When the Body Is a Weapon: An Intersectional Feminist Analysis of HIV Criminalization in Louisiana

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INTRODUCTION

The female body has long been a battleground in the fight to control women's lives.[1] Patriarchal constructions of gender prescribe how women must look and behave, categorizing which bodies are female within Western society's gender binary.[2] Underlying these constructions of gender are heteronormativity, class exploitation, and white supremacy.[3] Such constructions of women's bodies create boundaries between genders, delineating what behavior is worthy and acceptable, and what bodies deserve ostracization and punishment.[4] Women whose bodies fail to conform to these artificial standards are subject to violence,

1. ROSE WEITZ, THE POLITICS OF WOMEN'S BODIES: SEXUALITY, APPEARANCE, AND BEHAVIOR 3 (2003).
2. *Id*. at 20.
3. JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 24 (2011); Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 437, 452-57 (1997); Berch Berberoglu, *Class, Race and Gender: The Triangle of Oppression*, 2 RACE, SEX & CLASS 69 (1994) (describing how patriarchal divisions of gender reinforce capitalist class exploitation); *see* ANGELA DAVIS, WOMEN, RACE & CLASS 5 (1st ed. 1981) (finding "slave women may as well have been genderless" as they were thought of as "units of labor," not women).
4. Weitz, *supra* note 1, at 20.

policing, and marginalization.[5]

Women living with HIV (WLHIV) fall squarely outside societies' prescription of womanhood.[6] Mainstream society has historically associated HIV with taboo behavior, including homosexuality, drug use, sex work, and promiscuity.[7] Moreover, the populations most impacted by HIV, including poor women, women of color, and trans women, are members of intersecting marginalized identity groups already grappling with discrimination.[8] As such, mainstream society views WLHIV as dangerous, deviant, and deserving of punishment and stigmatization.[9]

This paper will discuss how Louisiana lawmakers have attempted to erase the bodies of WLHIV through HIV criminalization. Motivated by discriminatory animus and devoid of any legitimate penological rationale, Louisiana lawmakers wield HIV criminalization to enact violence, deny resources, and disappear WLHIV into prisons and morgues. Louisiana's HIV criminalization statute weaponizes WLHIV's HIV status against them and uses HIV as a conduit for discrimination based on race, class, gender identity, and more. In Louisiana and throughout the country, laws criminalizing the intentional exposure of HIV devastate the lives of WLHIV through draconian penalties, sabotage public health initiatives by exacerbating HIV stigma, and consequently harm both HIV negative and positive populations. Consequently, HIV criminalization has no place in Louisiana law and must be repealed to ensure the health and safety of Louisianans.

Section one of the paper provides background on HIV itself. This context is necessary to understand the flaws of Louisiana's outdated, medically inaccurate HIV criminalization statute and the struggles that WLHIV already encounter. The next section provides legislative background on HIV criminalization, nationally and in Louisiana. The third section examines Louisiana's intentional exposure statute. Next, the paper deconstructs pro-criminalization arguments and analyzes patterns of the law's under- and over-enforcement; in doing so, the paper exposes the discriminatory animus driving its continued enforcement. The final section discusses the destructive impact that HIV criminalization has on WLHIV in Louisiana, and on the state as a whole.

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5. *Id*. at 85. Mogul, *supra* note 3, at 24.
6. *See* Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 540 (2000) ("as one commentator noted, '[r]eading AIDS as the outward and visible sign of an imagined depravity of will, AIDS commentary deftly returns us to a premodern vision of the body, according to which heresy and sin are held to be scored in the features of their voluntary subjects by punitive and admonitory manifestations of disease'").
7. Carolyn M. Audet, Catherine C. McGowan, Kenneth A. Wallston, & Aaron M. Kipp, *Relationship between HIV Stigma and Self-Isolation among People Living with HIV in Tennessee*, 8 PLOS ONE 1, 5-6 (2013).
8. Deepa Rao, Michele Andrasik, & Lauren Lipira, *HIV Stigma Among Black Women in the United States: Intersectionality, Support, Resilience*, 108 AM. J. PUB. HEALTH 446, 446-47 (2018).
9. *Id*.; Mogul, *supra* note 3, at 34-36.

I. UNDERSTANDING HIV/AIDS

This section provides background on HIV/AIDS to elucidate the numerous medical inaccuracies promulgated by Louisiana's intentional exposure statute. Human immunodeficiency virus (HIV) is a virus that can lead to acquired immune deficiency syndrome (AIDS).[10] The virus attacks and destroys cells in the immune system, making it difficult for the body to defend itself from opportunistic infections and certain cancers.[11] The illness has several stages, all of which have varying levels of contagiousness.[12] The first phase, acute HIV infection, may last for several weeks, during which the person living with HIV (PLHIV) has a high quantity of the virus in their blood, i.e. has a high "viral load," making them extremely contagious.[13] The second phase, clinical latency, may last for several decades during which the PLHIV will likely be asymptomatic and significantly less contagious.[14] The final stage is the development of AIDS, at which point the individual experiences recurrent and severe illness, has a gravely compromised immune system, and is highly contagious.[15] HIV is only transmitted through certain behaviors.[16] The most common means of transmission are sharing syringes and anal or vaginal sex.[17] Only blood, semen, pre-seminal fluid, rectal fluid,

10. *About HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 31, 2018), https://perma.cc/PS84-ECJX.
11. *HIV/AIDS: The Basics*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Nov. 6, 2018), https://perma.cc/AG9R-CYHB.
12. *About HIV/AIDS*, *supra* note 10.
13. *Id*. A person who becomes infected with HIV will not display any symptoms until two to four weeks after the infection, when they may experience flu-like symptoms. *Id*.
14. *Id.* During this stage of infection the virus reproduces at a very low rate. *Id*. As such, a PLHIV is likely to not display outward symptoms and will have a lower viral load. *Id*. Without treatment, this stage may last for a decade; however, with treatment, a PLHIV may partially or completely suppress their viral load, allowing the disease to remain latent for decades. *Id*.
15. *Id*. Without treatment, people living with AIDS may live for up to three years, during which they will experience constant fever, weight loss, weakness, and swollen lymph nodes. *Id*. Prior to the 2018 amendment, Louisiana's intentional exposure statute law was titled, "Intentional Exposure to the AIDS Virus." This is medically inaccurate as AIDS is not a virus, but rather a stage of infection of HIV and demonstrates that even the title of law itself was inaccurate. LA. REV. STAT. § 14:43.5 (2018) (original version with 2018 amendments at https://perma.cc/DA28-N6BU). Ironically, as early as 1987, the Presidential Commission on the Human Immunodeficiency Virus Epidemic Report, which first promulgated HIV criminalization, recognized that using the terms AIDS and HIV interchangeably is "obsolete." Commission Report, *infra* note 148, at XVII.
16. *HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 31, 2018), https://perma.cc/P6L3-GMCT. Stigma and myths surrounding HIV transmission persist today. *HIV Stigma and Discrimination*, AVERT (Apr. 9, 2018), https://perma.cc/UAC6-EWXJ. For example, until the 2018 amendment, the law outlawed behavior that were medically incapable of transmitting the disease, like spitting. LA. REV. STAT. § 14:43.5, *supra* note 15. Again, there is no risk of transmitting HIV through spitting and the risk through biting is negligible. F.V. Cresswell, J. Ellis, J. Hartley, C.A. Sabin, C. Orkin, & D.R. Churchill, *A Systematic Review of Risk of HIV Transmission through Biting or Spitting: Implications for Policy*, HIV MEDICINE 532, 532 (2018).
17. *HIV Transmission, supra* note 16.

vaginal fluid, and breast milk can transmit HIV.[18] Although HIV is incurable, medical advancements like antiretroviral therapy (ART) allow PLHIV to live longer, healthier lives.[19] By adhering to an ART regimen, PLHIV can suppress their viral load to an undetectable level at which they have "effectively no risk of sexually transmitting HIV to their HIV negative partner."[20] Therefore, HIV treatment is a form of prevention.[21] Pre-exposure prophylaxis (PrEP), an oral medication that can reduce the risk of HIV infection from sex by 99%, is another form of prevention.[22]

A. Demographics of HIV Prevalence

Anyone can contract HIV regardless of their gender, age, race, or sexual orientation.[23] However, certain social, economic, and demographic factors influence the prevalence of HIV within different communities.[24]

Geographically, those living in the Southern United States face an increased risk of contracting HIV.[25] Despite making up only one third of the population, these states account for over one-half of all new HIV diagnoses nationwide.[26] In Louisiana, HIV affects the lives of over 20,000 people, with over one thousand

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18. *Id*.
19. *HIV Treatment: The Basics*, U.S. DEP'T. OF HEALTH & HUM. SERVS., https://perma.cc/B4SA-JTPZ.
20. *Id*.
21. *Id*. Achieving viral suppression requires that a person is aware of their HIV status, has been prescribed ART, and consistently adheres to their ART. *Id*.
22. *PrEP*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/CJQ4-8S2Y (last visited Nov. 1, 2018). PrEp reduces the risk of HIV from sex by up to 99% and by at least 74% for those using intravenous drugs. *Id*. Despite PrEPs effectiveness, usage rates remain low in Louisiana, especially for women. Kam Stromquist, *HIV rates still high, but Louisiana ranks 24th in use of disease-preventing medication*, THE ADVOCATE (Mar. 6, 2018), https://perma.cc/92MD-XX76. Interestingly, although the FDA approved PrEP in 2012, fears that the drug would encourage "irresponsible behavior" caused years of delay for marketing the drug. Andrea Gallo, *Once-a-day pill can help prevent HIV; why aren't more in Baton Rouge taking it?*, THE ADVOCATE (Mar. 25, 2017), https://perma.cc/H96G-XZ2R. One study found that only 48% of Louisianans were aware that PrEP could be used to prevent HIV transmission. *People Living with HIV Needs Assessment*, LA. DEP'T. OF HEALTH & HOSPS. 8 (Sept. 2015), https://perma.cc/MS6Y-BKEQ. Further, in an emergency, post-exposure prophylaxis (PEP) can also be used to prevent infection. *PEP*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/R76V-K6QB (last visited Jul. 23, 2018). PEP can be administered in an emergency room after an accidental exposure, such as a needle prick or sexual assault. *Id*.
23. *HIV by Group*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/3FJ4-TUSR (last updated Aug. 20, 2018).
24. *What Is the Impact of HIV on Racial and Ethnic Minorities in the U.S.?*, HIV. GOV, https://perma.cc/MH2L-CLAG (last visited Dec. 7, 2018).
25. *HIV in the United States by Region*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/SU3K-Y5U7 (last updated Sept. 9, 2019).
26. *Id*. The South makes up 52% of new HIV diagnoses in the US. *Id*. Further, while other regions of the US saw a decline in HIV diagnosis from 2012 to 2016, the South remained stable. *Id*.

new diagnoses presenting annually[27] This represents one of the highest rates of HIV in the nation.[28] The state's capital, Baton Rouge, ranks as the city with the highest rate of HIV in the country.[29]

Gender also plays a role in HIV prevalence. Nationwide, the majority of people living with HIV are men.[30] Of this group, men who have sex with men account for the majority of HIV infections.[31] Nationally, women account for 19% of new HIV diagnoses, and heterosexual contact account for the large majority of these diagnoses.[32] Significantly, in Louisiana, 27% of new HIV diagnoses occur in women.[33] Additionally, HIV disproportionately impacts transgender people, who receive new HIV diagnoses at over three times the national average.[34] Further, over half of these new diagnoses stem from transgender people living in the South.[35] Of trans-people living with HIV, the vast majority are trans-women.[36] Nationwide, an estimated 14% of all trans-women live with HIV.[37]

In addition to gender and geography, race plays a large role in determining HIV risk.[38] Nationally, African Americans account for a higher proportion of all new HIV diagnoses, rates of people living with HIV, and people who have ever received an HIV diagnosis as compared to other races and ethnicities.[39] While African Americans only comprise 13% of the nation's population, African Americans account for 43% of HIV diagnoses.[40] In Louisiana, the disparity is even more dramatic: African Americans constitute over 68% of PLHIV.[41] Moreover,

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27. *Local Data: Louisiana*, AIDSVU, https://perma.cc/CH84-JNRH (last visited Dec. 7, 2018).
28. *HIV in the United States by Region*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 2019), https://perma.cc/SU3K-Y5U7. This rate is calculated by rates of HIV diagnosis per 100,000 people. *Id*.
29. Andrea Gallo, *Despite innovations in treatment, HIV rates still high, including in Baton Rouge and New Orleans*, THE ADVOCATE (Dec. 30, 2015), https://perma.cc/RH4V-CVGN. HIV is also more common in urban areas, but HIV rates are rising in rural Louisiana. Andrea Gallo, *Report: Rural parishes in Louisiana struggle even more than Baton Rouge, New Orleans to fight HIV*, THE ADVOCATE (Sept 3, 2017), https://perma.cc/E74P-Q9QZ.
30. *HIV and Men*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 9, 2017), https://perma.cc/A74H-LHS7.
31. *Id*.
32. *HIV Among Women*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jul. 5, 2018), https://perma.cc/WFB4-8K5Q.
33. *2016 STD/HIV Surveillance Report*, LA. DEP'T. OF HEALTH & HOSPS., 2 (2016), https://perma.cc/NR29-QVQL.
34. *HIV and Transgender People*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 30, 2018), https://perma.cc/KGB2-J883.
35. *Id*.
36. *Id.* 84% of HIV positive transgender people are trans women. *Id*.
37. *Id*.
38. *HIV Among African Americans*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jul 5, 2018), https://perma.cc/8PV3-2SMU.
39. *Id*.
40. *Id*.
41. *2016 STD/HIV Surveillance Report*, *supra* note 33. In Baton Rouge, the city with the highest HIV rate in the nation, 85% of all HIV diagnoses are within the Black community. Gallo, *supra* note 22.

where race intersects with other marginalized identities, the disparities grow. For example, black men who have sex with men are the group most impacted by HIV nationwide.[42] Likewise, Black women constitute 59% of all women who have received a new HIV diagnosis.[43] For Black trans women, estimates are even more dire; the CDC estimates around half of all Black trans women may be living with HIV.[44] In Louisiana, an estimated 80% of transgender people living with HIV are African American.[45]

Other populations also face disproportionate impacts. For instance, HIV is more prevalent among poor people in urban areas.[46] Sex workers, although difficult to study, are also believed to face an increased risk of HIV transmission.[47] In addition, individuals who inject drugs face an increased risk of HIV exposure, accounting for 9% of new HIV diagnoses nationally.[48]

Popular media has frequently relied on racist, classist, homophobic, and transphobic tropes to explain the disparities in HIV prevalence.[49] However, social determinants and structural barriers to HIV care, not individual behavior, are responsible for transmission disparities.[50] Moreover, the same racism, classism, homophobia, sexism, and transphobia underlying these stereotypes fuel HIV stigma and drive disparate rates of transmission.[51] The rest of this section illustrates how stereotypes and structural barriers help explain disproportional HIV prevalence among Black women, trans women, sex workers, and Southern women.

