

# COMMENT

## CRIMINAL TRANSMISSION OF HIV LAWS: ARE THEY OUTDATED OR ARE THEY STILL USEFUL?\*

### TABLE OF CONTENTS

- I. INTRODUCTION ..... 1180
- II. BACKGROUND ..... 1183
  - A. *The Stages of HIV and AIDS*..... 1184
  - B. *The Transmission of HIV Infection* ..... 1185
  - C. *Treatment for HIV-Positive Individuals and Preventative Measures to Lower Risk of Becoming Infected* ..... 1186
- III. CASE LAW ANALYSIS ..... 1189
  - A. *Attempted Murder Convictions for Possible Transmission of HIV*..... 1190
  - B. *HIV May Not Be a “Deadly Weapon” or a “Dangerous Instrument” as Used in Statutes*..... 1193
    - 1. *Aggravated Harassment of a Public Servant* ..... 1194
    - 2. *Aggravated Sexual Assault* ..... 1195
    - 3. *Bodily Fluids/ Saliva Potentially Containing HIV Is Neither a “Deadly Weapon” nor a “Dangerous Instrument”* ..... 1197
    - 4. *Assault in the First Degree* ..... 1199
- IV. ANALYSIS OF VARIOUS HIV-TRANSMISSION STATUTES... 1201

---

\* J.D. Candidate, University of Houston Law Center, 2016. This Comment received the Shook, Hardy & Bacon LLP Award for the Best Paper in the Area of Health Law for the *Houston Law Review*. The Author would like to thank Professor Sandra Thompson and the editors of the *Houston Law Review*.

1180	<i>HOUSTON LAW REVIEW</i>	[53:4
	A. <i>Statutes Criminalizing Solely the Intentional Transmission of HIV</i> .....	1202
	B. <i>Statutes Criminalizing the Transmission of Any STD</i> .....	1203
V.	RECOMMENDATIONS FOR TEXAS ADOPTING AN HIV-TRANSMISSION STATUTE.....	1204
VI.	CONCLUSION.....	1206
	APPENDIX: PROPOSED CRIMINAL TRANSMISSION OF HIV STATUTE .....	1208

## I. INTRODUCTION

Spitting on another individual is a reprehensible act. However, should a person who spits on another face criminal liability?<sup>1</sup> Would a thirty-five-year prison sentence be a just punishment?<sup>2</sup> Willie Campbell, who has Human Immunodeficiency Virus (HIV), spat on a public official and was sentenced to prison for thirty-five years.<sup>3</sup> A first degree felony in Texas is subject to a prison sentence somewhere between five and ninety-nine years.<sup>4</sup> Should spitting on someone receive a punishment commensurate with a first degree felony? Furthermore, was Campbell punished for spitting on someone, or was he punished for being HIV positive? Some people are concerned that laws criminalizing acts specifically related to HIV-positive individuals are really just laws criminalizing HIV status.<sup>5</sup>

1. See JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 33 (4th ed. 2000) (citing John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 5 (1955)) (discussing the theories of punishment and stating that a person “should suffer in proportion to his wrongdoing”).

2. Compare *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. App.—Dallas July 14, 2009, pet. ref’d), *writ of habeas corpus granted*, No. AP-76969, 2013 WL 458063 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication) (upholding a conviction for aggravated harassment of a public official), with TEX. PENAL CODE ANN. § 12.32 (West 2011) (showing the punishment range for a first degree felony as somewhere between five and ninety-nine years in prison).

3. See *Ex Parte Campbell*, No. AP-76969, 2013 WL 458063, at \*1 (Tex. Crim. App. Feb. 6, 2013) (showing that the defendant was sentenced to thirty-five years in prison for aggravated harassment of a public official).

4. PENAL § 12.32.

5. See Amy L. McGuire, Comment, *AIDS as a Weapon: Criminal Prosecution of HIV Exposure*, 36 *HOUS. L. REV.* 1787, 1790 (1999); see also *Criminal Transmission of HIV*, AVERT, <http://web.archive.org/web/20150725211924/http://www.avert.org/criminal-transmission-hiv.htm> (last visited Mar. 16, 2016).

