NOTE

INJECTIONS, INFECTIONS, CONDOMS, AND CARE: THOUGHTS ON NEGLIGENCE AND HIV EXPOSURE

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Many states have criminal statutes specifically criminalizing the transmission of the Human Immunodeficiency Virus (HIV). This Note argues that tort, rather than criminal, law should regulate the wrongful transmission of HIV/AIDS. The Note then examines the applicability of various tort doctrines to the peculiar problems presented by this particularly notorious plague, including assumption of the risk and disclosures.

INTRODUCTION

In his groundbreaking work on the Acquired Immune Deficiency Syndrome (AIDS) epidemic's early days, journalist Randy Shilts recounts the chilling story of the man believed[1] by many to be the epidemic's North American "Patient Zero": Gaëtan Dugas, an Air Canada flight attendant.[2] Dugas, whose work provided him with free air travel across the globe, gained a reputation for peculiar post-coital activity.

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[1] Mistakenly believed, as it happens. Dugas was not, in fact, the vector for HIV in North America. Dugas died more than a decade after the death of Robert Rayford, the teenager who is currently North America's first documented AIDS case. *See* Gina Kolata, *Boy's 1969 Death Suggests AIDS Invaded U.S. Several Times*, N.Y. TIMES (Oct. 28, 1987), http://www.nytimes.com/1987/10/28/us/boy-s-1969-death-suggests-aids-invaded-us-several-times.html.

[2] RANDY SHILTS, AND THE BAND PLAYED ON (1987).

While turning up the lights, Dugas pointed out lesions on his body and told his partners, "I've got gay cancer. . . . I'm going to die and so are you."[3] Dugas's behavior—the careless, shameless, and intentional spread of a frightful, then-fatal disease—represented an unsavory stereotype for homosexuals and terrified heterosexual, polite society.

In the years that followed, understandings of this new "gay cancer" evolved. Scientists across the nation renamed the disease Acquired Immune Deficiency Syndrome (AIDS) and discovered its methods of progression and transmission. Fear, however, remained the epidemic's signature trait. Fear was the foundation for wild-eyed calls for quarantine,[4] widespread discrimination against those living with AIDS (and those who have died because of it),[5] and laws criminalizing transmission and exposure to HIV.

More than half of U.S. states have laws criminalizing transmission of HIV. Generally, the laws require HIV-positive individuals to disclose that they are HIV-positive to their sexual partner prior to sexual activity. Iowa's statute takes the somewhat unusual construction of illegalizing HIV exposure but naming disclosure as an affirmative defense.[6] However, not all of the statutes require disclosure. Alabama's, for example, apparently regards disclosure as irrelevant. It facially disallows any sexual contact leading to infection.[7] Regardless of their specific construc-

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[3] *Id.* at 165.

[4] *See, e.g.*, *Poll Indicates Majority Favor Quarantine for AIDS Victims*, N.Y. TIMES (Dec. 20, 1985), http://www.nytimes.com/1985/12/20/us/poll-indicates-majority-favor-quarantine-for-aids-victims.html. Unfortunately, calls for quarantine may not be merely relics from the early days of the crisis. *See also* David Freedlander, *Kansas Quarantine Bill Has HIV/AIDS Advocates Up in Arms*, DAILY BEAST (Apr. 2, 2013), http://www.thedailybeast.com/articles/2013/04/02/kansas-quarantine-bill-has-hiv-aids-advocates-up-in-arms.html (discussing a Kansas bill that would allow the state to quarantine people with infectious diseases).

[5] *See* Jane Gross, *Funerals for AIDS Victims: Searching for Sensitivity*, N.Y. TIMES (Feb. 13, 1987), http://www.nytimes.com/1987/02/13/nyregion/funerals-for-aids-victims-searching-for-sensitivity.html (detailing funeral home and mortuary discrimination against those who have died of AIDS).

[6] See the infamous Iowa statute (which has since been amended) used to convict Nick Rhoades:

> A person who knows that he or she is infected with HIV commits criminal transmission if he or she: (1) engages in intimate contact with another person; (2) transfers, donates or provides blood, tissue, semen, organs, or other potentially infectious bodily fluids for administration (e.g., transfusion) to another person; or (3) in any way transfers to another person any nonsterile intravenous or intramuscular drug paraphernalia previously used by the person infected with HIV. "Intimate contact" means 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 HIV. Actual transmission of HIV is not a necessary element of this crime. It is an affirmative defense that the person exposed to HIV knew the other person had HIV, knew the action could result in transmission of HIV, and consented to the action with that knowledge.

IOWA CODE § 709C.1, *repealed by* 2014 Iowa Acts, ch. 1119, § 9.

[7] Note that unlike the usual statutes, disclosure is not statutorily required, and unlike the Iowa statute, disclosure is not an affirmative defense. *See* ALA. CODE § 22-11A-21(c) (2006)

tions, these statutes impose criminal sanctions on HIV-positive individuals for the perceived risk presented by what is called their "serostatus"—the quality of being either HIV-positive or HIV-negative.

The application of such criminal statutes results in convictions like that of Nick Rhoades, an Iowa man whose viral load was reduced through avid treatment to undetectable levels, which greatly reduced his chances of transmitting the virus.[8] Rhoades—who used a condom during the incident in question—was sentenced to twenty-five years in prison on the basis of a single sexual encounter because he did not disclose his HIV-positive status to his sexual partner.[9] Though Rhoades did not infect his sexual partner, he was still convicted.[10] The Iowa statute specifically notes that actual transmission is not required for criminal sanctions; merely the possibility that transmission could occur is sufficient.[11] On the other hand, cases like Nushawn Williams's—who infected more than ten sexual partners, allegedly with the intention of transmitting the HIV virus[12]—lead to hysteria and support for criminal statutes regarding HIV exposure.[13] In reality, intentional infections are exceedingly rare, though when they occur (or allegedly occur), they are widely and notoriously reported,[14] further warping public understanding of the issue.

This Note argues that criminal sanctions, by virtue of the societal reproof inhering in them and their rigid application in comparison to tort liability, are an inappropriate response to the problem of HIV exposure. On the other hand, tort liability and the "reasonable person" standard of

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("Any person afflicted with a sexually transmitted disease who shall knowingly transmit, or assume the risk of transmitting, or do any act which will probably or likely transmit such disease to another person shall be guilty of a Class C misdemeanor."). Little case law interprets this problematic provision. Nonetheless, apparently concluding that the penalty for a misdemeanor is insufficient, the Alabama legislature has moved to make this offense a felony. H.B. 50, 2015 Reg. Sess. (Ala. 2015).

8 Rhoades v. State, 848 N.W.2d 22, 25 (Iowa 2014).

9 *Id.* at 26.

10 *See id.*

11 IOWA CODE § 709C.1 (2006) ("This section shall not be construed to require that an infection with the human immunodeficiency virus has occurred for a person to have committed criminal transmission of the human immunodeficiency virus."). Criminal transmission involves merely "intimate contact" by an HIV-positive individual.

12 *See* New York v. Williams, 938 N.Y.S.2d 717, 718 (App. Div. 2012).

13 Then-Mayor of New York, Rudy Giuliani, declared that Williams "should be prosecuted for attempted murder, or worse." Jane Gross, *Trail of Arrests, H.I.V. Fears and a Woman's Tale of Love*, N.Y. TIMES (Oct. 29, 1997), http://www.nytimes.com/1997/10/29/nyregion/trail-of-arrests-hiv-fears-and-a-woman-s-tale-of-love.html.