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42. *HIV Among African Americans*, *supra* note 38.
43. *HIV Among Women, supra* note 32.
44. *HIV and Transgender People*, *supra* note 34.
45. *National Transgender HIV Testing Day*, LA. DEP'T. OF HEALTH & HOSPS. (Apr. 18, 2017), https://perma.cc/9H6A-6X2M.
46. *See generally* Paul Denning & Elizabeth DiNenno, *Communities in Crisis: Is There a Generalized HIV Epidemic in Impoverished Urban Areas of the United States?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 28, 2017), https://perma.cc/M59V-E2W5; *see also* Jennifer Pellowski, et al., *A Pandemic of the Poor: Social Disadvantage and the U.S. HIV Epidemic*, 68 AM. PSYCHOL. 197, 200 (2013) ("HIV infection nearly exclusively impacts those who face economic adversity.").
47. *See generally HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 2016), https://perma.cc/46BN-U3W4.
48. *HIV and People Who Inject Drugs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 21, 2019), https://perma.cc/AP4Q-FKP5.
49. Russell Robinson & Aisha C. Moodie-Mills, *HIV/AIDS Inequality: Structural Barriers to Prevention, Treatment, and Care in Communities of Color*, CTR. FOR AM. PROGRESS (July 27, 2012), https://perma.cc/S7JY-KT6S.
50. *Id*. DEBRAN ROWLAND, THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN'S RIGHTS IN AMERICA 471 (2004) ("[c]ommunities at increased risk are defined not just by a single, clearly identifiable risk behavior–for example, men having sex with men or intravenous drug users sharing needles–but by much broader social and economic structures within which these behaviors occur, such as geography, race, social institutions (such as prostitution), and economic class.").
51. *HIV Stigma and Discrimination*, AVERT (Apr. 9, 2018), https://perma.cc/UAC6-EWXJ.

1. Black Women

Women and girls are disproportionately vulnerable to HIV because of "their unequal cultural, social and economic status in society."[52] Multiple levels of racism influence Black women's reproductive health, including HIV transmission.[53] Structural racism, defined as "the macrolevel systems, social forces, institutions, ideologies, and processes that interact with one another to generate and reinforce inequities among racial and ethnic groups," influences the health of people of color and contributes to health inequity, including HIV rates.[54] Structural racism results in poverty, stigma, and poor health outcomes, all of which increase HIV risk.[55] Other forms of racism include institutional racism, personally mediated racism, and internalized racism.[56] Institutional racism, defined as the practices of large organizations or governments that negatively affect access to health services, results in differences in the quality of healthcare for Black women.[57] Personally mediated racism occurs where healthcare providers' internal biases influence their provision of care, and it can lead to substandard healthcare for racial minorities.[58] Finally, internalized racism, which involves "the embodiment and acceptance of stigmatizing messages from society by racially oppressed groups," further influences reproductive health, including HIV.[59] In the case of Black women, the unique vulnerabilities of gender and racism collide, making Black women especially vulnerable to HIV.[60] Importantly, Black women have fewer sexual partners than other populations and are more likely to use condoms, further proving that structural barriers, not individual behavior, spur HIV disparities.[61] Moreover, despite Black women's disproportionate risk of HIV,

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52. *Women and Girls, HIV and AIDS*, AVERT (June 19, 2010), https://perma.cc/2J6J-KCJ3. Factors such as women's biological susceptibility to HIV through heterosexual vaginal sex, poverty, domestic and sexual violence, and poverty all exacerbate women's vulnerability to HIV. *HIV Among Women*, *supra* note 32; Jenny A. Higgins, Susie Hoffman, & Shari L. Dworkin, *Rethinking Gender, Heterosexual Men, and Women's Vulnerability to HIV/AIDS*, 100 AM. J. PUB. HEALTH 435, 436 (2010).
53. Cynthia Prather, Taleria R. Fuller, Khiya J. Marshall, & William L. Jeffries, IV, *The Impact of Racism on the Sexual and Reproductive Health of African American Women*, 25 J. WOMEN'S HEALTH 664 (2016).
54. Gilbert C. Gee & Chandra L. Ford, S*tructural Racism and Health Inequities: Old Issues, New Directions*, 8 DU BOIS REV. 115, 116 (2011).
55. *HIV and African Americans*, *supra*, note 38; Valerie A. Earnshaw, Laura M. Bogart, John F. Dovidio, & David R. Williams, *Stigma and Racial/Ethnic HIV Disparities: Moving Toward Resilience*, 68 J. AM. PSYCHOL 225 (2013); Nabila El-Bassel, Nathilee A. Caldeira, Lesia M. Ruglass, & Louisa Gilbert, *Addressing the Unique Needs of African American Women in HIV Prevention*, 99 AM. J. PUB. HEALTH 996 (2009); Linda Villarosa, *America's Hidden H.I.V. Epidemic*, N.Y. TIMES MAG. (June 6, 2017), https://perma.cc/4DLV-N9A2.
56. Prather et al., *supra* note 53, at 665.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*; *see generally* Whitney S. Rice et al., *Perceptions of Intersectional Stigma Among Diverse Women Living with HIV in the United States*, 208 SOC. SCI. AND MED. 9 (2018).
61. *Why are Black Women at Higher Risk of HIV?*, WE>AIDS (2018), https://perma.cc/LKY5-

there are few prevention programs specifically tailored to target Black women.[62]

Mass incarceration also exacerbates the spread of HIV infection among women of color.[63] Mass incarceration, which predominantly targets Black men, disrupts communities and alters sex ratios between men and women.[64] In some communities, it is estimated that there are only 6 to 8 Black men for every 10 Black women.[65] This imbalance alters sexual behavior and "has been associated with concurrency of partnerships, which can foster the transmission of HIV. . . and can undercut [women's] power to negotiate partner monogamy and condom use."[66]

2. Trans Women[67]

Transgender people experience extreme and pervasive discrimination because of their gender identities, including physical violence,[68] employment and housing discrimination, and harassment in school.[69] Transphobic discrimination and victimization negatively impacts the mental health and economic stability of transgender individuals,[70] resulting in increased substance use, school dropout rates, engagement in unprotected sex,[71] and participation in the "underground economy," such as drug sales and sex work.[72] The social marginalization,

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62. *See* El-Bassel et al., *supra* note 55, at 997.
63. David A. Wohl, *HIV and Mass Incarceration: Where Infectious Diseases and Social Justice Meet*, 77 N.C. J. MED. J. 359, 363 (2016).
64. *Id*.
65. *Id*.
66. *Id.* Louisiana has the second highest incarceration rates in the country. Adam Gleb & Elizabeth Compa, *Louisiana No Longer Leads Nation in Imprisonment Rate: New Data Show Impact of 2017 Criminal Justice Reforms*, PEW CHARITABLE TRUSTS (July 10, 2018), https://perma.cc/8TN3-LUFB.
67. "Transgender women are one of the most highly impacted groups in the HIV epidemic to date, yet they are disproportionately under-researched." Jae Sevelius, *Transgender Issues in HIV: Providers Need Accurate, Current Information to Provide Optimal Care*, HIV SPECIALIST 30, 31 (Dec. 2013). "Often, transgender women are not even 'seen' because they are combined incorrectly into other categories, such as men who have sex with men." *Trans Women Living with HIV*, WELL PROJECT (Aug. 21, 2018), https://perma.cc/V7GK-LQWG.
68. *2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY 15 (Dec. 2016), https://perma.cc/2KD3-YSGF. Importantly, Louisiana has the highest rate of trans murders. Brian McBride, *HRC Mourns the Loss of Vontashia Bell, a Trans Woman Killed in Louisiana*, HUM. RIGHTS CAMPAIGN (Aug. 31, 2018), https://perma.cc/E9X5-2Y5B. Tragically, even in death trans women's identities are disrespected as police regularly misgender victims of transphobic violence. Chase Strangio, *Deadly Violence Against Transgender People is on the Rise. The Government Isn't Helping*, ACLU (Aug. 21, 2018), https://perma.cc/ZVD8-Y77N.
69. *2015 U.S. Transgender Survey, supra* note 68, at 11-13. Trans women also face unique challenges as they are more likely to be misgendered by society, making them more vulnerable to negative interactions. *Id.* at 50.
70. *Id*. at 197.
71. *Id*. at 31, 115.
72. *Id.* at 157. Furthermore, the intersection of structural racism with transphobia results in increased rates of economic hardship and marginalization. Samantha LaMartine et al.,

stigmatization, isolation, and discrimination faced by trans women in particular increases their HIV vulnerability.[73]

3. Sex Workers

Similarly, sex workers' heightened HIV risk stems from their economic vulnerability, marginalization,[74] increased risk of sexual violence, and reduced ability to negotiate consistent condom use.[75] Women engaging in sex work "may have a history of homelessness, unemployment, incarceration, mental health issues, violence, emotional/physical/sexual abuse, and drug use," all of which heighten HIV risk.[76] Additionally, heterosexual vaginal sex and receptive anal sex pose a greater biological risk for HIV infection, leaving sex workers more biologically susceptible.[77] Furthermore, federal legislation such as SESTA and FOSTA, which makes online platforms liable for the content posted by users, diminishes sex workers' ability to maintain agency over their work, which in turn causes an increased risk of HIV.[78] The enactment of SESTA and FOSTA demonstrate an increasingly hostile environment that leaves sex workers increasingly vulnerable.[79]

Transgender Women of Color and HIV, AM. PSYCHOL. ASS'N (Mar. 2018), https://perma.cc/4CSZ-35Z9.

73. Tonia Poteat, Sari L. Reisner, & Anita Radix, *HIV Epidemics Among Transgender Women*, 9 CURRENT OP. HIV AIDS 168, 169 (2014). "The purported relationship between exposure to stigma and health risk behaviors among transgender women is consistent with Meyer's (2003) minority stress model. According to this model, individuals who belong to socially devalued groups are vulnerable to chronic exposure to stigma and discrimination, which over time can compromise psychological coping resources and lead to mental, behavioral, and physical health challenges." Don Operario, Mei-Fen Yang, Sair L. Reisner, Mariko Iwamoto, & Tooru Nemoto, *Stigma and the Syndemic of HIV-Related Health Risk Behaviors in a Diverse Sample of Transgender Women*, 42 J. CMTY. PSYCHOL. 544, 546 (2014); *see also* LaMartine, et al., *supra* note 72; *Transgender People, HIV and AIDS,* AVERT (2018), https://perma.cc/9999-UJFT. In addition to these factors, transgender women who have sex with men "often. . . engage in receptive anal intercourse – an efficient route for acquisition of HIV." Poteat, et al., *supra* note 73, at 169; *see also* Operario, et al., *supra* note 73, at 553-54.

74. Kate Shannon et al., *Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants*, 385 THE LANCET 55, 58-60 (Jan. 3, 2015).

75. *Sex Workers HIV and AIDS*, AVERT (2018), https://perma.cc/QF4J-BPDT.

76. *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, *supra* note 47.

77. H. Patricia Hynes & Janice G. Raymond, *The Neglected Health Consequences of Sex Trafficking in the United States*, *in* POLICING THE NATIONAL BODY 213-14 (Jael Silliman & Anannya Bhattacharjee eds., 2002); *Risk of Exposure to HIV/AIDS*, STANFORD HEALTH CARE (last visited Dec. 1, 2019), https://perma.cc/GA75-CYNB.

78. Larry Buhl, *FOSTA/SESA May Put Sex Workers At Risk*, A&U MAG. (June 4, 2018), https://perma.cc/4KF7-KU9A. Sex workers report diminished ability to be "picky" regarding clientele and increased difficulty navigating condom usage. Jake Ketchum & Laura LeMoon, *What Sex Workers Have to Say About HIV After FOSTA/SESTA*, THE BODY (July 2, 2018), https://perma.cc/Y5DY-JJNY.

79. Ketchum & LeMoon, s*upra* note 78.

4. Southern Women

Structural barriers such as poverty, racism, and poor healthcare cause higher HIV rates amongst Southern women.[80] Stigma and misinformation surrounding HIV and sexuality also contribute to geographic HIV disparities.[81] In one study, participants throughout the Deep South reported a dearth of information regarding HIV apart from information transmitted by word of mouth.[82] In the same study, Southern participants were found to be less likely to trust the medical system, government, and health providers.[83] As a result, they were more likely to view public health campaigns with suspicion and were less likely to get tested for HIV, increasing their vulnerability to transmitting or contracting HIV.[84] Southerners' negative stigma surrounding sex and HIV, in part due to heightened religious conservativism in the region, also contributes to HIV transmission rates.[85]

In conclusion, women with multiple and overlapping marginalized identities are at a dramatically increased risk of contracting HIV. A complex web of structural barriers and societal factors—*not* deviant or morally blameworthy behavior—explain disparities in HIV prevalence. Moreover, the same factors that influence certain populations of women's susceptibility to HIV also exacerbates those women's experiences of living with HIV.

B. HIV's Impact on Women's Lives

The following section will examine the lived experiences of women living with HIV ("WLHIV"). Understanding the unique challenges faced by WLHIV - related to their health, personal relationships, and socioeconomic status - is necessary in order to understand the additional burden that HIV criminalization has on the lives of WLHIV.[86]

First, HIV uniquely impacts women's health. WLHIV may suffer different HIV symptoms and react differently to HIV treatments than men.[87] Importantly,

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80. *HIV in the Southern United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 2016), https://perma.cc/3WQB-4C4N.
81. *Id*.
82. Susan Reif, Elena Wilson, & Carolyn McAlister, *Perceptions and Impact of HIV Stigma Among High Risk Populations in the U.S. Deep South*, 4 J. HIV & AIDS 1, 2-3 (Apr. 6, 2018).
83. *Id*. at 6.
84. *Id*.
85. *Id*; Bronwen Lichtenstein, Edward W. Hook III, & Amit K. Sharma, *Public Tolerance, Private Pain: Stigma and Sexually Transmitted Infections in the American Deep South*, 7 CULTURE, HEALTH, & SEXUALITY 43 (Jan. 2005).
86. This information does not mean to imply that all women living with HIV suffer from all these issues or that WLHIV are not able to live normal lives.
87. *HIV and Women's Health Issues,* HIV.GOV (May 7, 2018), https://perma.cc/6FU3-J83P. For example, women's symptoms of HIV may include frequent and severe vaginal infections. *Id*. Women are also subject to unique AIDS defining cancers, mainly cervical cancer. *Id*. HIV also affects menstruation. *Id*. Furthermore, antiretroviral therapies may have adverse reactions to hormone therapy in trans women. Sevelius, *supra* note 67.

stigma related to HIV also has a unique impact on women's mental and physical health.[88] Physically, stigma compromises [WLHIV's] access to HIV treatment and care and reduces ART adherence.[89] Psychologically, internalized stigma undermines WLHIV mental health and fosters feelings of rejection, isolation, poor self-image, hopelessness, loss of control, and depression.[90] This detrimental impact of this stigma is more severe for women with multiple co-occurring devalued social identities, such as Black women and trans women, especially those living in certain communities.[91] In socially and religiously conservative Southern states like Louisiana, WLHIV face increased stigma because HIV is often associated with promiscuity, social deviance, and immorality.[92] This leaves WLHIV in Louisiana especially vulnerable to the detrimental physical and psychological impacts of HIV stigma.

Structural barriers, including lack of financial resources, transportation, caretaking responsibilities, and lack of healthcare, also prevent some women from accessing HIV treatment, leaving some women sicker than others.[93] In addition, trans women experience unique challenges engaging in and adhering to HIV care.[94] For example, trans women often avoid healthcare settings due to stigma and past negative experiences; and when trans women do try to access care, they often face challenges accessing culturally competent[95] and gender-affirming healthcare.[96] WLHIV of color also experience increased barriers to HIV treatment,

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88. Vikas Paudel & Kedar P. Baral, *Women Living with HIV/AIDS (WLHA), Battling Stigma, Discrimination and Denial and the Role of Support Groups as a Coping Strategy: A Review of Literature*, REPRODUCTIVE HEALTH 1, 2 (2015).

89. Ingrid T. Katz et al*., Impact of HIV-related stigma on treatment adherence: systematic review and meta-synthesis*, J. OF THE INTL. AIDS SOCIETY (Nov. 13, 2013), https://perma.cc/UD4U-EP8R.

90. Audet, *supra* note 7, at 5-6. That is not to say that all women living with HIV are depressed or unhealthy or feel that way all the time. Online resources like the blog A Girl Like Me share the multitude of experiences of WLHA. *A Girl Like Me*, WELL PROJECT (Dec 8, 2018), https://perma.cc/Y52G-B2B7.