Recently, Acquired Immunodeficiency Syndrome (AIDS) organizations have made a push to either repeal or amend laws criminalizing the transmission of HIV.<sup>6</sup> In 2014, Iowa amended its HIV transmission statute.<sup>7</sup> Certain AIDS organizations argue that if a law exists criminalizing HIV transmission, it should be limited solely to situations of intentional transmission.<sup>8</sup> Citing public health reasons, they argue criminalizing beyond intentional transmission may do “more harm than good.”<sup>9</sup> Thus, these organizations claim HIV-transmission laws are somewhat misguided.<sup>10</sup> This Comment argues that HIV-transmission statutes still serve an important purpose but should better reflect a modern understanding of HIV, AIDS, and transmission of HIV to accommodate current public health concerns.

---

6. See *Criminal Transmission of HIV*, *supra* note 5 (finding laws that criminalize HIV transmission to sometimes be “archaic” and “misguided” and that a large number of HIV-positive individuals are opposed to criminalization of HIV transmission); see also UNAIDS, CRIMINALIZATION OF HIV TRANSMISSION 1–3 (Aug. 2008) [http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731\\_jc1513\\_policy\\_criminalization\\_en.pdf](http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf) (arguing that laws criminalizing HIV transmission should be limited solely to cases where transmission is intentional); *HIVMA Urges Repeal of HIV-Specific Criminal Statutes*, HIV JUSTICE NETWORK (Oct. 26, 2012), <http://criminalhivtransmission.blogspot.com/search/label/USA> (stating that the HIV Medicine Association (HIVMA) is arguing for the repeal of HIV-specific statutes); *Policy on the Use of Criminal Sanctions as a Response to the Transmission of HIV.*, AIDS COMMITTEE OF TORONTO, <http://www.actoronto.org/website/research.nsf/pages/crimsanct> (last visited Mar. 16, 2016) (finding laws which criminalize the transmission of HIV to be ineffective as they are “reactionary” and do not come into effect until transmission has occurred).

7. See Alison Gowans, *New HIV Transmission Law Makes Iowa Model for Nation*, GAZETTE (June 3, 2014, 11:48 AM), <http://thegazette.com/subject/news/new-hiv-transmission-law-makes-iowa-model-for-nation-20140529>; see also REPEAL Act, H.R. 3053, 112th Cong. § 4 (2011) (introducing a federal bill whose goal was to encourage states and the federal government to update and amend criminal laws related to HIV).

8. See *Criminal Transmission of HIV*, *supra* note 5 (finding that “most HIV and AIDS organisations, public health officials and civil rights groups favour” this sort of limited policy); CRIMINALIZATION OF HIV TRANSMISSION, *supra* note 6, at 1–2 (arguing that laws criminalizing HIV transmission should be limited solely to cases where transmission is intentional). For state laws solely criminalizing the intentional transmission of HIV, see CAL. HEALTH & SAFETY CODE § 120291 (West 2012) (making it a felony to intentionally transmit HIV); 720 ILL. COMP. STAT. ANN. 5/12-5.01 (LexisNexis Supp. 2015) (criminalizing the intentional transmission of HIV and making it a Class 2 felony).

9. See *Criminal Transmission of HIV*, *supra* note 5, (“In cases of reckless or accidental transmission, most agree that education and counselling is a more effective prevention method than imprisonment or fines.”). The argument is that if criminalization extends beyond intentional transmission, it might deter people from getting tested. *Id.* This is problematic because not getting tested increases the risk of transmission. See THE WHITE HOUSE OFFICE OF NAT’L AIDS POLICY, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 7 (2010), <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf> (noting that “[a]n estimated 21 percent of people with HIV in the United States do not know their status”).

10. See *Criminal Transmission of HIV*, *supra* note 5 (discussing how criminal laws might deter people from being tested for HIV).