14 *See, e.g.*, Amanda Mikelberg, *HIV-Positive Man Who Intentionally Infected "Thousands" of Partners Turns Himself In*, N.Y. DAILY NEWS (Dec. 30, 2011), http://www.nydailynews.com/life-style/health/hiv-positive-man-intentionally-infected-thousands-partners-turns-article-1.999178; Graham Gremore, *Man Learns He Was Intentionally Infected with HIV via Facebook Message*, QUEERTY (Aug. 27, 2014), http://www.queerty.com/man-learns-he-was-intentionally-infected-with-hiv-via-facebook-message-20140827.

care present a flexible solution to the varied and complex situations in which HIV-exposure claims are likely to arise.

Part I of this Note provides a brief history of criminal statutes addressing HIV exposure. Part II of this Note examines the criminal statutes in greater detail, and explains why they are an inadequate and inelegant solution to the problem of HIV exposure. Part III of this Note discusses why civil liability is a superior method of addressing the HIV exposure problem in modern society and briefly considers the future of criminal liability for HIV transmission.

I. A BRIEF HISTORY OF HIV-RELATED CRIMINAL LEGISLATION

In its early days, the HIV/AIDS plague inspired fear without equal among modern diseases in the United States.[15] The disease produced terror wildly disproportionate to its spread and transmission: one member of the President's AIDS Commission declared that AIDS threatened to bring about the extinction of mankind.[16] Widespread misunderstanding about the disease's spread and transmission led to unrealistic and inflated fears among the general public.[17] HIV/AIDS presented a salacious combination: it was a fearsome and deadly disease that was perceived to be spread largely through taboo sex acts among an abhorred sexual minority. This combination produced not only fear, but also stigma and hatred on an unprecedented level.[18]

HIV/AIDS—because of its plague-like spread among homosexuals—was used as a tool for moral vindication by conventional society. For example, Pat Buchanan famously declared in a 1983 newspaper column that "[t]he poor homosexuals . . . have declared war upon nature, and now nature is exacting an awful retribution."[19] His opinion was far from uncommon. The late Senator Jesse Helms of North Carolina was famed for his fight against AIDS research and funding.[20] Senator Helms felt that AIDS was uniformly caused by homosexual conduct and believed that the disease was a divine punishment for homosexuality. He

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15 WILLIAM A. RUSHING, THE AIDS EPIDEMIC: SOCIAL DIMENSIONS OF AN INFECTIOUS DISEASE 129 (1995) ("HIV-AIDS has been the most feared infectious disease since the emergence of germ theory and the most stigmatized disease in modern times.").

16 *Id.* at 149.

17 *See id.* at 151.

18 *Id.* at 170 ("More than victims of any disease in modern times, people with HIV-AIDS have been viewed with disgust and hatred and treated as social pariahs.").

19 SAMUEL WELLS, CHRISTIAN ETHICS: AN INTRODUCTORY READER 259 (2010).

20 *See* WILLIAM A. LINK, RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM 350 (2008); *see also* Edward I. Koch, *Senator Helms's Callousness Toward AIDS Victims*, N.Y. TIMES (Nov. 7, 1987), http://www.nytimes.com/1987/11/07/opinion/senator-helms-s-callousness-toward-aids-victims.html.

declared on the Senate floor that there was "not one single case of AIDS reported in this country that cannot be traced in origin to sodomy."[21]

The potent mélange of public fear and moral conviction was an uncommonly effective motivator for state legislatures. In response to the disease, they created laws that addressed HIV/AIDS more aggressively than any prior epidemic.[22] Among these laws were statutes which expose HIV-positive individuals to criminal sanctions for engaging in sexual activity without disclosing their serostatus to their sexual partners, infecting their sexual partners with HIV, or simply exposing their sexual partners to HIV. Also common are laws that do not criminalize the transmission or exposure of HIV specifically, but criminalize the transmission or exposure of sexually transmitted infections generally.

II. CRIMINAL LIABILITY FOR HIV EXPOSURE

Criminal laws are not merely a mode of punishment; they also express a society's moral sensibility and disapproval of certain behaviors.[23] Behaviors that create problems for others but require no great censure are better addressed through the civil tort system. Behaviors deemed particularly deserving of society's reproach are addressed through the criminal system. It is important to consider, too, that there is no particular reason why HIV transmission cannot be addressed through conventional and broad criminal statutes that address homicide, assault, and attempt.[24] Indeed, the first HIV transmission prosecutions were brought under such statutes.[25]

HIV transmission statutes cover a wide array of behaviors through a variety of modes. Sometimes, knowledge of the infected partner's serostatus by the exposed partner is an affirmative defense, as in Iowa's HIV transmission statute, Iowa Code § 709C.1. That statute provides an affirmative defense if the exposed person knew that his or her sexual partner was infected.[26] Thus, to benefit from this affirmative defense, the

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21 LINK, *supra* note 20, at 350.

22 *See* DAVID W. WEBBER, AIDS AND THE LAW 7-3 (4th ed. Supp. 2011).

23 As Professors Dressler and Garvey note in a criminal law casebook, "What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition." JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 2 (6th ed. 2012). The editors quote Professor George Gardner's declaration that criminal conviction is "the expression of the community's hatred, fear, or, contempt." George K. Gardner, Bailey v. Richardson *and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953).

24 *See, e.g.*, State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989); *see also* Lori A. David, *The Legal Ramifications in Criminal Law of Knowingly Transmitting AIDS*, 19 LAW & PSYCHOL. REV. 259 (1995).

25 *See* Michael L. Closen et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921 (1994).

26 IOWA CODE § 709C.1(5) (2006) ("It is an affirmative defense that the person exposed to the human immunodeficiency virus knew that the infected person had a positive human

exposed person must know that sexual conduct might result in transmission even if the infected person did not disclose his or her serostatus to the partner.[27] Florida's statute follows the Iowa approach. Though it does not specifically name the affirmative defense, disclosure is a shield from criminal liability under the Florida statute.[28] Like the Iowa statute, the Florida statute only requires that the exposed party has "been informed" of his or her partner's serostatus—not that he or she was informed by the infected person. Other statutes require disclosure by the infected person. Idaho's statute, for example, specifically requires that the accused disclose his serostatus.[29] Finally, some statutes appear to offer no affirmative defense based upon disclosure. Alabama's HIV transmission statute apparently does not leave room for an affirmative defense of disclosure or consent. It criminalizes the infected party's taking of any action that will "likely transmit" a sexually transmitted disease.[30]

HIV transmission statutes generally do not require *actual* transmission of HIV for the crime of transmission to occur. Iowa's criminal statute explicitly states that actual transmission of HIV need not occur to sustain a conviction of criminal transmission of HIV.[31] Alarmingly, the statutes often criminalize behavior that simply cannot lead to infection.

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immunodeficiency virus status at the time of the action of exposure, knew that the action of exposure could result in transmission of the human immunodeficiency virus, and consented to the action of exposure with that knowledge.").

27 One could imagine a situation in which the exposed partner is aware of the infected partner's serostatus through gossip, mutual friends, or even deduction from the evidence of medications on the counter. The language of the Iowa statute suggests that so long as the exposed person has the knowledge that the infected person is infected, and understands the possible consequences of such infection, the infected partner could raise an affirmative defense.

28 *See* FLA. STAT. § 384.24(2) (2014) ("It is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.").

29 The statute reads: "It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity." IDAHO CODE § 39-608(3)(a) (2014). The language here appears to put the onus of ensuring knowledge upon the infected person, requiring him to disclose his serostatus himself, and denying him the benefit of the affirmative defense if he does disclose, regardless of the other party's knowledge.