91. *See* Rao et al., *supra* note 8 (finding that "perceived and experienced stigma resulting from multiple co-occurring devalued social identities pushes many to keep their statuses hidden, plac[ing] Black women at increased risk of HIV infection, and forces them to stay at home rather than engage in services along the HIV care continuum."); *see also* Rice et al., *supra* note 60 at 15 (studying intersectional stigma among women living with HIV).

92. Audet, *supra* note 7, at 5-6.

93. *Barriers to Care for HIV*, OFFICE OF WOMEN'S HEALTH (Nov. 2018), https://perma.cc/GFB8-8FJQ; Matthew Toth, Lynne C. Messer, & E. Byrd Quinlivan, *Barriers to HIV Care for Women of Color Living in the Southeastern US Are Associated with Physical Symptoms, Social Environment, and Self-Determination*, 27 AIDS PATIENT CARE STDS 613 (Nov. 2011). Barriers may include cost, mental health problems, stigma, transportation, and concerns about confidentiality, or domestic violence. *Id*. Women are less likely to achieve viral suppression. *HRSA-led Study Shows Reduction in Viral Suppression Disparities among Ryan White HIV/AIDS Program Clients*, HRSA (Nov. 14, 2018), https://perma.cc/4VGL-2VSQ.

94. Sevelius, *supra* note 67, at 31.

95. *Id*.

96. *Id*.

such as stigma and lack of access to affordable care.[97] Further, socioeconomic class is also connected to treatment adherence.[98] Successful treatment adherence requires WLHIV to orient their lives around their often complex treatment regimen.[99] For women living in poverty, stressful life events such as food insecurity, lack of transportation, and general "life chaos," makes treatment adherence especially difficult.[100]

In addition to the negative impacts of HIV/AIDS stigma on women's health, that stigma can harm their relationships with family and friends.[101] For example, WLHIV surveyed in one public health study reported experiencing painful stigma from family members, such as family members avoiding physical contact with them or suggesting that WLHIV were not fit to care for their own children.[102] Additionally, even when women felt that their families were supportive, WLHIV often felt isolated by their diagnosis.[103] HIV may also influence women's relationships with romantic partners. For example, studies have found that women experience declines in sexual activity, function, satisfaction and pleasure following HIV diagnosis.[104] HIV disclosure can also result in violence, rejection, and abandonment by romantic partners.[105] For WLHIV experiencing domestic violence, navigating HIV and abuse can be especially challenging.[106] Where HIV and domestic violence intersect, abusers may use WLHIV's status as a tool of power and control.[107] For example, WLHIV experiencing domestic violence report abusers destroying their HIV medication, threatening to expose their HIV status, reacting violently to partner notification, or increasing violence after

97. Toth et al., *supra* note 93, at 613.
98. Eric Houston & Amanda Osborn, *The Use Of Self-Managed Treatment Strategies In A Predominantly Low-Income, African-American Sample Of Women Living With HIV*, 116 PSYCHOL. REPORTS: MENTAL & PHYSICAL HEALTH 861, 867 (2015).
99. *Id.* at 862.
100. Seth C. Kalichman & Moira O. Kalichman, *HIV-Related Stress and Life Chaos Mediate the Association Between Poverty and Medication Adherence Among People Living with HIV/AIDS*, 23 J. CLINICAL PSYCHOL. MED. SETTINGS 420, 423, 426 (2016).
101. Faith Fletcher, Lucy Annang Ingram, Jelani Kerr, Meredith Buchberg, Libby Bogdan-Lovis & Sean Philpott-Jones, *"She Told Them, Oh That Bitch Got AIDS": Experiences of Multilevel HIV/AIDS-Related Stigma Among African American Women Living with HIV/AIDS in the South*, 30 AIDS PATIENT CARE & STDS 349 (2016).
102. *Id*. at 351.
103. Jill N. Peltzer, Elaine W. Domian & Cynthia S. Teel, *Infected Lives: Lived Experiences of Young African American HIV Positive Women*, 38(2) WESTERN J. OF NURSING RESEARCH 216, 221 (2014). Participants in one study reported feeling that friends and family members could not fully understand the experience of living with HIV, and thus felt alone. *Id*. at 226.
104. Allison Carter et al., *The Problematization of Sexuality among Women Living with HIV and a New Feminist Approach for Understanding and Enhancing Women's Sexual Lives*, 77 SEX ROLES 779 (2017).
105. *Id*. at 780.
106. Jane K. Stoever, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157 (2009).
107. *Id*. at 1161.

disclosure.[108]

For many women, HIV has the power to change women's relationships with their children and their experiences as parents.[109] Mothers may transmit HIV to child in utero, via childbirth, or through breastfeeding, creating unique concerns for WLHIV.[110] Even though mother-to-child transmission is preventable and WLHIV may still safely have children, the fear and misinformation surrounding transmission can affect the mother-child relationship.[111] Public health studies show that living with HIV burdens mothers with additional stress and maternal anxiety as they manage their own illness, parent their children,[112] contemplate disclosing their status to their children,[113] and even plan for their children's future in the case that they die from HIV.[114]

In addition to impacting women's health and interpersonal relationships, HIV has a significant impact on women's socioeconomic status.[115] First, maintaining employment can be challenging for PLHIV due to HIV's impact on physical and mental functioning, as well as HIV-related stigma and workplace discrimination.[116] Second, many PLHIV experience housing insecurity and homelessness, which in turn exacerbates their involvement in high-risk behaviors like drug use and creates challenges to maintaining a strict ART regimen.[117] When negative socioeconomic impacts of HIV intersect with gender discrimination, the harm WLHIV experience amplifies.[118] WLHIV experience unique socioeconomic

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108. *Id*. at 1161, 1170.

109. Debra A. Murphy, William D. Marelich, Lisa Armistead, Diane M. Herbeck & Diana L. Payne, *Anxiety/Stress among Mothers Living with HIV: Effects on Parenting Skills & Child Outcomes*, 22 AIDS CARE 1448 (2011).

110. *Preventing Mother-to-Child Transmission of HIV*, DHHS, (May 24, 2018), https://perma.cc/WY6D-92DC. HIV may also negatively impact WLHA's fertility. HADLEY LEGGETT, BECOMING A POSITIVE PARENT: REPRODUCTIVE OPTIONS FOR PEOPLE WITH HIV 45 (2011), https://perma.cc/PJ6P-VCRA.

111. *You can have a healthy pregnancy if you are HIV positive*, CATIE (Dec. 8, 2018), https://perma.cc/SYV2-RLMS.

112. *Id*.

113. Murphy, *supra* note 109, at 448.

114. *Planning for the Future Care of Your Children in the US*, THE WELL PROJECT (Oct. 30, 2018), https://perma.cc/69RJ-A3Q4.

115. *HIV/AIDS and Socioeconomic Status,* AM. PSYCHOL. ASS'N (Dec. 8, 2018), https://perma.cc/4SEU-R6FK.

116. *Id*; Ying Liu, Kelli Canada, Kan Shi & Patrick Corrigan, *HIV-related stigma acting as predictors of unemployment of people living with HIV/AIDS*, 24 AIDS CARE 129 (2012). Despite being prohibited by federal law, employment discrimination against PLWHIV is still prevalent. Annamarya Scaccia, *Stigma Drives Workplace Discrimination Against Workers Living With HIV* (May 7, 2014), https://perma.cc/FGY2-5AWF. In addition, WLHIV may need to rely on disability benefits to be able to afford HIV treatment, which in turn prevents them from working or earning above a certain amount of income. David Martin, et al., *Working with HIV*, AM. PSYCHOL. ASS'N (Jul. 2011), https://perma.cc/65LW-L8WK.

117. Evelyn P. Tomaszewski, *HIV/AIDS and Homelessness*, NASW (Dec. 8, 2018), https://perma.cc/8PNE-D8C8.

118. Elise D. Riley, Monica Gandhi, C. Hare, Jennifer Cohen & Stephen Hwang, *Poverty, Unstable Housing, and HIV Infection Among Women Living in the United States*, 4 CURRENT HIV/AIDS

barriers that stem from the intersection of race, class, and gender. For example, WLHIV lacking economic resources may be more likely to turn to sex work, placing them at risk for criminalization, further stigmatization, and violence.[119] Homeless WLHIV also face physical and sexual violence on the street,[120] and homeless mothers with HIV face additional unique challenges and health risks, such as subordinating their health needs for the needs of their children.[121]

Understanding the unique challenges faced by Louisiana women as a result of their HIV status contextualizes how harmful HIV criminalization can be. While WLHIV can and do lead happy, healthy, and fulfilling lives, they also face unique challenges when their HIV status intersects with other factors like race, class, and gender expression. For WLHIV in Louisiana, these issues are even more complex due to heightened stigma toward HIV in the South.[122] Simply living with HIV, especially in the Deep South, is hard enough without the added burden of HIV criminalization.

II. HIV CRIMINALIZATION'S HISTORICAL CONTEXT: A FEMINIST PERSPECTIVE

The following section will provide historical background of HIV criminalization through the lens of gender in both in the U.S. and Louisiana, elucidating the outdated science, hysteria, racism, homophobia, and sexism underling Louisiana's HIV criminalization statute. This background will inform the article's discussion of the discriminatory enforcement of HIV criminalization and its impact on marginalized groups.

A. National Origins of HIV Criminalization

In the United States, "women were nearly invisible at the beginning of the HIV/AIDS epidemic."[123] HIV was first reported in the Center for Disease Control's 1981 Morbidity and Mortality Weekly Report, and health officials initially believed it only affected gay men.[124] However, the CDC discovered cases of HIV infection among women by 1982,[125] and by 1983, it was reported that

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REPORTS 181 (2007).

119. *Id*. at 182-83.

120. Michael Alison Chandler, *For homeless women, violence is a pervasive part of their past and present, report shows*, WASH. POST (Feb. 19, 2018), https://perma.cc/EU23-6N93.

121. *HIV and Homelessness Fact Sheet*, NATIONAL COALITION FOR THE HOMELESS (Aug. 2007), https://perma.cc/5GPJ-JMDC.

122. Reif, *supra* note 82, at 6.; Fletcher, *supra* note 101, at 349; Lichtenstein, *supra* note 85, at 43.

123. Higgins, *supra* note 52, at 435.

124. *A Timeline of HIV and AIDS,* HIV.GOV, https://perma.cc/F23E-9Q8D. HIV was initially referred to as "gay cancer" and "Gay-Related Immunodeficiency Disorder." *Id*.

125. *Women and the Ryan White HIV/AIDS Program*, HRSA 1, https://perma.cc/Q6UC-TH2L. While studying HIV in Haitians, the CDC discovered Haitian women were experiencing symptoms. This discovery prompted the CDC to rename the disease AIDS. *Id*.

female heterosexual sexual partners were contracting the virus.[126] Despite the early understanding that HIV affected both men and women, lawmakers, activists, and the medical community largely excluded women from the national conversation surrounding the HIV epidemic, choosing instead to focus on gay white men.[127] Moreover, what limited resources did exist at the time were organized mainly by, and for, gay white men.[128]

Misinformation from the CDC and media outlets fueled the nation's denial surrounding HIV risk.[129] That denial led to targeted stigmatization. For example, the CDC inaccurately confined HIV transmission risk to already stigmatized groups such as gay men, which led many women and their medical providers to mistakenly believe women were not at risk.[130] For women who were HIV positive, the initial misrepresentation of HIV caused them to suffer extreme stigma.[131] During this time, HIV researchers also systematically blocked women, especially minority women, from their work by delaying research, delaying treatment and testing of women, and excluding women from clinical trials.[132] Excluding women from society's initial response to HIV had catastrophic results, and by 1988, "in certain geographic areas of the US (for example New York and New Jersey), AIDS had become the leading cause of death for African American women between the

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126. CDC, *Epidemiologic Notes and Reports Immunodeficiency among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS)*, 21 MMWR 52 (Jan. 7, 1983).

127. *See* Angela Perone*, From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 370-71 (2013). For example, women struggled for years to have cervical cancer added to the list of AIDS defining conditions. Rahel G. Ghebre, Surbhi Grover, Melody J. Xu, Linus T. Chuang & Hannah Simonds, *Cervical Cancer Control in HIV-infected Women: Past, Present and Future*, 21 GYNECOLOGY& ONCOLOGY REPORTS 101 (2017). Similarly, people of color were repeatedly excluded from HIV studies and conferences. *See* Gretchen Gavett, *Timeline: 30 Years of AIDS in Black America*, FRONTLINE (July 10, 2012), https://perma.cc/6HHM-T5FM.

128. *See Women and the Ryan White HIV/AIDS Program*, *supra* note 125, at 2. Aziza Ahmed, *"Rugged Vaginas" and "Vulnerable Rectums": The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic*, 26 COLUM. J. GENDER & L. 1, 27 (2013). Despite the focus on gay men, WLHA, lesbian and trans women, and LGBT allies were integral in AIDS organizing. Zaahira Wyne, *The Women Who Fought AIDS: 'It Was Never Not Our Battle*,' VICE, (Aug. 25, 2018) https://perma.cc/J42J-JP78. For example, Sister Love was the first organization in the South to focus exclusive on WLHIV. *1980s HIV Timeline*, AM. PSYCHOL. ASS'N, https://perma.cc/C8FL-S2B4.

129. *See Women and the Ryan White HIV/AIDS Program*, *supra* note 125, at 1. As late as 1988, popular women's magazine, Cosmopolitan, published an article declaring that women could have safe unprotected sex with male partners who were HIV positive. Jeff Cohen and Norman Solomon, *Cosmo's Deadly Advice to Women About AIDS*, THE SEATTLE TIMES (Jul. 31, 1993), https://perma.cc/4X52-AZUM.

130. *Women and the Ryan White HIV/AIDS Program*, *supra* note 125, at 1.

131. *Id*. at 2.

132. Ramani Durvasula, *A History of HIV/AIDS in Women: Shifting Narrative and a Structural Call to Arms*, AM. PSYCHOL. ASS'N (Mar. 2018), https://perma.cc/3MWJ-E43D. For example, "The National Institutes of Health (NIH) rejected women centered grants in HIV and felt that it was unnecessary to understand co-factors of HIV in low income ethnic minority women — assuming that a risk was a risk" *Id*.

ages of 15 and 44."[133]

As HIV continued to spread and was increasingly recognized outside of the gay and intravenous drug-using communities, hysteria surrounding the disease also increased.[134] The public attitude towards HIV quickly shifted from denial to blame, and then to hate.[135] PLHIV and even the doctors treating them were denied housing, medical treatment, and even burial rights.[136] Myths about AIDS left people afraid to touch, share silverware with, or even swim in the same pool as PLHIV.[137] Inaccurate information exacerbated the hysteria. For example, the now repudiated story of "Patient Zero," a flight attendant maliciously spreading HIV around the country, created lasting fears of "promiscuous sociopath[s] intending to infect numerous unsuspecting victims."[138]

Even as social hysteria mounted, the conservative Reagan administration failed to respond to the burgeoning epidemic.[139] For example, President Reagan notoriously declined to use the word AIDS in public until 1985, at which point over 12,000 people had already died from the disease.[140] Fueled by the religious right and "Moral Majority, " the Reagan administration's denial of HIV quickly turned into open hostility towards PLHIV. For example, Reagan's

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133. ROWLAND, *supra* note 50, at 472.

134. *See* Emma Mustich, *A History of AIDS Hysteria*, SALON (Jun. 5, 2011), https://perma.cc/7LPP-NQAB. Unfortunately, the years of public inaction and indifference had already taken its toll as thousands of people around the country had already contracted and died from the disease. *History of HIV and AIDS Overview*, AVERT, https://perma.cc/854D-TARH.

135. LAWRENCE GOSTIN, THE AIDS PANDEMIC, preface xxiv, UNC Press, (2004). In 1983, Reagan administration Communications Director Pat Buchanan exemplified this attitude by declaring, "The poor homosexuals - they have declared war against nature, and now nature is exacting an awful retribution." *See* David Jefferson, *How AIDS Changed America*, NEWSWEEK, 2 (May 2014), https://perma.cc/GN5M-EAN4.

