

2020

The Risks of Criminalizing COVID-19 Exposure: Lessons from HIV

Naomi K. Seiler

George Washington University, nseiler@gwu.edu

Anya Vanecek

George Washington University, anyavanecek@gwu.edu

Claire Heyison

George Washington University, cheyison@gwu.edu

Katherine Horton

George Washington University, khorton@gwu.edu

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Health Law and Policy Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Seiler, Naomi K.; Vanecek, Anya; Heyison, Claire; and Horton, Katherine (2020) "The Risks of Criminalizing COVID-19 Exposure: Lessons from HIV," *Human Rights Brief*. Vol. 24 : Iss. 1 , Article 3.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol24/iss1/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

The Risks of Criminalizing COVID-19 Exposure: Lessons from HIV

*Naomi Seiler, Anya Vanecek, Claire Heyison, & Katherine Horton**

* Naomi Seiler is an Associate Professor in the Department of Health Policy and Management at George Washington University. Her primary focus is HIV policy, and she has done extensive work on law and policy related to substance use disorder, chronic disease, and other health priorities, both in her current role and while serving as counsel in the U.S. House of Representatives. She is a graduate of Harvard College and Yale Law School and completed a postdoctoral fellowship in Bioethics and Health Policy at the Johns Hopkins Bloomberg School of Public Health. Anya Vanecek is a Senior Research Associate in the Department of Health Policy and Management at George Washington University. She earned a degree in Anthropology from Grinnell College and a Master's in Public Health from the George Washington University School of Public Health. Claire Heyison is a Senior Research Associate in the Department of Health Policy and Management at George Washington University. She holds a Master of Public Health degree from the George Washington University and an undergraduate degree from Barnard College. Katie Horton is a Research Professor in the Department of Health Policy and Management. Prior to joining the department, she was president of Health Policy R&D, a health policy firm in Washington, D.C. and also served as senior professional health staff for the United States Senate Committee on Finance and as a Legislative Director for Congressman Pete Stark (D-CA) in the House of Representatives. Professor Horton's research focuses on access to care issues with particular focus on those with chronic illness.

TABLE OF CONTENTS

Introduction	7
I. Background: A History of HIV Criminalization in the United States	8
II. Analysis.....	10
A. COVID-19 Criminalization Would Have Inequitable Impacts	10
B. Prosecuting COVID-19 Exposure Absent “Intent to Transmit” Risks Broad Criminalization	12
C. Potential Affirmative Defenses Are Not Equitably Available	13
D. Criminalization May Discourage COVID-19 Testing.....	15
1. Criminalization Compounds Stigma.....	15
2. Penalties for Violating Public Health Orders Already Exist	16
Conclusion	17

Introduction

On March 24, 2020, U.S. Deputy Attorney General Jeffrey Rosen released a memo on U.S. Department of Justice enforcement actions related to COVID-19. Among other “reprehensible” COVID-19 related behavior such as fraud, he noted that the “purposeful exposure and infection of others with COVID-19” could “potentially implicate the Nation’s terrorism-related statutes.”¹ Meanwhile, prosecutors have already brought multiple state criminal cases against individuals acting or threatening to intentionally infect others with COVID-19,² and legislators in at least one state have introduced a COVID-19-specific “terrorist threat” bill.³

Criminalizing COVID-19 exposure may seem reasonable in cases when a person appears to have deliberately tried or threatened to infect others. However, using the criminal law as a tool to address COVID-19 more broadly warrants concern.

We argue in this Article, drawing on lessons from HIV criminalization in the United States, that a response that too broadly criminalizes COVID-19 would likely impose inequitable infringements of individual rights, particularly among those most socially and economically vulnerable. As the UN program on AIDS stated in a recent analysis of COVID-19 and human rights, “the overuse of criminal law can often have significant negative outcomes both for the individual and for the response as a whole and often fails to recognize the reality of people’s lives.”⁴ In the United States, the reality of people’s lives includes vast disparities in healthcare, employment, and the criminal justice system that would render COVID-19 criminalization a highly problematic approach.

We begin with detailed background on the development and application of HIV-specific criminal laws in the United States, along with prosecutions under general criminal statutes. We then lay out a range of considerations for policymakers, prosecutors, and others, starting with the most important: COVID-19 criminalization risks overlaying the major racial disparities in COVID-19 outcomes with the already deeply inequitable application of criminal law. Additional

¹ Memorandum from the Deputy Attorney Gen. on Department of Justice Enforcement Actions Related to COVID-19 (March 24, 2020), <https://www.politico.com/f/?id=00000171-128a-d911-aff1-becb9b530000>.