30 ALA. CODE § 22-11A-21(c) (2006) ("Any person afflicted with a sexually transmitted disease who shall knowingly transmit, or assume the risk of transmitting, or do any act which will probably or likely transmit such disease to another person shall be guilty of a Class C misdemeanor.").

31 The statute explicitly allows for criminal transmission when no actual transmission has, in fact, occurred. *See* IOWA CODE § 709C.1.4 (2003). ("This section shall not be construed to require that an infection with the human immunodeficiency virus has occurred for a person to have committed criminal transmission of the human immunodeficiency virus.")

For example, Louisiana's HIV transmission statute criminalizes not only sexual conduct by the infected individual, but also "biting" or "spitting."[32] Statutes which criminalize behavior that cannot in any real sense transmit HIV—like Louisiana's statute[33]—are not only needlessly overbroad. They also perpetuate mistaken conceptions of HIV/AIDS and hurt those living with the disease.

Statutes criminalizing HIV transmission disproportionately affect certain socioeconomic, racial, and sexual classes. According to the American Psychological Association, people of a lower socioeconomic status are more likely to engage in risky sexual behaviors that spread HIV, and less likely to be able to afford effective treatments.[34] Those of a lower socioeconomic status are also more likely to engage in needle sharing among drug addicts, another major vector of HIV transmission.[35] African Americans are also disproportionately affected by HIV/AIDS. By sheer numbers alone, they are the ethnic group most affected by the disease.[36] Finally, those most associated in the public mind with HIV/AIDS are homosexuals. Statistically, men who have sex with men are the group most affected by HIV/AIDS in the nation.[37] In the subset of men who have sex with men, African-American men are the most severely affected.[38] Since the HIV/AIDS first struck the community, it has been a major force in shaping gay culture—from novels[39] and plays[40] to films.[41]

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32 Consider the definition assigned to "means" in LA. REV. STAT. § 14:43.5(D)(1) (2014). The statute defines "means or contact" as "spitting, biting, stabbing with an AIDS contaminated object, or throwing of blood or other bodily substances." LA. REV. STAT. § 14:43.5(D)(1) (2014).

33 *HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/basics/transmission.html (last visited Oct. 17, 2014) ("HIV cannot be spread through saliva, and there is no documented case of transmission from an HIV-infected person spitting on another person.").

34 *HIV/AIDS & Socioeconomic Status*, AM. PSYCHOLOGICAL ASS'N, http://www.apa.org/pi/ses/resources/publications/factsheet-hiv-aids.aspx (last visited Nov. 17, 2015).

35 *See id.*

36 *HIV Among African Americans*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/HIV/risk/racialethnic/aa/index.html (last visited Feb. 11, 2014).

37 *HIV Among Gay and Bisexual Men*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/risk/gender/msm/ (last visited Sept. 25, 2014).

38 *See HIV Among African American Gay and Bisexual Men*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/group/msm/bmsm.html (last visited Nov. 17, 2015).

39 For a particularly deft example, the author recommends Andrew Holleran's understated and poetic masterpiece, *The Beauty of Men*. ANDREW HOLLERAN, THE BEAUTY OF MEN (1st ed. 1996).

40 Notable is Larry Kramer's *The Normal Heart*, which was recently produced as a film by HBO. *The Normal Heart* (HBO television broadcast May 25, 2014).

41 *See, e.g.*, LONGTIME COMPANION (Samuel Goldwyn Co. 1989); PHILADELPHIA (TriStar Pictures 1993).

There is an obvious argument for criminalization of transmission to be gleaned from these statistics. By discouraging risky sexual practices and transmission, one might think that criminalization helps these communities. But blanket criminalization is not an efficient or effective way to combat the complex phenomena causing high rates of infection in the aforementioned communities.[42] Those actually interested in decreasing transmission rates through a legal framework should instead champion education and health assistance programs.[43]

Statutes criminalizing HIV transmission have come under heavy fire recently, particularly with the rise of cases such as that of Nick Rhoades. Recall, Rhoades was convicted of criminal transmission of HIV and sentenced to twenty-five years in prison.[44] He was convicted on the basis of a single encounter, during which he used a condom.[45] Moreover, because of his treatment, Rhoades's viral load during that encounter was undetectable.[46] As will be discussed in more detail, new studies suggest that an undetectable viral load carries virtually no chance of transmission.[47] Unsurprisingly, actual transmission did not occur as a result of Rhoades's encounter. Nonetheless, he was convicted and sentenced.

Ultimately, the Iowa Supreme Court set aside his conviction on grounds of ineffective assistance of counsel.[48] However, the court's opinion was primarily concerned with the factual issues it perceived in the case. The court worried that to allow the sentence to stand would imprison Rhoades for "something that can only theoretically occur."[49] Later, the court refused to take notice of the idea that a person with an undetectable viral load can infect his sexual partner.[50] The court interpreted the Iowa criminal transmission statute's use of the word "possible" not to mean merely "not impossible," but rather to hold an inherent reasonableness requirement.[51] This awkward interpretation was subject to a blistering dissent. That the court decided the case on an issue of substantive justice—rather than ineffective assistance of counsel—seems to be a better reflection of the court's reasoning.

The court's decision turned on the point that the district court did not have a "factual basis" to accept the guilty plea.[52] The court then examined the facts of Rhoades's case to decide that there was no "factual

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42 WEBBER, *supra* note 22, at 7-3.
43 *Id.*
44 Rhoades v. State, 848 N.W.2d 22, 25–26 (Iowa 2014).
45 *Id.* at 26.
46 *Id.* at 25.
47 *See infra* note 84.
48 *Rhoades*, 848 N.W.2d at 23.
49 *Id.* at 28.
50 *Id.* at 32.
51 *Id.* at 27–28.
52 *Id.* at 33.

basis" to his guilty plea.[53] The court effectively ruled that Rhoades's lawyer was incompetent for allowing Rhoades to plead guilty to sexual conduct without disclosing his serostatus to his sexual partner, when, in fact, Rhoades did just that.

Indeed, faced with the peculiarity of such an outcome, Justice Mansfield wrote in his concurrence that the court used ineffective counsel as a proxy for a plain error rule.[54] Justice Mansfield went on to concur in the court's result "without finding fault in the performance of Rhoades's defense counsel."[55] These judicial gymnastics avoided a manifestly unjust outcome, but they were only necessary because of an overbroad and unreasonable statute that was predicated largely on a public fear that has far outlived its rationality.

III. TORT LIABILITY FOR HIV EXPOSURE

Tort liability is a more flexible and elegant solution to the problem of HIV exposure. For one thing, tort law's dynamic approach allows a more intimate, case-by-case examination of the facts. Unlike criminal law, negligence liability is responsive to the circumstances surrounding each case, an important point in fact patterns as emotionally and personally fraught as those involving sexually transmitted infections. Most importantly, through the reasonable person standard, tort liability encourages more caution and care by those who are HIV-positive, rather than pushing their behavior underground.[56]

Liability for transmission could be imposed for a number of torts, including battery, negligence, and intentional or negligent infliction of emotional distress. While all of these torts raise interesting issues, negligence is the focus of this Note, so the analysis will largely center on the tort of negligence. Battery, an intentional tort, can take two forms: either a forced contact resulting in transmission (which could result in serious criminal repercussions, as well as tort liability)[57] or a consensual contact after a misrepresentation of one's HIV-positive status.[58] Such a misrep-

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53 *See id.* at 23.

54 *Id.* at 33 (Mansfield, J., concurring) ("In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa.").

55 *Id.* at 34 (Mansfield, J., concurring).