136. In 1983, Dr. Sonnabend, an AIDS researcher and physician was threatened with eviction for his AIDS work, this would later become the first AIDS discrimination lawsuit. Durvasula, *supra* note 132.

137. Elizabeth Landau, *HIV in the '80s: 'People didn't want to kiss you on the cheek*,' CNN (May 25, 2011), https://perma.cc/9VA7-TDP7; Perone*, supra* note 127, at 369.

138. Perone*, supra* note 127, at 369.

139. Jefferson, *supra* note 135; Phillip Boffey, *Reagan Defends Financing for Aids*, N.Y. TIMES (Sept. 18, 1985), https://perma.cc/BW9Y-HRGU. One haunting example of the administration's indifference to the crisis occurred in 1982 when a reporter asked if the President had a statement related to what was then over 600 cases of AIDS. Caitlin Gibson, *A disturbing new glimpse at the Reagan administration's indifference to AIDS*, WASH. POST (Dec. 1, 2015), https://perma.cc/Z3HU-XB6E. Chilling audio from the documentary "When AIDS Was Funny," showed that Press Secretary Larry Speakes appeared dumbfounded by the question, and then began cracking homophobic jokes about "gay plague" as the pressroom erupted in laughter. Footage shows that these jokes in the pressroom persisted for years despite HIV's rising death toll. *Id*.

140. Jefferson, *supra* note 135, at 2. When President Reagan did finally address HIV, his attitude was moralizing. Gerald Boyd, *Reagan Urges Abstinence for Young to Avoid AIDS*, N.Y. TIMES (Apr. 2, 1987), https://perma.cc/5CT7-PR5R (When urging the public to prevent HIV transmission through abstinence, President Reagan stated, "After all, when it comes to preventing AIDS, don't medicine and morality teach the same lessons?").

Communications Director Pat Buchanan notoriously argued that AIDS is "nature's revenge on gay men."[141] This animus towards PLHIV stunted the administration's response by preventing research and led to lasting devastating consequences for PLHIV.[142]

The controversy surrounding Ryan White finally forced leaders to confront AIDS as a national epidemic.[143] White was a white, middle-class, thirteen-year-old boy who had contracted HIV through contaminated blood products.[144] White received national attention in 1985 when his middle school barred him from attending because of his HIV status.[145] The discrimination against White inspired a national outcry,[146] and his story illustrated that HIV and the harmful effects of stigma surrounding the virus could affect anyone – including the white and the affluent.

President Reagan formed the Presidential Commission on the Human Immunodeficiency Virus Epidemic in 1987.[147] The thirteen-member Commission produced a report promulgating a national strategy to address HIV.[148] One of the strategies the report recommended was the "Criminalization of HIV Transmission."[149] The report reasoned that "extending criminal liability to those who knowingly engage in behavior which is likely to transmit HIV is consistent with the criminal law's concern with punishing those whose behavior results in harmful acts."[150] The report justified the criminalization of HIV by arguing that (1) PLHIV should be "held accountable for their actions," (2) criminal penalties would "deter HIV-infected individuals from engaging in high-risk behavior," and

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141. *See* Allen White, *Reagan's AIDS Legacy / Silence equals death*, SF GATE (Jun. 8, 2004), https://perma.cc/8ET8-JC2N.

142. *See id*. For example, Dr. C. Everett Koop, Reagan's Surgeon General, reported that any discussion of HIV was restricted by the administration due to the disease's association with gay men and drug users. *Id*.

143. *See* David Jefferson, *supra* note 135. PLHIV were often thought of as "guilty" or "innocent." GOSTIN, *supra* note 135, at preface xxv. "Persons who contracted HIV perinatally or through blood transfusions were thought to be blameless and deserving of sympathy. But those who contracted HIV through sex or sharing drug-injection equipment were reviled and censured for their illness." *Id*. Having contracted HIV through a blood transfusion, Ryan White was able to become a posterchild for the "innocent" victims of AIDS epidemic. See *id.*

144. *Who Was Ryan White?* HRSA (Oct. 2016), https://perma.cc/2PMJ-2ZPC.

145. *A Timeline of HIV and AIDS*, *supra* note 124.

146. *Thanks in Part to Media Attention, Ryan White Returns to School*, HFA (Mar. 17, 2014), https://perma.cc/8RTY-X8LU.

147. 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).

148. James D. Watkins et al., *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic*, INTERNET ARCHIVE, 130 (1988), https://perma.cc/J3ED-JMJA. The report would later be criticized as being heavy on right ring conservatism and light on expertise. Josh Getlin, *Protesters Say Reagan Commission Lacks Expertise: Critics Assail AIDS Panel at First Session*, L.A. TIMES (Sept. 10, 1987), https://perma.cc/8CDG-FJQM.

149. Watkins, *supra* note 148, at 130.

150. *Id*.

(3) existing criminal law was inadequate to address HIV.[151] Although the report recommended states pass HIV-specific legislation, it cautioned that states should only sanction "behavior which is scientifically established as mode of transmission" and that criminalization should not be used a substitute for public health measures or employed at the expense of public health or civil actions.[152]

The report further suggested that states enact criminal statutes that "(1) clearly identified illegal behavior (2) punished only for the failure to comply with the affirmative duties to disclose status, obtain consent, and use precautions" (3) strongly protect confidentiality (4) and consult with public health officials before initiating any criminal case.[153]

Two years after the commission released the report, Congress passed the Ryan White Care Act.[154] The Act was the largest federal funded program addressing HIV/AIDS to date and mandated that states certify the adequacy of their criminal laws to address HIV exposure.[155] By the time this provision of the Act was eliminated in 2000, every state had already codified criminal laws prosecuting HIV exposure.[156]

B. History of HIV Criminalization in Louisiana

Louisiana was one of the first states in the country to pass HIV-specific criminal legislation and thus lacked the advantage of the report's guidance.[157] In 1987, Representative Kernan "Skip" Hand of Jefferson Parish first introduced House Bill No. 1728, which created the crime of intentional exposure to the "AIDS virus."[158] Representative Hand asserted during debate in the state senate that the purpose of the bill was to "deter those who are infected with the AIDS virus from remaining sexually active in the community."[159] Despite warnings that the bill might disincentivize HIV testing, the legislature passed the bill in 1987.[160] In its original form, the statute only criminalized exposure via sexual contact,[161] but in 1993, the state amended it to expand the elements of the crime to include other

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151. *Id*.
152. *Id*.
153. *Id*. at 130–32; Hayley H. Fritchie, *Burning the Family Silver: A Plea to Reform Louisiana's Antiquated HIV-Exposure Law*, 90 TUL. L. REV. 209, 218 (2015). Ryan White Care Act continues to provide care to approximately 53% of all PLHIV in the US through providing medical care and support services to PLHIV who are uninsured or underinsured. *About the Ryan White HIV/AIDS Program*, HRSA, (Oct. 2016), https://perma.cc/W85G-QZKC.
154. Perone, *supra* note 127, at 372.
155. *Id.*; Fritchie, *supra* note 153, at 218.
156. Perone, *supra* note 127, at 372.
157. Intentional Exposure of Aids Virus, 1987 La. Sess. Law Serv. Act 663 (H.B. 1728) (West).
158. Official Journal of the House of Representatives of the State of Louisiana, 31st Day's Proceedings, 1987 Leg., 13th Reg. Sess. at 1628 (1987).
159. Fritchie, *supra* note 153, at 219.
160. *Id*.
161. Intentional Exposure of Aids Virus – Creation of Crime, 1987 La. Sess. Law Serv. Act 663 (H.B. 1728) (West).

means of exposure, including "spitting, biting, stabbing with an AIDS contaminated object, or throwing of blood or other bodily substances."[162] The amendment also added additional penalties to the intentional exposure of HIV to a police officer.[163]

The law remained in effect until the 2018 legislative session.[164] In 2018, the Louisiana Legislature made some positive advancements in the law, including amending previous medically inaccurate language within the bill conflating HIV and AIDS[165] and removing some language which criminalized behavior that posed a negligible risk of HIV transmission.[166] The 2018 amendment also created several affirmative defenses.[167] The next section will explain the structure and content of the law's latest iteration.

III. THE CURRENT LAW - LOUISIANA REVISED STATUTE § 14:43.5: INTENTIONAL EXPOSURE TO HIV

Louisiana's HIV criminalization statute, "Intentional Exposure to HIV," is part of the Louisiana Criminal Code under subpart C, "Rape and Sexual Battery."[168] The statute states that it is unlawful for a PLHIV who is aware of their status to "intentionally expose" another person to HIV through *sexual contact*, without the other person's "knowing and lawful consent."[169] Second, it is unlawful

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162. Intentional Exposure of Aids Virus – Elements of Crime; Exposing a Police Officer; Penalties, 1993 La. Sess. Law Serv. Act 411 (H.B. 335) (West).

163. *Id*.

164. Intentional Exposure to HIV, 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (West).

165. Until 2018, the statute was named "Intentional Exposure to the AIDs Virus." As explained earlier, this language is medically inaccurate as AIDS is not a virus, but a stage with HIV infection. In 2018 the word AIDS was eliminated from the statute altogether, and replaced with "Human Immunodeficiency Virus" or "Human Immunodeficiency." 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (West). However, media coverage of intentional exposure arrests subsequent to the amendment, continues to use the "intentional exposure to AIDS" language. *Baker Parish Bookings*, THE ADVOCATE (June 5, 2019), theadvocate.com/baton_rouge/news/communities/baker/article_789835ee-85b4-11e9-8250-5fac4cd46c9e.html.

166. 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (West). The amendment removed language in the statute which criminalized "spitting, biting, . . . or throwing of blood or other bodily substances." *Id*. Again, these actions pose a negligible threat of HIV infection. *See* Creswell *supra* note 16; *HIV Risk Behaviors*, CDC (Nov. 13, 2019), https://perma.cc/7TBA-24BJ.

167. LA. STAT. ANN. § 14:43.5. (2018).

168. LA. STAT. ANN. § 14:43.5(A) (2018).

169. LA. STAT. ANN. § 14:43.5 (2018). However, despite this language, case law illustrates that neither intent to expose another to HIV nor actual transmission of the virus is required under the law. *See HIV Criminalization in the United States, A Sourcebook on State and Federal HIV Criminal Law and Practice: Louisiana*, CTR. FOR HIV LAW & POLICY, 1 (2017) (hereafter, *HIV Sourcebook*). Moreover, the statute fails to define what constitutes sexual contact. *Id*. For example in *State v. Gamberella*, the state attempted to clarify the statute's meaning by defining sexual contact as "numerous forms of behaviors involving use of the sexual organs of one or more of the participants involving other forms of physical contact for the purpose of satisfying or gratifying the sexual desire of one of the participants." 633 So. 2d 595, 603 (La. Ct. App. 1993). However, this does little to clarify the meaning of the statute. *See HIV Sourcebook* at

for a PLHIV who is aware of their status to "intentionally expose" another person to HIV by *"any means or contact"* without the other person's knowing and lawful consent.[170] However, the statute fails to elaborate on what these other "means or contact" could be.[171] Until the law was amended in 2018, "any means or contact" was defined as "spitting, biting, stabbing with an AIDS contaminated object, or throwing blood or other bodily substances."[172] While the 2018 amendment eliminated this language from the statute, the ambiguity of the statutory language leaves space for continuing criminalization of these acts, despite science showing their lack of transmission power. Moreover, this language "suggests that oral sex or other sexual activities posing no or very low risk of HIV transmission are encompassed within the scope of the law."[173] Third, the law further specifies that it unlawful to intentionally expose a "first responder" to HIV through any means of contact without the first responder's knowing and lawful consent.[174] Notably, actual transmission of HIV is not required by the statute.[175]

Finally, the 2018 amendment enumerated the following affirmative defenses:[176]

> 1. It is an affirmative defense, if proven by a preponderance of the evidence, that the person exposed to HIV knew the infected person was infected with HIV, knew the action could result in infection with HIV, and gave consent to the

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1. For example, under this definition sexual acts that do not involve the exchange of bodily fluids or penetration could be prosecuted. *Id*. at 2.

170. LA. STAT. ANN. § 14:43.5(B) (2018). The statute fails to distinguish between different levels of culpability. Fritchie, *supra* note 153, at 224. PLHIV who maliciously, unintentionally, or negligently expose another to HIV are all treated the same under the statute. *Id*.

171. LA. STAT. ANN. § 14:43.5 (2018).

172. 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (WEST). This previous language was highly problematic for several reasons. First, it criminalized behavior which poses no risk of infection. For example, in *State v. Roberts*, the Fourth Circuit Court of Appeals of Louisiana convicted a PLHIV under the statute when they bit a woman while raping her. 844 So. 2d 263, 265 (La. App. 4 Cir. 3/26/03). Secondly, this language is also dangerously vague, as "bodily substances" is not defined. Thus, throwing saliva, urine, sweat or other substances, which pose no risk of infection, could result in criminal prosecution. *HIV Sourcebook*, *supra* note 169, at 4. Numerous PLHIV have been arrested for spitting under the statute. *Id*. Legislators reliance on vague terms like "bodily substances" is not new. In fact, the government's use of terms like "body fluids" when describing HIV dates back to the 1980s. *See* Emma Mustich, *A History of AIDS Hysteria*, SALON (Jun. 5, 2011), https://perma.cc/7LPP-NQAB. The government's choice to use vague terminology contributed to misinformation about the disease and discrimination against PLHIV. *Id*.

173. *HIV Sourcebook*, *supra* note 169, at 1.

174. LA. STAT. ANN. § 14:43.5(C) (2018). The statute defines "first responder" as law enforcement officers, probation officers, emergency medical service providers, firefighters, etc. *Id*.

175. *HIV Sourcebook*, *supra* note 169, at 4.

176. 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (West). However, the majority of intentional exposure cases are non-prosecutable. *See* Emily Lane, *US: Louisiana "AIDS Exposure" Law is Outdated and Perpetuates Stigma*, HIV JUSTICE NETWORK (May 17, 2017), https://perma.cc/T6KW-YR4L. Consequently, the amended affirmative defenses will not benefit the majority of PLHIV arrested under the statute.

action with that knowledge.

2. It is also an affirmative defense that the transfer[177] of bodily fluid, tissue, or organs occurred after advice from a licensed physician that the accused was noninfectious, and the accused disclosed his HIV-positive status to the victim.

3. It is also an affirmative defense that the HIV-positive person disclosed his HIV-positive status to the victim, and took practical means to prevent transmission as advised by a physician or other healthcare provider or is a healthcare provider who was following professionally accepted infection control procedures.[178]

All of these defenses are contingent upon the PLHIV disclosing their status.[179] However, whether disclosure occurs comes down the PLHIV's word against their "victims." For example, in *State v. Gamberella*, conflicting testimony regarding a PLHIV's disclosure resulted in the PLHIV being convicted under the statute and given a ten-year prison sentence.[180] Also significant is the fact that having an undetectable viral load or using protection such as condoms or PrEP are not considered affirmative defenses in and of themselves, but still predicated on disclosure.

A. Penalties

The harsh legal consequences associated with HIV exposure illustrate lawmakers' contempt for PLHIV. Under La. Stat. Ann. § 14:43.5, intentionally exposing another person to HIV without that person's consent is punishable by a fine of up to $5,000 and ten years in prison—with or without hard labor.[181] "Intentionally expos[ing]" a first responder can yield up to eleven years in prison and a fine of up to $6,000.[182]

Those convicted under this statute must also register as sex offenders, a status that imposes obstacles and penalties beyond fines and jail time.[183]

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177. "Transfer" is not defined and does not appear anywhere else in the statute. LA. STAT. ANN. § 14:43.5 (2018). Presumably, the term "is intended to encompass activities such as blood or organ donation, but can also be interpreted more generally to include various forms of exposure to bodily fluids." *HIV Sourcebook*, *supra* note 169, at 2.

