CHAPTER FOUR

ANIMUS AND SEXUAL REGULATION

A central feature of the Supreme Court's recent gay rights jurisprudence has been an awareness of — and antagonism toward — government actions fueled by animus toward sexual minorities. While the Court sporadically found animus in decisions predating its gay rights cases, anti-gay animus has played a recurring and pivotal role in the landmark trio of *Romer v. Evans*,[1] *Lawrence v. Texas*,[2] and, most recently, *United States v. Windsor*,[3] helping the Court to invalidate the challenged legislation in each case. When animus provides a lurking explanation for state action, the government's proffered justifications must be all the more compelling to assuage judicial suspicions. Animus has thus proven to be a powerful and nimble trope for framing and assessing negative attitudes toward sexual minorities by the political majority; it gives substance to unspoken, often affective motivations that may otherwise escape constitutional scrutiny, despite their real-world role in driving legislation. Importantly, the Court has analyzed underlying animus without invoking traditional tiered scrutiny or hewing to a specific standard of review, thereby avoiding doctrinal hurdles that may have otherwise frustrated judicial intervention.

Section A of this Chapter tracks the evolution of anti-animus sensibilities leading up to, and then through, the Supreme Court's gay rights jurisprudence, showing that animus-based concerns have been invoked in a variety of constitutional contexts and factual scenarios. This Chapter then proceeds to explore the potential role of animus-centered arguments for the LGBT rights movement going forward; to the extent that animus-centered critiques have been useful and appropriate in adjudicating gay rights disputes, there is potential to apply this analytic trope to other areas of sexual regulation — including issues that do not exclusively affect the LGBT community. Section B of this Chapter attempts one exercise in this vein: it argues that laws criminalizing broad forms of HIV exposure may be uniquely vulnerable to an animus-centered challenge. This section argues that invoking animus may give legal significance to critiques of HIV criminalization that have, so far, been limited to the policy sphere. Using this illustrative example, the Chapter concludes by arguing that animus may provide a maturing LGBT rights movement with a powerful thematic

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[1] 517 U.S. 620 (1996).
[2] 539 U.S. 558 (2003).
[3] 133 S. Ct. 2675 (2013).

thread for identifying and embracing legal priorities outside of the contemporary mainstream.

A. Invoking Animus: Lessons from Existing Jurisprudence

Early examples of animus-centered jurisprudence can be found in *United States Department of Agriculture v. Moreno*[4] and *City of Cleburne v. Cleburne Living Center, Inc.*[5] *Moreno* involved Congress's 1971 decision to amend the Food Stamp Act of 1964[6] to exclude households containing unrelated adults from food stamp eligibility.[7] The Court concluded that the "unrelated adults" restriction was little more than a veiled attempt to exclude "hippies" and "hippie communes" from federal benefits.[8] It held that the classification "clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[9] The Court also rejected the government's argument that the exclusion was "rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program."[10] It noted, as a threshold matter, that prior to the challenged amendment, the statute already contained provisions aimed at preventing fraud.[11] The Court then criticized the classification for being both under- and over-inclusive for vindicating the government's asserted fraud-prevention interests: individuals attempting to defraud the program could easily restructure their living arrangements to remain outside of the "unrelated adults" exception, while many legitimate recipients — like mothers in shared housing arrangements — would be disqualified.[12] The Court found this lack of tailoring sufficient to strip the classification of any rational basis.[13]

In *Cleburne*, a group home for people with mental disabilities was denied a special use permit under city zoning regulations.[14] The City

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[4] 413 U.S. 528 (1973).

[5] 473 U.S. 432 (1985).

[6] Pub. L. No. 88-525, 78 Stat. 703 (1964) (codified as amended at 7 U.S.C. §§ 2011–2033 (2012)).

[7] *Moreno*, 413 U.S. at 529–30 (describing Act of Jan. 11, 1971, Pub. L. No. 91-671, 84 Stat. 2048).

[8] *Id.* at 534 (internal quotation marks omitted).

[9] *Id.*

[10] *Id.* at 535.

[11] *Id.* at 536.

[12] *Id.* at 537–38.

[13] *Id.* at 538.

[14] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).

of Cleburne attempted to justify its zoning decision by reference to the "negative attitudes" of neighborhood residents.[15] The Court bristled at this argument, reasoning that the law should not give direct or indirect effect to private biases[16] and that "the city may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic."[17] The city also proposed a range of other, more neutral arguments: it argued that the residents of the group home may be harassed by students of the junior high school across the street; that the home's location was prone to flooding; that legal responsibility for the home's residents was a concern; and that the home itself would be too densely populated.[18] The Court rejected all of these arguments, concluding that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded"[19] and that this prejudice was the core of the city's decision.[20]

Cleburne and *Moreno*, among other cases,[21] laid the groundwork for animus-centered analyses in the Supreme Court. While the Court in these early cases purported to apply traditional rational basis review, its scrutiny of the government's proffered justifications was effectively more searching.[22] The Court continued this practice in *Romer*, *Lawrence*, and *Windsor*. In each case, the presence of animus led the Court to overturn state action without explicit recourse to established equal protection or due process doctrines. These cases indicate that freedom from animus is becoming a freestanding — and potentially generalizable — constitutional principle, firmly grounded in overlapping due process and equal protection concerns.

In *Romer*, a state constitutional amendment would have prohibited all legislative, executive, and judicial actions aimed at protecting homosexuals from discrimination.[23] The State of Colorado argued that

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[15] *Id.* at 448.

[16] *Id.* (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[17] *Id.*

[18] *Id*. at 449.

[19] *Id*. at 450.

[20] *See id.* at 449–50.

[21] *See* Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer*,* Lawrence*, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1329–31 (2004). Professor Miranda McGowan also counts *Plyler v. Doe*, 457 U.S. 202 (1982), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), as cases addressing — and invalidating — state action "grounded in moral distaste," McGowan, *supra*, at 1329, against the children of illegal immigrants and practitioners of the Santeria religion, respectively. *See id.* at 1329–31.

[22] *See generally* Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475 (1997) (describing the Court's "covert balancing" using heightened scrutiny while "ostensibly applying deferential rational basis review," *id.* at 478).

[23] Romer v. Evans, 517 U.S. 620, 624 (1996) (describing COLO. CONST. art. II, § 30b).

respecting "the liberties of landlords or employers who have personal or religious objections to homosexuality" and "conserving resources to fight discrimination against other groups" constituted two neutral rationales for the law.[24] Justice Kennedy, writing for the Court, found that the amendment's drastic sweep was "so far removed from these particular justifications that we find it impossible to credit them";[25] framed another way, the amendment inflicted "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[26] Contrasted with the sheer breadth of the amendment was the narrowness of the class affected — the Court emphasized that the targeting of a narrow, "politically unpopular group"[27] can "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[28] Quoting *Moreno*, the Court reaffirmed that such "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[29] It concluded that Colorado had violated the Equal Protection Clause, yet without deciding whether homosexuals were a suspect or quasi-suspect class. Instead, Justice Kennedy's analysis focused on the categorical impermissibility of the government's actions: "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[30] Justice Kennedy's focus was not on the "suspect" nature of a classification per se, with *Romer* conspicuously declining to follow a tiered scrutiny framework. Instead, Justice Kennedy was concerned with the use of classifications — suspect or not — to marginalize or harm a targeted group, resulting in a categorically impermissible use of state power irrespective of the group's characteristics. Thus, while ostensibly an equal protection case, *Romer* hinted at overlapping due process considerations that would be invoked again in *Lawrence* and *Windsor*.

Romer demonstrated how concern about animus could intensify judicial scrutiny. Commenting on the case, along with *Cleburne* and *Moreno*, Professor Cass Sunstein observes:

> In all three cases, there were poorly fitting but probably rational justifications (property values in *Cleburne*, discouragement of fraud in *Moreno*,

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[24] *Id.* at 635.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[28] *Id.*; *see also id.* at 632 (contesting the imposition of "a broad and undifferentiated disability on a single named group").

