWA CODE ANN. § 709C.1 (West 2003); LA. REV. STAT. ANN. § 14:43.5 (2007); MD. CODE ANN., HEALTH-GEN. § 18-601.1 (LexisNexis 2009); MICH. COMP. LAWS SERV. § 333.5210 (LexisNexis 2005); MISS. CODE ANN. § 97-27-14(1) (Supp. 2013); MO. ANN. STAT. § 191.677 (West 2011); NEV. REV. STAT. ANN. § 201.205 (LexisNexis 2012); N.J. STAT. ANN. § 2C:34-5(b) (West Supp. 2013); 10A N.C. ADMIN. CODE 41A.0202 (2013); N.D. CENT. CODE § 12.1-20-17 (2012); OHIO REV. CODE ANN. § 2903.11(B) (LexisNexis Supp. 2013); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 2002); S.C. CODE ANN. § 44-29-145 (2002); S.D. CODIFIED LAWS § 22-18-31 (2006); TENN. CODE ANN. § 39-13-109 (Supp. 2013); VA. CODE ANN. § 18.2-67.4:1 (2009); WASH. REV. CODE ANN. § 9A.36.011 (West 2009); see also Kaplan, *supra* note 8, at 1518 n.2.

¹⁶ See ARK. CODE ANN. § 5-14-123(b) (2006); CAL. HEALTH & SAFETY CODE § 120291 (West 2012); FLA. STAT. ANN. § 384.24(2) (West 2007); GA. CODE ANN. § 16-5-

bring forth evidence of disclosure and consent as an affirmative defense.¹⁷ In these states, the prosecutor must prove only that the infected person knew he or she was infected with HIV and intentionally engaged in sexual relations with another. The burden is then placed on the defendant to prove the elements set forth in the statute's affirmative defense provision. These elements vary among the states, but most require the defendant to prove the exposed partner knew the defendant was infected with the HIV, knew the conduct could result in exposure to the HIV, and consented to engage in the conduct with that knowledge.¹⁸ Two states' criminal statutes do not mention consent or disclosure and may leave HIV-positive persons criminally liable for fully consensual acts.¹⁹ The possibility that a nonculpable individual will face criminal liability under an HIV-transmission statute is particularly threatening for HIV-positive persons who participate in online dating.

C. Online Dating—Bringing People Together

Each year, millions of people log on to Internet dating sites looking for love or sex.²⁰ The percentage of households with access to the Internet is projected to rise, which will continue to expand the consumer market for online dating services.²¹ These sites allow members to customize “profiles by answering questionnaires, as well as posting pictures, videos, and additional com-

60(c) (2011); IND. CODE ANN. §§ 16-41-7-1 (LexisNexis 2011), 35-42-1-9 (LexisNexis 2009); LA. REV. STAT. ANN. § 14:43.5 (2007); MICH. COMP. LAWS SERV. § 333.5210 (LexisNexis 2005); MO. ANN. STAT. § 191.677 (West 2011); N.J. STAT. ANN. § 2C:34-5(b) (West Supp. 2013); 10A N.C. ADMIN. CODE 41A.0202 (2013); OHIO REV. CODE ANN. § 2903.11(B) (LexisNexis Supp. 2013); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 2002); S.C. CODE ANN. § 44-29-145 (2002); VA. CODE ANN. § 18.2-67.4:1 (2009).

¹⁷ IDAHO CODE ANN. § 39-608(3) (2011); 720 ILL. COMP. STAT. ANN. 5/12-16.2(d) (West 2002); IOWA CODE ANN. § 709C.1(5) (West 2003); MISS. CODE ANN. § 97-27-14(1) (Supp. 2013); NEV. REV. STAT. ANN. § 201.205(2) (LexisNexis 2012); N.D. CENT. CODE § 12.1-20-17(3) (2012); S.D. CODIFIED LAWS § 22-18-33 (2006); TENN. CODE ANN. § 39-13-109(c) (Supp. 2013).

¹⁸ 720 ILL. COMP. STAT. ANN. 5/12-16.2(d) (West 2002); IOWA CODE ANN. § 709C.1(5) (West 2003); NEV. REV. STAT. ANN. § 201.205(2) (LexisNexis 2012); S.D. CODIFIED LAWS § 22-18-33 (2006); TENN. CODE ANN. § 39-13-109(c) (2010). The model statute offered in section III.C shifts the burden to the government to prove beyond a reasonable doubt that the defendant was culpable with respect to his partner's consent. This structure appropriately shifts the burden onto the prosecution to prove every material element of the crime beyond a reasonable doubt.

¹⁹ MD. CODE ANN., HEALTH-GEN. § 18-601.1 (LexisNexis 2009); WASH. REV. CODE ANN. § 9A.36.011 (West 2009).

²⁰ See Eli J. Finkel et al., *Online Dating: A Critical Analysis From the Perspective of Psychological Science*, 13 PSYCHOL. SCI. PUB. INT. 3, 4 (2012).

²¹ *Dating Services in the US Industry Market Research Report Now Available from IBISWorld*, PRWEB, (Sept. 9, 2012), <http://www.prweb.com/releases/2012/9/prweb9882157.htm>.

ments”²² While online dating sites enable people to connect beyond traditional geographical and sociological constraints, there is often an accompanying deficit of information as well.²³

From MillionaireMatch.com to SeniorPeopleMeet.com, niche-dating sites are expected to see the greatest growth in coming years.²⁴ Among them are sites targeting people with sexually transmitted diseases.²⁵ These sites cater to infected individuals who specifically want to date other infected individuals.²⁶ For various reasons, people with HIV and other sexually transmitted diseases often prefer these sites. One woman described the dilemmas she encountered when revealing her sexually transmitted disease to prospective mates: “It’s confusing, because you don’t know when the right time is to tell somebody. Should you be up front and get it over with or wait until the person develops feelings for you? It’s a big ethical problem.”²⁷ She also explained that when she did reveal this information, the man she was dating would often break it off.²⁸

While some individuals, like the woman above, use niche-dating sites as a way to be upfront about identity, others do just the opposite. As one scholar notes:

The online environment permits us to foster a feeling of intimacy, sharing, and connection without the real-time barriers and filters of judgments based on physical appearance, race, occupation, class, and age. This freedom is potentially liberating in that we can transcend social expectations, identity, and typical scripts for our gender, class, and roles, and experiment with alternate models of relating.²⁹

For these people, Internet dating provides an identity apart from that of an HIV-positive person. Other HIV-positive individuals prefer to reveal or reference their serostatus via online dating profiles to avoid the discomfort involved with communicating this information to partners face-to-face.³⁰

²² Trenton E. Gray, *Internet Dating Websites: A Refuge for Internet Fraud*, 12 FLA. COASTAL L. REV. 389, 392 (2011).

²³ Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 543, 553 (2011).

²⁴ PRWEB, *supra* note 21.

²⁵ See, e.g., POSITIVESINGLES, <http://www.positivesingles.com> (last visited Mar. 19, 2014) (serving individuals infected with herpes, HPV, HIV and other STDs).

²⁶ *Id.*

²⁷ Elizabeth Cohen, *Rising STD Rate Sparks Online Dating Sites*, CNN (Mar. 12, 2007, 1:36 PM), http://articles.cnn.com/2007-02-27/health/std.internet_1_herpes-web-sites-human-papillomavirus?_s=PM:HEALTH.

²⁸ *Id.*

²⁹ Fan, *supra* note 23, at 543.

³⁰ One HIV-positive interviewee in a British study on homosexual men and Internet dating described, “I still just find it very embarrassing It’s one of those things. It’s not great leading to sex.” Mark Davis et al., *E-dating, Identity and HIV Prevention: Theorising Sexualities, Risk and Network Society*, 28 SOC. HEALTH & ILLNESS 457, 470 (2006).