178. LA. STAT. ANN. § 14:43.5(F)(1–3) (2018).

179. *See HIV Sourcebook*, *supra* note 169, at 1.

180. *Gamberella*, 633 So. 2d at 598-99. There, the PLHIV testified that they had worn condoms during sex and disclosed their status, while their sexual partner claimed they had not. Their firsthand accounts were the only evidence available regarding the alleged disclosure. *Id.*; *see also* Teresa Wiltz, *HIV Crime Laws: Historical Relics or Public Safety Measures?*, PEW (Sep. 6, 2017), https://perma.cc/V5X7-3RG6.

181. LA. STAT. ANN. § 14:43.5(E)(1–2) (2018).

182. *Id.*

183. LA. REV. STAT. ANN. §§ 15:541–15:553 (2018). This requires the PLHIV to register as a sex offender in the parishes and municipalities in which they reside and are employed. If they are

Registering as a sex offender would require PLHIV to provide extensive personal information to law enforcement.[184] Registration also entails additional fines and must be completed within strict deadlines. If the offender does not fulfill these strict requirements, they may face further prosecution.[185] Registered sex offenders must also notify their neighbors and landlords, nearby schools and businesses, and provide multiple forms of notification to local law enforcement.[186] Importantly, notification requires sex offenders to disclose the crime for which they were convicted, forcing PLHIV convicted under § 14:43.5 to publicly disclose their HIV status.[187] Registered sex offenders are not eligible for reduced sentences for good behavior,[188] nor are they eligible for probation, parole, or suspension of their sentences.[189] Sex offenders are also prohibited from certain types of employment.[190]

B. Alternate Forms of HIV Criminalization: Enhanced Sentences, Attempted Murder

In addition to the "Intentional Exposure to HIV" statute, Louisiana law criminalizes HIV status in several other ways. First, HIV status has been used to enhance the sentencing of other crimes.[191] For example, in *State v. Richmond*, the Louisiana Court of Appeal upheld a trial judge's decision to increase a woman's sentence for the charge of prostitution *because of* her HIV status.[192] The trial judge reasoned that the sentence was warranted because the woman's HIV status "[could] mean a death sentence to someone else."[193]

Despite the existence of statutes criminalizing HIV exposure, Louisiana has

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a student at a post-secondary institution, they must also register with the campus police. *Id*. at § 15:542(2–3).

184. Registration requires detailed disclosure and verification of the person's residence, employment, vehicles, schooling, contact information, immigration documents, online information (screenname, email address, etc.), as well as the submission of a photograph, DNA sample, fingerprint, and palm print sample. *Id*. at § 15:542(C)(3).

185. *Id*. at § 15:542(D).

186. *Id.* at § 15:542.1.

187. *Id*. at § 15:542.1(A)(2)(a).

188. *Id.* at § 15:537.

189. LA. REV. STAT. ANN. § 15:538. (2018).

190. LA. REV. STAT. ANN. § 15:553. (2018).

191. *HIV Sourcebook, supra* note 169, at 5–6.

192. 708 So. 2d 1272, 1274, 1276 (La. App. 5 Cir. 3/25/98) (finding that a sentence of five years of hard labor was not constitutionally excessive where a HIV positive woman offered oral sex in exchange for rent money to an undercover police officer.) In addition to being HIV positive, the woman suffered from "seizures. . .and a congenital condition called Arteriovenous Malformation, an abnormal collection of blood vessels in her brain. The defendant also advised the court that she was preparing to go into surgery for a brain infection. She told the court that the surgery would require a few months of rehabilitation and would result in partial memory and sensory loss." *Id*. at 1276; *see also State v. Lee*, 699 So. 2d 461, 465 (La. App. 4 Cir. 8/13/97) (finding that HIV does not constitute a mitigating factor for sentencing purposes.)

193. *Richmond*, 708 So. 2d at 1275.

occasionally prosecuted PLHIV with attempted murder, a far more serious crime. For example, in *State v. Caine*, the Louisiana Court of Appeal affirmed an attempted second-degree murder conviction of a PLHIV who stabbed a store clerk with a syringe and shouted, "I'll give you AIDS."[194] The court reasoned that because police observed the PLHIV's "track marks," which are indicative of intravenous drug use, the syringe was likely infected with HIV.[195] The court further reasoned that because "AIDS is a fatal disease," when the PLHIV told the victim he would give her AIDS, "it could only mean that he had specific intent to kill her."[196] The PLHIV was sentenced to fifty years of hard labor.[197]

IV. LOUISIANA HIV CRIMINALIZATION'S MOTIVES AND FUNCTION

Traditionally, criminal law is justified via utilitarian or retributivist penological rationales.[198] At its inception, HIV criminalization was justified using both theories.[199] This section will deconstruct both rationales, while analyzing how the law is currently enforced. Ultimately, it becomes clear that the statute does not advance any retributivist or utilitarian goal and this lack of penological rationale exposes the discriminatory animus behind the law's continued enforcement.

A. Deconstructing Retributivist Rationales

Retribution is an ancient penological principle that asserts punishment is justified because it is deserved.[200] HIV criminalization was and continues to be justified using this retributivist rationale. For example, the 1988 Presidential Commission Report reasoned:

> Just as other individuals in society are held responsible for their actions outside the criminal law's established parameters of acceptable behavior, HIV infected

194. 652 So. 2d 611, 615, 617 (La. App. 1 Cir. 3/3/95).
195. *Id*. at 616.
196. *Id*. at 617.
197. *Id*. at 612.
198. *See* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1 (2006); *Ewing v. California*, 538 U.S. 11, 25, 123 (2003) (outlining legitimate penological rationales). Moreover, the Constitution "does not mandate adoption of any one penological theory" and penological reasoning has varied over time. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991).
199. *Commission Report*, *supra* note 148, at 131. Interestingly, the authors of the Commission Report acknowledged that HIV criminalization's penological rationale was debatable and would receive pushback from HIV activists. *Id*. (The Report acknowledges concerns over the utilitarian function of the law by stating that there may be "concern that criminal sanctions will undermine public health goals," and that some may view "criminal sanctions [as] primarily punitive rather than preventive," and that such sanctions would be seen as "intrusive policing of private sexual activity and danger of selective prosecution and misuse of criminal law to harass unpopular groups.").
200. CYNDI BANKS, CRIMINAL JUSTICE ETHICS THEORY AND PRACTICE, 109 (6th Ed. 2017). For example, retribution was explained in the Bible as "an eye for an eye." *Id*.

> individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions.[201]

This subsection will discuss why HIV criminalization cannot be legitimately justified under retributivist penological principles.

1. HIV is Not a Crime

Implicit in retributivist theory is that a certain behavior is morally blameworthy, and that perpetrators of that behavior need to be held accountable for their actions.[202] Pro-HIV criminalization arguments are rooted, whether implicitly or explicitly, in the idea that HIV is a criminally significant harm.[203] However, living with HIV is not a crime. As one legal scholar explains, "we need not, and should not, treat HIV – an environmental phenomenon that inhabits some people and not others – as something that is abnormal in any morally significant sense."[204] However, HIV criminalization hinges on the dehumanization of PLHIV, "the construction of non-disclosers as a distinct category of individuals (a people category), and the typification of individuals who fall within this category as villains."[205] As author Erica R. Speakerman explains, typifying PLHIV in this way is rooted in several strategies of vilification - all of which are artificially constructed by society and reflected in non-disclosure laws.[206] First, vilification hinges on HIV being considered a great harm.[207] For example, HIV is consistently framed as "a death sentence," thereby constructing the bodies of PLHIV as murder weapons.[208] This construction is reflected by the extreme penalties non-disclosure

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201. *Commission Report*, *supra* note 148, at 130. Other proponents of HIV criminalization claim, "those persons who deliberately violate rules aimed at preventing HIV transmitting conduct, deserve to be punished." Donald H. J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 352 (1990).
202. Banks, *supra* note 200, at 109.
203. Pro HIV criminalization arguments are both implicitly and explicitly rooted in the idea that HIV is a criminally significant harm. Matthew Weait, CRIMINALIZING CONTAGION, HIV AND THE MEANING OF HARM 20 (Catherine Stanton & Hannah Quirk eds., 2016).
204. *Id*. at 21. Weait argues that, "if the human body is conceived of . . . as simply the environment in which HIV is able to exist, as the biosphere is for the bodies which the virus inhabits, then what, precisely, is it that justifies the allocation to it of a normative quality, to wit 'harmfulness'?" *Id.* at 27.
205. Erica R. Speakman, *Constructing an "HIV-Killer": HIV Non-Disclosure and the Techniques of Vilification*, 38 DEVIANT BEHAVIOR 392, 396 (2017). This construction is especially relevant to women, especially women of color, trans women, and sex workers, as vilification regularly exploits stereotyping based on race, gender, sexuality, and class. *Id*. at 398. Moreover, the vilification of HIV non-disclosers, requires the assumption that non-disclosers have nefarious motives or are callously indifferent to the individuals they allegedly expose. *Id*.
206. *See id*. at 396-99.
207. *See id*. at 396. This framing magnifies the harm caused by exposure to HIV, while minimizing the actual experiences of those living with and managing their HIV. *Id.*
208. *Id.* Media outlets like the National Post have run headlines with phrases such as "When AIDS Becomes a Murder Weapon." *Id.*; *See also*, Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1244 (2015); *Richmond*, 708 So. 2d

laws impose. But, advances in treatment mean that HIV is now a chronic yet manageable illness.[209]

Vilification is also rooted in framing the failure to disclose as a decision made knowingly and with callous indifference to the individuals allegedly exposed.[210] Again, this assumption is codified in non-disclosure laws, which fail to distinguish between levels of criminal culpability, and thereby assume that all non-disclosure is malicious. Moreover, this construction, and the non-disclosure laws predicated upon it, ignore the nuances and power dynamics involved in sex.[211] To some WLHIV, disclosure of their diagnosis could result in violence. For example, 4% of WLHIV reported experiencing violence following an HIV status disclosure.[212] For WLHIV in abusive relationships, this threat is even greater.[213] Women also risk experiencing economic abandonment after disclosing HIV.[214] Put differently, for many women, the motivation behind not disclosing their HIV status is fear, not disregard for their sexual partner's health. By forcing women to disclose their HIV status, even in the face of violence, non-disclosure laws at best ignore this risk and at worst sanction violence against WLHIV by forcing them into dangerous situations. Furthermore, not only is this typification of WLHIV artificial, it is also impermanent.[215] The definition of certain behavior as either a medical or criminal problem alternates – "what is attacked as criminal today may be seen as sick next year and fought over as a possibly legitimate by the next generation."[216]

2. Proportionality Problems

HIV criminalization further fails to satisfy retributivist rationale because the law's penalties are not proportional to the crime. Proportionality, "the notion that the punishment should fit the crime – is inherently a concept tied to the penological

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at 1275 (equating HIV status to a "death sentence").

209. Speakman, *supra* note 205, at 396; Buchanan, *supra* note 208, at 1244.

210. *See* Speakman, *supra* note 205, at 398-99.

211. Aziza Ahmed & Beri Hull, *Sex and HIV Disclosure*, AM. BAR ASS'N - HUMAN RIGHTS MAG. (April 1, 2011), https://perma.cc/9JQN-9CH3.

212. *Intersection of Intimate Partner Violence and HIV in Women*, CTRS. FOR DISEASE CONTROL & PREVENTION 3 (2014), https://perma.cc/6GXB-7833; *see also* Rashida Richardson & Catherine Hanssens, *Ignorance, Domestic Violence, and HIV Disclosure: A Fatal Combination*, THE CTR. FOR HIV LAW & POL. (Sep. 14, 2012), https://perma.cc/N38L-YPG8 (describing a woman who was murdered after disclosing her HIV status).

213. *Intersection of Intimate Partner Violence and HIV in Women, supra* note 212.

214. Alana Klein, *Feminism and the Criminalisation of HIV Non-disclosure*, CRIMINALIZING CONTAGION 175, 176 (Catherine Stanton & Hannah Quirk eds., Cambridge University Press 2016).

215. Trevor Hoppe, *From Sickness to Badness: The Criminalization of HIV in Michigan*, 101 SOC. SCI. & MED. 139, 146 (2014) (defining HIV as a criminal, rather than medical, problem requires the artificial assignment of blame and victimhood.)

216. Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance,* 15 SOC. PROBLEMS 175-188 (1967), *as quoted in id.* at 140.

goal of retribution."[217] Here, the penalties of Louisiana's HIV criminalization statute are vastly disproportionate to any alleged harm caused by non-disclosure.

Critically, Louisiana's HIV criminalization statute does not penalize *transmission*[218] of HIV but rather *exposure* to the virus.[219] One does not need to actually infect another individual with HIV to be convicted under the statute.[220] In fact, a PLHIV does not even have to have sex with another person in order to be charged under the statute.[221] Moreover, even if transmission did result from exposure to the virus, advancements in HIV care mean that HIV is now a chronic illness, not the death sentence it once was, further demonstrating the law's disproportionately punitive penalties.[222] Despite advancements in medical care and the lack of harm from exposure without transmission, HIV non-disclosure and subsequent exposure legally continues to be equated to a great harm worthy of extreme criminal penalties.[223]

This disproportionality is even more striking when compared to other criminal penalties in Louisiana. For example, crime that results in the death of another person are subject to dramatically lower penalties than a violation of § 14:43.5. The penalty for "Intentional Exposure to HIV " can be up to eleven years in prison,[224] yet the penalty for negligent homicide is only up to *five* years in prison.[225] Proportionality problems also arise out of the law's failure to distinguish between varying levels of culpability.[226] The law treats people who have committed malicious, unintentional, or low-risk exposure equally.[227] The failure to address varying levels of hypothetical criminal culpability elucidates lawmakers desire to simply punish PLHIV for their HIV status alone and not for any perceived crime.

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217. Ewing v. California, 538 U.S. 11, 31 (2003).
218. This is not to suggest that if the law required transmission that the law would be acceptable or less harmful. Further, the law cannot be analogized to other criminal threats, as § 14:43.5 does not require any malicious intent.
219. LA. STAT. ANN. § 14:43.5. (2017).
220. Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1431 (2013) (pointing out that the law's failure to distinguish between exposure and transmission implies that the continued sexual activity of PLHIV is harmful).
221. Robert McClendon, *'Saved' from her life on the streets, only to be branded 'sex offender'*, THE TIMES-PICAYUNE (Jan. 28, 2016), https://perma.cc/XK4K-JXV5 (WLHIV was convicted of intentional exposure when she had only sexually propositioned the "victim.").
222. *See* Speakman, *supra* note 205, at 396–97. *See also* State v. Turner, 103 So. 3d 1258, 1261 (La. Ct. App. 3 Cir. 12/5/12) (noting the trial judge's reasoning that an HIV-positive sex worker had "probably sentenced two other people to the death sentence").
223. *See* Speakman, *supra* note 205, at 396.
224. LA. STAT. ANN. § 14:43.5 (2017).
225. LA. STAT. ANN. § 14:32. Louisiana law also dictates a sentence of not more than *five years* for assault by drive by shooting, and not more than *five years* for simple kidnapping. §§ 14:37.1, 14:45.
226. *See* Fritchie, *supra* note 153, at 224-25.
227. *Id*.

In conclusion, HIV criminalization fails to serve a legitimate retributivist rationale. Living with HIV, including failing to disclose one's HIV status, is not a morally blameworthy act deserving of punishment. The construction of non-disclosure as morally blameworthy is predicated on the vilification of people living with HIV and ignores the realities of sexual politics. The extreme proportionality issues that arise between HIV non-disclosure statutes and other crime like homicide further undermine the statute's retributivist legitimacy.