² See, e.g., Press Release, The State of New Jersey, Man Charged with Terroristic Threats for Allegedly Coughing on Food Store Employee and Telling Her He Has Coronavirus (March 24, 2020), <https://www.nj.gov/oag/newsreleases20/pr20200324b.html>; Doyle Murphy, *Missouri Walmart Coronavirus Licker Charged with ‘Terrorist Threat’*, RIVERFRONT TIMES (March 24, 2020), <https://www.riverfronttimes.com/newsblog/2020/03/24/missouri-walmart-coronavirus-licker-charged-with-terrorist-threat>; Kaelan Deese, *Woman Accused of Coughing on Store’s Food Jailed, Charged with Terroristic Threats*, THE HILL (March 28, 2020, 11:30 AM), <https://thehill.com/homenews/news/489981-woman-accused-of-coughing-on-stores-food-jailed-charged-with-terrorist-threats>.

³ S. 2361, 219th Leg., Reg. Sess. (N.J. 2020), <https://legiscan.com/NJ/text/S2361/id/2178616>.

⁴ UNAIDS, *Rights in the Time of COVID-19 Lessons from HIV for an Effective, Community-led Response* (2020), https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf. See also Scott Skinner-Thompson, *Don’t Criminalize COVID-19*, SLATE (Mar. 27, 2020, 4:53 PM), <https://slate.com/news-and-politics/2020/03/criminalize-coronavirus-hiv-stigma.html>; Trenton Straube, *COVID-19 Criminalization: Seven Lessons from the HIV Response*, POZ (March 30, 2020), <https://www.poz.com/article/covid19-criminalization-seven-lessons-hiv-response>.

considerations include overbroad prosecutions for “knowing” exposure rather than intent to transmit; inequities in the availability of potential affirmative defenses; the potential impact of criminalization on COVID-19 testing rates; the creation of stigma that could hinder public health efforts to contain the spread of COVID-19; and the existing evidence of disparate enforcement of social distancing requirements. We close with a reminder that any individual decision made by a person with COVID-19 should not be considered in isolation from the structural and social factors influencing that person’s health and personal choices.

I. Background: A History of HIV Criminalization in the United States

In 1988, the Presidential Commission on the HIV Epidemic argued that criminalizing “failure to comply with clearly set standards of conduct” could help limit the spread of HIV by deterring high-risk behaviors.⁵ Due to “the problems in applying traditional criminal law to HIV transmission” — namely that charges such as attempted murder necessitated too high a burden of proof, and assault charges carried too lenient a penalty — the Commission stated that some states might need to consider enacting new HIV-specific laws to “provide clear notice of socially unacceptable standards of behavior . . . and tailor punishment to the specific crime of HIV transmission.”⁶ The report noted that such laws should be “carefully drawn” to address instances that public health and civil actions could not and were not to substitute for effective public health measures to prevent transmission.⁷

Echoing the Commission’s argument, the Ryan White Care Act of 1990, which created a program to support care and treatment for people with HIV, required as a condition of funding that states certify they have a legal mechanism — HIV-specific or otherwise — to prosecute HIV-infected individuals who intentionally expose others to HIV without disclosure.⁸

⁵ Presidential Commission on the Human Immunodeficiency Virus Epidemic 139 (Lary J. Tomayko et al. eds., 1988), <https://files.eric.ed.gov/fulltext/ED299531.pdf>.

⁶ *Id.*

⁷ *Id.*

⁸ Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101–381, § 301(a), 104 Stat. 603, <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg576.pdf>. The requirement was removed from the Act during the reauthorization in 2000. Pub. L. 106–345, title III, § 301(a), Oct. 20, 2000, 114 Stat. 1345:

(a) IN GENERAL. — The Secretary may not make a grant under section 2641 to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual, subject to the condition described in subsection (b), who — ... (2) *engages 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*; (b) CONSENT TO RISK OF TRANSMISSION. — The State laws described in subsection (a) need not apply to circumstances under which the conduct described in paragraphs (1) through (3) of subsection (a) *if the individual who is subjected to the behavior involved knows that the other individual is infected and provides prior informed consent to the activity.*