Internet dating sites not only serve as a meeting ground for relationship-seekers, but also a platform where individuals pursue casual sex. The capacity of the Internet to serve as a meeting ground for sexual encounters is so great that some psychologists describe it as the “new sexual revolution.”³¹

Adult dating sites facilitate casual sexual encounters among subscribers.³² Like the more traditional online dating sites, there is a wide range of niche adult dating sites that serve the HIV-positive population.³³ As these sites continue to grow in popularity, people increasingly pursue casual sex with partners met online.³⁴ Without traditional contextual sources to inform decision making, adult e-daters must rely primarily on other users’ online profiles, which may or may not contain accurate information.³⁵

III. ANALYSIS

HIV-transmission statutes targeting consensual sexual behaviors fail to draw a clear line between sex with disclosure and/or consent and sex without disclosure and/or consent. As a result of these ambiguities, situations may arise where the law extends into the bedroom, criminalizing consensual, private sexual activity. These issues are discussed in turn.

A. Disclosure and Consent

In the context of sexual relations, the law of disclosure and consent is far from clear. The difficulties in ascertaining disclosure and consent arise from the nonverbal ways people “negotiate[]” sex.³⁶ Direction as to what constitutes legally acceptable disclosure and consent has not been provided by statute or jurisprudence.³⁷ Is verbal disclosure and consent mandated? May disclosure and

³¹ See, e.g., Al Cooper & Eric Griffin-Shelley, *Introduction: The Internet: The Next Sexual Revolution*, in *SEX & THE INTERNET: A GUIDEBOOK FOR CLINICIANS* 1, 2 (Al Cooper ed., 2002).

³² See, e.g., ADULTFRIENDFINDER, <http://adultfriendfinder.com> (last visited Mar. 13, 2014).

³³ HIVAdultDating.com explains to users “[n]ow it is safe to conduct yourself openly without fear of judgment, here you will feel that peaceful feeling of acceptance. Allow yourself the opportunity to date freely and free of stress, allow yourself to feel relaxed and relieved with the other HIV positive singles from all around the world.” HIVADULT DATING, <http://www.hivadulddating.com/> (last visited Mar. 13, 2014).

³⁴ Fan, *supra* note 23, at 544.

³⁵ *Id.*

³⁶ Burris et al., *supra* note 7, at 469.

³⁷ The ambiguous consent and disclosure provisions prevent HIV-positive individuals from structuring their actions accordingly and may frustrate the purposes of the statute. One study found that “[HIV-positive] people’s misunderstanding [of consent and disclosure] could lead them to think wrongly that their actions (and inactions) are not prohibited by law.” Catherine Dodds et al., *Responses to Criminal Prosecutions for HIV Transmission Among Gay Men with HIV in England and Wales*, 17 *REPROD. HEALTH*

consent be inferred from the circumstances? Does indicating one's serostatus via an Internet dating profile constitute disclosure? The answers to these questions are uncertain. One scholar noted, "choosing to run the risk [of HIV exposure] with 'informed consent'—disclosure—is morally different from being involuntarily exposed, but in real life disclosure and consent may look more like an avian mating ritual than the negotiation of a business contract" ³⁸ The discussion below seeks to highlight the manifest difficulties in legally ascertaining disclosure and consent in the sexual context.

1. *Consent to Exposure*

Consent has the power to be morally and legally transformative.³⁹ This is particularly true when lack of consent is an element of the crime itself.⁴⁰ While consent is difficult to ascertain in the rape context, added difficulties arise in the HIV-exposure context. When determining whether sex was consensual in the rape context, the relevant inquiry is whether the partner consented to the act itself. Whether there is indicia of physical resistance, incapacity, or signs of emotional oppression, signals of nonconsent to an act are more outwardly apparent.⁴¹ Professor David Archard writes that consent to sexual relations "is an act rather than a state of mind."⁴² However, in the HIV-exposure context, consent to a risk is a subjective state of mind. Absent verbal discourse, indicators of consent or nonconsent to a risk are not easily ascertainable. That is, lack of consent to a risk is not revealed through obvious behavioral and physical signals that would place an HIV-positive person on notice that his or her partner does not consent to the risk of HIV exposure. Moreover, a blanket assumption that *no partner* would consent to the risk of HIV exposure may be inconsistent with an HIV-positive individual's past experiences and understanding about certain sexual behaviors. Indeed, there are many complicated reasons why individuals, including HIV-negative persons, may choose to assume certain health risks—particularly in the context of sexual

MATTERS 135, 143 (2009). Indeed "[b]y legitimating risk-taking via consent and disclosure . . . the law affirms the need to disclose and to gain consent. The problem is that in the absence of a clear understanding of what this means . . . some diagnosed people will place themselves at risk of prosecution." *Id.*

³⁸ Burris et al., *supra* note 7, at 509.

³⁹ Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 559 (2000).

⁴⁰ Kaplan, *supra* note 8, at 1546.

⁴¹ See, e.g., Deborah W. Denno et al., Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 171 (1994) ("There are occasionally cases that happen that way, but most of the time the signals that the victim has given, whether verbally or physically, are very clear. There is very little rape that is due to failure to communicate . . ." (quoting Linda Fairstein, Chief, Sex Crimes Prosecution Unit and Deputy Chief, N.Y. County District Attorney's Office)).

⁴² DAVID ARCHARD, *SEXUAL CONSENT* 4 (1998); Wertheimer, *supra* note 39, at 567 n.16.

relations and HIV.⁴³ As a result, it is more likely that an HIV-positive person may honestly believe his or her partner consented.

Without explicit verbal dialogue,⁴⁴ HIV-positive people look to their surroundings to determine whether their partner consented to the risk of HIV exposure.⁴⁵ Because consent to the risk of HIV is subjective in nature, the HIV-positive individual must make certain assumptions about his or her partner's consent based on the circumstances.⁴⁶

Does seeking sex in a bath house equal consent to HIV exposure? . . . If you don't ask, does that mean I don't have to tell? People may rely on contextual signals, assuming that a partner in a public sex venue who does not insist on safer sex has assumed the risk, or consented to the possibility of infection by engaging in risky behavior without inquiring about a partner's HIV serostatus.⁴⁷

As set forth above, there is a range of circumstances that may give rise to assumptions about partner consent. But when are these assumptions valid at law? And what degree of culpability, if any, should the law attach to these assumptions? The current state of the law on consent in the HIV-exposure context fails to provide answers to these questions. Moreover, HIV-transmission statutes do not account for circumstances where an individual honestly believed his partner consented to the risk of HIV exposure.⁴⁸ And mistaken beliefs are relevant to an

⁴³ See *infra* Part III.B.4 (discussing reasons why HIV-negative individuals may accept the risk of HIV exposure); see also Fadhila Mazanderani, *An Ethics of Intimacy: Online Dating, Viral-Sociality and Living with HIV*, 7 *BIOsocieties* 393, 400 (2012) (noting the “complexity of managing risk in the context of intimate relations and HIV,” and how “[i]ntimacy and risk management do not, it seems, blend well together”).

⁴⁴ Studies suggest that in some communities, nonverbal negotiation of consent and disclosure is the norm. See ADAM BOURNE ET AL., *RELATIVE SAFETY II: RISK AND UNPROTECTED ANAL INTERCOURSE AMONG GAY MEN WITH DIAGNOSED HIV 19* (2009), available at <http://www.sigmaresearch.org.uk/files/report2009d.pdf> (“There were those who were much more direct about disclosing their own HIV status to all partners, as well as always eliciting information about partners’ knowledge of their own status. However, they constitute a minority of those taking part in this research.”); Dodds et al., *supra* note 37, at 142 (“Analysis within and across interview transcripts revealed that few men disclosed their status in a clear and explicit manner. . . . [M]any respondents made what they felt to be a disclosure of their status, but which had the potential to be misunderstood by sexual partners.”).

⁴⁵ See Dodds et al., *supra* note 37, at 142.

⁴⁶ See *id.*

⁴⁷ Burris et al., *supra* note 7, at 480.