In the United States, some jurisdictions enacted statutes criminalizing HIV transmission,<sup>11</sup> while others enacted statutes criminalizing the transmission of any Sexually Transmitted Disease (STD).<sup>12</sup> Still other states, including Texas and Oregon, never enacted a statute specifically concerning HIV<sup>13</sup> or STD transmission.<sup>14</sup> As it stands, states without statutes dealing specifically with HIV transmission use statutes such as attempted murder<sup>15</sup> or aggravated assault<sup>16</sup> to convict individuals who engage in behavior that may or may not result in HIV transmission.<sup>17</sup> In order for the state to convict a defendant, it must meet the very high burden of proving beyond a reasonable doubt<sup>18</sup> that the defendant is guilty of all the elements of the crime.<sup>19</sup> Specifically, for an attempted murder conviction, the State must prove beyond a reasonable doubt that the defendant possessed the intent to kill.<sup>20</sup> For an aggravated assault or aggravated harassment conviction, the State must show beyond a reasonable doubt that HIV is a “deadly weapon.”<sup>21</sup> As such, convictions made through these statutes seem to “twist” the

---

11. See CAL. HEALTH & SAFETY CODE § 120291 (criminalizing the intentional transmission of HIV by making it a felony); FLA. STAT. ANN. § 775.0877(3) (West 2010) (making it a third degree felony to transmit HIV when an individual knows he is HIV positive).

12. See ALA. CODE § 22-11A-21(C) (LexisNexis 2006) (criminalizing the intentional and knowing transmission of any STD and making it a Class C Misdemeanor).

13. See J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV., 997, 999–1000 (2014) (showing states that have and have not enacted HIV-specific criminal laws).

14. See Ave Mince-Didier, *Transmitting an STD in Texas*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/transmitting-std-texas.htm> (last visited Mar. 15, 2016); Ave Mince-Didier, *Transmitting an STD in Oregon*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/transmitting-std-oregon.htm> (last visited Mar. 16, 2016).

15. See *State v. Hinkhouse*, 912 P.2d 921, 922 (Or. Ct. App. 1996) (affirming a conviction for attempted murder of an individual who did in fact transfer HIV to other individuals); *Weeks v. State*, 834 S.W.2d 559, 561 (Tex. App.—Eastland 1992, pet. ref'd) (affirming a conviction for attempted murder for an individual who attempted to transmit HIV to another individual).

16. See, e.g., *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. App.—Dallas July 14, 2009, pet. ref'd), *writ of habeas corpus granted*, No. AP-76969, 2013 WL 458063 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication) (affirming a conviction for assault using a deadly weapon—HIV-positive saliva).

17. See *infra* Part II.B (discussing how HIV can and cannot be transmitted).

18. See TEX. PENAL CODE ANN. § 2.01 (West 2013) (requiring proof beyond a reasonable doubt to be convicted of an offense); KAPLAN, *supra* note 1, at 19 (discussing burdens of persuasion and establishing proof beyond a reasonable doubt to be the highest).

19. See *In re Winship*, 397 U.S. 358, 364 (1970) (establishing that a person is not guilty of an offense unless the prosecution can prove “beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged”).

20. TEX. PENAL CODE ANN. §§ 15.01, 19.02.

21. See, e.g., *id.* § 22.02.

understanding of those general statutes<sup>22</sup> which may result in an appellate court overturning a conviction and exempting a defendant from appropriate punishment.<sup>23</sup> If, however, a statute specifically addressed HIV transmission, the statute would directly apply in an unambiguous manner.<sup>24</sup> A modernized statute will better reflect an understanding of how HIV is transmitted and will provide appropriate punishments.<sup>25</sup> Furthermore, a modernized statute can address public health goals of educating and counseling on how HIV is transmitted and ultimately reduce HIV infections.<sup>26</sup>

Part II of this Comment examines HIV, AIDS, transmission of HIV, and treatment for those who are infected. In particular, it discusses the ways in which HIV is transmitted and particular government positions on the risks of transmission of HIV.<sup>27</sup> Part III discusses various cases involving the transmission of HIV from different jurisdictions. These include cases in states where no HIV-transmission statute exists and cases in states where a statute does exist. Part IV discusses the benefits and drawbacks of different HIV transmission statutes that currently exist in the United States. Part VI concludes. The Appendix proposes an HIV transmission specific statute to be adopted in Texas.<sup>28</sup>

## II. BACKGROUND

HIV is a very serious virus that leads to AIDS, and ultimately death.<sup>29</sup> This section gives a brief overview of HIV and AIDS, the

---

22. See *infra* note 207 and accompanying text.

23. *People v. Plunkett*, 971 N.E.2d 363, 368 (N.Y. 2012) (overturning a conviction for aggravated assault).