56 Closen et al., *supra* note 25, at 933 (pointing out that criminal liability may simply drive conduct underground). Professor Schultz also makes the point that when criminal liability requires knowledge of an HIV infection, those who suspect their HIV status is positive will be discouraged from seeking testing, which will impose the possibility of criminal sanctions for sexual conduct. *Id.*

57 Namely, a rape conviction. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 567 (6th ed. 2012).

58 *See* RICHARD A. EPSTEIN, TORTS 43 (1999) ("[M]ost states regard the mere nondisclosure of serious medical conditions prior to intercourse as a species of fraud capable of overriding consent.").

resentation constitutes fraud in the inducement, and vitiates consent.[59] Fraud in the inducement can be either implied or apparent.[60]

For their part, both negligent and intentional infliction of emotional distress are notoriously difficult claims to prove.[61] In the context of HIV-transmission, intentional infliction of emotional distress might look strikingly similar to the behavior of Gaëtan Dugas. Dugas, who knew he was HIV-positive, intentionally engaged in risky behavior to distress his sexual partner. The heinousness required to prove claims of negligent or intentional infliction of emotional distress is considerable, and it must result from behavior "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency."[62] In *Whelan v. Whelan*, a Connecticut court found that spitefully and untruthfully claiming to have HIV during the dissolution of a marriage was sufficiently outrageous because such a claim would likely result in "shock and fright of enormous proportions."[63]

The intensity of emotional distress must be proven. In one case for intentional infliction of emotional distress, the court recognized that it could infer extreme emotional distress from the fact that a party realized he or she may have been infected with HIV, but "that inference alone is not sufficient to support a claim for emotional distress."[64] Furthermore, the distress must meet an objective reasonable person standard.[65] For example, the case of *Reynolds v. Highland Manor* involved a traveler who inadvertently picked up a used condom in her motel room.[66] Here, the chance of actual injury from picking up the condom was unreasonably slight, and so the court found the emotional distress resulting from it was also unreasonable.[67] In *Majca v. Beekil*, a woman discovered months after an office injury that her employer was HIV-positive. However, the court held that because she had been tested numerous times for

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59 *Id.*

60 *Id.* ("Nor is an explicit verbal lie necessary to override P's consent. If D covers up his body sores with talcum powder, or removes his AIDS medications from plain view, these acts of deliberate concealment, while difficult to prove, are in principle as wrongful as any other overt fraud.").

61 *See id.* at 18.

62 RESTATEMENT (SECOND) OF TORTS § 46 cmt. D. (AM. LAW INST. 1965).

63 Whelan v. Whelan, 588 A.2d 251, 253 (Conn. Super. Ct. 1991).

64 J.B. v. Bohonovsky, 835 F. Supp. 796, 798 (D.N.J. 1993) ("It is not unreasonable to infer that upon learning that one's lover has AIDS, there is a period of intense anxiety awaiting the result of one's own tests over an extended period of time. But that inference alone is not sufficient to support a claim for emotional distress. What makes that claim viable is the intensity of the distress, not its mere existence.").

65 Carroll v. Sisters of St. Francis Health Servs., 868 S.W.2d 585, 594 (Tenn. 1993).

66 Reynolds v. Highland Manor, 954 P.2d 11, 12–13 (Kan. Ct. App. 1998).

67 *Id.* at 15. ("Anxiety about a disease or condition developing from a physical injury is not recoverable as an element of mental distress where the medical evidence indicates the chance of such occurring is slight. . . . Because her fear of contracting the disease is unreasonable as a matter of law, she may not recover damages.").

HIV and had never tested positive for the infection, her distress upon discovering her employer's serostatus was unreasonable.[68]

In fact, in addressing problems such as those in *Reynolds* or *Majca*, a majority of courts require that actual exposure to HIV occur as a prerequisite of reasonableness in a claim of negligent or intentional infliction of emotional distress.[69] The court in *Carroll v. Sisters of St. Francis Health Services* found that "the plaintiff must prove, at a minimum, that he or she was actually exposed to HIV."[70] Likewise, the court in *Johnson v. American National Red Cross* found that absent proof of exposure, "the damages must be considered whimsical, fanciful and above all too speculative to form the basis of recovery."[71] However, the requirement of actual exposure is not recognized in all jurisdictions.[72] The court in *Faya v. Almaraz* did not require actual exposure, noting certain alarming characteristics of HIV/AIDS, including the fact that it is blood-borne and can have a long latency period.[73] The *Faya* court refused to issue a judgment as a matter of law, despite the fact that there was no proof of exposure.[74]

Addressing contagious diseases through tort law is not a new idea. Early tort cases evinced great concern for contagious livestock, extending negligence liability to owners of sheep and hogs that spread disease.[75] Courts also applied negligence liability to infectious diseases of humans. For example, the court in a 1910 case, *Hendricks v. Butcher*,

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68 Majca v. Beekil, 701 N.E.2d 1084, 1090 (Ill. 1998).

69 This seems to be a common requirement across state lines. *See, e.g.*, Johnson v. Am. Nat'l Red Cross, 578 S.E.2d 106 (Ga. 2003); *Majca*, 701 N.E.2d 1084; *Reynolds*, 954 P.2d 11; Bain v. Wells, 936 S.W.2d 618 (Tenn. 1997); *Carroll*, 868 S.W.2d 585; *see also* Heiner v. Moretuzzo, 652 N.E.2d 664 (Ohio 1995) (requiring those raising emotional distress claims to have been placed in actual peril).

70 *Carroll*, 868 S.W.2d at 594.

71 *Johnson*, 578 S.E.2d at 110 (citing Russaw v. Martin, 472 S.E.2d 508, 511 (Ga. Ct. App. 1996)).

72 *See, e.g.*, Faya v. Almaraz, 620 A.2d 327, 336–37 (Md. 1993).

73 *Id.* at 332, 336–37.

74 *Id.* at 339. The facts of *Faya* are interesting, involving a surgeon who had HIV/AIDS and continued to operate. Upon his death, his patients discovered his ailment, to their consternation. From an article in the Philadelphia Inquirer: "[T]he case of Dr. Almaraz, who died of AIDS on Nov. 16 at the age of 41, has frightened and angered his patients—mostly women with breast cancer—even though doctors say their risk of having contracted AIDS from Almaraz is extremely low. . . . [One patient] described Almaraz as a brilliant surgeon and charismatic person 'with great empathy for his patients.' But she said she had 'mixed feelings' because 'you realize that this could be the man who killed you.'" Matthew Purdy, *Doctor's Aids Death Raises Worries*, PHILA. INQUIRER (Dec. 7, 1990), http://articles.philly.com/1990-12-07/news/25922401_1_rudolph-almaraz-aids-virus-cancer-surgeon. The article demonstrates the fearful power of the AIDS epidemic in its early days.

75 *See, e.g.*, Demetz v. Benton, 35 Mo. App. 559, 563 (1889) (finding that allowing one's hogs to transmit disease can be negligence); Johnson v. Wallower, 18 Minn. 288, 294 (1872) (finding that liability covered both a contagious horse sold to the plaintiff and the plaintiff's other horse, which was infected by the purchased horse).

established a duty of care for those infected with smallpox not to spread their infection.[76] Courts also apply negligence principles to sexually transmitted diseases.[77] The Maine Supreme Judicial Court recognized a claim for negligent transmission of a sexually transmitted disease, stating: "We can conceive of no principled reason to distinguish . . . infection with a disease, from any other physical harm that could befall a person because of the negligence of another, and for which we would recognize a cause of action in negligence."[78] One Oklahoma case even extends negligence liability for a sexually transmitted infection from an infected mistress to her faithless inamorato's wife, who later became infected.[79]

This Note argues that the better approach is to apply negligence liability and a reasonable person standard of care for sexually active adults who are HIV-positive as well as those who are not. A few notable questions arise when considering the application of negligence liability for HIV transmission: (a) what constitutes reasonable care, (b) should disclosure be required in the tort regime, (c) what risks does the average sexually active adult assume, and (d) is there still a place for criminal prosecutions of intentional and malicious transmission?