B. Deconstructing Utilitarian Rationales

Utilitarian theories of criminal punishment focus on "how punishment will affect future actions and (increase) society's future aggregate happiness."[228] The goal of utilitarian theories of criminal punishment are deterrence and the prevention of future crime.[229] Theories of prevention, deterrence, rehabilitation, and incapacitation fold into utilitarian theories of punishment.[230]

The 1988 Presidential Commission Report initially couched HIV criminalization under utilitarian punishment principles.[231] The Report reasoned that "establishing criminal penalties for failure to comply with clearly set standards of conduct can also *deter* [emphasis added] HIV-infected individuals from engaging in high-risk behaviors, thus protecting society against the spread of the disease."[232] This section deconstructs the many reasons why HIV criminalization fails to serve any utilitarian function, including prevention, deterrence, rehabilitation, and incapacitation.

1. Prevention and Deterrence Rationale

Proponents of HIV criminalization argue that criminal prosecution prevents the spread of HIV.[233] However, non-disclosure laws like Louisiana's do not prevent HIV transmission and can actually exacerbate the spread of HIV.[234] In many cases, people may not know that HIV-related criminal laws exist; and therefore, they do not alter their behavior.[235] Even when people know about HIV

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228. Matthew Haist, *Deterrence in A Sea of "Just Deserts": Are Utilitarian Goals Achievable in A World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 794 (2009).
229. *See* Banks, *supra* note 200, at 211.
230. *Id.*; *see also* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 737–38 (2005).
231. *Commission Report, supra* note 148, at 130.
232. *Id.*
233. *Id.*; *see also* Donald H. J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 352–53 (1990) ("[T]here is a social objective to prevent conduct likely to spread HIV in order to prevent further transmission of HIV to uninfected persons; and there is a social goal to educate the public about conduct likely to spread HIV and to reinforce social norms against behavior likely to result in HIV transmission.").
234. *See* Weait, *supra* note 203, at 18.
235. Stephanie Papas, *HIV laws that appear to do more harm than good*, 49 AM. PSYCHOL. ASS'N 32 (Oct. 2018), available at https://www.apa.org/monitor/2018/10/ce-corner. For example, not

criminalization laws, studies have found that the law does not impact individual behavior.[236] Punishing PLHIV for failing to disclose their HIV status does not deter non-disclosure, nor does it deter PLHIV from engaging in "sexual contact."[237]

The criminalization of HIV exacerbates HIV transmission in three ways, because as the law is written, PLHIV have only committed a crime if they are aware of their HIV status.[238] This may disincentivize people from testing for HIV.[239] A person who does not know their status, and therefore does not receive treatment, is likely to take fewer precautions, be more contagious, and exacerbate transmission rates.[240] As the Dean of the Rutgers University School of Public Health explains, the law rewards the contagious person while "the positive person who knows their status, who is doing the right thing, who is probably in care and in treatment can get prosecuted. It makes no sense."[241]

Even when PLHIV have chosen and have the ability to get tested and become aware of their status, studies show that HIV criminalization does not influence these individuals' behaviors or rates of disclosure.[242] Other research posits that the law may actually increase HIV risk behavior and decrease rates of disclosure[243] because HIV criminalization increases stigma surrounding HIV, which in turn discourages PLHIV from disclosing their status for fear of discrimination or

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even HIV nurses are aware of HIV criminalization laws. *See* J. Craig Phillips, Jean-Laurent Domingue, Mary Petty, Michael A. Coker, Terry Howard & Shari Margolese, *HIV Care Nurses' Knowledge of HIV Criminalization: A Feasibility Study*, 27 J. ASS'N NURSES AIDS CARE 755, 755767 (2016).

236. Papas, *supra* note 235.

237. *Id*.

238. LA. STAT. ANN. § 14:43.5 (2017).

239. *See* Papas, *supra* note 235; *see also* Dini Harsono, *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 21 AIDS BEHAV. 10, 27-50 (Jan. 2017); Perry N. Halkitis, *HIV criminalization and the public's health,* AM. PSYCHOL. ASS'N (Mar. 2017), available at https://www.apa.org/pi/aids/resources/exchange/2017/03/policy-considerations. This phenomenon has inspired the phrase, "take the test, risk arrest." *HIV Criminalization: An Epidemic of Stigma Driving HIV Transmission*, MO. ANTI-CRIM. TASK FORCE, https://perma.cc/87DD-8RNH.

240. *See* Papas, *supra* note 235; *see also* Edwin Bernard, *HIV Criminalisation Discourages HIV Testing, Creates Disabling and Uncertain Legal Environment For People With HIV In U.S.*, HIV JUSTICE NETWORK (Jul. 2012), https://perma.cc/7WB3-4N7D; Maya Kesler, et al., *Prosecution of non-disclosure of HIV status: Potential Impact on HIV testing an transmission among HIV-Negative Men Who Have Sex With Men*, 13 PLOS ONE 1 (2018) (finding that HIV criminalization can reduce HIV testing by 7% which in turn correlates to an 18.5% increase in community HIV transmission).

241. *See* Papas, *supra* note 235.

242. *Id.*

243. *See* Keith Horvath, Craig Meyer & B.R. Simon Rosser, *Men Who Have Sex With Men Who Believe That Their State Has A HIV Criminal Law Report Higher Condomless Anal Sex Than Those Who Are Unsure Of The Law In Their State*, 21 AIDS BEHAV. 51 (2017). This is because the law confuses people into thinking such laws "are effective in discourage HIV-infected persons from engaging in condomless anal sex. As a result, these men may engage in higher risk behavior because they perceive that they are at low risk for HIV infection, protected in part by state law." *Id*. at 57.

violence.[244] Furthermore, the law fails to recognize the power dynamics embedded in sexual relationships. Because women utilize healthcare systems more frequently than men, "they are likely to learn their HIV status before male partners and as a result, may be prosecuted more often despite potential transmission from their current male partner."[245]

Finally, non-disclosure laws undermine HIV-related public health initiatives combatting HIV.[246] The law places the legal burden of preventing HIV transmission exclusively on PLHIV. Consequently, this "undermines the most basic public health message concerning sexual health: everyone should take responsibility for their own protection."[247] This framing undermines public health initiatives, including the use of PrEP.[248] PrEP empowers everyone, including HIV negative individuals, to take responsibility for prevention, whereas HIV criminalization shifts the prevention burden to PLHIV.[249]

HIV criminalization laws also "run counter to the current public health paradigm for the prevention and treatment of HIV in the U.S., namely the HIV Care Continuum."[250] The HIV Care Continuum is a public health model comprised of sequential steps from diagnosis to treatment designed to ensure viral suppression.[251] Fundamental to the Continuum's success is the idea that people believe HIV testing is in their best interest.[252] HIV criminalization undermines this concept by disincentivizing testing.[253] HIV criminalization also ignores other methods of HIV prevention such as condom usage, having an undetectable viral load, or using PrEP.[254] Central to today's public health initiatives is the concept that "Undetectable=Untransmittable."[255] By receiving treatment and achieving an undetectable viral load, PLHIV can no longer transmit the disease, even without condom use.[256] Put differently, treatment functions as a form of prevention. Non-disclosure statutes like Louisiana, fail to account for these biomedical and public health breakthroughs. By disincentivizing testing and further stigmatizing HIV,

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244. *See* Zita Lazzarini, *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350 (Aug. 2013); *see also* Reif, *supra* note 82, at 6; Tony Yang, *Rethinking Criminalization of HIV Exposure – Lessons from California's New Legislation*, 378 NEW ENG. J. MED. 1174-75 (2018).
245. Perone, *supra* note 127, at 391.
246. Halkitis, *supra* note 239, at 2.
247. Fritchie, *supra* note 153, at 229.
248. Halkitis, supra note 239, at 4.
249. *Id.*
250. *Id*. The United Nations acknowledges that HIV criminalization sabotages public health initiatives; *Criminalization of sexual behavior and transmission of HIV hampering AIDS responses*, UNAIDS (Nov. 2008), https://perma.cc/ML75-7GY6.
251. What is the HIV Care Continuum, HIV.GOV (Dec. 2016), https://perma.cc/6S35-7SSH.
252. Halkitis, *supra* note 239, at 2.
253. *Id.* at 2.
254. *Id*. at 2-4.
255. Undetectable = untransmittable, UNAIDS (Jul. 2018), https://perma.cc/G7XK-HHA7.
256. *Id.*

HIV criminalization undermines this model.[257] Moreover, non-disclosure laws punish virally suppressed PLHIV for behavior that has literally no risk of harm or alleged moral imperative to disclose.[258]

2. Rehabilitation Rationale

Criminalizing HIV also fails to further any rehabilitative function. Ironically, rehabilitationist penological theories "regard crime as the symptom of a social disease and see the aim of rehabilitation as curing that disease through treatment."[259] Of course, in the context of HIV criminalization, the disease is not metaphorical. Rehabilitationist theories imply not only that an HIV diagnosis is morally blameworthy and that punishment would help a PLHIV, but that HIV is somehow curable. Public health research disproves this theory and demonstrates that incarcerating PLHIV only makes them sicker.[260] Incarceration is repeatedly linked to poor health outcomes among PLHIV because it leads to economic, employment, and housing instability, which in turn creates barriers to receiving HIV treatment.[261] As Dr. Anne Spaulding, an associate professor at Emory University and national expert on HIV in corrections explains, "of all the life events that knock people out of HIV care, going to jail is one of the biggest disruptors."[262] The longer a PLHIV goes without treatment, the higher their viral load and the more contagious they become. Thus, rather than rehabilitating PLHIV, HIV criminalization only endangers the health of the individuals convicted under the statute, as well as the communities to which those individuals belong upon release.

3. Incapacitation Rationale

Traditional penological theory has justified imprisonment by reasoning that incapacitating criminals "protect[s] the public from the chance of future offending."[263] HIV criminalization fails to achieve this incapacitation rationale. HIV criminalization does not affect rates of HIV disclosure,[264] but rather is deleterious to both PLHIV's health and the public at large.[265]

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257. Halkitis, *supra* note 239, at 2.
258. *Id.* at 4.
259. Banks, *supra* note 211, at 169.
260. Bisola O. Ojikutu, Sumeeta Srinivasan, Laura M. Bogart, S. V. Subramanian & Kenneth H. Mayer, *Mass incarceration and the impact of prison release on HIV diagnoses in the US South*, PLOS ONE 1 (Jun. 2018).
261. *Id.*; *see generally* Ginny Shubert, *Mass Incarceration, Housing Instability and HIV/AIDS: Research Findings and Policy Recommendations* (Feb. 2013).
262. *Paying the Price, Failure to Deliver HIV Services in Louisiana Parish Jails*, HUMAN RIGHTS WATCH (Mar. 29, 2016), https://perma.cc/TN4G-S2F9.
263. Banks, *supra* note 200, at 171.
264. Harsono, *supra* note 239.
265. Halkitis, *supra* note 239.

Quarantining PLHIV in prisons similarly fails to protect PLHIV or the public. Louisiana prisons frequently fail to provide adequate treatment to PLHIV.[266] While incarcerated, Louisiana prisoners are denied regular HIV testing, and treatment is regularly delayed, interrupted, or denied.[267] Moreover, even if care is available, many prisoners avoid disclosing their HIV status to prison officials for fear of discrimination and harassment by guards and other inmates.[268] Additionally, while imprisoned, PLHIV can continue to transmit HIV through unprotected consensual sexual intercourse or rape, tattooing, and intravenous drug use.[269] While many experts believe that HIV transmission in prison and jails is rare, "transmission of HIV during incarceration is a concern given the potential 'perfect storm' in many correctional systems of relatively high prevalence of HIV infection coupled with policies that ban condom use and clean injecting equipment."[270]

C. Where the Rubber Meets the Road: Examining Enforcement of HIV Criminalization in Louisiana

If Louisiana's HIV non-disclosure statute is to exist legitimately, it must be enforced equally.[271] However, an examination of available case law and arrest records reveal a pattern of discriminatory enforcement. Notably, the law's enforcement is dependent on the status of the alleged "victim," with the law functioning as a means of quarantining HIV within marginalized or politically unpopular populations. The law's discriminatory enforcement refutes any legitimate penological justification of the law.[272] Rates of HIV non-disclosure are consistent across PLHIV. Therefore, the demographics of HIV arrests and prosecutions should resemble the demographics of PLHIV in Louisiana.[273] However, this is not the case.

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266. Paying the Price, *supra* note 262.
267. *Id*. Cost is a huge barrier for parish jails in administering HIV treatment. Medicaid does not cover prisoners, and no state or federal funding exists to defray HIV treatment, which costs $50,000 a year on average.
268. *Id*. These fears are not unfounded. HIV positive prisoners report extreme HIV related discrimination and stigma such as being placed in solitary confinement or being forced to use segregated toilets by other inmates; Courtenay Sprague, Michael L. Scanlon, Bharathi Radhakrishnan & David W. Pantalone, *The HIV Prison Paradox: Agency and HIV-Positive Women's Experiences in Jail and Prison in Alabama,* 27 QUALITATIVE HEALTH RESEARCH 1427, 1434 (2016). Similarly, female inmates in Alabama reported experiencing similar forms of extreme harassment and stigma. One woman surveyed reported that prison officials disclosed her HIV status to her children without her permission; another woman reported that guards failed to break up fights where inmates were HIV positive.
269. *Prisoners, HIV, and AIDS*, AVERT (Jun. 19, 2019), https://perma.cc/FB6S-7ELM.
270. David A. Wohl, *HIV and Mass Incarceration: Where Infectious Diseases and Social Justice Meet*, 77 N.C. J. MED. 259, 362-63 (2016).
271. Buchanan, *supra* note 208, at 1306.
272. *Id*. at 1174.
273. *Id*. at 1308.

First, there is a discrepancy between the conduct PLHIV are arrested for under the law and the most common categories of HIV transmission. Police do *not* arrest PLHIV for conduct that is most likely to transmit HIV. The vast majority of HIV transmissions in Louisiana arise from male-to-male sexual contact.[274] However, only a minority of HIV criminalization arrests involve this type of conduct.[275] Another common category of transmission, intravenous drug use, is also not reflected in arrest rates.[276] Instead, a large proportion of arrests are made for conduct that is extremely unlikely, or impossible, to transmit HIV.[277] For example, PLHIV have repeatedly been arrested/convicted of non-disclosure for biting, spitting, defecating, or fighting.[278] Secondly, a discrepancy exists between the demographics of those arrested or charged under the statute and the statewide demographics of PLHIV. For example, cis and transgender women are underrepresented in HIV non-disclosure arrests/convictions.[279] Only 15% of arrests/convictions involved a female perpetrator, while approximately 30% of PLHIV in Louisiana are women.[280] Intravenous drug users are also underrepresented.[281]

In addition, clear patterns emerge regarding the alleged "victims" of HIV exposure. Populations who are most at risk of contracting HIV, including trans women, men who have sex with men, sex-workers, and intravenous drug users, are underrepresented as "victims."[282] Meanwhile, other populations are overrepresented as "victims," including police officers, first responders, women engaged in heterosexual sex, and children.[283] Where the victim is a member of a marginalized group, the law is likely to be underenforced.[284] But, where a victim is engaged in heteronormative social behavior and is a first-responder or a sympathetic figure – arrest and prosecution is over-represented.