24. McGuire, *supra* note 5, at 1801–02; see also DEP'T OF JUSTICE, RIGHTS DIVISION, BEST PRACTICES GUIDE TO REFORM HIV-SPECIFIC CRIMINAL LAWS TO ALIGN WITH SCIENTIFICALLY-SUPPORTED FACTORS (2015), <https://www.aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf> [hereinafter BEST PRACTICES GUIDE] (arguing that states should create HIV-specific criminal laws addressing two limited situations).

25. See, e.g., CAL. HEALTH & SAFETY CODE § 120291 (West 2012) (listing a particular sentence for the crime).

26. See *infra* Appendix (proposing a statute that would address public health concerns).

27. While HIV is not the only serious disease or infection that can be transmitted sexually, this Comment will only focus on HIV transmission.

28. This Comment acknowledges that with criminal law, a great deal of prosecutorial discretion exists in terms of which charges will be brought against a defendant. Thus, a prosecutor may still decide to use general statutes to prosecute an individual even though an HIV-transmission statute exists. However, with clear legislative history noting that this statute should only be used for HIV-transmission cases, there is a stronger possibility that the discretion will be limited. Further, it would still provide a much clearer path for a prosecution and provide appropriate punishment.

29. See *What Are HIV and AIDS?*, AVERT, <http://www.avert.org/aids.htm> (last visited Mar. 16, 2016) (describing how the HIV virus causes AIDS); see also *Global Fact Sheet: HIV/AIDS*, AIDS 2014, <http://www.aids2014.org/webcontent/file/AIDS>

stages of HIV infection, how HIV is transmitted from one individual to another, and treatment and preventative measures for HIV.

A. *The Stages of HIV and AIDS*

HIV infection is the precursor to AIDS.<sup>30</sup> Every person has an immune system which protects the body from infections and diseases. Within the immune system, T cells fight off infectious bacteria and viruses to make a person healthy again.<sup>31</sup> HIV attacks a body's immune system, specifically targeting the T cells within the immune system, leaving an individual without internal protection from diseases and infections.<sup>32</sup> Without a fully functioning immune system, the body becomes susceptible to other infections and diseases which can ultimately lead to a person's death.<sup>33</sup> Someone infected with HIV is considered HIV positive but being HIV positive does not necessarily mean that the person has AIDS.<sup>34</sup>

The first stage of HIV infection, the Acute HIV Infection stage, begins shortly after infection,<sup>35</sup> and is the stage with the highest probability of HIV transmittance.<sup>36</sup> HIV reproduces and destroys the body's T cells at the same time.<sup>37</sup> Thus, HIV reaches a very high count and the number of T cells plummets.<sup>38</sup> At some point, the immune system reacts to this large imbalance and lowers the number of HIV in the body.<sup>39</sup> This allows for the number of T cells to grow.<sup>40</sup> However, the number of T cells produced by the body will most likely never return to the number in existence before the individual's HIV infection.<sup>41</sup>

---

2014\_Global\_Factsheet\_April\_2014.pdf (last visited Mar. 16, 2016) (“[Since 1981.] approximately 30 million people have died of AIDS-related illnesses.”).

30. *About HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/whatishiv.html> (last updated Dec. 6, 2015) (discussing general information about HIV).

31. *Id.*

32. *Id.* Note that T cells are sometimes referred to as CD4 cells. *Id.*

33. *Id.* When illnesses seize upon your immune system's weakened state, they are aptly referred to as “opportunistic infections.” *Id.*

34. *Id.*

35. *See id.* (“Within 2 to 4 weeks after infection . . . [some] people may experience a flu-like illness.” (emphasis omitted)); *HIV Overview: The Stages of HIV Infection*, AIDSINFO, <http://aidsinfo.nih.gov/education-materials/fact-sheets/19/46/the-stages-of-hiv-infection#> (last updated Sept. 15, 2015) (giving an overview of the stages of HIV infection).