Today, twenty-nine states have HIV-specific criminal laws,⁹ nine have HIV-specific sentencing enhancements, and twenty-four states have prosecuted people living with HIV under general criminal laws.¹⁰ These laws generally criminalize nondisclosure of HIV status or potential exposure of another to HIV, regardless of intent to transmit or whether transmission actually occurs, and even for behaviors that cannot transmit HIV, such as spitting. In eighteen states, violation of these laws can result in a maximum sentence of up to ten years; five states offer a maximum sentence of greater than twenty years.¹⁵ From 2008 to 2019, there were at least 411 criminal prosecutions of HIV transmission, under HIV-specific laws or under general criminal statutes such as battery or assault, in twenty-two states.¹¹

Some states also expanded HIV criminalization through sentence enhancements, particularly for sex work, increasing penalties for people who are convicted of prostitution or sex solicitation if the defendant is HIV positive.¹² In addition, six states require that any person incarcerated for HIV non-disclosure must register as a sex offender upon release from prison.¹⁶

Public health experts and legal scholars have debated the constitutionality and effectiveness of HIV-based criminal laws and prosecutions.¹³ There have been multiple constitutional challenges to HIV criminalization laws based on vagueness and overbreadth, First Amendment questions, challenges involving equal protection, the Eighth Amendment, and due process, though most have failed in court.¹⁴ Outside the justice system, multiple scholars and advocates have advanced human rights arguments against HIV criminalization, focusing primarily on these cases as discriminatory based on health status or disability.¹⁵

⁹Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin. See Center for HIV Law and Policy, *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice* (2020), hivlawandpolicy.org/sourcebook.

¹⁰ Center for HIV Law and Policy, *HIV Criminalization in the United States* (2020), <http://www.hivlawandpolicy.org/sites/default/files/CHLP%20HIV%20Crim%20Map%20033120.pdf>.

¹¹ *Id.*

¹² *Id.*

¹³ See, e.g., Andre A Panossian, et al., *Criminalization of Perinatal HIV Transmission*, 19 J. LEGAL MED. 223 (1998); Joseph Allen Garmon, *The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of HIV/AIDS*, 57 HOW. L.J. 665 (2014); Stephen Frost, *HIV Criminalization Laws: A Poor Public Policy Choice in the New Era of PrEP*, 6 WAKE FOREST J.L. & POL'Y 319 (2016); Mario Brito, *On an Alternative to a Punitive State in Response to a Modern Understanding of the HIV/AIDS Epidemic in Florida*, 40 NOVA L. REV. 285 (2016).

¹⁴ Joseph Payne, *Criminal HIV Transmission Statutes and Covert Online Investigations: A Due Process Analysis*, 49 COLUM. HUM. RTS. L. REV. 324, 326 (2018).

¹⁵ *Nolan v. State of New York*, 2018 N.Y. Slip Op. 00269 (N.Y. App. Div. January 16, 2018). For human rights arguments against HIV criminalization, see, e.g., Jürgens R. et al. *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 REPROD. HEALTH MATTERS 163 (2009); *Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law*, UNAIDS (2013), https://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf.

II. Analysis

A. COVID-19 Criminalization Would Have Inequitable Impacts

Given racial disparities in disease prevalence combined with persistent over-policing of Black and Latinx individuals, laws that criminalize COVID-19 exposure or transmission could, like HIV criminalization, exacerbate issues of disparate enforcement, infringing on the right to equality under the law.

In the United States, people of color are more likely to experience negative outcomes at nearly every point in the American criminal justice system. A national evaluation of traffic and street stops found that Black people are more likely to be stopped by police than white people, and both Black and Hispanic individuals are more likely to be searched during these stops.¹⁶ African Americans are more likely than white Americans to be arrested, despite little evidence to suggest that they commit more crimes: African Americans have similar rates of drug use, lower contraband hit rates in searches, and higher rates of exonerations than white Americans.¹⁷ Yet once arrested, courts are more likely to convict African Americans; and upon conviction, African Americans are more likely to experience lengthy prison sentences.¹⁸ Compared to white Americans, Black Americans are 5.2 times more likely to be incarcerated, and Hispanics are 2.5 times more likely to be incarcerated.¹⁹

Existing evidence suggests that penalties associated with HIV-specific statutes have fallen mostly on people of color: in California, Black and Latinx individuals made up fifty-one percent of the people living with HIV between 1988 to 2014 but made up sixty-seven percent of people charged with HIV-related offenses;²⁰ in Georgia, Black men are nearly twice as likely to be convicted of an HIV-related offense as white men.²¹

Meanwhile, in the COVID epidemic, people of color in the United States are experiencing higher risks of contracting COVID-19, being hospitalized, and dying.²² In the majority of states that report

¹⁶ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (April 18, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ E. Ann Carson, *Prisoners in 2018*, U.S. DEP'T JUST. OFF. JUST. PROGRAMS (April 2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf>.