Any discussion of tort liability hinges upon tort's famous standard, beloved by law professors and despised by first-year students: the reasonable person. Since the venerable English case of *Vaughan v. Menlove*, an objective standard has ruled tort law.[80] Unlike criminal law, the tort of negligence only expects people to employ an average level of caution and reason.[81] It is an eminently human standard, one more easily

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[76] Hendricks v. Butcher, 129 S.W. 431, 432 (1910) ("[W]e have no hesitancy in holding that any one afflicted with the disease of smallpox, which is known by every one to be a highly contagious disease, owes to every one the duty to so conduct himself as not to communicate this disease to them after he becomes aware that he is afflicted with it.").

[77] *See, e.g.*, Deuschle v. Jobe, 30 S.W.3d 215, 219 (Mo. Ct. App. 2000) (holding that a girlfriend infected with herpes by her boyfriend stated a claim for negligence); McPherson v. McPherson, 712 A.2d 1043 (Me. 1998).

[78] *McPherson*, 712 A.2d at 1045.

[79] Lockhart v. Loosen, 943 P.2d 1074, 1081 (Okla. 1997) ("If Loosen knew the plaintiff's identity and recognized her as someone with whom her sexual partner would later copulate and she did not tell him she had herpes before he engaged in sex with this third person, it can be found that a natural and probable consequence of her silence is that Lockhart would communicate this highly contagious disease to the third person."); *see also* Doe v. Johnson, 817 F. Supp. 1382 (W.D. Mich. 1993) (recognizing claims for negligence against a party, A, who knew his serostatus and that his sexual partner had sex with others, but neglected to inform his partner of his infection).

[80] Vaughan v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837); *see also* EPSTEIN, *supra* note 58, at 111.

[81] As Oliver Wendell Holmes wrote with characteristic eloquence: "[H]e who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is

applicable to reality surrounding HIV/AIDS than the strict and inflexible commands of criminal law.

However, precisely because of its flexibility, the reasonable person standard is malleable and opaque. What does the reasonable person do when faced with a sexual encounter that might transmit HIV? As discussed above, public fear of HIV far outstrips the statistical likelihood of contracting the disease.[82] HIV, contrary to popular belief, is relatively difficult to transmit if safe-sex methods are used.[83] Depending on the patient's medical circumstances, the chances of transmitting HIV can range from alarming to negligible. Indeed, a new scientific study suggests that it is virtually impossible to transmit HIV if a patient's viral load is undetectable.[84]

A. A Modern Scheme of Reasonable Care for HIV Positive Individuals

The elements of the tort of negligence are simple: (1) the defendant owes the plaintiff a duty of care, (2) the defendant's conduct fell below the standard of care expected of a reasonable person, (3) the defendant's failure to meet the standard of care was the cause of the plaintiff's harm, and (4) the plaintiff was, in fact, harmed.[85] A myriad of courts have found a duty on the part of an infected person to protect his or her sexual partners from infection.[86]

Though the reasonable person standard is objective, it is closely sensitive to circumstances. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm states that "[a]n actor is negligent in

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answerable for the consequences." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108–09 (1881).

82 *See* RUSHING, *supra* note 15, at 151 ("In light of the actual risks, to say that such fears were unrealistic grossly understates the matter.").

83 *Canadian Scientists Agree that HIV is Difficult to Transmit Sexually*, CTR. FOR HIV LAW & POLICY (May 2, 2014), http://www.hivlawandpolicy.org/fine-print-blog/canadian-scientists-agree-hiv-difficult-transmit-sexually.

84 The PARTNER study, conducted by the Center for Health and Infectious Disease Research and funded by the National Institute for Health Research in the UK and the Swiss Office for Public Health, involves serodiscordant couples (by 2014, the study included 1,145 couples) who regularly engage in sexual intercourse with each other, without the use of condoms. Since the study's creation in 2010, no HIV transmission has been recorded from an individual with an undetectable viral load to his partner. *Q & A for PARTNER Studies: Interim Analysis Results Presented at CROI 2014*, CTR. FOR HEALTH & INFECTIOUS DISEASE RESEARCH, http://www.chip.dk/portals/0/files/CROI_2014_PARTNER_QA.pdf (last visited Nov. 18, 2015). *But see HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/basics/transmission.html (last visited Jan. 16, 2015) ("A person with HIV can still potentially transmit HIV to a partner even if they have an undetectable viral load . . . .").

85 EPSTEIN, *supra* note 58, at 109–10.

86 *See, e.g.*, Berner v. Caldwell, 543 So. 2d 686, 689 (Ala. 1989); R.A.P. v. B.J.P., 428 N.W.2d 103, 108 (Minn. Ct. App. 1988).

engaging in conduct if the actor does not exercise reasonable care."[87] By placing the onus of complying with the objective standard upon the actor instead of the victim, the objective standard requires a deficient or dangerous person to take additional precautions because that person has the foreknowledge of their own infirmity.[88]

Thus, just as a person with impaired eyesight will be expected to wear glasses while driving an automobile even though those with excellent vision need not, a person who is HIV-positive must take precautions that an HIV-negative person need not. The question, of course, is: what precautions constitute reasonable care by a person who is HIV-positive? The question of what precautions are required would ultimately be one answered by a finder of fact, but certain edges might be sketched out here. Condom use is certainly part of the reasonable standard of care[89] and antiretroviral therapy likely is, as well.[90]

Finally, though sexually active HIV-positive individuals bear a heavier standard of care than sexually active HIV-negative individuals do, under a tort theory of transmission liability, the entirety of responsibility does not rest upon the HIV-positive individual's shoulders. By engaging in sexual activity, all sexually active individuals assume the risk that they will contract sexually transmitted infections. The risk of

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87 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 4 (AM. LAW INST. 2011).

88 EPSTEIN, *supra* note 58, at 113 ("The objective standard encourages sensible steps toward accident precaution by inducing people with below-average abilities to stay out of harm's way in the first instance.").

89 Condom use is uniformly urged from a variety of sources. The CDC states simply: "Use a condom every time you have anal, vaginal, or oral sex." *How You Can Prevent Sexually Transmitted Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/std/prevention/default.htm (last visited Nov. 5, 2013). Condom usage is not merely recommended by doctors, but it is also a widely publicized piece of health advice; for example, the City of New York branded its own condoms, complete with citywide advertisements. Sewell Chan, *A New Condom in Town, This One Named 'NYC'*, N.Y. TIMES (Feb. 15, 2007), http://www.nytimes.com/2007/02/15/nyregion/15condom.html?_r=2&. Indeed, even popular lifestyle magazines insist upon the regular use of condoms; *Cosmopolitan* urged ladies to require condom usage of their male sexual partners and offered a "hands-on" guide to putting them on, while *GQ* gleefully reported that the return on investment of a condom is 114,266%. *A Brief Course on Condoms*, COSMOPOLITAN (June 9, 2003), http://www.cosmopolitan.com/sex-love/advice/a1565/course-on-condoms/; Mark Byrne, *What's the Return on Investment for a Condom? 114,266%.*, GQ (Sept. 16, 2014), http://www.gq.com/blogs/the-feed/2014/09/return-on-investment-condom-114266.html.