⁴⁸ See Erin E. Langley & Dominic J. Nardi, Jr., *The Irony of Outlawing AIDS: A Human Rights Argument Against the Criminalization of HIV Transmission*, 11 *GEO. J. GENDER & L.* 743, 778 (2010).

individual's moral blameworthiness.⁴⁹ Considering the purely subjective nature of consenting to a risk and the good-faith mistakes that may follow, the statutes should account for a defendant's degree of culpability vis-à-vis partner consent.⁵⁰ Grading offenses based on knowledge,⁵¹ recklessness,⁵² and negligence⁵³ would better ensure that a defendant will not become subject to disproportionate punishment.⁵⁴

2. *Disclosure of Serostatus*

Like consent, the measures an individual must take to "disclose" his or her serostatus are unclear under state statutes.⁵⁵ While case law is limited in this area, one Ohio court found that verbal disclosure sufficiently reveals one's positive HIV status; that written, signed, and notarized disclosure is unnecessary; and that after initial disclosure, an individual would not be guilty for any subsequent sexual encounters with that same partner.⁵⁶ While verbal disclosure may be sufficient, courts have yet to describe it as mandatory. It remains uncertain whether disclosure can be inferred from circumstances.

⁴⁹ See Kaplan, *supra* note 8, at 1545 ("[L]egislatures that determine that reckless conduct should be criminally liable should require the prosecutor to demonstrate that the defendant ignored a substantial and unjustifiable risk of transmission.").

⁵⁰ The Joint United Nations Programme on HIV/AIDS (UNAIDS) recommends against the use of criminal law in circumstances where the person "honestly and reasonably believed the other person was aware of his or her status through some other means." UNAIDS, ENDING OVERLY BROAD CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: CRITICAL SCIENTIFIC, MEDICAL, AND LEGAL CONSIDERATIONS 26 (2013) [hereinafter UNAIDS GUIDANCE NOTE].

⁵¹ "A person acts knowingly with respect to a material element of an offense when . . . he is aware that his conduct is of that nature or that such circumstances exist" or if "he is aware that it is practically certain that his conduct will cause such a result." MODEL PENAL CODE § 2.02 (2)(b) (1985).

⁵² "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02 (2)(c).

⁵³ "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02 (2)(d).

⁵⁴ See *infra* Part III.C.1.

⁵⁵ See, e.g., Taylor Craig Newbold, *Full Disclosure: Idaho's HIV Disclosure Laws Causing Their Own Issues*, BOISEWEEKLY (Jan. 23, 2013), <http://www.boiseweekly.com/boise/full-disclosure-idahos-hiv-disclosure-laws-causing-their-own-issues/Content?oid=2803038> (noting how Idaho's "statute does not stipulate what exactly constitutes disclosure").

⁵⁶ See *State v. Gonzalez*, 796 N.E.2d 12, 22 (Ohio Ct. App. 2003) ("A person of common intelligence would understand that verbal disclosure effectively and sufficiently reveals the information. A person of common intelligence would also understand that once the person being told hears and comprehends the information, the person is not likely to forget such a significant revelation, and does not need to be told each time before further intimacies.").

The contextual circumstances that contribute to the mistaken assumption of partner consent will likely be the same circumstances that lead to the determination that disclosure is not necessary. HIV-positive individuals may employ “a range of proxy behaviours which they believe[] to be a simulation of disclosure, and . . . [will] generate a fair idea of their partners’ status.”⁵⁷ For example, the “Code of the Condom” holds that “[t]he person who assiduously uses condoms has no obligation . . . [to] inform his prospective sexual partners of his HIV status, even when he knows himself to be infected.”⁵⁸ In this scenario, the HIV-positive individual’s assumption that his partner is familiar with the “Code of the Condom”—a community norm—may enlighten his decision that disclosure is unnecessary. The “Code of the Condom” raises another important consideration discussed in detail below; assumptions about community norms influence disclosure. Indeed, individuals living with HIV “live and work in a complicated array of circumstances,” and whether the influence of community norms or fear of personal harm, disclosure may not always be the most appropriate response.⁵⁹

Lastly, transmission laws containing disclosure provisions alone fail to adequately protect others.⁶⁰ Disclosure alone does not ensure that a partner had the information necessary to make an educated choice concerning his or her own health. Unlike consent, disclosure can occur without a partner’s awareness of the

⁵⁷ BOURNE ET AL., *supra* note 44, at 19.

⁵⁸ Lazzarini et al., *supra* note 2, at 249 (quoting David L. Chambers, *Gay Men, AIDS, and the Code of the Condom*, 29 HARV C.R.-C.L. L. REV. 353, 353 (1994)). Condom use does not absolve an HIV-positive person from criminal liability in most states. *See, e.g.*, IDAHO CODE ANN. § 39-608 (2011); MO. ANN. STAT. § 191.677(4) (West 2011); TENN. CODE ANN. § 39-13-109 (Supp. 2013). California, however, provides an exception for condom use. *See* CAL HEALTH & SAFETY CODE § 120291 (West 2012).

⁵⁹ Aziza Ahmed & Beri Hull, *Sex and HIV Disclosure*, 38 HUM. RTS. 11, 13 (2011). Scholars have noted that in certain situations, nondisclosure may be the product of power imbalances between partners and fear of physical harm. *See* Kane Race, *Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law*, 9 J. BIOETHICAL INQUIRY 327, 331 n.3 (2012) (“The very idea of disclosure assumes that sex takes place face-to-face between partners of equal power and with some impetus to speak.” (quoting Heather Worth et al., *Reckless Vectors: The Infecting “Other” in HIV/AIDS Law*, 2 SEXUALITY RES. & SOC. POL’Y 3, 10 (2005)); Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There A Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 874 (2004) (“Reasons for non-disclosure are complex. In some cases, people need to learn skills to help them disclose, something that some public health prevention programs address. In other cases, disclosure may place people at risk of other harm.” (citation omitted)).

⁶⁰ Kaplan, *supra* note 8, at 1534–35; *see, e.g.*, OHIO REV. CODE ANN. § 2903.11(B) (LexisNexis Supp. 2013) (“No person, with knowledge that the person has tested positive as a carrier of a virus that causes [AIDS], shall knowingly . . . [e]ngage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct . . .”).

corresponding risks of HIV exposure.⁶¹ For example, the exposed partner may be intoxicated such that he or she could not appreciate the risks involved. Awareness, on the other hand, can occur without disclosure.⁶² As discussed above, risk awareness can be derived from circumstances alone. “While disclosure is evidence of awareness of risk, the two are not coextensive.”⁶³ Thus, if criminal-transmission statutes are to protect those powerless to protect themselves from the health risks associated with HIV exposure, disclosure language must be discarded.

3. *Burdening Privacy Rights*

As implied in the previous subsection, neither legislatures nor courts have defined whether verbal consent and disclosure is mandatory. The Internet introduces a platform where serostatus can be communicated nonverbally and consent can be negotiated based on the circumstances. For example, one’s presence on an HIV-specific dating site discloses serostatus and contextually communicates consent to exposure.⁶⁴ Where it is unclear whether the exposure statutes impose a mandatory verbal disclosure and consent rule, criminal laws may reach private, consensual sexual conduct.

As discussed in detail below, there are many complicated reasons why HIV-negative individuals may wish to expose themselves to the virus,⁶⁵ and the right to privacy under the Fourteenth Amendment may protect an individual’s interest to do so.⁶⁶ The U.S. Supreme Court has held that the privacy right includes an “interest in independence in making certain kinds of important decisions.”⁶⁷ After first identifying the unenumerated substantive-due-process right of privacy in *Griswold v. Connecticut*,⁶⁸ the Supreme Court has spent nearly four decades determining its reach.⁶⁹ *Lawrence v. Texas*⁷⁰ served as a “powerful affirmation of a

⁶¹ See Kaplan, *supra* note 8, at 1534–35 (discussing various reasons disclosure of HIV status may not by itself reduce the risk of HIV transmission).

⁶² *Id.* (without disclosure “an individual may know her partner’s serostatus . . . or may be unsure of a partner’s serostatus but be aware of the risk of transmission.”). *But see* R. v. Cuerrier, [1998] 2 S.C.R. 371, 372 (Can.) (“Without disclosure of HIV status there cannot be a true consent.”).

⁶³ See Kaplan, *supra* note 8, at 1534.

⁶⁴ See discussion *infra* Part III.B.4.

⁶⁵ See *infra* text accompanying notes 120–123.

⁶⁶ See *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (“[T]he right [to privacy] has some extension to activities relating to . . . contraception . . .”).