²⁰ Amira Hasenbush, Ayako Miyashita, & Bianca D.M. Wilson, *HIV Criminalization in California*, CENTER HIV L. & POL'Y (December 2015), <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20CA%202015.pdf>.

²¹ *Id.*

²² Samantha Artiga, et al., *Growing Data Underscore that Communities of Color are Being Harder Hit by COVID-19*, KAISER FAM. FOUND. (Apr. 21, 2020), <https://www.kff.org/coronavirus-policy-watch/growing-data-underscore-communities-color-harder-hit-covid-19/>; *COVID-19 in Racial and Ethnic Minority Groups*, CDC (June 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

COVID-19 data by race and ethnicity, Black people account for a disproportionate share of confirmed cases, hospitalizations, and deaths.²³ Although there is a lack of national data on the impact of COVID-19 on Latinx and Asian communities, local reports suggest that these groups account for high percentages of cases and deaths in some parts of the country.²⁴ For example, one neighborhood-level study in San Francisco found that although Latinx individuals make up only fifty-eight percent of the neighborhood population, they accounted for ninety-five percent of people who tested positive for COVID-19.²⁵

Higher risk of COVID-19 infection is driven by a mix of structural factors. People of color are more likely to live in densely populated, segregated neighborhoods; have incomes below the federal poverty limit; lack access to health insurance or paid sick leave; and experience chronic health conditions — all of which increase risks of contracting COVID-19 and of developing severe complications.²⁶ In addition, Black and Hispanic individuals are overrepresented among essential workers and service industry workers and are far less likely to be able to telework than white individuals, resulting in greater exposure to COVID-19.²⁷

The negative health consequences of COVID-19 in communities of color have been compounded by economic devastation, which in turn may disproportionately impel people to work despite potential vulnerability to infection. In April 2020, sixty-one percent of Hispanic Americans and forty-four percent of Black Americans experienced a job loss or decrease in income due to COVID-19, compared to thirty-eight percent of white Americans.²⁸ Black and Hispanic Americans are also less likely than white Americans to have financial reserves to cover their expenses during emergencies. Meanwhile, undocumented immigrants and people in mixed-status families²⁹ are ineligible for the individual recovery rebates authorized by the CARES Act.³⁰ As states and

²³ Samantha Artiga, *supra* note 22; *COVID-19 in Racial and Ethnic Minority Groups*, *supra* note 22.

²⁴ Samantha Artiga, *supra* note 22.

²⁵ Usha Lee McFarling, *When Hard Data Are ‘Heartbreaking’: Testing Blitz in San Francisco Shows Covid-19 Struck Mostly Low-wage Workers*, STAT NEWS (May 28, 2020), <https://www.statnews.com/2020/05/28/sobering-finding-covid19-struck-mostly-low-wage-essential-workers-san-francisco/>.

²⁶ Samantha Artiga, *supra* note 22; *COVID-19 in Racial and Ethnic Minority Groups*, *supra* note 22.

²⁷ Samantha Artiga, *supra* note 22; Bureau of Labor Statistics, *Report 1082: Labor Force Characteristics by Race and Ethnicity, 2018*, BLS REP. (October 2019), <https://www.bls.gov/opub/reports/race-and-ethnicity/2018/home.htm>; Elise Gould & Heidi Shierholz, *Not Everybody Can Work From Home*, ECON. POL’Y INST. (March 19, 2020), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>; *Job Flexibilities and Work Schedules Summary*, US BUREAU LAB. STAT. (Sept. 24, 2019), <https://www.bls.gov/news.release/flex2.nr0.htm>.

²⁸ Mark Hugo Lopez et al., *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RES. CTR. (May 5, 2020), <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/>.

²⁹ *MALDEF Sues Federal Government Over Denial of COVID-19 Relief to Mixed-Status Married Couples*, MALDEF (April 28, 2020), <https://www.maldef.org/2020/04/maldef-sues-federal-government-over-denial-of-covid-19-relief-to-mixed-status-married-couples/>; *Mixed-Status Families Ineligible for CARES Act Federal Pandemic Stimulus Checks*, MIGRATION POL’Y INST. (May 2020), <https://www.migrationpolicy.org/content/mixed-status-families-ineligible-pandemic-stimulus-checks>.