90 Antiretroviral therapy reduces the risk of opportunistic infection and suppresses viral loads. It is recommended by the Department of Health and Human Services. *See generally Guidelines for the Use of Antiretroviral Agents in HIV-1-Infected Adults and Adolescents*, AIDS INFO, http://aidsinfo.nih.gov/contentfiles/lvguidelines/adultandadolescentgl.pdf (last visited Nov. 18, 2015).

sexually transmitted infections is widely taught[91] and publicized.[92] The tort of negligence punishes not transmission, but a failure to exercise reasonable care.[93] So long as the HIV-positive individual met a reasonably prudent standard of care, he has not committed a tort, even if the virus was transmitted. As discussed in more detail below, that risk (greatly reduced if both parties are observing their respective standards of care) is simply one incurred by the decision to become sexually active.

B. Disclosure and Serostatus

The elegance of a tort solution to the problem of HIV transmission is that one size need not fit all: the reasonable person standard considers the totality of the circumstances in which the person behaved. Thus, disclosure will probably be required in most cases to meet the standard. However, as the body of medical data about transmission rates grows—particularly transmission rates among those whose viral load is undetectable—the disclosure requirement may diminish in importance. A requirement of disclosure represents a complex interplay between the actual risk of transmission (with other prudent cautionary measures, quite low) and the fearsome public image of HIV.

The central tension is: what risks would a reasonable person considering intercourse with an HIV-positive person take? The plague-like horror of the AIDS epidemic's early days lends the disease a reputation for fatality that is no longer accurate. Distinct from its early days, AIDS is a chronic, but treatable condition.[94]

Of course, if a person is unaware of his HIV-positive status, he may escape liability despite actions that, if taken by a person who knows he is HIV-positive, would result in liability. Such a result presupposes two conditions: first, that the individual observed the reasonable standard of care for any person engaging in sexual relations, and second, that the individual does not achieve ignorance through willful blindness.

Though the standard of care for an HIV-negative person is more relaxed than that for an HIV-positive person, it requires him or her to act reasonably as well. While the precise formulation will likely change from fact finder to fact finder, it is not difficult to imagine what reasonable care for an HIV-negative, sexually active individual might involve.

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91 Sexual education is widespread: 22 states require sexual education, and 37 states require that information on the benefits of abstinence be provided. *State Policies in Brief: Sex and HIV Education*, GUTTMACHER INST. (Nov. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf.

92 *Id.* 19 states require that condom usage be taught in schools. *See also supra* note 89.

93 EPSTEIN, *supra* note 58, at 69. This is in contrast to strict liability, which applies liability regardless of whether the actor employed reasonable care. *Id.* at 70.

94 *Living with HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/living/index.html (last visited Nov. 20, 2014).

It likely requires condom usage,[95] which is widely recommended by physicians, and regular testing, which will be discussed further in this Note.

So long as the reasonably ignorant HIV-positive person follows the standard of reasonable care for a sexually active person, tort liability should not attach. It may be true that discussing willful blindness separate of the general standard of care is redundant, but the use of a tort liability structure in the HIV-transmission context would—at least initially—seem to incentivize willful blindness. Thus, I address it separately to show why a tort framework would not actually incentivize willful blindness in the HIV/AIDS context.

Willful blindness—the intentional failure to take steps to avoid knowledge of wrongdoing—amounts to constructive knowledge, and would offer our hypothetical person no safe harbor. In the context of HIV-transmission liability, willful blindness would take the form of a sexually active party who refuses or neglects to be tested for sexually transmitted infections in order to avoid the heightened preventative steps that the reasonable person standard would require of a sexually active person with a sexually transmitted infection. Such a scheme, however, would fail. For one thing, to be sexually active with more than one partner and refuse to be tested for sexually transmitted infections is so foolhardy that it falls below the standard of reasonable care.[96] Indeed, so uniform is the opinion of physicians, epidemiologists, and medical professions that sexually transmitted infection screening is imperative. For sexually active individuals who have more than one partner engaging in

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95 Among the many medical authorities uniformly exhorting regular condom usage are the Centers for Disease Control, which bluntly state: "Use a condom every time you have anal, vaginal, or oral sex." *How You Can Prevent Sexually Transmitted Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/std/prevention/default.htm (last visited Nov. 5, 2013). In 1987, Surgeon General C. Everett Koop urged condom usage. Shocking to many, who expected a more conservative Surgeon General, Dr. Koop wrote that absent proof that one is not infected, "you must protect your partner by always using a rubber (condom) during (start to finish) sexual intercourse (vagina or rectum)." C. EVERETT KOOP, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 17 (1986), http://profiles.nlm.nih.gov/ps/access/NNBBVN.pdf. Courts, too, have noted that condom usage is a must. In *Doe v. Roe*, the court referred to condom usage, stating: "Both parties in an intimate relationship have a duty to adequately protect themselves." 598 N.Y.S.2d 678, 681 (1993). Even a formative influence in the author's own life—the late Lady Pearl, resident drag queen at a Gainesville, Florida gay nightclub—urged condom use regularly. She closed every performance with a colorful signature phrase: "Wrap it up! Because no injection is worth the infection . . . ."

96 The Centers for Disease Control recommend yearly testing of common sexually transmitted infections and more frequent testing depending upon certain risk factors. *STD & HIV Screening Recommendations*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/std/prevention/screeningReccs.htm (last visited June 30, 2014). The United States Preventative Services Task Force, an independent board appointed and funded by the Department of Health and Human Services, recommends screening for all sexually active men and women. David Meyers et al., *USPSTF Recommendations for STI Screening*, 77 AM. FAM. PHYSICIAN 819, 819 (2008).

sexual activity without regular testing, their refusal to test for infections likely falls below the standard of reasonable care as a matter of law.[97]

Numerous courts have declined to limit negligence liability in a sexual infection case to actual knowledge and instead have embraced constructive knowledge.[98] The Supreme Court of California noted that requiring actual, rather than constructive, knowledge of HIV infection not only conflicted with the definition of negligence, but also presented perverse and socially undesirable incentives against testing and treatment for the disease.[99] Similarly, Maine requires "knowledge or its equivalent."[100] Louisiana also accepts both actual and constructive knowledge for cases of infection.[101]

Initially, it might appear problematic that an HIV-positive person who knows of his serostatus would incur liability for behavior that, if undertaken by an HIV-positive person who reasonably *does not* know his serostatus, would not result in liability. At closer examination, however, this result is not inconsistent with the result under many existing criminal statutes that require knowledge as an element. This result comports with criminal law's usual requirement of *mens rea*. So long as a person's ignorance of his serostatus is objectively reasonable—and his behavior met the required standard of care—no liability should attach. Such an outcome is satisfactory because requiring "reasonable care" to consist of heightened caution in the case of an HIV-positive individual reflects two considerations: first, the knowingly HIV-positive person is the most efficient risk manager,[102] and second, tort liability incentivizes the reasonable person to take precautions when he or she is dangerous.

An interesting question is whether an infected person with knowledge—or constructive knowledge—of his status is required to disclose his serostatus to his sexual partners. Currently, the overwhelming answer is "yes."[103] Courts have widely recognized a duty to inform in

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97 This is a difficult standard to meet. Judgment as a matter of law requires the court to find that no reasonable jury would find otherwise. *See* FED. R. CIV. P. 50.