[29] *Id.* at 634 (alteration in original) (quoting *Moreno*, 413 U.S. at 534) (internal quotation mark omitted).

[30] *Id.* at 635.

> conservation of resources and protection of association in *Romer*) and also well-fitting justifications whose legitimacy was in doubt (response to private fears in *Cleburne*, desire to exclude nontraditional families in *Moreno*, desire to avoid legitimizing homosexuality in *Romer*).[31]

By recognizing that "hatred and fear can always be translated into public-regarding justifications," Sunstein concludes that the Court in these cases allowed lurking illegitimate purposes to cannibalize the government's asserted neutral interests.[32]

Seven years after *Romer*, the Supreme Court departed even further from traditional tiered scrutiny by striking down Texas's antisodomy statute in *Lawrence* as a violation of the Due Process Clause. Drawing from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[33] Justice Kennedy's opinion for the Court affirmed that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" deserve constitutional protection;[34] state intervention in such affairs would undermine the Constitution's respect for personal autonomy, privacy, and liberty in intimate, deeply personal decisionmaking.[35] Yet *Lawrence* was concerned with more than just fundamental privacy interests; the case also supposed a responsibility on the part of the state to treat classes of individuals — like homosexuals — with a baseline level of dignity and respect. Justice Kennedy concluded that the State "cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime,"[36] and the majority was keenly attuned to the stigmatizing real-world effects of criminalization.[37]

Lawrence's focus on the sodomy law's demeaning, condemnatory, and stigmatizing effects was, in one sense, a continuation of the constitutional principle developed in *Romer* and in the earlier anti-animus cases: the Constitution is inimical to legislative actions that demean or denigrate a class of persons by imposing concrete burdens or vulnerabilities upon that class. But unlike in *Romer*, *Cleburne*, *Moreno*, or the *Lawrence* concurrence,[38] the *Lawrence* majority's innovation was to

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[31] Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996).

[32] *Id.*; *see also id.* at 62–63.

[33] 505 U.S. 833 (1992).

[34] Lawrence v. Texas, 539 U.S. 558, 574 (2003); *see also id.* at 573–74.

[35] *Id.* at 573–74.

[36] *Id.* at 578.

[37] *Id.* at 575–76. The opinion also pointed out the practical effects of prosecution under the antisodomy laws, including difficulty securing subsequent employment and potential sex offender registry, as "underscor[ing] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Id.* at 576.

[38] *Compare id.* at 574–75, *with id.* at 579–84 (O'Connor, J., concurring) (relying directly on these cases to support striking down the sodomy law on equal protection grounds, arguing that the Equal Protection Clause prohibits any "legislative classification that threatens the creation of

locate these anti-animus sensibilities within the Due Process Clause itself. In Justice Kennedy's words, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[39]

Arguing for the significance of this maneuver, Professor Robert Post observes that "[t]hemes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine. They signal that the Court is concerned with constitutional values that have not heretofore found their natural home in the Due Process Clause."[40] Professor Neomi Rao reaches a similar conclusion: "While themes of dignity linked to individual autonomy have been expressed in other substantive due process cases, the focus on human dignity and the freedom from stigma emphasized in *Lawrence* takes the Court further than in any previous decision."[41]

Commentators have been quick to point out the transformative doctrinal consequences of the *Lawrence* decision. Professor Pamela Karlan argues that *Lawrence* "does to due process analysis something very similar to what the Court's previous gay-rights decision, *Romer v. Evans*, did to equal protection analysis: it undermines the traditional tiers of scrutiny altogether."[42] She observes that *Lawrence* was "magisterial but vague" about the precise constitutional right in question, but that "[a]t its core, the liberty interest at issue in *Lawrence* is the right of gay people to equal respect for their life choices."[43] The Court was able to forego tiered scrutiny because "laws that reflect nothing more than class-based animosity against gay people lack even a legitimate government purpose — a conclusion that, whatever the Court's doctrinal handle, sounds in equal protection."[44] Professor Laurence Tribe also reads *Lawrence* as articulating an expansive new understanding of what "liberty" means in the due process context: "[T]he decision's unmistakable heart is an understanding that liberty is centered in equal respect and dignity for both conventional and unconventional human relationships."[45] Like Karlan, Tribe argues that this dual focus on re-

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an underclass" and that perpetuates a "lifelong penalty and stigma," *id.* at 584 (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring))).

[39] *Id.* at 575 (majority opinion).

[40] Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97–98 (2003) (footnote omitted).

[41] Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 241 (2008).

[42] Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1450 (2004) (footnote omitted).

[43] *Id.*

[44] *Id.* at 1450–51 (footnote omitted).

[45] Laurence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955 (2004).

spect and animosity provides a meta-principle of constitutional liberty beyond the enumeration of specific fundamental rights.[46]

Windsor cemented the Court's continuing commitment to an anti-animus constitutional principle. Justice Kennedy again quoted *Moreno* for the axiom that the "Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group,"[47] and that the federal government's decision to do so "violates basic due process and equal protection principles."[48] *Windsor* thus expressly blended due process and equal protection considerations into a harmonized constitutional concern with animus, empowering the Court to depart from its usual tiered approach. Instead of taking the tiered approach, Justice Kennedy focused on whether the Defense of Marriage Act[49] (DOMA) had "the purpose and effect of disapproval of [a] class."[50] The "unusual" way that DOMA deviated "from the usual tradition of recognizing and accepting state definitions of marriage" was marshaled as evidence of animus, as was the legislative history and context of DOMA's passage.[51] These circumstances allowed the Court to conclude that "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[52] The "resulting injury and indignity" constituted "a deprivation of an essential part of the liberty protected by the Fifth Amendment."[53] Indeed, Justice Scalia called anti-animus sensibilities the "real rationale" behind the majority's decision in his *Windsor* dissent.[54]

In sum, the Court's gay rights cases have refined and applied the anti-animus sensibilities originally developed in cases like *Cleburne* and *Moreno*. *Romer* was a watershed moment in this process: instead of formally applying "heightened scrutiny" or "rational basis with bite,"[55] *Romer* departed altogether from traditional tiered scrutiny, moving the Court toward a more categorical concern with how the

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[46] *See id.*

[47] United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[48] *Id.*

[49] 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675.

[50] *Windsor*, 133 S. Ct. at 2693.

[51] *Id.*; *see also id.* ("The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'" (quoting H.R. REP. NO. 104-664, at 16 (1996))).

[52] *Id.*

[53] *Id.* at 2692.

[54] *Id.* at 2709 (Scalia, J., dissenting).

[55] *See* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793 (1987).

government views and legislates against politically unpopular groups. In *Lawrence* and *Windsor*, this doctrinal reorientation continued to blur the line between equal protection and due process considerations.

It is also possible, at this point, to ascertain some evidentiary bases from which an animus-centered analysis may proceed. First, there are problematic characteristics of some legislative schemes that can allow courts to deduce that majoritarian animus is at work. The biggest red flag appears to be the singling out of specific groups for special burdens or disabilities that the political majority enjoys immunity from; in the words of one commentator, animus is "the meanness inherent in claiming for one's self that which one would deny others."[56] *Romer* and *Windsor* best exemplify this consequentialist approach. In these cases, the Court was attuned to "[d]iscriminations of an unusual character"[57] by the political majority that imposed real, and continuing, harms. In *Windsor*, DOMA's purpose was "to impose a disadvantage, a separate status, and so a stigma" upon those who enter into same-sex marriages.[58] In *Lawrence*, the legal significance of stigma was rooted in its real-world effects in fields like employment.[59] Animus, in other words, is not merely expressive or symbolic, but also a product of asymmetrical power relationships and constitutive of asymmetrical real-world outcomes between social groups. Especially pronounced statutory effects can thus shed light on a legislature's unspoken intentions.