⁶⁷ *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (citations omitted).

⁶⁸ 381 U.S. 479, 484–86 (1965).

⁶⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (finding that the right to privacy encompasses the rights of adults to engage in private, consensual sexual conduct); *Roe*, 410 U.S. at 154 (finding the “right of personal privacy includes the abortion decision”).

⁷⁰ 539 U.S. 558 (2003).

right to privacy.”⁷¹ *Lawrence* recognized that the right to privacy extended to private, consensual sexual relations.⁷² Although the Court neither described this right as fundamental nor articulate a level of scrutiny, scholars suggest that laws infringing upon this right must meet some form of heightened scrutiny.⁷³

Assuming laws concerning the right to private, consensual sexual activity are subject to heightened scrutiny, it follows that “[t]he means chosen must be more than a reasonable way of attaining” the state’s policy objective.⁷⁴ Whether laws implicating this right are subject to some form of intermediate or strict scrutiny, such laws must be “narrowly tailored” to achieve the state’s goals.⁷⁵

In light of the reasoning above, the ambiguities surrounding the consent and disclosure provisions in the HIV-exposure statutes may offend constitutional principles. Because the right to consensual sexual activity is protected, thus demanding some form of heightened scrutiny, HIV-exposure laws need to be narrowly tailored such that only culpable behavior is punished. Online dating sites make nonverbal disclosure and consent possible. With no guiding standards as to whether nonverbal consent and disclosure is legally permissible, prosecutors may bring charges against HIV-positive individuals for engaging in private, consensual sexual activity—constitutionally protected behavior. Given the stigma that already accompanies HIV,⁷⁶ the chances are greater that wholly nonculpable behavior will become subject to selective, morality-based prosecutions.⁷⁷

⁷¹ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 868 (4th ed. 2011).

⁷² *Lawrence*, 539 U.S. at 567.

⁷³ Dean Erwin Chemerinsky highlights two reasons why laws implicating the right to private, consensual sexual activity may be subject to heightened scrutiny. First, the *Lawrence* court relied on past privacy cases where strict scrutiny was applied. Second, the State of Texas’s proffered justification for its deviate sexual intercourse law—advancing moral interests—would traditionally satisfy rational basis review. However, the law was invalidated in this case. CHERMERINSKY, *supra* note 71, at 868.

⁷⁴ CHERMERINSKY, *supra* note 71, at 553.

⁷⁵ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569–70 (2001) (holding that some regulations reviewed under intermediate scrutiny do not need to be the least restrictive alternative, but must be narrowly tailored and substantially related to the state’s goals); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80 (1986) (explaining that strict scrutiny analysis mandates that laws be narrowly tailored to accomplish a compelling state purpose).

⁷⁶ Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1185–86 (2009) (explaining how discrimination against people living with HIV is “rampant”); see also Kaplan, *supra* note 8, at 1536 (“Criminalizing sexual activity regardless of the actual risk it poses uses criminal law’s expressive purpose of condemnation to endorse this stigma.”).

⁷⁷ Cf. CHERMERINSKY, *supra* note 71, at 970 (explaining how vague laws restricting speech can create a risk of selective prosecution because under vague laws “the government can choose who[m] to prosecute based on their views or politics” without clear notice of what conduct is prohibited).

B. Consent, Disclosure, and Online Dating

The consent and disclosure provisions in HIV-transmission statutes disregard the complexities involved in negotiating sex. The Internet adds a new layer of complication.⁷⁸ As discussed in Part II.C, the Internet has become an important venue for people to meet sexual and romantic partners,⁷⁹ and many HIV-positive individuals enjoy the conveniences of online disclosure. Given the Internet's popularity as a means to seek partners and the conveniences of online disclosure, it is logical to assume that the Internet would encourage candor and facilitate the effective negotiation of consent and disclosure. However, the Internet forum actually may frustrate these purposes.

One study noted how concern among HIV-positive individuals about "the lack of control they now exercised over . . . personal information meant they were now rarely open about their HIV status among friends and acquaintances."⁸⁰ These individuals were reluctant to be candid about their HIV status and safer sex practices on social sexual networking sites.⁸¹

Moreover, design features of online dating profiles restructure sexual negotiation, giving rise to new assumptions about a partner's HIV status and normalizing ambiguous disclosure practices.⁸² For example, one study observed how routine prompting of HIV status on profiles may alter the practices and expectations of those navigating the online dating context.⁸³ "Where previously, HIV-negative men were encouraged to presume all their sexual partners were potentially HIV-positive and modify their sexual practice accordingly, increasingly they are much more likely to presume their partners are HIV-negative unless circumstances (such as reluctance to disclose HIV status) indicate otherwise."⁸⁴

While in some cases, the Internet may break down initial barriers to HIV disclosure and encourage frank discussions about HIV status and partner consent, the *Internet itself* is often the barrier to these frank discussions. In the online dating

⁷⁸ Nicolas Sheon & G. Michael Crosby, *Ambivalent Tales of HIV Disclosure in San Francisco*, 58 SOC. SCI. & MED. 2105, 2116 (2004) (noting that the Internet has "dramatically affected the calculus of risk and norms of disclosure").

⁷⁹ Mary D. Fan, *Decentralizing STD Surveillance: Toward Better Informed Sexual Consent*, 12 YALE J. HEALTH POL'Y L. & ETHICS 1, 18–22 (2012). It is worth noting that numerous HIV-positive individuals already have been prosecuted for exposing partners they met online to the virus. See, e.g., *Boise Man Charged with Transferring HIV*, IDAHO PRESS TRIB. (Sept. 14, 2010, 12:59 PM), http://www.idahopress.com/news/article_bbf76ac-c032-11df-9d38-001cc4c002e0.html; *Man Given 25 Years for Not Disclosing HIV*, QCONLINE, (May 02, 2009, 11:11 PM), <http://qconline.com/archives/qco/display.php?id=437798>; Patricia M. Murret, *Man Accused of Exposing Woman to HIV*, GAZETTE.NET, (Apr. 29, 2009), http://ww2.gazette.net/stories/04292009/gaitnew205325_32520.shtml.

⁸⁰ Dodds et al., *supra* note 37, at 141.

⁸¹ *Id.*

⁸² See Kane Race, *Click Here for HIV Status: Shifting Templates of Sexual Negotiation*, 3 EMOTION, SPACE & SOC'Y 7, 8–11 (2010).

⁸³ *Id.* at 13.

⁸⁴ *Id.*

environment, context may speak loudly and effectively. When it does, users glean the same information from the context (i.e., an individual's HIV-positive status) and share a common understanding based on this information.⁸⁵ However, in some instances, context does not speak as effectively as one may assume. In these instances, good-faith mistakes are likely to occur—mistakes about a partner's consent to HIV exposure among them.⁸⁶

This Note proposes four scenarios where the various problems surrounding disclosure and consent may manifest in the context of online dating. Although these scenarios are hypothetical, they are informed by findings from studies and interviews with HIV-positive and -negative e-daters. The first three scenarios serve to show how various assumptions about online dating community norms may lead to mistakes regarding partner consent. The fourth scenario provides a situation where criminal liability may attach to constitutionally protected private, consensual sexual conduct.

1. Serostatus Displayed on an Online Dating Profile

In this scenario, the HIV-positive e-dater—let's call him Bob—posts his serostatus prominently on his profile. Angela, an HIV-negative e-dater does not notice the serostatus and later engages in sexual intercourse with Bob. In this scenario, Bob believes verbal disclosure is unnecessary because he indicated his serostatus on his online profile.⁸⁷ He assumes, in good faith, his partner knew he was HIV positive.

Bob's assumption that Angela consented to exposure was further informed by one online dating community norm called "serosorting." Serosorting is an HIV-prevention practice⁸⁸ where individuals select romantic or sexual partners based on those that share an identical serostatus.⁸⁹ Potential partners may rely on Internet profiles for serosorting.⁹⁰ Based on Bob's understanding that serosorting is

⁸⁵ See *infra* Part III.B.4.

⁸⁶ See *infra* Parts III.C.1–3.