³⁰ P.L. 116-136, Sect. 6428(d)(1) “2020 Recovery Rebates for Individuals” (March 27, 2020), <https://www.congress.gov/bills/116th-congress/house-bill/748/text/enr#toc-H25CA409D9D2844399CF965A38F83F6C6>.

localities begin to reopen and the federal Pandemic Unemployment Assistance program expires, people who have been hit hardest economically will likely feel the most pressure to return to work, even if that means risking exposure to COVID-19.

Given the racial disparities in disease prevalence, combined with persistent over-policing of Black and Latinx individuals as well as the disparate economic pressures to continue or to return to work, it is highly likely that people of color could bear the brunt of COVID-19 criminalization efforts, as they have for HIV criminalization efforts.

B. Prosecuting COVID-19 Exposure Absent “Intent to Transmit” Risks Broad Criminalization

While proposals to criminalize COVID-19 exposure might focus on the most egregious hypotheticals, the history of HIV exposure prosecutions suggests that in practice, prosecutions may expand from “intent to transmit” to “knowing exposure,” rendering a far broader swath of people vulnerable to prosecution.

There would likely be significant consensus — among the public, and among policymakers — that exposing another to a potentially deadly virus with the *intent* to transmit the infection might warrant criminal liability. As noted in the introduction, several reported prosecutions have focused on people who threatened to expose others to COVID-19, regardless of whether the defendants were in fact COVID-positive.³¹ Similarly, a bill introduced in the New Jersey State Legislature would make it a “terrorist threat” to threaten to infect another person with COVID-19 — or another disease triggering a public health emergency — punishable by up to ten years imprisonment, a fine of up to \$150,000, or both.³²

These cases echo the recommendations of the President’s Commission and of the Ryan White Care Act early in the HIV epidemic to ensure that cases of intentional transmission are punished. However, the vast majority of HIV laws and prosecutions hinge not on the intent to transmit HIV but on *knowing* exposure to HIV and alleged nondisclosure.³³ Some statutes and prosecutions have

³¹ See, e.g., *Man Charged with Terroristic Threats for Allegedly Coughing on Food Store Employee and Telling Her He Has Coronavirus* (Mar. 24, 2020), <https://www.nj.gov/oag/newsreleases20/pr20200324b.html>; Kaelan Deese, *Woman Accused of Coughing on Store’s Food Jailed, Charged with Terroristic Threats*, THE HILL (Mar. 28, 2020), <https://thehill.com/homenews/news/489981-woman-accused-of-coughing-on-stores-food-jailed-charged-with-terrorist-threats>; Doyle Murphy, *Missouri Walmart Coronavirus Licker Charged with ‘Terrorist Threat’*, RIVERFRONT TIMES (Mar. 24, 2020), <https://www.riverfronttimes.com/newsblog/2020/03/24/missouri-walmart-coronavirus-licker-charged-with-terrorist-threat>.

³² NJ S2361, (2020–21) <https://legiscan.com/NJ/text/S2361/id/2178616>. The bill would apply when the threat is made “with the purpose to put [another] in imminent fear of serious bodily injury or death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.”

³³ See generally *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, CENTER HIV LAW & POL’Y (2020), hivlawandpolicy.org/sourcebook (several state statutes ascribing a “Knowingly” mindset required for conviction).

even been based on activities that cannot in fact transmit HIV, such as spitting.³⁴ It is easy to imagine similar patterns emerging in the development of COVID-19-specific criminal laws or in COVID-19 exposure prosecutions: simply knowing one's COVID-19 status when allegedly exposing others could lead to prosecution, even absent any evidence of malicious intent. In addition, like for HIV, prosecutions could proceed based on faulty evidence or misunderstandings about the science behind COVID-19 transmission or epidemiology.

C. Potential Affirmative Defenses Are Not Equitably Available

While social distancing and wearing masks can help lower the risk of COVID-19 transmission and could in theory serve as defenses to criminal liability for exposure, these measures are not equitably available. The availability of affirmative defenses in COVID-19 cases could have unintended negative consequences for relatively disempowered or underserved people.