The Court has also had reason to assume the potential for animus a priori, and has adjudicated the legitimacy of state justifications in light of that presupposition. In some cases, like *Windsor*, concrete evidence of animus appears in the legislative record.[60] But when the vulnerable social position of the burdened group is obvious, such candidness on the part of government actors has not been required. For example, in *Moreno*, the Court noted that there was "little legislative history to illuminate the purposes" of the challenged amendment.[61] The legislative history that did exist, however, indicated that the amendment "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[62] The Court connected the dots, concluding that this legislative history amounted to evidence of "a bare congressional desire to harm a politically unpopu-

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56 McGowan, *supra* note 21, at 1345.

57 *Windsor*, 133 S. Ct. at 2692 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

58 *Id.* at 2693.

59 *See* Lawrence v. Texas, 539 U.S. 558, 575–76 (2003).

60 *See, e.g.*, *Windsor*, 133 S. Ct. at 2693.

61 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

62 *Id.*

lar group."[63] Yet the Court needed to make numerous inferences to reach this conclusion. The Court did not require evidence from the congressional record to prove that "hippies" and "hippie communes" were "politically unpopular" — it arrived at this conclusion independently, relying on its background understanding of how hippies and hippie communes were viewed and treated in 1971 by the political majority. Likewise, the Court did not need record evidence to conclude that the decision to exclude hippies from the food stamp program amounted to "a bare congressional desire to harm" that group, even though this conclusion was far from self-evident — groups are routinely disqualified from government programs, yet it is not automatically assumed that these disqualifications are fueled by a "bare desire to harm." Again, the Court appears to have relied on background common-sense assumptions about how despised minorities will tend to be treated by the political majority in making its animus determinations. Similarly, in *Romer*, *Lawrence*, and *Windsor*, gays and lesbians were uncritically assumed to be a "politically unpopular group" vulnerable to legislative animus. The lesson from these cases is that social and historical context matters when the Court probes for impermissible motives.

B. Applying Animus: Overbroad HIV Criminalization as Constitutional Harm

The Court's anti-animus cases espouse a normative vision of how the state must treat politically unpopular groups, one grounded in substantive due process while also sounding in equal protection. This constitutional standard emphasizes the dignity and humanity of marginalized groups, demands a norm of mutual respect, and requires freedom from class-based stigma or unfairly distributed burdens. It is not surprising that this doctrine has been refined in cases dealing with the rights of gays and lesbians. As Professors Martha Nussbaum and William Eskridge both observe, the existence of sexual minorities can trigger fear, revulsion, and deep-seated anxieties for members of the political majority;[64] legislative actions based on these affective responses may, in turn, be grounded in irrational hatred or prejudice. A focus on animus illuminates powerful affective motivations and moral emotions that may otherwise evade judicial scrutiny. If this is the case, then animus might be a productive frame for addressing many

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[63] *Id.*

[64] *See generally* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY 1–30 (2010); William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1014–29 (2005).

forms of government regulation in deeply contested, emotionally charged realms of sex, sexual identity, and gender expression.

This section takes one particularly challenging example — laws criminalizing broadly defined instances of HIV "exposure" — as a possible opportunity for extending animus-centered constitutional analysis beyond its gay rights foundations. There are, to be sure, important sociohistorical associations between those who have tested HIV-positive and the LGBT community; the first reported cases of HIV/AIDS in the United States were discovered in gay men[65] and the HIV/AIDS epidemic, in time, galvanized LGBT communities throughout the 1980s, 1990s, and beyond.[66] Today, the disease continues to disproportionately affect the LGBT community[67] and continues to be a priority issue for many LGBT civil society organizations. Yet the LGBT community and the HIV-positive community are far from coextensive; furthermore, anti-LGBT animus cannot be reduced to prejudices surrounding HIV, nor can HIV stigma be reduced to animus against sexual minorities. These dynamics create an opportunity to think about how doctrinal innovations forged in the gay rights sphere can be generalized to advance related, yet distinct, legal projects.

1. HIV Crimes in the United States. — Efforts to control the spread of HIV have arguably spawned "an epidemic of . . . bad law."[68] By 2012, the United States had become the world leader in HIV-related criminal enforcement.[69] As of December 2013, thirty-two states have HIV criminal exposure statutes that apply to consensual sexual activities involving HIV-positive individuals.[70]

The federal government was an early proponent of HIV criminalization, albeit in narrowly constrained circumstances. The first-ever presidential commission to investigate the disease — the Presidential Commission on the Human Immunodeficiency Virus Epidemic (Com-

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[65] *See* NEIL MCKEE ET AL., STRATEGIC COMMUNICATION IN THE HIV/AIDS EPIDEMIC 148 (2004).

[66] *See generally* PHILIP M. KAYAL, BEARING WITNESS 113–47, 227–35 (1993).

[67] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, HIV IN THE UNITED STATES (2013), *available at* http://www.cdc.gov/hiv/pdf/statistics_basics_factsheet.pdf (reporting that 63% of all new U.S. HIV infections occurred in men who have sex with men (MSM) in 2010 and that MSM represented 52% of all people living with HIV in 2009).

[68] Shereen El-Feki, HIV — How to Fight an Epidemic of Bad Laws, Address at the TEDx Summit in Doha, Qatar (Apr. 2012), *available at* http://www.ted.com/talks/shereen_el_feki_how_to_fight_an_epidemic_of_bad_laws.html.

[69] *See* JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, CRMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION 7–8 (2012), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/BackgroundCurrentLandscapeCriminalisationHIV_Final.pdf.

[70] POSITIVE JUSTICE PROJECT, THE CTR. FOR HIV LAW & POLICY, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION 286 (2013), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Criminalization%20Manual%20%28Revised%2012.5.13%29_0.pdf. *See generally id.* at 7–285 (compiling statutes and prosecutions).

mission) — organized by President Ronald Reagan supported the promulgation of HIV-specific criminal laws in its inaugural 1988 report, noting that "[a]n HIV-specific statute . . . would provide clear notice of socially unacceptable standards of behavior specific to the HIV epidemic and tailor punishment to the specific crime of HIV transmission" while avoiding certain burdens of proof that must be met under the traditional criminal law.[71] The Commission also made specific recommendations regarding the substantive content of these laws. First, it recommended that the statutes apply only to people who knew that they were infected with HIV at the time of the illegal conduct.[72] Second, it called on states to criminalize only behaviors that were "likely to result in transmission of HIV" according to scientific research.[73] Third, the Commission recommended that the statutes themselves clearly define which behaviors were dangerous.[74] In 1990, Congress conditioned receipt of federal funds for state HIV programs under the Ryan White Comprehensive AIDS Resources Emergency Act[75] (CARE Act) upon proof that states could adequately prosecute the intentional transmission of HIV within their borders.[76]

In the same period, media reports of HIV-infected sexual predators ignited hysteria and rage, creating political demand for a legislative response.[77] Responding to all these pressures, a majority of states promulgated HIV-specific criminal statutes during the 1990s — yet few heeded the limitations proposed by the Commission, nor did many limit their scope to truly intentional exposure, as would have been sufficient to abide by the CARE Act. While the contemporary statutes differ in many specifics, general trends apply to the statutes as a group. Most states treat HIV exposure as a felony offense, although penalties vary significantly.[78] The scienter requirement for most contemporary

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[71] PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130 (1988), *available at* https://ia600402.us.archive.org/14/items/reportofpresidenoopres/reportofpresidenoopres.pdf; *see also id.*

[72] *Id.* at 131.

[73] *Id.*

[74] *Id.*

[75] Pub. L. No. 101-381, 104 Stat. 576 (1990) (codified as amended in scattered sections of 42 U.S.C.).

[76] *Id.* § 2647, 104 Stat. at 603 (codified at 42 U.S.C. § 300ff-47 (1994)) (repealed 2000) (requiring capacity to prosecute individuals who "engage[] in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV" under grantee states' criminal laws).

[77] *See, e.g.*, Amy M. Decker, Comment, *Criminalizing the Intentional or Reckless Exposure to HIV: A Wake-Up Call to Kansas*, 46 U. KAN. L. REV. 333, 333–34 (1998) (describing the highly publicized case of Nushawn Williams in New York).