36. *HIV Overview: The Stages of HIV Infection*, *supra* note 35.

37. *Id.*

38. *Stages of HIV Infection*, AIDS, <https://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/stages-of-hiv/> (last visited Mar. 16, 2016).

39. *Id.*

40. *Id.*

41. *See id.* (“[Y]our [T cell] count begins to increase, but it may not return to pre-infection levels.”).

The second stage of HIV infection is the Clinical Latency stage.<sup>42</sup> The length of this stage varies greatly.<sup>43</sup> HIV reproduces very slowly, keeping the amount of HIV at a fairly consistent level.<sup>44</sup> Eventually, towards the latter end of this stage, the number of HIV increases and the number of T cells dwindle.<sup>45</sup> However, this time, no correction for the imbalance occurs.<sup>46</sup>

AIDS is the third and final stage of HIV infection.<sup>47</sup> A person generally receives an AIDS diagnosis when the number of T cells in his body drops below 200 cells/mm<sup>3</sup> of blood.<sup>48</sup> Generally, after reaching this stage, a person's life expectancy drops to about 3 years with treatment and about 1 year without treatment.<sup>49</sup> So, how does one become infected with HIV in the first place?<sup>50</sup>

### B. *The Transmission of HIV Infection*

For some time, the general public lacked an accurate understanding of how HIV could be transmitted.<sup>51</sup> This existed at the time HIV and AIDS were first discovered in the late 1970s and even into the early 1990s.<sup>52</sup>

In the United States, HIV is typically spread through vaginal and anal sex as well as needles shared with someone who is HIV

---

42. This stage of HIV infection is also referred to as “[A]symptomatic HIV [I]nfection or [C]hronic HIV [I]nfection”. See *About HIV/AIDS*, *supra* note 30.

43. Those who are taking medication and treating HIV may stay in this stage for “several decades.” See *id.* (indicating the general understanding that this stage can last for an indefinite length of time).

44. While reproduction is low, the HIV is still considered active and can still be transmitted to others. *Id.*

45. *Id.* (indicating that towards the end of this stage, people tend to become ill because the immune system is too weak to fend off an infection).

46. *Id.*

47. See *id.* (giving a brief discussion of the stages for HIV infection).

48. A healthy individual generally has anywhere between 500 and 1,600 cells/mm<sup>3</sup>. *Id.* A person may also be diagnosed with AIDS if the individual “develop[s] one or more opportunistic illnesses, regardless” of the number of T cells in the person's body. See *Stages of HIV Infection*, *supra* note 38.

49. *Stages of HIV Infection*, *supra* note 38.

50. See DONALD T. DICKSON, *HIV, AIDS, AND THE LAW: LEGAL ISSUES FOR SOCIAL WORK PRACTICE AND POLICY* 8 (2001) (“HIV . . . can be transmitted from one individual to another in only a limited number of ways . . .”).

51. See *id.* (discussing that even though “repeated medical evidence” showed that HIV could only be transmitted in “a limited number of ways,” people still believed otherwise).

52. See *Doe v. Borough of Barrington*, 729 F. Supp. 376, 379 (D.N.J. 1990) (stating that parents removed their children from the school they attended because one child had a parent who was HIV positive); see also *Nolley v. Cnty. of Erie*, 776 F. Supp. 715, 719 (W.D.N.Y. 1991) (stating that a person believed that HIV could be transmitted “by casual contact, by plaintiff using the typewriter in the law library, and even by coming into contact with plaintiff's personal items but not plaintiff”).

positive.<sup>53</sup> A person infected with HIV can only transmit HIV to others through certain bodily fluids that come into contact with “a mucous membrane or damaged tissue[,] or be directly injected into the bloodstream.”<sup>54</sup>

Besides vaginal and anal sex and sharing needles, other less common ways of transmitting HIV exist.<sup>55</sup> The Centers for Disease Control and Prevention (CDC) lists “[b]eing bitten by a person with HIV” as a possible, although unlikely, way of transmitting HIV.<sup>56</sup> The CDC also states that saliva is not a bodily fluid capable of transmitting HIV.<sup>57</sup> Furthermore, the CDC states that “there is no documented case of transmission from an HIV-infected person spitting on another person.”<sup>58</sup>

Individuals can take measures to prevent being infected with HIV.<sup>59</sup> While HIV is not transmitted easily, these measures are still strongly encouraged.<sup>60</sup> Medication also exists to prevent the onset of AIDS.