⁸⁷ According to one study, "[n]arratives that described Internet cruising suggested that personal profiles eliminate the need to discuss status in person, or even online." Sheon & Crosby, *supra* note 78, at 2112.

⁸⁸ The Center for Disease Control and Prevention explicitly states that it does not recommend serosorting as a safer sex practice. It cautions, "[s]erosorting is not recommended because: (1) too many MSM [men seeking men] who have HIV do not know they are infected because they have not been tested for HIV recently, (2) men's assumptions about the HIV status of their partners may be wrong, and (3) some HIV-positive men may not tell or may misrepresent their HIV status." *Serosorting Among Gay, Bisexual and Other Men Who Have Sex with Men*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/msmhealth/Serosorting.htm> (last updated Oct. 24, 2011).

⁸⁹ Kaplan, *supra* note 8, at 1563.

⁹⁰ DANIEL E. SICONOLFI & ROBERT W. MOELLER, *SEROSORTING*, 19 BETA 45, 45 (2007), available at http://img.thebody.com/sfaf/pdfs/winter07_serorting.pdf. One study "found that the [I]nternet was generally regarded by HIV-positive men as a safer space in which they could signal their HIV status to other positive men." Race, *supra* note 82, at 11.

common practice within HIV online dating circles, he assumes there is a high probability that Angela engages in the practice of serosorting.⁹¹ In other words, Bob believed Angela was HIV positive as well. Under these good-faith assumptions, Bob does not disclose his status. Indeed, studies have confirmed that perceptions about a partner's HIV status often influence an individual's decision to disclose.⁹² As demonstrated in this scenario, assumptions based on e-dating norms and the ability of the Internet to communicate serostatus propagate mistaken beliefs about consent and disclosure.

2. Code-Word Disclosure

In this scenario, Ralph, a homosexual HIV-positive e-dater, relies on cultural code words to communicate his serostatus via his online dating profile. The responding partner, Stuart, is HIV negative and does not understand the cue word Ralph used. Without knowing Ralph was HIV-positive, Stuart engages in sexual intercourse with Ralph after responding to Ralph's Internet dating profile.

The use of code language largely results from e-daters' desires to present themselves in a favorable light or to avoid the unsexy conversation accompanying dialogue about HIV. As one scholar noted, "because of the self-advertising imperative in the online marketplace for sex and romance, ads and representations may be deliberately opaque, euphemistic, ambiguous, and suggestive."⁹³ For example, one study found that some e-daters disposed of the box indicating their HIV serostatus on Gay.com (an online dating site).⁹⁴ Instead they specified that they practiced safe sex "sometimes," instead of "always."⁹⁵ In a sexier manner, these modifications served as a discrete code suggesting they were HIV-positive.⁹⁶ An interviewee in the study expressed this sentiment:

I don't disclose. I still just find it very embarrassing I don't mind telling you. It's one of those things. It's not great leading to sex. It's like putting the goddamned condom on in the first place. There is nothing sexy about discussing you're HIV positive prior to doing the deed . . . if you put 'sometimes' or 'never' for safe sex on your profile, everyone assumes.⁹⁷

⁹¹ See Dodds et al., *supra* note 37, at 142 ("Just as disclosure was sometimes ambiguous, so were the practices that some men described as 'ensuring' they knew whether their sexual partners also had HIV. Actually, gaining unequivocal understanding of sexual partners' HIV infection was rare.")

⁹² Robert Klitzman et al., *It's Not Just What You Say: Relationships of HIV Disclosure and Risk Reduction Among MSM in the Post-HAART Era*, 19 AIDS CARE: PSYCHOL. SOCIO-MED. ASPECTS AIDS/HIV 749, 749–51 (2007).

⁹³ Fan, *supra* note 79, at 27–28.

⁹⁴ Davis et al., *supra* note 30, at 468–70, 472.

⁹⁵ *Id.* at 469–70.

⁹⁶ Fan, *supra* note 79, at 28.

⁹⁷ Davis et al., *supra* note 30, at 470.

Suggesting serostatus by expressing desire for unprotected sex may be a painless and sexy way for this interviewee to disclose his status.⁹⁸

Others may use explicit images of unsafe sex to communicate serostatus. Consider the following conversation between an interviewer and interviewee:

- MD: So how do you present yourself on the website? Do you say you are positive?
- Interviewee: I used to do and I deleted that part of my profile. If people ask me the question I will always tell the truth. If you look at my site, my name and the fact that I say I never practise safe sex and just look at the pictures that I have got posted there. Quite frankly if you have to ask the question then you're being pretty damn naïve⁹⁹

Turning back to our fictional characters, Ralph, in good faith, assumed Stuart understood that practicing safe sex “sometimes” constituted disclosure of his serostatus. In other words, he engaged in a “proxy behaviour[] . . . believed to be a simulation of disclosure.”¹⁰⁰ Ralph’s assumptions about Stuart’s understanding of online community code and norms informed his decision that disclosure was unnecessary.

Ralph’s experience is parallel to that of one e-dater who was a respondent in a British study that explored instances of unprotected sex among homosexual men diagnosed with HIV.¹⁰¹ This man recounted an incident where he initially assumed his partner was aware of his HIV-positive status.¹⁰² Sensing his partner was not aware of his serostatus, however, the man mentioned he was “poz”; his partner then responded, “[w]hat does poz mean?”¹⁰³ The man characterized this experience as a “learning point” where he realized that “even though [a serostatus reference] is down on my profile[,] . . . I have to get back to how it used to be where I don’t make that assumption”¹⁰⁴ His experience highlights how online dating more readily fosters mistaken assumptions about partner consent—assumptions that he would not have made in more traditional social settings.

Ralph and the British interviewee communicated serostatus using language they understood to be common parlance in the online dating community. Nevertheless, their partners were unfamiliar with this vocabulary. The examples in

⁹⁸ *Id.*

⁹⁹ *Id.* at 468.

¹⁰⁰ BOURNE ET AL., *supra* note 44, at 19 (characterizing one’s “ticking ‘safer sex to be discussed’ on an online profile” as one of these “proxy behaviors”). *Id.* Similar to Ralph’s assumption, the Relative Safety II researchers found that “[a] large number of respondents who used [online dating sites] indicated that safe sex ‘needs discussion’ on their user profile, believing this to be a clear indicator of their HIV infection.” *Id.* at 26.

¹⁰¹ *Id.* at 26.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

this section serve to reemphasize how assumptions about online community norms may lead to good-faith mistakes regarding partner disclosure and consent.

3. *The Adult Dating Site*

This scenario concerns Lola and Jack, two individuals who meet on an adult dating site. Lola is HIV positive, and Jack is HIV negative. Without discussing serostatus, the two engage in casual, unprotected sex. Given the risks that arise from engaging in casual, unprotected sex with partners met over the Internet—among them, the risk of contracting HIV—Lola assumed that Jack consented to the risk of exposure.

Assumptions about the behaviors of online sex seekers inform the HIV-positive individual's determination of whether disclosure is necessary.¹⁰⁵ The risk of HIV infection is heightened when “[o]nline sex-seekers are more apt to engage in riskier behaviors, such as casual sex and concurrent partnerships.”¹⁰⁶ The Internet also enables “targeted shopping among searchable personals for someone amenable to riskier modes of sex, such as ‘barebacking’—the practice of anal or vaginal sex without a condom.”¹⁰⁷ Lola's assumption that Jack was receptive to sexual risk-taking with concurrent partners led her to the conclusion that he consented to the risk of exposure.

Additionally, Lola's experience with past partners, who all took measures to mitigate the risk of exposure, led her to believe that Jack consented because he did not inquire about her status. Studies show that people acknowledge the risks involved with engaging in casual sex with partners met over the Internet. Around 64% of people ages eighteen to twenty-four have discussed their HIV status with partners met online.¹⁰⁸ Meanwhile, approximately 75% of persons aged twenty-five and older inquired about HIV status with online partners.¹⁰⁹ An HIV-positive person might believe that because past partners inquired about serostatus¹¹⁰ or used

¹⁰⁵ For some individuals, nondisclosure about being HIV-positive or HIV-negative is accepted as a norm in the casual encounter context. For example, consider the comments of this HIV-negative interviewee: “It must be so impossible to disclose, particularly in a casual situation. I don't think disclosure is a responsibility. It's a bonus. I just think everyone's potentially HIV positive, that's how I deal with it.” Race, *supra* note 82, at 11. This man, along with other men interviewed in this study, adhere to the “traditional policy of assuming any of their casual partners could be HIV-positive”—a policy “situated in terms of the norms of non-disclosure that have operated historically in many casual sex contexts.” *Id.*

¹⁰⁶ Fan, *supra* note 23, at 554; *see also* Fan, *supra* note 79, at 27–28.