[78] *See generally* LAMBDA LEGAL, HIV CRIMINALIZATION: STATE LAWS CRIMINALIZING CONDUCT BASED ON HIV STATUS (2010), *available at* http://data.lambdalegal.org/publications/downloads/fs_hiv-criminalization.pdf (chart comparing state penalties).

HIV exposure statutes falls short of specific intent to transmit or expose another to the virus; only California,[79] Oklahoma,[80] Virginia,[81] and Washington[82] require proof of intent to transfer HIV or intent to inflict serious bodily harm as a component of the offense. Almost all other states with criminal exposure statutes have made knowledge of one's own HIV-positive status and the performance of certain prohibited acts the core components of the offense. For example, in Iowa, it is currently illegal for a person who knows their HIV-positive status to "[e]ngage[] in intimate contact with another person."[83] Some states require nondisclosure of one's HIV-positive status as a third component of the offense,[84] while others allow the disclosure of one's HIV-positive status as an affirmative defense.[85]

The actus reus requirements also vary significantly between states. Many statutes broadly prohibit sexually intimate acts; for example, both Arkansas and Michigan prohibit "any . . . intrusion, however slight, of any part of [an HIV-positive individual's] body or of any object into a genital or anal opening of another person's body."[86] Other statutes are less explicit about the scope of prohibited acts, criminalizing any act that "could" transmit HIV.[87] Since HIV is transmitted through bodily fluids, almost any imaginable form of intimate contact — including kissing, mutual masturbation, or sharing a toothbrush — presents a theoretical risk of infection.[88] Some states simply criminalize "exposure" without invoking any probabilistic standard at all.[89]

These categorical approaches obscure the wide spectrum of transmission risks that different kinds of sexual contact present. According to the CDC, the per-act probability of HIV transmission through un-

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[79] *See* CAL. HEALTH & SAFETY CODE § 120291(a) (West 2012).

[80] *See* OKLA. STAT. tit. 21, § 1192.1(A) (2011).

[81] Only felony convictions require specific intent in Virginia; misdemeanors do not. *See* VA. CODE ANN. § 18.2-67.4:1 (2009).

[82] *See* WASH. REV. CODE § 9A.36.011(1) (2012).

[83] IOWA CODE § 709C.1(1)(a) (2007). As of February 2014, a bill to modernize Iowa's HIV criminalization statute had been passed by the Iowa Senate. *See* S. File 2297, 85th Gen. Assemb., Reg. Sess. (Iowa 2014); *see also* William Petroski, *Senate Approves Bill to Amend "Badly Outdated and Draconian" Law on HIV Transmission*, DES MOINES REG., Feb. 28, 2014, http://www.desmoinesregister.com/article/20140228/NEWS/302280096/Senate-approves-bill-to-amend-badly-outdated-and-draconian-law-on-HIV-transmission?News.

[84] *See, e.g.*, GA. CODE ANN. § 16-5-60(c) (2011).

[85] *See, e.g.*, FLA. STAT. § 775.0877(6) (2013).

[86] ARK. CODE ANN. § 5-14-123(c)(1) (2013); *see also* MICH. COMP. LAWS ANN. § 333.5210(2) (West 2001).

[87] *See, e.g.*, IOWA CODE § 709C.1(2)(b) (2007).

[88] *Cf.* Ari Ezra Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550, 566–68 (2011) (critiquing the invocation of theoretical risks in HIV-criminalization prosecutions).

[89] *See, e.g.*, MISS. CODE ANN. § 97-27-14(1) (2006 & Supp. 2013); WASH. REV. CODE § 9A.36.011(1)(b) (2012).

protected anal sex, where the insertive partner is HIV-positive, hovers around 50 per 10,000 exposures, or 0.5%;[90] other estimates have yielded higher figures of around 1.7%.[91] This type of sexual contact represents the highest transmission risk, with other avenues of sexual transmission being far less risky. Unprotected penile-vaginal sex yields only a 10 in 10,000 probability, or 0.1% risk, of transmission.[92] The transmission risk for oral sex is exceedingly low, and has yet to be accurately defined; best estimates place the risk at no more than 4 in 10,000 exposures, or 0.04%.[93] Condom use and adherence to effective antiretroviral therapy further reduce these baseline risks, by estimated rates of 80%[94] and potentially up to 96%,[95] respectively (and exponentially when used in conjunction).

Thus while there is a slight — but still substantial — risk of HIV transmission through unprotected anal and, to a lesser degree, vaginal intercourse, the actual risk drops off precipitously in the case of oral sex and whenever either condoms or treatment adherence are in the mix.[96] Yet only California,[97] Illinois,[98] and Tennessee[99] tie their criminal exposure statutes to the significance of transmission risk or limit

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[90] CTRS. FOR DISEASE CONTROL & PREVENTION, HIV TRANSMISSION RISK (2012), *available at* http://www.cdc.gov/hiv/law/pdf/HIVtranmsmision.pdf.

[91] Marie-Claude Boily et al., *Heterosexual Risk of HIV-1 Infection per Sexual Act: Systematic Review and Meta-Analysis of Observational Studies*, 9 LANCET INFECTIOUS DISEASES 118, 118 (2009).

[92] CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 90.

[93] *See* Julie Fox et al., *Quantifying Sexual Exposure to HIV Within an HIV-Serodiscordant Relationship: Development of an Algorithm*, 25 AIDS 1065, 1077 (2011); *see also* Beena Varghese et al., *Reducing the Risk of Sexual HIV Transmission: Quantifying the Per-Act Risk for HIV on the Basis of Choice of Partner, Sex Act, and Condom Use*, 29 SEXUALLY TRANSMITTED DISEASES 38, 41 (2002) (estimating that the risk for unprotected fellatio is between five to ten times lower than unprotected vaginal intercourse).

[94] KIMBERLY A. WORKOWSKI & STUART BERMAN, CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUALLY TRANSMITTED DISEASES TREATMENT GUIDELINES, 2010, at 4 (2010), *available at* http://www.cdc.gov/std/treatment/2010/STD-Treatment-2010-RR5912.pdf.

[95] Myron S. Cohen et al., *Prevention of HIV-1 Infection with Early Antiretroviral Therapy*, 365 NEW ENG. J. MED. 493, 503 (2011).

[96] The Supreme Court of Canada recently held that the combination of low viral load and condom use cannot be said to present a "reasonable probability" of HIV transmission, and that sex falling under this description may no longer be prosecuted as sexual assault. *See* R. v. Mabior, [2012] 2 S.C.R. 584, para. 81–94 (Can.).

[97] *See* CAL. HEALTH & SAFETY CODE § 120291(a)–(b) (West 2012) (limited to unprotected anal or vaginal sex).

[98] 720 ILL. COMP. STAT. 5/12-5.01(a)(1) (2012) (limited to "sexual activity with another without the use of a condom").

[99] TENN. CODE ANN. § 39-13-109(b)(2) (2010 & Supp. 2013) (defining prohibited "[i]ntimate contact" as "exposure of the body of one person to a bodily fluid of another person in any manner that presents a *significant risk* of HIV . . . transmission" (emphasis added) (internal quotation mark omitted)); *see also* State v. Ingram, No. W2011-02595-CCA-R3-CD, 2012 WL 5355694, at *5 (Tenn. Crim. App. Oct. 31, 2012) (requiring expert testimony to establish "significant risk" of exposure under the statute).

their statutes to a set of high-risk activities. Furthermore, efforts to mitigate baseline transmission risks through strategies like condom use and treatment adherence are legally irrelevant in all but three states.[100]

2. Public Policy Objections and Legislative Reform. — Advocates have mounted a robust grassroots campaign to repeal or reform broadly formulated HIV criminal exposure laws.[101] A healthy academic literature has arisen in tandem, questioning both the premises and the effects of HIV criminalization; medical authorities,[102] public health institutions,[103] members of Congress,[104] the Obama White House,[105] and the United Nations[106] have also sounded alarm bells, and the issue has

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[100] California and Illinois limit the scope of their statutes to sex without a condom. *See* CAL. HEALTH & SAFETY CODE § 120291(a)–(b) (West 2012); 720 ILL. COMP. STAT. 5/12-5.01(a)(1) (2012). Idaho allows a defense when the HIV-infected person was informed by a physician that he or she is noninfectious, potentially allowing for suppressed viral load to operate as a defense. *See* IDAHO CODE ANN. § 39-608(3)(b) (2011).