98 John B. v. Superior Court, 137 P.3d 153, 161 (Cal. 2006).

99 *Id.*

100 McPherson v. McPherson, 712 A.2d 1043, 1046 (Me. 1998) (quoting MacDonald v. Hall, 244 A.2d 809, 814 (Me. 1968)) ("The duty of taking care[e] . . . presupposes knowledge or its equivalent. The knowledge may be actual or that with which he is reasonably chargeable, by reason of events which could be foreseen or reasonably anticipated.").

101 Meany v. Meany, 639 So. 2d 229, 234 (La. 1994) ("[U]nder traditional negligence concepts, the duty to take reasonable steps to protect against injurious consequences resulting from the risk is based on the defendant's actual or constructive knowledge." (citing Kent v. Gulf States Utilities Co., 418 So. 2d 493, 497 (La. 1982))).

102 It is more efficient, economically speaking, for a single high-risk individual to take additional (more onerous and more expensive) precautions than to require all sexually active adults to take those expensive precautions.

103 *See, e.g.*, *John B.*, 137 P.3d 153 (holding that a defendant has a duty to disclose his HIV-positive status to a sexual partner); Endres v. Endres, 968 A.2d 336, 340 (Vt. 2008)

cases where a defendant has a sexually transmitted infection such as herpes, gonorrhea or HIV.[104] This answer, however, hinges upon the definition of *duty*. In their classic treatise on torts, Professors Prosser and Keeton define duty as "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."[105] This definition of duty represents a court's balancing act, which weighs the state's interests in protecting other citizens and halting the spread of disease against a defendant's interest in privacy. On this question, courts continuously come down on the side of the public interest.[106] A Minnesota appellate court provides a paradigmatic example of such reasoning in favor of public interest, stating that "courts have long recognized that the preservation of public health is a matter of great public importance. Legal duties and rules must therefore be designed, whenever possible, to help prevent the spread of dangerous, communicable diseases."[107]

Yet, depending on the circumstances of the case in question, there may not be a genuine threat to public health or interest inherent in the infected party. As discussed earlier, new treatments and precautions can reduce the chances of transmission considerably—perhaps even to infinitesimally small probabilities. Some courts recognize that the balance between public health and privacy is dictated by the circumstances of each case, and thus is not a permanent per se solution.[108] The court in *Long v. Adams* noted that the duty owed by those with sexually transmitted infec-

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("Although we have not addressed the question directly, courts have uniformly imposed on persons with communicable diseases a tort duty not to infect others."); Robinson v. Louie (*In re* Louie), 213 B.R. 754 (Bankr. N.D. Cal. 1997).

104 *See* R.A.P. v. B.J.P., 428 N.W.2d 103, 108 (Minn. 1988) ("[P]eople suffering from genital herpes generally have a duty either to avoid sexual contact with uninfected persons or, at least, to warn potential sex partners that they have herpes before sexual contact occurs."); Berner v. Caldwell, 543 So. 2d 686, 689 (Ala. 1989) ("[O]ne who knows, or should know, that he or she is infected with genital herpes is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them."). Though these cases deal with herpes and not HIV, the doctrine points upon which they turn are identical to those upon which the duties of a person infected with HIV would turn. Indeed, many of the cases dealing with HIV/AIDS, a relatively new illness, cite cases dealing with herpes, gonorrhea, or some other sexually transmitted infection. *See, e.g.*, Doe v. Roe, 267 Cal. Rptr. 564, 567 (Ct. App. 1990), *cited in Robinson*, 213 B.R. 754.

105 WILLIAM LLOYD PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 53 (5th ed. 1984).

106 *See, e.g.*, *R.A.P.*, 428 N.W.2d at 107.

107 *Id.* at 106 (citing Skillings v. Allen, 173 N.W. 663, 664 (Minn. 1919)).

108 Long v. Adams, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) ("It should be made clear that this court is not stating here that herpes victims have a specific duty to warn any person of their condition; however, they, like all citizens, are to be guided by those considerations which ordinarily regulate the conduct of human affairs, and they may be sued in this state for negligence in the omission to do something which a reasonable person would do."). Far from a mere tautology, the court here recognizes that reasonableness is a flexible standard that responds closely to circumstances.

tions to their partners was merely "the same one that every individual in this state owes another: the duty to exercise ordinary care not to injure others."[109] The court in *Long* went on to specify that "[i]t should be made clear that this court is not stating here that herpes victims have a specific duty to warn any person of their condition," ruling instead that such people are held simply to the reasonable person standard, which—in the circumstances of this case—included a duty to warn.[110] This approach seems to leave the door open for more fact-intensive inquiries in the future where one might imagine a situation in which, thanks to proper precautions and treatment, the risk of transmission is minimized to such a degree that the infected party need not inform his partner.

As intriguing as a thought experiment about a case in which disclosure is not required might be, such a point is not yet here and perhaps never will be. The statistics for new treatments for HIV are too young to be interpreted with any degree of certainty. Furthermore, the law has a long history of applying liability to infectious diseases, and such a tradition is not easily diverted. Finally, disclosure offers a sexually active party the unparalleled opportunity to select the level of risk with which that person is comfortable—those who are particularly nervous or risk-averse may demur from engaging in sexual conduct with an HIV-positive individual, even after being presented with information about the relative unlikelihood of contracting the illness from a partner who receives the proper treatment. Likewise, an individual who is not so risk-averse may be willing to engage in sexual relations with an HIV-positive person—or a person who has an undetectable viral load, but not one whose viral load has not yet been suppressed. Insomuch as one of tort law's key functions is risk management, relaxing the requirement for disclosure may be disfavored because such relaxation transfers risk management from the potential victim to the potential tortfeasor.

C. Assumption of Risk and Plaintiff's Conduct

Until now, this Note has focused on a defendant's behavior in a tort action based on HIV transmission. Any encounter resulting in the transmission of HIV, however, requires at least two parties. Another advantage of addressing HIV transmission through tort rather than criminal law is that tort law offers a more involved analysis of the plaintiff's actions. Though criminal law arguably considers the actions of the victim in limited circumstances, such as those of self-defense[111] or defense of

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[109] *Id.* at 854.

[110] *Id.* at 855.

[111] *See* DRESSLER, *supra* note 57, at 222. A claim of self-defense depends on the actor's perception of the victim's actions. Note that the actor himself or herself is still the major focus of the law.

others,[112] it is largely unconcerned with the victim's actions.[113] Criminal law punishes offenses as actions against the state and its authority, not simply offenses against a victim.[114] Consider, for example, that criminal cases are named with the state as a party and prosecuted using public funds. On the other hand, the plaintiff's actions in a tort suit are often dispositive and decisions turn on whether the plaintiff gave consent,[115] assumed the risk of injury,[116] or acted negligently.[117] The defense of assumption of risk allows courts to consider the actions of both parties.

Assumption of risk—itself a flexible tort doctrine—can be of crucial importance in analyzing HIV transmission liability. Assumption of risk comes in two varieties: implied and express.[118] Express assumption of risk deals with contractual agreements where plaintiffs agree not to hold defendants liable.[119] Express assumption of risk need not detain us here long—contracts regarding legal liability are rarely presented prior to sex, and those who attempt to secure a signature before an amorous encounter seem unlikely to continue on to behavior that might transmit HIV.

On the other hand, implied assumption of risk does not require a contract between the plaintiff and defendant. Certain behaviors carry inherent risks—skiing, for example, carries the inherent risk that one might

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112 *See id.* at 255. A claim of defense of others, like a claim of self-defense, also involves the victim's actions.