¹⁰⁷ Fan, *supra* note 23, at 554.

¹⁰⁸ Mary McFarlane et al., *Young Adults on the Internet: Risk Behaviors for Sexually Transmitted Diseases and HIV*, 31 J. ADOLESCENT HEALTH 11, 14, tbl.2 (2002).

¹⁰⁹ *Id.*

¹¹⁰ *See* Race, *supra* note 82, at 12 (interviewing one HIV-negative man who explained that he “always asked” about his partner's serostatus before having unprotected sex).

a condom,¹¹¹ the partner who does not take these precautions consents to the risk of exposure.

In the context of online sex-seeking, an HIV-positive person may believe one's partner has a greater responsibility to mitigate the risks of HIV exposure.¹¹² She assumes that the risks flowing from casual sex with Internet partners are apparent. Furthermore, her experience with past partners, who all took precautions, lend credence to the belief that sexual partners will always inquire about serostatus if they are truly concerned. Under these assumptions, she feels her responsibility to disclose is negated. Indeed, "[s]tudies of HIV-positive people who fail to disclose their status to sexual partners indicate that one commonly proffered reason for not disclosing was that individuals felt a lessened sense of responsibility or concern for the sexual partner in the casual encounter context."¹¹³ The world of online sex-seeking alters perceptions about rights, responsibilities, and disclosure.¹¹⁴ As a result, the Internet dating site, as a medium for casual sex-seeking, more readily fosters mistaken assumptions about disclosure and consent.

4. *Communications over an HIV-Specific Dating Site*

Run a standard Google search using the key words "HIV" and "online dating," and dozens of dating sites targeting the HIV-positive population appear. As discussed above, HIV-specific dating sites permit individuals to reveal their positive status to prospective partners without the discomfort involved with face-to-face disclosure.¹¹⁵ Some of the HIV dating sites even seek to attract potential members by appealing to the fear of disclosure.¹¹⁶ In this context, disclosure occurs nonverbally in two ways. First, presence on the dating site itself may serve as a means of disclosure,¹¹⁷ and second, serostatus may be explicitly revealed on one's dating profile. Thus, membership on an HIV dating site, or serostatus disclosure via profile, replaces verbal disclosure and may discourage frank discussions.

¹¹¹ See *id.* at 11 (stating that a number of HIV-negative men found that "the use of condoms tended to substitute for the need to know their partner's HIV status").

¹¹² See Ahmed & Hull, *supra* note 59, at 12.

¹¹³ Fan, *supra* note 79, at 22; see also Dodds et al., *supra* note 37, at 141 (finding that some HIV-positive individuals believed that anonymous, casual sexual settings carried a lower risk of prosecution because they assumed that "people in such environments knew and accepted the risks").

¹¹⁴ See Ahmed & Hull, *supra* note 59, at 12.

¹¹⁵ See *supra* note 30 and accompanying text.

¹¹⁶ See, e.g., HIVDATING, <http://www.hiv-dating.org/> ("If you're looking for love and companionship without the fear of judgment and disclosure, you've come to the right place!") (last visited Mar. 20, 2014).

¹¹⁷ Profiles on certain HIV-specific dating sites may make no mention of serostatus at all to avoid identification of oneself in terms of an illness. See Whitney Digilio & Kate Klonick, *Online Dating Helps People With AIDS, HIV*, ABC NEWS (Dec. 1, 2006), <http://abcnews.go.com/Health/story?id=2690839&page=1#.UHCfchXA-Jp>.

For most individuals, HIV-positive dating sites serve as a forum where HIV-positive individuals go to forge a relationship. However, HIV-negative individuals may be active on these sites as well. In February of 2003, an article appeared in *Rolling Stone Magazine* identifying a practice called “bug chasing.”¹¹⁸ The author described “bug chasers” as HIV-negative gay men who actively seek infection from HIV-positive individuals.¹¹⁹ While this practice has been questioned as myth, studies have shown the phenomenon does exist among a minority of gay men.¹²⁰ In many ways, the subculture is driven by Internet dating forums; “[t]he Internet has proven itself a powerful tool in linking individuals with similar, and in some cases, marginalised interests.”¹²¹

The bug-chasing subculture exemplifies the many complicated reasons why individuals accept certain health risks.¹²² So, why might a person want to contract HIV? Researchers have suggested several themes. First, bug chasers may believe that infection is inevitable and contracting HIV eliminates uncertainty and fosters a sense of relief.¹²³ Meanwhile, others may view sex without condoms as erotic and dangerous.¹²⁴ Researchers also suggest that bug chasers may pursue infection to escape loneliness or may do so to gain a sense of empowerment by “preemptively fulfilling . . . negative societal labels.”¹²⁵

Given the reasons why an HIV-negative person may seek exposure, this Note proposes one last scenario. Lars is an HIV-positive homosexual male who is active on an HIV-specific dating site. Fearing HIV infection is inevitable, Gus, who is HIV negative, decides to take control and engage in sexual relations with Lars. Lars believes verbal disclosure is not necessary because his presence on an HIV-positive dating site speaks for itself. He believes responding potential partners are HIV positive or, possibly for one of the reasons discussed above, otherwise willing

¹¹⁸ Gregory A. Freeman, *In Search of Death*, ROLLING STONE, Feb. 6, 2003, at 44.

¹¹⁹ *Id.*

¹²⁰ CHRISTIAN GROV & JEFFREY T. PARSONS, *Bug Chasing and Gift Giving: The Potential for HIV Transmission Among Barebackers on the Internet*, 18 AIDS EDUC. PREVENTION 490, 490–91 (2006) (This data suggests that “bug chasing and gift giving do exist; however a sizable portion of both bug chasers and gift givers were not intent on spreading HIV”). “Gift giving” refers to “HIV-positive men who seek to pass HIV to seronegative men . . .” *Id.*

¹²¹ Christian Grov, *Barebacking Websites: Electronic Environments for Reducing or Inducing HIV Risk*, 18 AIDS CARE 990, 995 (2006). “The Internet, and specifically websites devoted to barebacking, has also been connected to the emerging phenomena of gift giving and bug chasing.” *Id.* at 991.

¹²² “Intimacy and risk management do not, it seems, blend well together, as has been vividly illustrated in research on the subculture of ‘barebacking’ and the active pursuit of HIV infection (‘bug chasing’) among gay men.” See Mazanderani, *supra* note 43, at 400.

¹²³ Grov & Parsons, *supra* note 120, at 492; see also Richard Pendry, *HIV ‘Bug Chasers’: Fantasy or Fact?*, BBC NEWS, <http://news.bbc.co.uk/2/hi/health/4895012.stm> (last updated Apr. 10, 2006, 10:22 PM) (describing one man’s feelings as “welcom[ing] the ‘inevitable’” as he learned of his diagnosis of being HIV positive).

¹²⁴ GROV & PARSONS, *supra* note 120, at 492.

¹²⁵ *Id.*

to assume the risk of HIV exposure. Under these assumptions, Lars and Gus never discuss one another's serostatus and engage in private, consensual sexual relations.