### C. *Treatment for HIV-Positive Individuals and Preventative Measures to Lower Risk of Becoming Infected*

While no cure currently exists for HIV or AIDS, treatment is available for both.<sup>61</sup> Antiretroviral Therapy (ART) is a treatment regimen whereby an individual takes several medications on a daily basis.<sup>62</sup> The medications prevent HIV from reproducing and ultimately keep the amount of HIV low.<sup>63</sup> With the amount of HIV in

---

53. See *HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/transmission.html> (last updated Dec. 14, 2015) (providing a more in depth analysis of how HIV can spread from person to person).

54. See *id.* (listing the types of fluids that can transmit HIV to be “blood, semen (cum), pre-seminal fluid (pre-cum), rectal fluids, vaginal fluids, and breast milk”). Mucous membranes can be found inside the rectum, the vagina, the penis, and the mouth. *Id.* For a lengthier discussion on which types of sex are more likely to transmit HIV, see *id.*

55. See *id.* (listing other less risky ways for transmission to occur, including biting and oral sex).

56. See *id.* (“Each of the very small number of documented cases [where biting has occurred, it] has involved severe trauma with extensive tissue damage and the presence of blood” and noting that there is “no risk of transmission if the skin is not broken”).

57. See *id.* (listing several ways in which HIV cannot be transmitted).

58. U.S. Ctrs. for Disease Control & Prevention, *Basic Questions and Answers About HIV Transmission*, BODY (Jan. 16, 2015), <http://www.thebody.com/content/30024/hiv-transmission.html?getPage=3#q15>.

59. See *infra* Part II.C (discussing preventative measures an individual can take).

60. *HIV Overview: The Stages of HIV Infection*, *supra* note 35.

61. See *About HIV/AIDS*, *supra* note 30 (discussing antiretroviral therapy (ART) and stating that it can help HIV-positive people live longer lives).

62. *HIV Treatment*, AIDSINFO, <http://aidsinfo.nih.gov/education-materials/fact-sheets/21/51/hiv-treatment—the-basics> (last updated Mar. 1, 2016).

63. *Id.*

check, the number of T cells can grow.<sup>64</sup> While HIV still exists within the body, the larger number of T cells bolsters the immune system.<sup>65</sup> Furthermore, the reduced amount of HIV in the body lowers the risk of transmission and extends a person's life expectancy.<sup>66</sup>

ART can be somewhat cumbersome.<sup>67</sup> An initial treatment regimen typically "includes three or more HIV medicines" to be taken on a daily basis.<sup>68</sup> Complications where medications interact negatively with each other or with other medications are also possible.<sup>69</sup> If a person does not maintain his regimen of daily medications, there is a risk the HIV will become resistant to the medications.<sup>70</sup> Ultimately, complications are not prevalent for ART, but these issues can prevent the medication from taking full effect.<sup>71</sup> Complications aside, ART provides an effective reduction in the likelihood of an HIV infected individual from contracting AIDS.<sup>72</sup> The treatment does generally extend one's life,<sup>73</sup> but it is not guaranteed.<sup>74</sup>

There are obvious preventative measures people can take in order to lower their risk of being infected with HIV like using a condom, lowering the number of sexual partners, and not sharing needles.<sup>75</sup> In addition to these measures, medication exists to prevent HIV infections.<sup>76</sup> The medication is Pre-Exposure

---

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.* (discussing a typical regimen of HIV treatment).