113 Importantly, one must note that mitigating factors, justifications other than defense, and excuses hinge upon the actions of the actor, not those of the victim. For example, an actor afflicted with schizophrenia may attack an innocent bystander and plead an excuse, perhaps that, for example, the actor believed the victim to be a demon attempting murder. Such a defense would be an excuse, which admits that the actor's deed was wrong, but that the actor was not responsible for the deed. *See id*. at 463; DRESSLER & GARVEY, *supra* note 23, at 463. Here, the law focuses on the actor's behavior, not the victim's.

114 *See* DRESSLER, *supra* note 57, at 1. ("[U]nlike torts and contracts, the criminal law involves *public* law. . . . [A] crime involves more than a private injury. A crime causes 'social harm,' in that the injury suffered involves 'a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.'" (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (1769))).

115 That consent is so important to tort law is another example of the difference between criminal offenses against society and tort offenses against a victim. Generally, one cannot consent to a crime—there is no consent to murder, for example. Some crimes include a lack of consent in the definition of the crime—for example, rape and assault—but that the crime's definition includes consent does not mean that one can consent to the crime. Consenting to a touch means that an assault simply did not occur, *not* that one had consented to be assaulted.

116 Here again, risky behavior does not absolve the criminal of responsibility. Though it is risky and indeed foolhardy to walk at midnight in a dangerous area of town, doing so does not excuse one's attacker of criminal responsibility.

117 Plaintiff's negligence may give rise to defenses of contributory or comparative negligence, depending on which state's tort law is being applied. *See* EPSTEIN, *supra* note 58, at 210.

118 *Id.* at 197.

119 JOSEPH W. GLANNON, THE LAW OF TORTS 538 (4th ed. 2010).

collide with a tree.[120] By choosing to engage in such activities, a plaintiff is assuming certain inherent risks.[121] As Justice Cardozo noted, "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . . ."[122]

The question that then arises is, in which situations does a sexual adventurer assume those risks? Much like defining the reasonable standard of care above, defining exactly which situations result in assumption of risks is an enterprise that will be largely left to lay juries. Nevertheless, it is possible to raise certain arguments. On one end of the spectrum is behavior that almost certainly indicates an assumption of risk: unprotected sex. As noted earlier, the fact that sex without a condom can and often does lead to sexually transmitted diseases is widely disseminated in high schools, colleges, nightclubs, and television programs. Indeed, one New York court held that a person who engages in unprotected sex assumes the risk of infection with a sexually transmitted disease, colorfully noting that "[w]hen one ventures out in the rain without an umbrella, should they complain when they get wet?"[123]

What, then, of risks that arise from protected sex? It is common knowledge that condoms occasionally fail.[124] There is, however, little in the judicial opinions that directly addresses this point. Taking Justice Cardozo's formulation of the assumption of risk as our lodestar, we must ask if the risk is "obvious and necessary."[125] Here, the risk is necessary—it is physically inherent to the activity.[126] The risk is also obvious—it is well publicized and widely disseminated. Actors who choose

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120 According to the National Ski Areas Association, skiing and snowboarding resulted in 54 deaths from 2011 to 2012, or approximately 5.5 deaths per million skiers. *Facts About Skiing/Snowboarding Safety*, NAT'L SKI AREAS ASS'N 1 (Oct. 1, 2012), https://www.nsaa.org/media/68045/NSAA-Facts-About-Skiing-Snowboarding-Safety-10-1-12.pdf.

121 As Professor Joseph Glannon concisely explains the concept to generations of desperate first-year students mere days or hours prior to their examination, "A plaintiff may . . . accept risks simply by engaging in an activity with knowledge that it entails certain risks." GLANNON, *supra* note 119, at 539.

122 Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929).

123 Doe v. Roe, 598 N.Y.S.2d 678, 681 (1993) ("A person assumes the risk where he voluntarily subjects himself to a peril known to him or generally observable by a person of ordinary prudence in his situation . . . . In the same vein, persons who engage in unprotected sex, at a time of the prevalence of sexually transmitted diseases, including some that are fatal, assume[ ] the risk of contracting such diseases.").

124 The CDC estimates that the typical failure rate of condoms is 18%. *Contraception*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/reproductivehealth/unintendedpregnancy/contraception.htm (last visited Feb. 24, 2015).

125 *Murphy*, 166 N.E. at 174.

126 As many sexual education programs stress, abstinence from sexual activity is the only absolutely safe form of sexual activity. Even Planned Parenthood decrees: "Being continuously abstinent is the only way to be absolutely sure that you won't have an unintended pregnancy or get an STD." *Abstinence*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-info/birth-control/abstinence#sthash.6KpCJpFx.dpuf (last visited Jan. 18, 2015).

to engage in sexual relations—absent circumstances such as fraud or deception[127]—accept a certain amount of inherent risk.[128] As for those who are unwilling to accept that risk—well, "[t]he timorous may stay at home."[129] The dearth of opinions resulting from tort claims for infection implies that finding assumption of risk in a protected sexual encounter remains untested. Though arguable, this interpretation is doctrinally sound.

D. The Future of Criminal Transmission

In the absence of state criminal transmission statutes, the primary legal recourse for those who have had a sexual encounter with an HIV-positive person would be an action in tort for negligence or negligent infliction of emotional distress. Criminal sanctions under statutes that proscribe assault and attempted murder, however, remain in force. The first prosecutions against those who transmitted HIV were brought under such statutes,[130] and new prosecutions can be brought under those statutes once again. Requiring future criminal cases to be brought under such statutes ensures that only the most egregious of cases—those involving malicious and criminal intent—are treated with criminal sanctions.[131]

Criminal sanctions are appropriate for cases such as Williams's. Nevertheless, criminal sanctions are not effective weapons in the public health battle against HIV/AIDS,[132] and they should not be used merely to discourage behavior, but rather only to punish individuals whose behavior manifests clear, harmful, and criminal intent.

CONCLUSION

The problem of HIV/AIDS is not going away soon. Indeed, after a brief lull, transmission rates are rising alarmingly once again, particularly

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127 As discussed above, those who know or should know that they are infected have certain duties above and beyond the risks that their partners accept. *See supra* notes 91–94.

128 "[I]ndividuals who engage in these recreational events do so out of choice and not necessity, so a jury may infer assumption of risk from the circumstances of the transaction." EPSTEIN, *supra* note 58, at 207.

129 *Murphy*, 166 N.E. at 174.

130 *See* WEBBER, *supra* note 22.

131 The reservation of criminal penalties for only the most egregious of cases is a position championed by David W. Webber, author of the treatise *AIDS and the Law*. In that publication, he elucidates a seven-prong requirement for cases meriting criminal sanction, including that "[t]he offense's conduct must have posed a clear and medically significant risk of transmission of HIV (not merely a theoretical risk), and the accused must have failed to employ reasonable prophylactic measures," and that "[t]he accused must have been aware of the risk of HIV transmission posed to the victim by the offense conduct." WEBBER, *supra* note 22, at 7-8. Such requirements are appropriate: they ensure that the case is indeed one of criminal intent, and not simple negligence that is best handled through tort law.

132 *Id.* at 7-7.

among young gay men[133] and African Americans.[134] Until medical science eradicates the disease, it is something with which millions of Americans must live. Accordingly, it is time to brush away outmoded and outdated laws and address the epidemic in a clear-headed and orderly fashion. Elegant in its flexibility, tort law has handled personal wrongs for centuries. It is time to return transmission of HIV cases to where they belong—tort law.

[133] *HIV Among Gay and Bisexual Men*, *supra* note 37; *see also HIV Among Youth*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/group/age/youth/index.html (last visited June 30, 2015).

[134] *HIV Among African Americans*, *supra* note 36.