As discussed in Part II.A.3, private, consensual sexual relations are a protected privacy right under the Fourteenth Amendment. Supposing Gus presses charges, and Lars is ultimately convicted under an HIV-exposure statute, Lars would be convicted of a crime based on the exercise of his own constitutional rights. For purposes of examination, this scenario is presented hypothetically in the Internet dating context. However, there are reported cases where a consenting partner ultimately decides to press charges, often for retaliatory purposes, against an HIV-positive partner.¹²⁶ It is possible that this scenario has already played out in real life as sexual relations risking HIV exposure generally occur in private and beyond the purview of witnesses.¹²⁷ Thus, fact finders are generally presented with "he said, she said" testimony at trial.¹²⁸

C. Suggested Remedies

Consent to sexual relations is expressed through action, whereas consent to a risk is a state of mind.¹²⁹ Without uttering a word, nonconsent to an act can be ascertained by physical indicators. However, in the absence of a verbal exchange, it is difficult to determine nonconsent to the risk of HIV exposure. Invariably, an HIV-positive person will be mistaken about his need to disclose based on misunderstanding about his partner's consent. Where courts have yet to impose a mandate of verbal disclosure and consent, it is tempting to advocate for an affirmative consent and disclosure requirement to rectify problems of mistake. A verbal mandate would be the most effective way to prevent misunderstandings concerning consent to HIV exposure. Aside from the practical considerations surrounding the question of how this approach could be incorporated into our legal system,¹³⁰ imposing a verbal-permission rule every time an HIV-positive

¹²⁶ For example, in one reported Canadian case, a woman was charged with aggravated sexual assault for not disclosing her HIV-positive status to her boyfriend when they began dating five years earlier. At some point, they broke up, and the man was charged with assault in response to complaints of domestic violence against the woman. In retaliation, he asserted that she did not disclose her HIV-positive status before they engaged in unprotected sexual relations, although the woman testified that they had used condoms since their relationship commenced. "In a bitter irony, he was given an absolute discharge with no criminal record despite being found guilty of assaulting her and her son." Alison Symington, *Criminalization Confusion and Concerns: The Decade Since the Cuerrier Decision*, 14 HIV/AIDS POL'Y & L. REV. 4, 9 (2009); see also BOURNE ET AL., *supra* note 44, at 12 (finding that some HIV-positive individuals were fearful of "retribution from disgruntled ex-partners").

¹²⁷ See Fan, *supra* note 23, at 574–75 (discussing the problems with proving consent at trial).

¹²⁸ *Id.* at 574.

¹²⁹ See *supra* Part III.A.1.

¹³⁰ Dan Subotnik, *Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy*, 41 AKRON L. REV. 847, 857–59 (2008). It is worth noting that a

individual engages in sexual intercourse “would impose an excessive degree of formality and artificiality on a dimension of life in which spontaneity is important.”¹³¹

If consent is not negotiated verbally, then it will be negotiated based on contextual cues and understandings about human behavior. However, these indicators are imperfect sources of information. Thus, there is a strong probability, especially when Internet dating is concerned, that an HIV-positive individual will hold a mistaken, but good-faith, belief that his or her partner consented. As demonstrated above, community norms exist within the HIV Internet dating community. Consequently, there are outsiders unaware of these conventions, and HIV-positive individuals may mistakenly rely on these norms to their detriment.

In their current form, the transmission statutes do not distinguish between those who intend harm from those who hold a good-faith belief that a partner consented. The statutes also fail to proportionately assign punishment to those who were reckless or negligent with regard to their partner’s consent.¹³² Accordingly, the possibility for disproportionate punishment results.¹³³ The laws need to be restructured in a way that allocates punishment based on the degree of blameworthiness inherent in the conduct itself. Professor Margo Kaplan recently proposed a sample statute¹³⁴ that would afford punishment according to a defendant’s degree of blameworthiness relative to her partner’s consent. Kaplan’s sample statute reads as follows:

verbal mandate would not resolve issues relating to conflicting evidence—the “he-said, she-said” problem—that may arise in criminal prosecutions under HIV-exposure statutes.

¹³¹ Wertheimer, *supra* note 39, at 574.

¹³² Kaplan, *supra* note 8, at 1532–34.

¹³³ All states with HIV-exposure statutes categorize the offense as a felony with the exception of Maryland and North Carolina. MD. CODE ANN., HEALTH-GEN § 18-601.1(b) (LexisNexis 2009); 10A N.C. ADMIN. CODE 41A.0202 (2011).

¹³⁴ Professor Kaplan proposes three changes to the transmission statutes. *See generally* Kaplan, *supra* note 8. First, she suggests the statutes should punish in terms of risk creation. This requires juries to consider all the factors that influence the risk to which the defendant exposed the victim, such as viral load and condom use. Second, she proposes that the prosecution demonstrate the defendant had a culpable mental state as to transmission. Third, she suggests “a more nuanced approach to consent that focuses on consent to degrees of risk.” *Id.* at 1522.

It is unlawful for an individual

- (1) [with the purpose of infecting another with HIV]
- (2) [who is aware of and ignores a substantial and unjustifiable risk that her actions will result in HIV infection of another]
- (3) [who should have been aware of a substantial and unjustifiable risk that her actions will result in HIV infection of another]

to engage in conduct that creates a substantial and unjustifiable risk of infecting another with HIV. For the purposes of this statute, the word “creates” applies only to the degree of risk that the defendant [knows/recklessly disregards a risk/should have known] the victim did not consent to.¹³⁵

1. *Defects Cured*

Kaplan’s statute resolves several issues discussed in this Note. First, the model statute assigns punishment in relation to the defendant’s degree of moral blameworthiness. For example, an HIV-positive defendant who knows his or her partner did not consent to HIV exposure may be distinguished from the defendant who should have been aware his or her partner did not consent. The defendant who, albeit negligently or recklessly, is mistaken about his partner’s consent may be punished proportionately.¹³⁶ Statutory construction in this manner avoids the risk of disproportionate punishment. Consider, for example, scenario one where Bob posted his HIV-positive status on his online dating profile but failed to verbally disclose his status to his partner. Here, the jury may choose to convict Bob of a lesser offense based on a negligence standard—even though he believed in good faith that his partner knew his serostatus, he should have been aware of the substantial and unjustifiable risk that his partner did not consent to exposure.

Second, the statute removes all of the disclosure language. Disclosure alone does not ensure that an exposed partner consciously appreciated the risks of exposure. Punishment is centered on the defendant’s level of awareness in relation to what his or her partner consented. Awareness of partner consent need not result from verbal exchange alone, and Kaplan’s statute permits partners to negotiate consent contextually.¹³⁷

¹³⁵ Kaplan, *supra* note 8, at 1551.

¹³⁶ Still, as noted by the Joint United Nations Programme on HIV/AIDS, “because of prejudices against people living with HIV—including those from marginalized and stigmatized populations”—applying standards of recklessness and negligence could be problematic because juries, courts, and prosecutors may find that “any sexual acts” by HIV-positive people meet these standards of culpability. UNAIDS GUIDANCE NOTE, *supra* note 50, at 23.

¹³⁷ See Kaplan, *supra* note 8, at 1550–51 (discussing current statutes’ failure to consider social cues as a form of consent).

2. *Remaining Flaws*

While Kaplan's statute cures some of the defects surrounding the consent and disclosure provisions, problems still remain. Namely, "what is unreasonable behavior or unusual risk in one setting or sub-population may not be in another. A jury of sexually active gay men might see a case differently than a jury of straight married people."¹³⁸ Individuals vary with respect to how they perceive risk. First, people regard purely voluntary risks as less threatening.¹³⁹ Two people who meet on an adult dating website and engage in casual sex may regard the risks of their behavior differently than a juror who would never voluntarily do the same.

Second, when sexual activity is concerned, the degree of risk a person identifies will vary depending on the information presented to him or her and his or her understanding of the nature of the relationship involved.¹⁴⁰ For example, the HIV-positive individual who is familiar with and informed about the "Code of the Condom"¹⁴¹ might find the risk of nonconsent lower than the juror who is unfamiliar with this community norm. Also, an understanding of the complexities that are embedded in the relationship at issue influences risk perception. Heightened risk perception may result from the conservative juror's inability to understand the complexities of online relationships and community norms. Because the conservative juror does not understand the nature of these casual, online sexual relationships, she finds the risk of partner nonconsent greater. Lastly, studies demonstrate gender differences in risk perception.¹⁴² Women identify risks as greater and are less willing to tolerate them than men.¹⁴³

Therefore, when relying on a juror's determination of what the defendant knew, what risks he or she consciously disregarded, and what risks he or she should have been aware of, how may we bridge the disparity between a defendant and a juror's risk evaluation of nonconsent? There are no definitive answers, but providing the juror with more information is a good starting point. Information can

¹³⁸ Burris et al., *supra* note 7, at 509.