In the HIV context, criminal liability often hinges on nondisclosure: informing a sexual partner of one's HIV status is typically an affirmative defense — though one that may be difficult to prove in court.³⁵ In a few states, condom use can also be an affirmative defense.³⁶ More recently, as evidence has made clear that anti-retroviral therapy can also reduce a person's viral load to undetectable levels and thus not transmittable through sexual contact, evidence of suppressed viral load has become an affirmative defense in a handful of states.³⁷

However, these tools for reducing the risk of being a defense to HIV transmission may be unavailable to certain individuals. Persuading a court that HIV-status disclosure occurred in a private setting is challenging, particularly for defendants who are seen as less credible by judges or juries. Negotiating, or even suggesting, condom use can be fraught or dangerous for some women or for sex workers, potentially rendering that defense unavailable. Even when condoms are used, there are numerous criminal convictions for HIV transmission, exposure, or nondisclosure.³⁸ Meanwhile, undetectable viral load is associated with access to healthcare and

³⁴ *Id.*

³⁵ *HIV Criminalization Fact Sheet*, CENTER HIV L. & POL'Y & POSITIVE JUST. PROJECT, https://www.hivlawandpolicy.org/sites/default/files/PJP%20fact%20sheet_11.14.2012.pdf.

³⁶ See generally *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, CENTER FOR HIV LAW & POL'Y (2020), hivlawandpolicy.org/sourcebook (stating statutes negating specific intent to transmit disease if a condom was used in the course of sexual intercourse).

³⁷ *HIV Treatment as Prevention*, HIV.GOV, hiv.gov/tasp; see, e.g., Myron S. Cohen et al., *HIV Treatment as Prevention and HPTN 052*, CURRENT OPINION HIV AIDS 7(2), 99–105 (2012), <https://doi.org/10.1097/COH.0b013e32834f5cf2>; Alison J. Rodger, M.D. et al., *Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy*, JAMA 316(2), 171–181 (2016), doi:10.1001/jama.2016.5148; Alison J. Rodger, M.D. et al., *Risk of HIV Transmission Through Condomless Sex in Serodifferent Gay Couples with the HIV-Positive Partner Taking Suppressive Antiretroviral Therapy (PARTNER): Final Results of a Multicentre, Prospective, Observational Study*, THE LANCET 393 (10189), 2428–2438 (2019), [https://doi.org/10.1016/S0140-6736\(19\)30418-0](https://doi.org/10.1016/S0140-6736(19)30418-0).

³⁸ Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. R. 1403, 1405–1406 (2013).

race.³⁹ Considering viral load as a mitigating factor can further shift the burden of HIV criminal laws to people of color.

In theory, laws regarding the exposure to COVID-19 could include affirmative defenses that consider attempts on the part of the person with COVID-19 to reduce transmission to others. The role of disclosure might be similar to disclosure for HIV. However, because COVID-19 can be spread simply by breathing, it is difficult to contemplate how broadly someone with COVID-19 could reasonably be expected to disclose their status. A more favored tool is isolation — the CDC advises people with a known COVID-19 infection to self-isolate for at least ten days after symptom onset.⁴⁰ It is also widely recommended that people engage in social distancing and wear masks as people may be contagious even before exhibiting symptoms or when only mildly symptomatic.⁴¹

However, not all people with COVID-19 are equitably situated to take these measures to protect others. As discussed above, people at lower income levels and people of color are less likely to be able to telework or otherwise stay home without losing income or their jobs. The Families First Coronavirus Response Act of 2020 guaranteed up to eighty hours of fully-paid COVID-19-related sick leave to certain employees.⁴² However, many categories of employees are not covered; benefits may not extend for the full duration a person needs to recover and become noncontagious; and benefits do not apply to non-sick people who are quarantining because of a known exposure.⁴³ Therefore, many people are still left with a choice between isolating — or quarantining — and keeping their income.⁴⁴ In addition, people have little control over their distance from coworkers in certain sectors. For example, news outlets report that many meat industry workers must work “shoulder to shoulder.”⁴⁵ As for masks, people of color, particularly men who wear masks, may be subjected to heightened racial profiling and the attendant physical risks.⁴⁶

³⁹ Kate Buchacz et al., *Disparities in HIV Viral Load Suppression by Race/ethnicity among Men who Have Sex with Men in the HIV Outpatient Study*, AIDS RES. HUM. RETROVIRUSES (Jan. 9, 2018).

⁴⁰ *Duration of Isolation and Precautions for Adults with COVID-19*, CDC (Last visited July 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/strategy-discontinue-isolation.html>.

⁴¹ *Frequently Asked Questions About Novel Coronavirus (COVID-19)*, NAT’L INST. INFECTIOUS DISEASES (June 25, 2020), <https://www.nfid.org/infectious-diseases/frequently-asked-questions-about-novel-coronavirus-2019-ncov/>.