Under-enforcement of criminal laws may indicate indifference or disdain towards politically unpopular or vulnerable groups.[285] Under-enforcement sends an unofficial but powerful signal about which crimes matter and which are

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274. *Local Data: Louisiana*, *supra* note 27.
275. Of the 21 examples of arrests/convictions for non-disclosure involving sexual contact, only three involved male-to-male sexual contact. *See appendix.*
276. Only one arrest involved contact from a syringe used for intravenous drug use. *See id.*
277. *See appendix.* As discussed, biting and spitting cannot transmit HIV. Cresswell, *supra* note 16, at 1.
278. *Id.*
279. *See appendix*; *Local Data: Louisiana*, *supra* note 27. No trans women were arrested/convicted of non-disclosure, despite representing a significant population of PLHIV. However, it is possible that some trans women are been misgendered by police.
280. *See Local Data: Louisiana*, *supra* note 27.
281. *Id.*; *see appendix*. Unfortunately, I was unable to analyze potential racial disparities in policing related to HIV exposure. Most newspaper articles and decisions do not reference race.
282. *Id*.
283. *Id*.
284. Buchanan, *supra* note 208, at 1238.
285. *Id*. at 1307.

dismissed and devalued.[286] Here, patterns of policing indicate that individuals such as those engaged in heteronormative sex or the police *matter*, while those most at risk of contracting HIV, including women and people of color, *do not*. Under-enforcement also elucidates official attitudes towards what behavior is considered normal and what behavior is considered intolerable within certain communities.[287] Here, the selective enforcement of HIV non-disclosure indicates that the exposure of politically favorable groups to HIV is not normal and intolerable, while the spread of the disease within disfavored groups is acceptable.[288] In other words, patterns of enforcement show that lawmakers only find HIV criminalization laws worth enforcing where HIV threatens to invade heteronormative communities or politically favorable groups.[289]

These policing patterns shed light on the animus underlying the law's enactment and continued enforcement and further disprove any of the law's retributivist or utilitarian legitimacy. Again, retributivist theory is premised on the belief that certain behavior is morally blameworthy and deserving of punishment.[290] Here, policing patterns show that the perceived blameworthy and punishable crime is not *just* the act of non-disclosure of HIV, it is the non-disclosure and subsequent exposure of HIV to *a politically favorable individual*. Again, only where the "victim" is seen as worthy is the behavior treated as criminal. This nuance further delegitimizes Louisiana's law and reveals the animus motivating its enforcement.

Likewise, governments officials' purported desire to serve a utilitarian goal of preventing HIV is also disproved. Rather than protecting all Louisianans from HIV, patterns of policing reveal that officials are exclusively interested in preventing HIV from spreading outside of marginalized communities. Again, the desire to quarantine HIV within certain communities demonstrates an intent to sabotage public health initiatives and a choice to allow those communities to remain sick, and thus exposes lawmakers' animus towards those communities.

D. Pulling it All Together: Stigma, Transphobia, Sexism, and Racism Collide

HIV criminalization is unjustifiable under any penological rationale. The law is discriminatorily enforced and can exacerbate the spread of HIV. In light of the law's failure to achieve any utilitarian or retributivist goals, this paper posits that the law's continued existence coupled with the disparate enforcement is

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286. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1774, 1749 (2006).
287. *Id*. at 1749-50. "Underenforcement can also have a devastating normative impact on those who live in underenforcement zones."
288. *See id*. Here, marginalized populations constitute the law's "underenforcement zone."
289. *See id*.
290. Banks, *supra* note 200, at 200; "Retributive Justice," STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jun. 2014), https://perma.cc/4S7P-E4JC.

evidence of the state's discriminatory animus towards the populations most impacted by HIV.

In criminalizing HIV, Louisiana lawmakers have made a conscious decision to define a medical problem as criminal.[291] Criminal law distinguishes deviant and non-deviant behavior through coercion, control, repression, and punishment.[292] In the HIV criminalization context, the state artificially assigns blame and victimhood to HIV positive and negative people. This assignment is contingent on the vilification of PLHIV.[293]

This vilification is rooted in the archetype that the populations most affected by HIV - people of color, LGBT people, poor people, etc. - are dangerous "disease spreaders."[294] Initial constructions of PLHIV presented men who have sex with men, people of color, and drug users as "groups who bore responsibility for their infections and were, therefore, undeserving of sympathy."[295] This paradigm persists today.[296]

Analyzed through a feminist lens, the disease spreader archetype is explained as a collision of institutional racism, patriarchy, and class exploitation.[297] These systems work in concert to construct a "cult of true [white] womanhood," defined by sexual purity, heteronormativity, wealth, and whiteness.[298] WLHIV, especially WLHIV with co-occurring marginalized identities, fall outside these boundaries and are therefore seen as dangerous and deviant "vectors of disease."[299] Under the disease spreader archetype, WLHIV whose identities are outside the "cult of womanhood" are therefore seen as

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291. Hoppe, *supra* note 215, at 140. The definition of certain behavior as either a medical or criminal problem alternates—"What is attacked as criminal today may be seen as sick next year and fought over as a possibly legitimate by the next generation." *Id.*

292. Stanton, *supra* note 225, at 195.

293. Speakman, *supra* note 205, at 400, 402; Hoppe, *supra* note 215, at 146.

294. Mogul, *supra* note 3, at 34 ; *see also* Rosenblum, *supra* note 6, at 540 (noting that " [r]eading AIDS as the outward and visible sign of an imagined depravity of will, AIDS commentary deftly returns us to a premodern vision of the body, according to which heresy and sin are held to be scored in the features of their voluntary subjects by punitive and admonitory manifestations of disease.'").

295. Speakman, *supra* note 205, at 394.

296. For example, rates of HIV infection among Black heterosexual women are blamed on narratives that Black women are "sexually aggressive" and "promiscuous" and/or are in relationships with duplicitous and hypersexual Black men "on the down low." Mogul, *supra* note 3, at 24-25, 35.

297. HIV criminalization lies at the intersection of institutional racism, patriarchy, and class exploitation in that it defines who is expendable and deserving of punishment. Cohen, *supra* note 3, at 448.

298. Mogul, *supra* note 3, at 24-25.

299. Lisa M. Keels, "Substantially Limited:" the Reproductive Rights of Women Living with HIV/AIDS, 39 U. BALT. L. REV. 389, 394 (2010); "Women were viewed as vectors, with their needs ranked secondary to those of their fetuses or their male clients and those clients' other partners." Higgins, *supra* note 52, at 435; Cristina Velez, *The Continued Marginalization of People Living with HIV/AIDS in U.S. Immigration Law*, 16 CUNY L. REV. 221, 229-30 (2013) (finding that HIV is associated with death, punishment, crime, horror and otherness and that HIV is perceived as punishment for deviant behavior).

unworthy, a threat to moral order, and ultimately criminal.[300] Their behavior and bodies are interpreted as threats to conventional notions of morality and sexual conformity, and are consequently in need of policing.[301] HIV criminalization responds to this threat through erecting barriers between socially acceptable HIV negative individuals and "deviant" WLHIV.[302]

In conclusion, in the absence of any legitimate penological justification, Louisiana's continued criminalization of HIV is an enduring product of the "disease spreader" archetype. The statute originated in a time of misunderstanding, hysteria, and overt homophobia. While inexcusable then, the law's continued use today is even more disturbing. Lawmakers can no longer feign ignorance about the disease, nor can they purport that the law is justified under any legitimate rationale. In light of the reasons outlined in the previous sections, there is no other explanation for the state's continued commitment to HIV criminalization other than discriminatory animus against PLHIV. Implicit within that animus is institutionalized contempt towards the populations most affected by HIV and a desire to moralize, police, and pathologize the bodies and behaviors of those populations.

V. IMPLICATIONS OF ILLEGITIMACY: THE IMPACT OF HIV CRIMINALIZATION ON WOMEN IN LOUISIANA

HIV criminalization in Louisiana has profound and unique consequences on the lives and welfare of women, regardless of their HIV status.[303] First, HIV criminalization exacerbates rates of HIV transmission, which endangers all women.[304] Secondly, for WLHIV, HIV criminalization poses different threats to different populations of women, such as women experiencing domestic violence, trans women, women of color, and sex workers. Third, for WLHIV convicted or charged under the statute, HIV criminalization has devastating and prolonged consequences. Finally, HIV criminalization works in conjunction with other prohibitions on harm reduction methods to create a paradox that prevents HIV negative women from protecting themselves from HIV transmission while simultaneously criminalizing women when they do contract the virus.

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300. Mogul, *supra* note 3, at 25.
301. *Id*. at 51. The state's attitude that PLHIV are reviled and sexually deviant is also evidenced by the statute's requirement that those convicted under the statute must register as sex offenders.
302. *Id*. at 35.
303. Again, this article has chosen to highlight the unique challenges HIV criminalization has specifically on women's lives. This is not to suggest that the law does not negatively impact men.
304. Moreover, HIV criminalization does not protect HIV negative women from coercion of violence which is frequently responsible for HIV transmission. *10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women*, ATHENA NETWORK, 3, https://perma.cc/Z2HR-49UL.

A. Impact on Women Living with HIV/AIDS

First, criminalization increases stigma against WLHIV, damaging women's health and quality of life.[305] HIV stigma compromises WLHIV's engagement with healthcare.[306] As discussed, stigma also results in discrimination that can harm women's socioeconomic welfare, interpersonal relationships, and mental health. Increased stigma also puts women at risk of violence and vigilantism.[307]

HIV criminalization also compromises WLHIV's privacy and sexual autonomy. The same groups most impacted by HIV are also disproportionately policed and incarcerated.[308] HIV criminalization, in turn, further polices these women's lives, putting WLHIV at risk of further harassment, violence, and exacerbated tension with police.[309]

HIV criminalization also has a unique impact on WLHIV in relationships, especially relationships where domestic violence is present.[310] Nationwide, many HIV criminalization charges occur during "bad break-ups."[311] The law easily allows disgruntled consensual sexual partners to accuse a WLHIV of intentional exposure, even if the WLHIV disclosed her status.[312] For WLHIV experiencing domestic violence, HIV criminalization is used by abusers as a weapon to maintain

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305. 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 Behavior 451, 458 (2006); Sophie Patterson et al., *The impact of criminalization of HIV non-disclosure on the healthcare engagement of women living with HIV in Canada: a comprehensive review of the evidence*, 18 J. INTL. AIDS SOCIETY 20572 (2015).

306. Patterson, *supra* note 305.

307. AIDSWatch, *HIV Criminalization: A Challenge to Public Health and Ending AIDS*, https://perma.cc/3MG2-VCG7.

308. *What HIV Criminalization Means to Women in the U.S.*, POSITIVE JUSTICE PROJECT, https://perma.cc/QG6Q-BDV5. The nation incarcerates African American women at twice the rate of white women. *Criminal Justice Fact Sheet,* NAACP, https://perma.cc/Q9JN-GPNP; Christy Malory, Amira Hasenbush & Brad Sears, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, THE WILLIAMS INSTITUTE, 1-4, (Mar. 2015), https://perma.cc/TS96-2YT2 (finding that discrimination and harassment on the basis of sexual orientation and gender identity is pervasive). This is especially true in Louisiana; a study of police harassment in New Orleans found that Black, Latino, and Native American transgender women reported the highest levels of maltreatment by police. Angela Irvine, *You Can't Run from the Police!: Developing a Feminist Criminology that Incorporates Black Transgender Women*, 44 SW. L. REV. 553, 560 (2015); *see also* Kim Blankenship & Stephen Koester, *Criminal Law, Policing Policy, and HIV Risk in Female Street Sex Workers and Injection Drug Users*, 30 J. LAW, MED. & ETHICS 548, 556 (2002) (describing police harassment among IDUs and sex workers). HIV criminalization also affects immigrant women. Velez, *supra* note 299, at 237.

309. Blankenship & Koester, *supra* note 308 (describing how police harassment influences HIV risk behavior in IDUs and sex workers); Robert Suttle, *The dehumanizing effect of HIV criminalization*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Mar. 2017), https://perma.cc/E7WE-WJN3.

310. *What HIV Criminalization Means to Women in the U.S.*, *supra* note 308.

311. *Id.*

312. *Id.* Ironically, the HIV negative partner can still transmit other STIs to the WLHIV that are more dangerous to HIV positive than HIV negative people—however, this will not result in arrest. *Id.*

power and control, and can impede women's access to justice.[313] For example, abusers may threaten to falsely report non-disclosure.[314] In addition, the stigma created by HIV criminalization means that WLHIV may experience discrimination by judges or juries in court proceedings because of their HIV status.[315] HIV stigma may also prevent domestic violence survivors from fully testifying about HIV related abuse for fear of publicizing their HIV status.[316]

B. Impact on Women Arrested or Convicted Under the Law

For the women arrested or convicted under the law, the repercussions are life altering. First, arrest can mean harassment or violence by police. Second, arrests are especially burdensome on mothers living with HIV, who are already under increased parenting stress due to their HIV status.[317] The arrest of a parent majorly disrupts families.[318] An arrest is traumatizing for children, and may result in children being placed in foster care, family instability, and economic hardship.[319] An arrest may also cause a WLHIV to lose her job, which can be especially onerous given the lower socioeconomic status occupied by many WLHIV.[320] An arrest may also publicize a WLHIV's HIV status, which may result in stigma or violence.[321] Time spent in pretrial detention also hurts WLHIV's health by separating them from their current HIV treatment regimen.[322]

Second, because intentional exposure to HIV is a felony, it carries exorbitant bail that many WLHIV cannot pay. [323] Consequently, WLHIV may spend weeks

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313. Stoever, *supra* note 106, at 1161.
314. *What HIV Criminalization Means to Women in the U.*S., *supra* note 308.
315. Stoever, *supra* note 106, at 1191.
316. *Id*. at 1189-90.
317. Murphy et al., *supra* note 109, at 1449 (finding that parental HIV infection can lead to maternal stress and an impact parenting skills).
318. Yvonne Humenay Roberts et al., *Children Exposed to the Arrest of a Family Member: Associations with Mental Health*, 23 J. CHILD FAM. STUD. 214 (2014) (finding that children's exposure to arrest is associated with negative emotional and behavioral outcomes); Steve Christian, *Children of Incarcerated Parents*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 2009), https://perma.cc/6XJ5-KMZU.
319. *Id*.
320. Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 532 (2017) (finding that pretrial detention increases unemployment); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 937 (2013).
321. Arrests for intentional exposure are regularly publicized in town police blotters and list the full name of the arrestee as well as the crime they were arrested for. *See appendix.* For example, in one case a police officer informed a PLHIV's consensual sexual partner of the person's HIV status and asked if they wanted to file charges, exposing his status. Samantha Morgan, *Man arrested for intentional exposure of the AIDS virus*, WAFB (Aug. 8, 2014), https://perma.cc/262A-YMEW.
322. *Paying the Price*, *supra* note 262.
323. Daniel Bethencourt, *Some Baton Rouge inmates serving excessive jail time: What's the cause; how's it being fixed?*, THE ADVOCATE (Jan. 26, 2015), https://perma.cc/8M25-4268. As

in jail awaiting the resolution of their case.[324] Despite the trauma and disruption that an intentional exposure arrest may cause, the "vast majority of cases involving the crime [are] non-prosecutable."[325] Even if the prosecution drops the charges, the damage caused by the arrest remains. Furthermore, because of the high bail, the severity of sentencing, and the desire to avoid a trial about their HIV status, WLHIV are likely to plead out.[326] If WLHIV are convicted of intentionally exposing someone to HIV, they may face up to eleven years in prison.[327] While incarcerated, women may not have access to adequate HIV treatment and may also experience deplorable conditions,[328] HIV stigma,[329] violence,[330] and separation from their families and children.

Once convicted, WLHIV face the harm of being added to the sex offender registry.[331] Sex offender status has serious economic consequences for WLHIV who may already experience the adverse socioeconomic consequences of HIV stigma and a criminal records. First, registering as a sex offender and completing

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discussed, WLHIV are likely to be low-income and are therefore less likely to be able to afford bail. Further, bail determinations are often rife with racial disparities, further disadvantaging black WLHIV. Jones, *supra* note 320, at 938. Furthermore, the cost of HIV treatment itself is often exorbitant, and may average up to $5,000 per month. Jessica Camille Aguirre, *Cost Of Treatment Still A Challenge For HIV Patients In U.S.*, NPR (Jul. 27, 2012), https://perma.cc/XM3V-499N. While public programs help defer the cost of treatment, people often experience challenges remaining eligible to receive the help. *Id.*

324. One man charged under the statute was unable to pay the $6,500 bail and waited in jail for over 100 days before a judge ordered his release. Bethencourt, supra note 323.