[101] *See, e.g.*, HIV JUST. NETWORK, http://www.hivjustice.net/ (last visited Mar. 1, 2014); *Positive Justice Project*, CENTER FOR HIV L. & POL'Y, http://www.hivlawandpolicy.org/initiatives/positive-justice-project (last visited Mar. 1, 2014); SERO PROJECT, http://seroproject.com/ (last visited Mar. 1, 2014); *see also* POSITIVE JUSTICE PROJECT, THE CTR. FOR HIV LAW & POLICY, CONSENSUS STATEMENT ON THE CRIMINALIZATION OF HIV IN THE UNITED STATES (2012), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/PJP%20Consensus%20Statement%20with%20Endorsers_0.pdf (containing endorsements from experts and advocacy organizations).

[102] *See, e.g.*, HIV MED. ASS'N, INFECTIOUS DISEASES SOC'Y OF AM., HIVMA URGES REPEAL OF HIV-SPECIFIC CRIMINAL STATUTES (2012), *available at* http://www.hivma.org/uploadedFiles/HIVMA/FINAL%20HIVMA%20Policy%20Statement%20on%20HIV%20Criminalization.pdf; *IHV Supports REPEAL HIV Discrimination Act*, INST. OF HUM. VIROLOGY (Jan. 7, 2014), http://somvweb.som.umaryland.edu/absolutenm/templates/?a=2584&z=51.

[103] *See, e.g.*, NAT'L ASS'N OF CNTY. & CITY HEALTH OFFICIALS, STATEMENT OF POLICY: OPPOSING STIGMA AND DISCRIMINATION AGAINST PERSONS WITH COMMUNICABLE DISEASES (2013), *available at* http://www.naccho.org/advocacy/positions/upload/13-11-Opposing-Stigma-and-Discrimination-against-Persons-with-Communicable-Diseases-2.pdf; NAT'L ASS'N OF STATE AND TERRITORIAL AIDS DIRS., NATIONAL HIV/AIDS STRATEGY IMPERATIVE: FIGHTING STIGMA AND DISCRIMINATION BY REPEALING HIV-SPECIFIC CRIMINAL STATUTES (2011), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/2011311_NASTAD%20Statement%20on%20Criminalization%20-%20Final.pdf.

[104] *See* Letter from Thirty-Six Members of Cong. to Eric H. Holder, Att'y Gen. of the United States (July 17, 2012), *available at* http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Final%20DOJ%20letter.pdf.

[105] *See* PRESIDENTIAL ADVISORY COUNCIL ON HIV/AIDS (PACHA), RESOLUTION ON ENDING FEDERAL AND STATE HIV-SPECIFIC CRIMINAL LAWS, PROSECUTIONS, AND CIVIL COMMITMENTS (2013), *available at* http://aids.gov/federal-resources/pacha/meetings/2013/feb-2013-criminalization-resolution.pdf; WHITE HOUSE OFFICE OF NAT'L AIDS POLICY, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 36–37 (2010), *available at* http://aids.gov/federal-resources/national-hiv-aids-strategy/nhas.pdf.

[106] *See* RICHARD ELLIOTT, JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, CRIMINAL LAW, PUBLIC HEALTH AND HIV TRANSMISSION 22–27 (2002), *available at* http://data.unaids.org/publications/IRC-pub02/jc733-criminallaw_en.pdf; GLOBAL COMM'N ON HIV AND THE LAW, UNITED NATIONS DEV. PROGRAMME (UNDP), HIV AND THE LAW (2012), *available at* http://www.undp.org/content/dam/undp/library/HIV-AIDS/Governance%20of%20HIV

received critical coverage in the mainstream press.[107]

Critics attack HIV criminalization primarily on public health policy grounds. They point to the perverse, and potentially counterproductive, public health consequences of linking criminal liability to knowledge of one's HIV status; many commentators worry that this regime creates a disincentive to seek HIV testing and learn one's status.[108] Baseline testing rates are already low in the United States, with only 45% of adults having ever been tested for HIV in their lifetimes and only about 10% having been tested within the last twelve months.[109] As a result, approximately one in six people living with HIV do not know that they are infected; this cohort is responsible for over half of all new HIV infections in the United States.[110] The public health ramifications of low HIV testing rates have intensified as the effectiveness of HIV treatment has increased. The advent of highly active antiretroviral therapy (HAART) in the mid-1990s has transformed HIV from an effective "death sentence" into a manageable, chronic condition, with one recent analysis finding that there is "no

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%20Responses/Commissions%20report%20final-EN.pdf; JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, ENDING OVERLY BROAD CRIMINALIZATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION 2–6 (2013), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/document/2013/05/20130530_Guidance_Ending_Criminalisation.pdf.

[107] *See, e.g.*, Editorial, *Get Rid of Those Outdated HIV Laws*, L.A. TIMES, June 6, 2013, http://www.latimes.com/news/opinion/editorials/la-ed-hiv-state-laws-review-20130606,0,6253519.story; James Hamblin, *Spreading HIV Is Still a Felony, Which May Abet Its Spread*, ATLANTIC (Dec. 9, 2013, 1:15 PM), http://www.theatlantic.com/health/archive/2013/12/spreading-hiv-is-still-a-felony-which-may-abet-its-spread/282153/; Sergio Hernandez, *How an HIV-Positive Man Was Sent to Prison for Having Sex — With a Condom*, BUZZFEED (Dec. 1, 2013, 11:01 PM), http://www.buzzfeed.com/cerealcommas/how-an-hiv-positive-man-was-sent-to-prison-for-having-sex-wi; Todd Heywood, *When Being HIV-Positive Was a Crime*, SALON (Apr. 2, 2013, 11:15 AM), http://www.salon.com/2013/04/02/when_being_hiv_positive_was_a_crime_partner/; Mark Joseph Stern, *HIV Criminalization Is Bad Public Policy and Terrible Science*, SLATE (Oct. 4, 2013, 8:30 AM), http://www.slate.com/blogs/outward/2013/10/04/hiv_criminalization_bad_public_policy_terrible_science.html.

[108] *See, e.g.*, Widney Brown et al., *Criminalising HIV Transmission: Punishment Without Protection*, 17 REPROD. HEALTH MATTERS 119, 120 (2009); Michael L. Closen et al., Discussion, *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921, 964 (1994); Andrew M. Francis & Hugo M. Mialon, *The Optimal Penalty for Sexually Transmitting HIV*, 10 AM. L. & ECON. REV. 388, 414–15 (2008); Ralf Jürgens et al., *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 REPROD. HEALTH MATTERS 163, 165–66 (2009); Erin M. O'Toole, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, 10 J.L. & HEALTH 183, 200 (1995); 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, 383–85 (2013); Mark A. Wainberg, Editorial, *HIV Transmission Should Be Decriminalized: HIV Prevention Programs Depend on It*, 5 RETROVIROLOGY 108, 109 (2008).

[109] CTRS. FOR DISEASE CONTROL & PREVENTION, HIV TESTING TRENDS IN THE UNITED STATES, 2000–2011, at 8–9 (2013), *available at* http://www.cdc.gov/hiv/pdf/testing_trends.pdf.