⁴² The Families First Coronavirus Response Act is applicable to certain public employers and private employers with fewer than 500 employees. Employers of fewer than fifty employees may seek exemption from the rule. Approximately 6.5 million people who work for companies with more than 500 employees do not have access to paid sick leave. While some companies have voluntarily extended paid sick leave benefits, this option is by no means universally available among lower-income workers. See Abby Vesoulis, *Trump Signs Law to Grant Paid Leave Benefits Amid Coronavirus Crisis – But Millions Won’t Be Eligible*, TIME (Mar. 18, 2020, 9:16 PM), <https://time.com/5803671/paid-leave-imminent-coronavirus/>.

⁴³ *Families First Coronavirus Response Act: Employee Paid Leave Rights, COVID-19 and the American Workplace* U.S. DEP’T LABOR, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>. In addition, as of 2018, only ten states had laws protecting workers from losing their job in case of medical quarantine.

⁴⁴ Rebecca Katz et al., *Raising the Yellow Flag: State Variation in Quarantine Laws* 24 J. PUB. HEALTH MGMT. & PRAC. 380, 383 (2018), <https://doi.org/10.1097/PHH.0000000000000699>.

⁴⁵ Megan Molteni, *Why Meatpacking Plants Have Become Covid-19 Hot Spots*, WIRED MAG. (May 7, 2020), <https://www.wired.com/story/why-meatpacking-plants-have-become-covid-19-hot-spots/>.

⁴⁶ Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, N.Y. TIMES (April 14, 2020), <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html>.

Furthermore, even if a COVID-19-specific criminal statute accounted for isolating, quarantining, social distancing, and masks, a statute written now would not reflect advances in scientific understanding of, and responses to, coronavirus in the future.

D. Criminalization May Discourage COVID-19 Testing

In the context of HIV criminalization, advocates have long argued that criminalizing knowing exposure could disincentivize testing: if knowing one's HIV status would trigger criminal liability for exposure, individuals may choose not to be tested in order to avoid liability.⁴⁷ This argument was particularly compelling before the development of effective antiretroviral therapy — with no meaningful treatment options available, people might already question the value of testing. Since the majority of people diagnosed with HIV modify their behaviors to protect others, lower testing rates would negatively impact overall transmission rates and, given the treatments available today, hurt the individual as well.⁴⁸

There is scant empirical evidence of a direct link between HIV criminalization and testing rates.⁴⁹ However, it is worth considering whether criminalizing COVID-19 exposure would disincentivize testing, particularly since, unlike HIV, there is currently no highly effective treatment to otherwise motivate testing. COVID-19 testing is considered a crucial public health strategy to reduce transmission by appropriately identifying and isolating those who are infected and tracing their contacts to stem the spread of the virus.⁵⁰ If knowing exposure is criminalized, the risk of punishment may disincentive testing by tipping the balance away from adherence with public health efforts and towards avoiding criminal liability.

1. Criminalization Compounds Stigma

HIV criminalization has been broadly criticized for both reflecting and perpetuating stigma around HIV. Stigma against people living with HIV can result in a range of human rights violations, such as hindering access to housing, employment, healthcare and other basic needs.⁵¹ Given the widespread discrimination against people with HIV since the beginning of the epidemic, increasing stigma through prosecutions or sentencing enhancements solely on the basis of HIV status is a major concern. Perpetuating stigma in the name of reducing transmission is particularly unfounded when HIV is, for those with access to healthcare, a chronic and manageable disease. While

⁴⁷ See, e.g., Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1350–51 (tracking a Canadian study and the effect of disincentivization on testing and clinical-patient relationships).

⁴⁸ Lisa A. Eaton & Seth C. Kalichman, *Changes in Transmission Risk Behaviors Across Stages of HIV Disease Among People Living with HIV/AIDS*, 20 J. ASS'N NURSES AIDS CARE 39, 43–44 (2009).

⁴⁹ Dini Harsono et al., *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 21 AIDS BEHAV. 27, 35 (2017).

⁵⁰ Health Policy & Public Health COVID-19 Advisory Panel, *Key Public Health Strategies for Responding to COVID-19*, VAND. U. SCH. MED. (Mar. 27, 2020), https://www.vumc.org/health-policy/sites/default/files/public_files/COVID%20Memo%20-%20Sources-Strategies-final.pdf.

⁵¹ *HIV/AIDS and Human Rights*, UNITED NATIONS OFF. HIGH COMMISSIONER HUM. RTS., <https://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx>.

prosecutions under criminal laws of general application raise this concern, arguably the existence of HIV-specific criminal laws is distinctly problematic in that such laws signify a particular category of blame for people living with HIV.