325. Ben Myers, *New Orleans Police charge man for exposure to 'AIDS virus,'* NOLA (Jan. 13, 2016), https://perma.cc/X5R7-TZHS.

326. John D. Parron, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the Revocation of Bail*, 20 U. PA. J. CONST. L. 137, 167 (2017) (finding that high bails have the propensity to induce defendants to plead out); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529 (2017) (finding that pretrial detention due to inability to pay bail increased the probability of conviction)

327. LA. STAT. ANN. § 14:43.

328. Melissa Farres & Charles Levinson, *Special Report: In Louisiana jail, deaths mount as mental health pleas unheeded*, REUTERS (May 31, 2018), https://perma.cc/SBY8-JD8F. For example, Orleans Parish Prison is under a federal consent decree due to abhorrent conditions including escapes, poor mental health care, deaths, and inmate violence. Naomi Martin, *Federal judge approves Orleans Parish Prison consent decree*, NOLA.(Jun. 7, 2013), https://perma.cc/S5TJ-7HGY.

329. Sprague, *supra* note 268, at 1427; *see generally Paying the Price*, *supra* note 262; Rosenblum, *supra* note 6, at 541 (describing how a prisoner living with HIV was forced to keep her laundry and silverware separate from those of other inmates and faced bathroom restrictions due to her health status).

330. *US: Federal Statistics Show Widespread Prison Rape*, HUMAN RIGHTS WATCH (Dec. 15, 2007), https://perma.cc/UPF3-S8LY. Violence and discrimination is especially prevalent for incarcerated trans women. *Police, Jails & Prisons*, NAT. CTR. FOR TRANSGENDER EQUALITY, https://perma.cc/8UD6-BTT4 (explaining that transgender prisoners routinely experience violence and abuse by fellow inmates and prison staff). Trans women prisoners are also routinely misgendered and placed in men's prisons, subjecting them to additional danger. Rosenblum, *supra* note 6, at 520-22.

331. LA. STAT. ANN. § 14:43.5.

the required notification process is costly. If WLHIV fail to pay, they may be penalized further.[332] Second, WLHIV labeled as sex offenders may be denied housing and employment.[333] Further, being listed on the sex offender registry makes WLHIV more vulnerable to further stigma and ostracism.[334] Finally, sex offender registration mandates that WLHIV will not be eligible for probation, parole, or suspension of sentences.[335] This has a disproportionate impact on many WLHIV who are more likely to be discriminatorily policed due to their gender identity, race, or engagement in sex work or drug use.

C. Aaliyah's Story

One WLHIV's story illustrates the immense harm caused by Louisiana's HIV criminalization. Aaliyah was living with HIV and working as a sex worker when Louisiana state troopers arrested her for prostitution.[336] Because of her HIV status, Aaliyah was also charged with intentional exposure to AIDS under § 14:43.5.[337] The only evidence against her was that she agreed to have sex with an undercover police officer, she was not carrying condoms, and she was HIV positive.[338] Aaliyah never had sex with the man who hired her and was arrested

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332. In addition to paying fees to register as a sex offender, offenders bear the cost of making required community notifications, which can be upwards of $580. *State v. Jones*, 182 So. 3d 1218, 1223 (La. App. 5 Cir. 12/23/15); s*ee also State v. Cooper*, 260 So. 3d 594, 597 (La. App. 1 Cir. 9/24/18) (noting that a sex offender was required to pay a $60 registration fee in addition to $585 for flyers and $110 for newspaper notifications). Worse, Louisiana courts have been unforgiving of sex offenders who fail to meet their registration and notification requirements due to an inability to pay. *See State v Jones, 182* So. 3d at 1222; *State v. Mouton*, 219 So. 3d 1244, 1259 (La. App. 5 Cir. 4/26/17); *State v. Cooper*, 260 So. 3d at 599. Sex offender registries are also extremely costly to the state, which must devote resources to tracking sex offenders and maintaining the registry. Alan Greenblatt, *States Struggle To Control Sex Offender Costs*, NPR (May 28, 2010), https://perma.cc/5YY6-ARPD.

333. *See* Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. L. & ECON. 207, 212-13 (2011); Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 762-63 (2013). Louisiana law also bans sex offenders from certain types of employment. LA. STAT. ANN. § 15:533 (2016). For example, the law prohibits sex offenders from employment as service workers, an employment category held predominantly by women. See *Labor Force Statistics from the Current Population Survey*, U.S. DEP'T. OF LABOR (Jan. 19, 2018), https://perma.cc/M9NT-DKME.

334. *See* Platt, *supra* note 333, at 759-60; Serena Solomon, *The Sex Offender Registry Leaves Female Sex Offenders Open to Abuse* (Oct. 24, 2017), https://perma.cc/7SBT-93DP (describing sexual harassment women who were labeled sex offenders experienced from employers and strangers who sent sexually explicit mail after seeing women's names and personal information on sex offender registries).

335. LA. STAT. ANN. § 14:43.5.

336. Robert McClendon, *'Saved' from her Life on the Streets Only to be Branded a Sex Offender'*, NOLA.COM (Oct. 20, 2016), https://perma.cc/A7E5-KMBP. Ironically, the arrest was part of a human trafficking sting; however, police were inexplicably unconvinced that Aaliyah was being trafficked. In fact, the sting operation, which resulted in 23 arrests, only arrested two pimps. *See id*.

337. *See id*.

338. *See id*. Whether Aaliyah was carrying condoms is disputed, with Aaliyah claiming she was

immediately after agreeing to accept money in exchange for sex. She could have intended to disclose her HIV status later in the encounter.[339]

Unable to pay bail, Aaliyah opted to plead guilty in a crowded courtroom, exposing her HIV status to the world.[340] What she did not understand at the time was that in doing so, the words "sex offender" would be branded on her driver's license for years to come.[341] Because of her sex offender status, Aaliyah has suffered countless indignities. On Halloween, police officers called to remind her that she could not trick-or-treat or wear a costume.[342] She must send postcards to hundreds of her neighbors explaining both her HIV and sex offender statuses.[343] When Aaliyah applied for work at a clothing store, the store owner told her that she was denied the job because "kids come in here."[344] Aaliyah has struggled to find a job and stable housing and to pay the sex offender registration and notification fees.[345] An advocate at a homeless shelter who has been helping Aaliyah describes her situation as "unconscionable."[346] Unfortunately, Aaliyah's story is just one example of the devastating impact HIV criminalization has on the lives of WLHIV in Louisiana.

D. Harm Reduction Paradox

Louisiana's prohibition and restriction of strategies for harm reduction and safe sex is another way in which HIV criminalization impacts women's lives in Louisiana. These policies create a paradox that denies women full access to HIV prevention methods while simultaneously penalizing them in the event that they do contract HIV.

1. Syringe Service Program Provision in Louisiana

HIV may be spread through injection drug use.[347] Opioid use, which is often associated with injection drug use, is prevalent in Louisiana, thus placing Louisianans at an increased risk of contracting HIV.[348] In 2016, intravenous drug

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carrying multiple condoms. *See id.*

339. *See id*.
340. *See id*.
341. *See id*.
342. *Id*.
343. *Id*; *see supra* footnotes 186-187 and accompanying text.
344. *Id*.
345. *See id*.
346. *Id*.
347. *See Injection Drug Use and HIV Risk*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 9, 2018), https://perma.cc/LB94-2HUP.
348. *Louisiana Opioid Summary*, NAT. INSTITUTE ON DRUG ABUSE (Feb. 2018), https://perma.cc/D7DJ-3WWB; *Louisiana's Opioid Response Plan A Roadmap to Decreasing the Effects of the Opioid Epidemic*, LA. DEP'T OF HEALTH STEERING COMM. at 3, https://perma.cc/JPX4-WTB5. For example, the number of opioid related deaths in Louisiana was "184% times higher in 2018 than in 2012." *Id*. Moreover, while opioid prescription rates

use accounted for 6% of new HIV transmissions in Louisiana.[349] The CDC recognizes syringe service programs (SSP), which provide injection drug users (IDU) with sterile needles, as playing an important role in reducing HIV risk.[350] SSPs are recognized as an "effective component" of comprehensive HIV prevention programming[351] and are successful in reducing the transmission of blood borne diseases.[352] Despite the benefits of SSPs, Louisiana law makes SSPs difficult to operate.

Louisiana law currently defines hypodermic syringes as drug paraphernalia and criminalizes the possession of drug paraphernalia for nonmedical purposes.[353] In 2017, lawmakers clarified that existing laws should not "prohibit the establishment and implementation of a needle exchange program within the jurisdiction of a local governing authority. . . *upon the express approval of the local governing authority* [emphasis added]."[354] While the new clarifying law removes some barriers from the operation of SSPs, IDUs may still be criminalized for possessing syringes.[355] This in turn "push[es] people to avoid carrying new syringes, forcing them to share injection equipment and risk exposure to. . . HIV."[356] IDUs may be punished with up to a $2,500 fine and two years in prison under this law.[357] Additionally, the law passes enforcement down and shifts responsibility to local municipalities to ultimately determine whether to permit their jurisdiction to operate an SSP.[358] As a result, only New Orleans and Baton Rouge operate SSPs, denying the rest of the state the benefit of access to clean syringes.[359] In 2018, lawmakers proposed a bill eliminating this loophole, but the

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have decreased in Louisiana, residents are still prescribed opioids at a higher average rate than the rest of the country. *Id*. at 4.

349. *2016 STD/HIV Surveillance Report*, *supra* note 33, at 26. Sharing needles to inject drugs can spread HIV, as needles may be contaminated with HIV-positive blood. *See Injection Drug Use and HIV Risk*, *supra* note 347. Drug use may also lead to HIV transmission because when people are high, they are more likely to engage in risky sexual activity like not using condoms. *See id*.

350. *See Syringe Services Programs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 30, 2018), https://perma.cc/7QVK-2FBV.

351. *See id*.

352. *About Syringe Service Programs*, RURAL SYRINGE SERVICES PROGRAM, https://perma.cc/BM97-RTGC.

353. La. Stat. Ann. §§ 40:1021(11), 40:1023.

354. La. Stat. Ann. § 40:1024(C) (2017).

355. *Intersection of Syringe Use and HIV Criminalization: An Advocate's Toolkit,* THE CTR. FOR HIV LAW & POLICY, NAT'L LGBTQ TASK FORCE, 2-3, (2017), https://perma.cc/LBT8-XM2G.

356. *Id*.

357. La. Stat. Ann. § 40:1025 (2016).

358. La. Stat. Ann. § 40:1024(C) (2017).

359. Andrea Gallo, *Clean Needle, Syringe Exchange Programs Now Allowed under Baton Rouge Law*, THE ADVOCATE (Nov. 8, 2017), https://perma.cc/Z47Z-6J6Y. Shreveport may also soon permit the operation of SSPs. *Shreveport City Council to Decide on Needle Exchange Boxes, KTBS* (Oct. 12, 2018), https://perma.cc/T3XC-7VN9.

bill failed.[360]

2. Prohibitions on Safe Sex Practices

Laws that interfere with women's ability to have safe and informed sex, including during sex work, also contribute to Louisiana's HIV epidemic and evidence Louisiana lawmakers' indifference towards HIV prevention among key populations. For example, UNAIDS recommends decriminalizing sex work entirely to prevent HIV transmission and improve treatment outcomes.[361] Not only does Louisiana criminalize sex work, but the law also subjects sex workers to draconian penalties and increasingly invasive policing.[362] The New Orleans Police Department also uses condoms as evidence of sex work.[363] This practice disincentivizes trans women, a group already at increased risk of contracting HIV, from carrying condoms, leaving them at even greater risk.[364]

In addition to prohibitions on sex work, Louisiana lawmakers also restrict access to sexual health service providers like Planned Parenthood, limiting women's ability to access free condoms and HIV testing.[365] Further, Louisiana lawmakers regularly oppose legislation that would provide comprehensive sexuality education that would teach young people how to prevent HIV.[366]

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360. H.B. 661, Reg. Sess. (La. 2018), The law would have also expanded existing SSPs to include opioid overdose treatment, fentanyl testing strips, and more. *See* Julia O' Donogue, *Needle Exchanges forDrug Users Could Go Statewide in Louisiana*, NOLA (Mar. 28, 2018), https://perma.cc/BTZ6-DQ4F. The criminalization of drug possession in general harms marginalized communities and harms HIV prevention and treatment efforts. *See The Intersection of Syringe Use and HIV Criminalization: An Advocate's Toolkit*, *supra* note 355, at 4-5. Also notable is that UNAIDS recommends decriminalizing drug use to improve HIV prevention and treatment. *See The Gap Report*, UNAIDS, 71, https://perma.cc/BF3P-VPBN.

361. *The Gap Report, supra* note 360, at 197.

362. *See* La. Stat. Ann. §§ 14:82-86. Penalties for sex work in Louisiana can range from six months to fifty years in prison. *Id*. at § 14:82; *see e.g.*, Kevin Litten, *Some French Quarter Strip Clubs Cited for Prostitution, Lewd Acts, Drugs: Police*, NOLA.(Jan. 31, 2018), https://perma.cc/8UV7-7FKJ (discussing crackdowns on sex work in New Orleans); Kevin Litten, *Women's Groups, Strip Club Owners Join Forces to Change Stripper Age Bill*, NOLA, (Mar. 10, 2017), https://perma.cc/PK3T-GXFX (detailing legislators' attempts to increase the minimum age requirement to work at strip clubs, a measure opposed by sex worker's rights groups).

363. *See, e.g.*, *In Harms Way,* HUMAN RIGHTS WATCH (Dec. 11, 2013), https://perma.cc/UBJ9-EEPX.

364. *See id*. For example, one trans woman surveyed by Human Rights Watch explained: "In the French Quarter I was at [a bar] with a man and the cops asked only the trans women to go outside and they searched us. If we had condoms we got arrested for attempted solicitation."

365. *See* Kevin McGill, *Legal Battle Persists as Louisiana Attempts to Revise Cutting Medicaid Funds to Planned Parenthood Clinics*, NOLA (Sep. 30, 2016), https://perma.cc/PJ7Q-MEEB. Planned Parenthood rankings of congressional support of women's health and Planned Parenthood programming ranked 5 out of 6 Louisiana congressional representatives as 0-4% out of a possible 100%. *2018 Congressional Scorecard*, PLANNED PARENTHOOD (2018), https://perma.cc/6P9E-P8J3.

366. *See, e.g.*, Alex Woodard, *Louisiana House Committee Rejects Comprehensive Sex Ed,* GAMBIT (Apr. 4, 2018), https://perma.cc/QZM6-53MR; Alex Woodard, *The Facts of Life: The State of Sex Ed in Louisiana*, GAMBIT (May 15, 2017), https://perma.cc/U5YK-LPXC.

Louisiana law also prohibits schools from dispensing contraceptives.[367] These policies work in conjunction with HIV criminalization to create an atmosphere that stigmatizes sex and prevents women from fully controlling their sexual health and bodily autonomy, while simultaneously punishing women who do contract HIV.

CONCLUSION

HIV criminalization in Louisiana is unjustifiable. The statute criminalizing intentional transmission of HIV is devoid of any justifiable penological rationale and is inconsistently and discriminatorily enforced. Moreover, extensive public health research shows that HIV criminalization statutes like Louisiana's hurt the public's health by discouraging HIV testing, increasing stigma, and ultimately increasing rates of HIV transmission. Louisiana lawmakers' continued commitment to HIV criminalization, despite the absence of any penological rationale, is evidence of the statute's discriminatory animus towards the marginalized populations most affected by HIV, including women of color, trans women, poor women, sex workers, and women who use drugs. The public policy and health implications of this animus are catastrophic for all Louisianan women, regardless of their HIV status.

Louisiana lawmakers must repeal § 14:43.5 to ensure justice and to protect the public health and safety of Louisiana women.

APPENDIX

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