[110] CTRS. FOR DISEASE CONTROL & PREVENTION, CHALLENGES IN HIV PREVENTION 1 (2013), *available at* http://www.cdc.gov/nchhstp/newsroom/HIVFactSheets/Challenges/TooFewPeople.htm.

evidence for a raised risk of death" between HIV-positive individuals on successful HAART and the general population.[111] There is also considerable evidence that HIV therapy — by reducing a person's viral load to undetectable levels — significantly reduces the transmissibility of the virus itself by up to 96%,[112] leading to a new "[t]reatment as [p]revention"[113] paradigm for controlling the epidemic. Some health experts have gone so far as to claim that HIV-positive individuals on effective HAART are "not sexually infectious, i.e. cannot transmit HIV through sexual contact."[114] While this view remains controversial,[115] "its very existence underlines that appropriate use of anti-HIV drugs will not only improve the health of infected persons but may also have benefits for HIV spread and public health."[116] Thus, while a causal relationship between criminalization and decreased testing has been difficult to establish empirically,[117] the possibility of decreasing already-low testing rates is cited by many experts and commentators as a reason for opposing HIV criminalization.[118]

Criminal justice–based critiques often supplement the public health argument against HIV criminalization. Many opponents point to the

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111 Alison J. Rodger et al., *Mortality in Well Controlled HIV in the Continuous Antiretroviral Therapy Arms of the SMART and ESPRIT Trials Compared with the General Population*, 27 AIDS 973, 973 (2013).

112 *See* Cohen et al., *supra* note 95, at 503.

113 Scott M. Hammer, Editorial, *Antiretroviral Treatment as Prevention*, 365 NEW ENG. J. MED. 561, 561 (2011). *See generally id.* at 561–62.

114 *See* Edwin J. Bernard, *Swiss Experts Say Individuals with Undetectable Viral Load and No STI Cannot Transmit HIV During Sex*, NAM AIDSMAP (Jan. 30, 2008), http://www.aidsmap.com/Swiss-experts-say-individuals-with-undetectable-viral-load-and-no-STI-cannot-transmit-HIV-during-sex /page/1429357.

115 *See* David P. Wilson et al., *Relation Between HIV Viral Load and Infectiousness: A Model-Based Analysis*, 372 LANCET 314, 317 (2008) (arguing that, despite beneficial effects of treatment, transmission rates would not reach zero at a population level using a pure treatment-as-prevention approach).

116 Wainberg, *supra* note 108, at 109.

117 *See* Patrick O'Byrne et al., *HIV Criminal Prosecutions and Public Health: An Examination of the Empirical Research*, 39 MED. HUMAN. 85, 86–87 (2013) (summarizing studies and noting some preliminary evidence of negative testing impacts).

118 Aside from decreased testing, critics also argue that overbroad HIV criminalization disseminates inaccurate information about how the virus is spread, confounding efforts to provide the public with accurate and realistic information about HIV risks. *See, e.g.*, Brown et al., *supra* note 108, at 120; Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & BEHAV. 451, 457–58 (2006); Jürgens et al., *supra* note 108, at 166; Perone, *supra* note 108, at 385–86; James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 722–23 (2009). Critics also argue that a disclosure-centered criminalization regime may create a false sense of security among HIV-negative partners, especially considering the number of infections caused by individuals who do not know their HIV-positive status. *See* Brown et al., *supra* note 108, at 120; Scott Burris & Edwin Cameron, Commentary, *The Case Against Criminalization of HIV Transmission*, 300 JAMA 578, 579–80 (2008); Galletly & Pinkerton, *supra*, at 456; Jürgens et al., *supra* note 108, at 166.

lack of proportionality between absolute transmission risk, which is low with even the highest-risk activities, and the penalties imposed by the HIV exposure statutes, which are generally harsher than other, more risky endangerment offenses.[119] Critics also object to the lack of differentiation within statutes between varying degrees of risk, arguing that even if all potential "exposures" are criminalized to some extent, relatively high-risk activities should not be punished the same as low-risk activities.[120] The laws also make an operative distinction between those HIV-positive individuals who have sought testing and those who have not, reserving liability only for those who know their HIV status; distinct from whether this regime will affect testing rates, it may be normatively undesirable to punish people for making responsible health choices.[121] Finally, in a related objection, commentators point to the fact that the criminal exposure laws fail to take into account socially desirable, risk-mitigating behavior like condom use and treatment adherence.[122]

Responding to these various objections, federal legislation was introduced in 2013 to spur the reform of HIV criminalization laws.[123] A handful of states have also begun to reform or repeal their criminal exposure laws without congressional action. A comparison between Illinois's modernized criminal exposure statute and Iowa's more traditional criminal exposure law shows how states have attempted to address their tailoring deficiencies. Illinois's criminal exposure statute requires "the specific intent to commit the offense" of "engag[ing] in sexual activity with another without the use of a condom knowing that he or she is infected with

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[119] In North Dakota, for example, "an HIV-exposure conviction carries a potential prison sentence of up to twenty years; yet a reckless endangerment offense, where 'the circumstances manifest [an] extreme indifference to the value of human life,' carries a maximum sentence of only five years." Sarah J. Newman, Note, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1426 (2013) (alteration in original) (quoting N.D. CENT. CODE § 12.1-17-03 (2012)). HIV-exposure offenses carry, on average, a maximum sentence of eleven years, whereas reckless endangerment offenses typically carry sentences of six months to one year. *Id.*; *see also Comparative Sentencing Chart on HIV Criminalization in the United States*, CENTER FOR HIV L. & POL'Y (May 2012), http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Comparative%20Sentencing%20Chart%20%28The%20Center%20for%20HIV%20Law%20and%20Policy%2C%20May%202012%29.pdf.

[120] *See* Newman, *supra* note 119, at 1418–19.

[121] *Cf.* O'Toole, *supra* note 108, at 204–05 (arguing that HIV criminalization may not pass rational basis review because of these perverse effects).

[122] *See, e.g.*, Galletly & Pinkerton, *supra* note 118, at 455 (noting that despite the prevalence of safe-sex messaging and the known effectiveness of condoms, only two of the twenty-three HIV disclosure laws discussed acknowledge the benefit of condoms).

[123] *See* Repeal Existing Policies that Encourage and Allow Legal (REPEAL) HIV Discrimination Act of 2013, H.R. 1843, 113th Cong. (2013); Repeal Existing Policies that Encourage and Allow Legal (REPEAL) HIV Discrimination Act, S. 1790, 113th Cong. (2013). The National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013), also required the Secretary of Defense to review HIV-exclusionary military policies. *See id.* § 572.

HIV."[124] Along with the condom use carve-out, "sexual activity" is defined narrowly to include only high-risk vaginal or anal intercourse.[125] Iowa's statute, on the other hand, currently imposes criminal penalties on any person who knows their HIV-positive status and "[e]ngages in intimate contact with another person."[126] "Intimate contact" is defined as "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus."[127] Unlike Illinois, Iowa both employs a "could result" standard — which includes activities presenting only a very low, negligible, or theoretical risk — and fails to provide any explicit carve-out for condom use.

3. Unique Disadvantages and Unequal Burdens: Toward a Constitutional Critique. — The rising tide of policy critiques against HIV criminalization has yet to be translated into successful legal arguments. Facial challenges to criminal exposure statutes have progressed along relatively narrow constitutional theories; the majority of plaintiffs have alleged unconstitutional vagueness or overbreadth,[128] while a handful have attempted to invoke the First Amendment,[129] due process privacy interests,[130] or equal protection principles.[131] None have been successful to date.

An animus-centered critique could bridge the gap between existing policy objections and constitutional doctrine. Broadly speaking, this approach would argue that the criminal exposure laws do a poor job of vindicating legitimate state interests because their predominant purpose is to vindicate unspoken, and illegitimate, state interests; a degree of means-ends rationality was necessarily lost in translation as public-regarding justifications were marshaled to replace the more reflexive, affective motivations of legislative actors. The vestigial remains of these unspoken motives may be evident in the aforementioned statutory deficiencies, especially in their lack of tailoring along actual transmission risk and, specifically, their criminalization of low-risk or no-risk sexual contact. These features, combined with the statutes' socio-historical context, point to lurking legislative aims: to stig-

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124 720 ILL. COMP. STAT. 5/12-5.01(a)(1) (2012).

125 *Id.* § 12-5.01(b).

126 IOWA CODE § 709C.1(1)(a) (2007).

127 *Id.* § 709C.1(2)(a).