¹³⁹ David Aldous, *Risk to Individuals: Perception and Reality*, in ON CHANCE AND UNPREDICTABILITY: 13/20 LECTURES ON THE LINKS BETWEEN MATHEMATICAL PROBABILITY AND THE REAL WORLD 53, 56 (2012), available at http://www.stat.berkeley.edu/~aldous/Real-World/draft_book.pdf.

¹⁴⁰ Kaplan, *supra* note 8, at 1550–51; see also BOURNE ET AL., *supra* note 44, at 7 (indicating that "[a]fter diagnosis, men's risk perceptions continue to undergo significant changes, influenced by their own emotional state, experience, and information gained as they [made] decisions about being sexually active individuals with HIV").

¹⁴¹ See *supra* note 58 and accompanying text.

¹⁴² Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 424 (2006); see also Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, 1997 U. CHI. LEGAL F. 59, 68 ("Several dozen studies have documented the finding that men tend to judge risks as smaller and less problematic than do women.").

¹⁴³ Levit, *supra* note 142, at 424.

alter judgments about risk.¹⁴⁴ Because familiarity with community conventions guide individual risk evaluation, it is important to educate the jury on these community norms.

As exemplified in the above scenarios, the online dating community maintains its own norms and language that are unlikely to be understood by a community of traditional jurors.¹⁴⁵ Information about how online community conventions influence assumptions about partner consent may help bridge the defendant/juror risk-evaluation gap. Educating the jury about these norms may encourage them to assign punishment proportionate to a defendant's blameworthiness. Jury instructions may be an effective means by which to provide this information. As the United States Supreme Court has said, "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law."¹⁴⁶

3. *Model Jury Instruction*

In light of the considerations above, this Note proposes the following model jury instruction:

The prosecution is required to prove beyond a reasonable doubt that the defendant [knew/recklessly disregarded/should have known] [name] did not consent to the risk of HIV infection. When considering whether the defendant [knew/recklessly disregarded/should have known] [name] did not consent to the risk of HIV infection, you are to consider the totality of the circumstances bearing on the defendant's degree of awareness that [name] did not consent to the risk of infection. Consent need not be verbal in all cases. Consent can only occur nonverbally when a reliable context otherwise establishes the victim's consent to the risk of HIV infection.

Lastly, you are instructed to consider that defendant and [name] met on an Internet dating website. Like any community, Internet dating communities have their own unique norms and language you may be unfamiliar with. You are to consider these factors in determining whether the prosecution has proven beyond a reasonable doubt that the defendant

¹⁴⁴ See, e.g., W. Kip Viscusi & Richard J. Zeckhauser, *Hazard Communication: Warnings and Risk*, 545 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 106–07 (1996).

¹⁴⁵ "Values in these communities are often formed, reflected and transmitted not only through traditional institutions of moral influence but also popular culture and social media. . . . [W]e are [not] . . . members of a single, unified and consciously accepted group engaged in the common pursuit of our own forms of sexual satisfaction." Scott Burris & Matthew Weait, *Criminalisation and Moral Responsibility for Sexual Transmission of HIV* 5 (Temple U. Beasley Sch. of L. Legal Stud. Res. Paper Series, Working Paper No. 2013-17, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126714.

¹⁴⁶ *Miller v. California*, 413 U.S. 15, 30 (1973).

[knew/recklessly disregarded/should have known] [name] did not consent to the risk of HIV. If you are not convinced beyond a reasonable doubt that defendant [knew/recklessly disregarded/should have known] [name] did not consent to the risk of HIV infection, you must find defendant not guilty.

The bracketed areas represent the different mental states required¹⁴⁷ by the offense charged. Defense counsel should also be encouraged to request the court to instruct the jury on lesser included offenses and mistake of fact when applicable. The instruction is designed to encourage a thoughtful consideration of the various factors that contributed to the defendant's determination that his or her partner consented. It serves briefly to inform jurors about how online daters move within their own community. Knowledge on this matter reminds the jury to consider the factors that bear on how an HIV-positive e-dater may evaluate the risk of nonconsent differently, thereby reducing the risk that a defendant will receive disproportionate punishment.

Furthermore, it reminds jurors that consent to the risk of HIV infection need not be verbal. It is the jury's fact-finding duty to determine if consent to exposure was in fact communicated contextually. Where it may not be apparent to the jury that certain situations establish consent by themselves, including this provision in the instruction serves to remind jurors that acquittal may be warranted when the exposed party consents—albeit nonverbally—to the risk of HIV infection. As a result, it decreases the risk that constitutionally protected private, consensual sexual conduct will become subject to punishment.

As an example, consider again our characters from scenario one, Bob and Angela. First, the instruction reminds the jury that Angela's consent to the risk of HIV exposure could occur nonverbally. However, the jury must first look at the circumstances, including Bob's online dating profile that revealed his serostatus, and determine whether the context met a level of reliability that could establish Angela's consent and replace the need for verbal communication. Moreover, by requesting that the jury consider Internet dating norms, the instruction asks the jury to examine evidence that might otherwise be dismissed, such as online serosorting practices. The instruction encourages jurors to examine Bob's culpability in view of these norms and to look beyond their own predilections concerning risk and morality. When a defendant, like Bob, faces charges under an HIV-exposure law based on sexual conduct with a partner met online, Kaplan's narrowly tailored statute, coupled with the model instruction above, minimizes the danger of disproportionate punishment.

IV. CONCLUSION

The law of consent is a legal anomaly. It focuses not only on the defendant's state of mind, but also on the victim's mindset. Or, rather, what the defendant

¹⁴⁷ Kaplan, *supra* note 8, at 1551.

knew about the victim's mindset. Consent to HIV exposure is consent to a risk, not consent to an act. Consent to an act is more outwardly apparent—signals of nonconsent may include physical resistance, incapacity, signs of emotional oppression, among others. Consent to a risk, however, is purely subjective. Accordingly, there is more room for good-faith mistakes vis-à-vis partner consent. The risk is only exacerbated by the many nonverbal ways in which individuals negotiate consent and disclosure in the context of sexual relations. Moreover, assumptions about online dating community norms create an additional layer of opportunity for good-faith mistakes. The statutes do not accommodate the potential for mistakes as they fail to provide for the varying degrees of culpability held by a defendant relative to his or her partner's consent

The ambiguously drafted HIV-exposure statutes offer no guidance on what constitutes legally permissible consent and disclosure; courts have yet to require a verbal mandate nor have they determined whether consent and disclosure may be inferred from the circumstances. Accordingly, criminal-transmission laws may touch private, consensual sexual relations—a privacy right protected by the Constitution. This lack of clarity is particularly problematic in the Internet age where online dating sites facilitate nonverbal negotiation of disclosure and consent.

With the growing popularity of online dating between HIV-positive and -negative individuals alike, a greater necessity arises for these ambiguous statutes to be restructured. Kaplan's proposed statute rectifies several problems with these disclosure and consent provisions. However, this statute fails to bridge the gap that exists between the lay juror's risk perception and the HIV-positive e-dater's risk perception of partner nonconsent. This gap may be bridged by informing jurors about e-dating community norms under which the HIV-positive defendant maneuvers. The instruction is designed to encourage a thoughtful consideration of the online community norms that may contribute to the defendant's determination that his partner consented.

In their current state, the disclosure and consent exceptions are flawed. Regulating behavior as complicated as consensual sexual relations requires careful statutory construction—especially when technology adds an additional layer of complexity. The criminal-transmission statutes' disclosure and consent exceptions need restructuring to account for these complexities. Structural changes to the statutory scheme can help rectify these flaws and ensure that only the truly culpable are convicted. Nearly two decades have passed since these statutes were first enacted. Since that time, the Internet has dramatically transformed our behaviors and the ways in which we relate to one another. The HIV-exposure statutes must be overhauled in light of these changes.