Criminalizing COVID-19 exposure could similarly create unproductive stigma around COVID-19. Given the massive racial and socioeconomic disparities in COVID-19's impact in the United States criminalizing exposure could compound the burden experienced by the most affected communities.

2. Penalties for Violating Public Health Orders Already Exist

Finally, any development of criminal penalties for COVID-19 exposure must consider the backdrop of existing penalties for violating public health orders related to the pandemic. The CDC has authority to impose federal isolation and quarantine orders related to international or interstate travel, and violation of those orders can result in a fine of up to \$1,000.00, imprisonment of up to one year, or both.⁵² Multiple states and localities enacted similar laws that make violation of social distancing requirements an offense punishable by fines and/or jail.⁵³ At the state level, violation of quarantine or isolation orders is a misdemeanor in many states and a felony in several, and can result in fines as high as \$10,000 or a range of prison terms.⁵⁴

Quarantine and isolation, as well as the current social distancing laws, can be important public health tools when applied fairly and scientifically. However, these approaches can also raise equity issues. For example, there have been multiple reports of inequitable enforcement of social distancing, including increasing surveillance and enforcement against people of color in jurisdictions across the country.⁵⁵ Layering additional criminal liability on top of existing enforcement regimes may compound these equity concerns.⁵⁶

⁵² 42 U.S.C. § 271(a) (2018).

⁵³ See, e.g., Exec. Order HI 505 2020 (Apr. 16, 2020), https://custom.statenet.com/public/resources.cgi?id=ID:exec_order:HI2020505&mode=current_text (“[A]ny person violating any rule set forth in this Proclamation shall be guilty of a misdemeanor, and upon conviction, the person shall be fined not more than 5,000, or imprisoned not more than one year, or both.”);

Enforcement of Social Distancing Orders (Apr. 10, 2020), https://regs.health.ny.gov/sites/default/files/pdf/emergency_regulations/20-07_social_distancing_measures_0.pdf; Second Amended Order 20-01 (holding individuals who violate the New York mandate to a maximum fine of \$1,000 for each violation); Quinton D. Lucas, *Second Amended Order*, KCMO.GOV (Mar. 12, 2020), <https://www.kcmo.gov/home/showdocument?id=4065> (violating the Kansas City order constitutes an imminent threat).

⁵⁴ See National Council of State Legislatures, *State Quarantine and Isolation Statutes* (Feb. 27, 2020), <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx> (Wisconsin).

⁵⁵ See, e.g., Janell Ross, *Pattern of Uneven Social Distancing Enforcement Coming into View, Civil Rights Experts Say*, NBC NEWS (May 28, 2020), <https://www.nbcnews.com/news/nbcblk/pattern-uneven-social-distancing-enforcement-coming-view-civil-rights-experts-n1216506> (comparing New York City, Chicago, and Philadelphia); Office of the Attorney General, *AG James Calls on the NYPD to Ensure Equal Social Distancing Enforcement in NYC Communities*, <https://ag.ny.gov/press-release/2020/ag-james-calls-nypd-ensure-equal-social-distancing-enforcement-nyc-communities> (discussing New York).

⁵⁶ Betsy Pearl et al., *The Enforcement of COVID-19 Stay-at-Home Orders*, CTR. AM. PROGRESS (Apr. 2, 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-covid-19-stay-home-orders>.

Conclusion

Applying potential criminal liability for COVID-19 runs into the same problem as the criminal law often does more broadly: it seeks to assign culpability to an individual with little or no regard to the structural context of that person's decisions. Like HIV, the nature of COVID-19 infections and the decisions people face during this pandemic are influenced by a confluence of community, public health, and national factors.

The COVID-19 epidemic in the United States, to date, is characterized by massive failures of federal leadership and planning, shortages of medical equipment and gear, an inconsistent patchwork of state and city approaches, and the politicization of basic public health advice and precautions. These factors overlap with persistent racial and ethnic disparities in underlying risk factors for severe COVID-19 illness, access to healthcare, and people's economic ability to stay at home. Meanwhile, politicians and business owners are making decisions daily — from requiring or disparaging mask use, continuing or ending unemployment assistance, reopening or not in the face of new spikes in infection — that influence community risk and the economic choices far beyond any one person's decisions. Given this context, in most cases the value of punishing individuals for COVID-19 exposure does not justify the multiple inequities and infringements that criminalization would impose on individuals and communities.