128 *See, e.g.*, People v. Russell, 630 N.E.2d 794, 796 (Ill. 1994); People v. Dempsey, 610 N.E.2d 208, 223 (Ill. App. Ct. 1993); State v. Keene, 629 N.W.2d 360, 365 (Iowa 2001); State v. Gamberella, 633 So. 2d 595, 603 (La. Ct. App. 1993); People v. Jensen, 586 N.W.2d 748, 751–52 (Mich. Ct. App. 1998).

129 *See, e.g.*, *Russell*, 630 N.E.2d at 796; State v. Musser, 721 N.W.2d 734, 742–45 (Iowa 2006); *Jensen*, 586 N.W.2d at 759.

130 *See, e.g.*, *Musser*, 721 N.W.2d at 747–48; *Jensen*, 586 N.W.2d at 757–58.

131 *See, e.g.*, *Musser*, 721 N.W.2d at 740 n.1; *Gamberella*, 633 So. 2d at 604–05.

matize and isolate HIV-positive people vis-à-vis the noninfected population, driven by visceral fears of infection and contagion divorced from actual transmission risk. A turn to animus would argue that these marginalizing effects align with impermissible government motives, resulting in constitutionally cognizable harm.

The "practical effects" of the HIV criminalization laws, especially "[d]iscriminations of an unusual character"[132] that impose "a broad and undifferentiated disability on a single named group,"[133] provide a starting point for reasoning to animus in the context of HIV exposure. The burdens and disadvantages imposed by the HIV legal regime may be so extreme, or the fit between aims and effects so poor, that neutral governmental interests cannot adequately explain the statutes' full scope. After *Moreno*, *Cleburne*, and the gay rights cases, animus toward those who have tested positive for HIV may work to fill the explanatory gap in these scenarios. The most glaring statutory deficiency relates to transmission risk. While broad definitions of HIV "exposure" certainly capture activities that present a bona fide health risk, they also make HIV-positive individuals criminally liable for a range of intimate interactions that pose little to no risk at all. Iowa's statute, for example, has been interpreted to encompass theoretical or hypothetical transmission risks, including oral sex without ejaculation (and with the HIV-positive partner having an undetectable viral load),[134] ejaculation when the seminal fluid made no contact with any mucous membrane,[135] and all forms of protected sex with a condom. Prosecutions under these circumstances have led to felony convictions, one for twenty-five years in prison.[136]

While the lack of precision in a statute like Iowa's could be explained away as the product of suboptimal drafting or an abundance of caution, an animus-centered analysis would argue that the lack of differentiation between risky and non-risky activity is not accidental, but by design: the criminal exposure statutes may be motivated by the political majority's desire to insulate itself from *all* intimate contact with HIV-positive people without prior knowledge, irrespective of transmission risk,[137] and that interest may be well served by the statute's overbreadth. This possibility opens the door to an animus-based critique: while the regulation of risky activities may advance a legiti-

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[132] United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (alteration in original) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)) (internal quotation mark omitted).

[133] *Romer*, 517 U.S. at 632.

[134] *See* Rhoades v State, No. 12-0180, 2013 WL 5498141, at *3 (Iowa Ct. App. Oct. 2, 2013).

[135] *See* State v. Keene, 629 N.W.2d 360, 363 (Iowa 2001).

[136] *Rhoades*, 2013 WL 5498141, at *1.

[137] *Cf.* Newman, *supra* note 119, at 1426 ("Given the broad range of sexual activity that HIV-exposure statutes typically cover, disproportionate sentences suggest that it is the person's HIV status, rather than her specific conduct, that is criminalized.").

mate state interest in health and safety, the criminalization of non-risky activities may impermissibly use government powers to advance the moral and emotional prerogatives of the body politic, divorced from legitimate health or safety concerns.[138] Likewise, an asserted governmental interest in ensuring informed consent to sexual intimacy with an HIV-positive person[139] must square with the realities of transmission risk. The assertion that disclosure of HIV status is required even in very low- or no-risk scenarios stigmatizes HIV-positive people on the basis of status without advancing a legitimate state interest in health or safety.

The burdens and consequences of broad HIV criminalization are also not benign. Instead, the regime intensifies the stigmatization and marginalization of HIV-positive people. This stigmatization arises from the fact that HIV exposure laws — in all but a handful of states — make intimate contact involving HIV-diagnosed individuals a presumptive crime that justifies state intervention, displacing the ability and responsibility of sexual partners to negotiate sex, mitigate risk, and disclose health-status information voluntarily and autonomously. As in *Lawrence*, the injection of criminal sanctions into areas of low-risk interpersonal intimacy inflicts both injury and indignity upon HIV-positive people, and may indicate legislative animosity sufficient to violate their constitutional liberty interests.

The unique burdens and disabilities imposed by a legislative regime may only be half the picture in an animus-centered analysis — as prior cases have shown, a court may also be primed for animus by the mere fact that a politically unpopular group is being targeted for disparate treatment, shifting the burden to the government to provide truly compelling, animus-free alternative justifications. HIV criminalization unambiguously targets a narrow group for special burdens: only HIV-diagnosed individuals are exposed to the intensified criminal liability and disclosure obligations created by the statutes.

The question of political vulnerability is likewise an easy case: it is almost unremarkable to observe that HIV/AIDS is a tremendously stigmatized disease affecting already-stigmatized subpopulations. HIV stigma has been "[f]ueled in part by the disfavored social standing of many of the persons who were first infected, in part by communal desires to blame the afflicted and thus deny personal vulnerability, and in

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138 *See* O'Toole, *supra* note 108, at 204 ("HIV-specific statutes could also reflect irrational prejudice against individuals who have tested positive for HIV."); J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 446–47 (1994) ("The general HIV exposure statutes, and broad application of traditional criminal laws, [] sweep so broadly that they encompass activity that carries no real risk of HIV transmission. Instead, the laws provide broad condemnation of large groups of society." *Id.* at 446.).

139 *See, e.g.*, State v. Musser, 721 N.W.2d 734, 748 (Iowa 2006).

part by long-standing social aversion to sexually transmitted diseases."[140] The pathologization of HIV-affected communities — of homosexual men, sex workers, injection-drug users, racial minorities, and other vulnerable groups[141] — was intensified by a national focus on truly reprehensible HIV transmitters during the early stages of the epidemic: the "promiscuous sociopath intending to infect numerous unsuspecting victims,"[142] from the apocryphal story of "Patient Zero" popularized by Randy Shilts[143] to bona fide sexual predators like Nushawn Williams in the 1990s.[144] The exceptional actions of these individuals eclipsed the more mundane story of HIV as a socially determined health crisis within the popular imagination.[145]

The public's fear of contagion, disease, and death also fuels the marginalization of HIV-positive people. Sunstein observes that, in *Romer*, "as with the mentally retarded [in *Cleburne*], we can find a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive."[146] He further connects the two cases by noting that "[a]s with homosexuality, many people appear to think that mental retardation is contagious and frightening for that reason."[147] While homosexuality and mental disability might be feared because of some amorphous, morally inflected sense of "contagion," fear of HIV is rooted in a more immediate fear of contagion and contamination.[148] This fear can quickly balloon into irrational, freewheeling prejudice; as the Supreme Court has observed, "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."[149] Reflecting on the early period of the HIV/AIDS epidemic, Professors Gregory Herek and Eric Glunt likewise noted the "identification of AIDS as a serious illness" as an important source of HIV/AIDS stigma, through which "[h]ealthy individuals distance themselves from death by defining the

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140 Galletly & Pinkerton, *supra* note 118, at 451.

141 *See* RICHARD PARKER ET AL., HIV/AIDS-RELATED STIGMA AND DISCRIMINATION 2–4 (2002), *available at* http://www.popcouncil.org/pdfs/horizons/sdcncptlfrmwrk.pdf; Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 149–50 (1988).

142 Perone, *supra* note 108, at 369.

143 *See id.*

144 *See* Galletly & Pinkerton, *supra* note 118, at 458–59.

145 *See* Jürgens et al., *supra* note 108, at 166 ("The introduction of HIV-specific criminal offences, as well as individual criminal prosecutions against people living with HIV for conduct that transmits or risks transmitting HIV, has often been accompanied by inflammatory and ill-informed media coverage or commentary by high-profile figures such as prosecutors, government officials, or legislators.").

146 Sunstein, *supra* note 31, at 62.

147 *Id.* at 61.

148 *See* Eskridge, *supra* note 64, at 1063–64.

149 Sch. Bd. v. Arline, 480 U.S. 273, 284 (1987).

illness as an affliction of others."[150] They deemed this characteristic, along with the epidemic's association with already-stigmatized groups, the two foundational sources of stigma against HIV-positive people.[151]

Unsurprisingly, public support for the coercive control of HIV-positive individuals was high in the early years of the epidemic. National polls conducted between 1985 and 1986 found that 51% to 58% of respondents supported the idea of governmental restrictions on the sexual activities of "known AIDS carriers," and 28% to 51% supported the full-scale quarantine of AIDS patients.[152] In a *New York Times* oped from 1986, William F. Buckley Jr. argued that all AIDS carriers should be tattooed to facilitate easy identification.[153] One district court, commenting on the public hysteria surrounding the epidemic in 1989, aptly characterized HIV/AIDS as "a disease that is widely thought of as the modern day equivalent of leprosy."[154] "AIDS Hysteria" was also the characterization that *Time* magazine chose when it made the disease its cover story in 1983.[155]

In such a charged sociopolitical climate, one might expect the legislative response to have been calibrated toward identifying and isolating HIV-positive people beyond what was necessary to protect health and safety, especially when the target was a set of already-marginalized populations. Professors Kathleen Sullivan and Martha Field cautioned against these dynamics in an early law review article, while commenting on proposals to criminalize HIV transmission and quarantine HIV-positive individuals:

> [A] quarantine may be the majority's pretext for inflicting harm on an unpopular minority, and not just a means for avoiding real harm to itself. . . . Many in positions of power will not fear a law they think themselves and their kind immune to, nor will they empathize with those less powerful groups to whom the law will predictably apply. If AIDS primarily afflicted mainstream groups such as white heterosexuals, quarantine and criminalization would not be discussed so lightly.[156]

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[150] Gregory M. Herek & Eric K. Glunt, *An Epidemic of Stigma: Public Reactions to AIDS*, 43 AM. PSYCHOL. 886, 887 (1988); *see also* PARKER ET AL., *supra* note 141, at 4; Richard Parker & Peter Aggleton, *HIV and AIDS-Related Stigma and Discrimination: A Conceptual Framework and Implications for Action*, 57 SOC. SCI. & MED. 13 (2003).

[151] Herek & Glunt, *supra* note 150, at 887.

[152] Eleanor Singer et al., *The Polls — A Report: AIDS*, 51 PUB. OPINION Q. 580, 591–92 (1987).

[153] *See* William F. Buckley Jr., Op-Ed, *Crucial Steps in Combating the AIDS Epidemic: Identify All the Carriers*, N.Y. TIMES, Mar. 18, 1986, at A27 ("Everyone detected with AIDS should be tatooed in the upper forearm, to protect common-needle users, and on the buttocks, to prevent the victimization of other homosexuals.").

[154] Doe v. Am. Red Cross Blood Servs., S.C. Region, 125 F.R.D. 646, 652 (D.S.C. 1989).

[155] *See Historical Magazine Covers: AIDS Hysteria — July 4, 1983*, TIME, http://content.time.com/time/covers/0,16641,19830704,00.html (last visited Mar. 1, 2014).

[156] Sullivan & Field, *supra* note 141, at 149–50.

The stigmatization of HIV continues today, despite advances in treatment and prevention that have further eroded the need to systematically identify and isolate HIV-positive people as a public health response. In responses to a 2009 survey of Americans, 42% of respondents reported that they would be uncomfortable having a roommate with HIV; 35% would be uncomfortable with a child having an HIV-positive teacher; and 23% would be uncomfortable having an HIV-positive co-worker.[157] Respondents also vastly overestimated the communicability of HIV in all circumstances.[158]

This aversion to even casual contact with HIV-positive individuals cannot be characterized as a considered, rational desire to avoid HIV infection. The aversion is better explained as the product of social stigma and prejudice. If courts accept these underlying social dynamics and believe, a priori, that HIV-positive individuals are a politically vulnerable group, they may be more amenable to framing the kind of statutory overbreadth derided by activists and policymakers — especially the indiscriminate criminalization of low-risk or no-risk intimate conduct — as the result of irrational prejudice, overreaction, and animosity, rather than mere imprecision or antipathy. The burdensome, targeted, and stigmatizing real-world effects of HIV criminalization only strengthen the "inevitable inference"[159] that animus is at work.

C. Conclusion

HIV criminalization represents one realm where an animus-centered critique may enable new constitutional arguments. Importantly, the availability of these arguments could have recursive ramifications for the LGBT legal movement going forward. Frustrations have arisen among some HIV activists who are concerned that, despite a history of shared political struggle, the mainstream LGBT rights movement has steadily distanced itself from HIV-related legal issues.[160] As the mainstream LGBT rights movement has secured major legal and political victories, its association with the HIV/AIDS epidemic has become more fraught; activists have accused the LGBT movement of abandoning HIV/AIDS in favor of more mainstream, less de-

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157 KAISER FAMILY FOUND., 2009 SURVEY OF AMERICANS ON HIV/AIDS: SUMMARY OF FINDINGS ON THE DOMESTIC EPIDEMIC 21 (2009), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7889.pdf.

158 *See id.*

159 Romer v. Evans, 517 U.S. 620, 634 (1996).

160 *See* Scott Schoettes, *Remarks on HIV/AIDS at the 2013 Lavender Law Conference*, LAMBDA LEGAL (Aug. 27, 2013), http://www.lambdalegal.org/news/schoettes-lav-law-2013; Peter Staley, *Gay Marriage is Great, but How About Some Love for the AIDS Fight?*, WASH. POST, June 28, 2013, http://www.washingtonpost.com/opinions/gay-marriage-is-great-but-how-about-some-love-for-the-aids-fightlove-will-tear-us-apart/2013/06/28/5b18c50c-dddo-11e2-948c-d644453cf169_story.html.

pressing, and more gay-specific legal priorities.[161] This observation is in line with a broader critical literature assessing the costs and calculations that have accompanied the success of the post-*Romer* gay rights movement, especially its focus on gay marriage over other legal issues. By borrowing and expanding upon the anti-animus framework that has been so successfully deployed for the benefit of gays and lesbians, it may be possible to spark internal dialogue within the LGBT movement about its continuing commitment to HIV-positive people. Considering the continuing impact of HIV/AIDS on LGBT communities, such a conversation may end up being both healthy and productive.

Even more optimistically, focusing on the relationship between animus and legal regimes may help LGBT advocates internalize and articulate the concerns of sexual minorities beyond the gay and lesbian mainstream. For example, as with HIV criminalization, a critical literature has attacked the mainstream gay rights movement for ignoring — or for being incapable of integrating — gender expression and trans rights as a top legal priority.[162] Yet the marginalization of trans people may well be fueled by analogous shades of stigma, ignorance, and fear. A similar attempt to cross-pollinate the rhetoric of anti-gay animus into the trans rights arena may ultimately prove useful for orienting the LGBT movement around an evolving doctrinal agenda. Freedom from state animus, along with fundamental rights and equal protection, may prove to be an integral part of the LGBT movement's constitutional vocabulary.

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[161] *See* Schoettes, *supra* note 160.

[162] *See, e.g.*, Shannon Minter, *Do Transsexuals Dream of Gay Rights?: Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589 (2000); *Are "Trans Rights" and "Gay Rights" Still Allies?*, N.Y. TIMES ROOM FOR DEBATE (Oct. 15, 2013), http://www.nytimes.com/roomfordebate/2013/10/15/are-trans-rights-and-gay-rights-still-allies; Tyler Currie, *Why Gay Rights and Trans Should Be Separated*, HUFFINGTON POST (Feb. 17, 2014, 7:44 PM), http://www.huffingtonpost.com/tyler-curry/gay-rights-and-trans-rights_b_4763380.html.