68. *See id.* (discussing the different medications that exist for HIV treatment). For a brief overview of the different types of HIV medicines and the different classifications of the HIV medicines, see *HIV Overview: FDA-Approved HIV Medicines*, AIDSINFO, <http://aidsinfo.nih.gov/education-materials/fact-sheets/19/58/fda-approved-hiv-medicines> (last updated Mar. 15, 2016).

69. *See HIV Treatment, supra* note 62 (discussing certain risks with HIV medicines).

70. *Id.*

71. *See id.* (discussing the possibility of drug interactions leading to the medicine not being effective).

72. *See How Do You Get HIV or AIDS?*, AIDS, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/> (last updated Dec. 31, 2015).

73. *About HIV/AIDS, supra* note 30; *see also* PANEL ON ANTIRETROVIRAL GUIDELINES FOR ADULTS AND ADOLESCENTS, GUIDELINES FOR THE USE OF ANTIRETROVIRAL AGENTS IN HIV-1-INFECTED ADULTS AND ADOLESCENTS C-5, I-1 to -4, <http://aidsinfo.nih.gov/contentfiles/lvguidelines/adultandadolescentgl.pdf> (last updated Jan. 28, 2016) (recommending Antiretroviral Therapy for most any person in any situation).

74. *See HIV Transmission, supra* note 53 (stating that there is currently no cure for HIV or AIDS).

75. *See HIV/AIDS: Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/prevention.html> (last updated Mar. 10, 2016) (listing several ways to prevent contracting HIV by limiting potential exposure to HIV).

76. *See HIV/AIDS: PrEP*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/prep.html> (last updated Feb. 23, 2016) (discussing the basics of HIV Prevention medicine).

Prophylaxis, or PrEP for short.<sup>77</sup> This prevention medication must be taken on a daily basis.<sup>78</sup> It is not a vaccine and is not 100% effective in the sense that it does not guarantee the prevention of contracting HIV.<sup>79</sup> PrEP is, however, estimated to reduce the risk of contracting HIV by up to 92%.<sup>80</sup>

Fortunately, advancements in science and technology have occurred since the discovery of HIV and AIDS in the United States in the 1970s.<sup>81</sup> Even into the 1980s, “people with AIDS were not likely to live longer than a few years.”<sup>82</sup> Now, with early detection and ART treatment, an HIV-positive person’s life expectancy may not actually change substantially.<sup>83</sup> However, a person with HIV must strictly adhere to a treatment regimen.<sup>84</sup> This means he must take several HIV medications on a daily basis, for the rest of his life, in order to maintain his health.<sup>85</sup> Therefore, when someone is infected, even if his life expectancy does not change dramatically, his lifestyle does.<sup>86</sup> Not only will he have to take lots of medication for the rest of his life, but he will have to stop himself from engaging in certain actions that might transmit HIV to another person, and he very well might be single for some time.<sup>87</sup> On top of

---

77. *Id.*

78. *Id.*

79. *See id.* (discussing the differences between PrEP and vaccines and stating that while “PrEP can significantly reduce your risk of HIV infection” it does not completely eliminate the risk of infection).

80. *See HIV/AIDS: Pre-Exposure Prophylaxis (PrEP)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/risk/prep/index.html> (last updated Feb. 10, 2016) (discussing studies that have been conducted on PrEP effectiveness).

81. *See HIV/AIDS: HIV Cost-Effectiveness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/> (last updated Apr. 16, 2013) (“[A] study estimated that average life expectancy after an HIV diagnosis increased from 10.5 to 22.5 years from 1996 to 2005.”); *see also About HIV/AIDS*, *supra* note 30 (discussing the origins of HIV and discussing how it spread to humans).

82. *Treatment of HIV Infection*, NAT’L INST. OF ALLERGY & INFECTIOUS DISEASES, <http://www.niaid.nih.gov/topics/hivaids/understanding/treatment/Pages/Default.aspx> (last updated Nov. 14, 2012).

83. *See About HIV/AIDS*, *supra* note 30 (“Today, someone diagnosed with HIV and treated before the disease is far advanced can have a nearly normal life expectancy.”); Gus Cairns, *Life Expectancy Now Considerably Exceeds the Average in Some People with HIV in the US*, NAM (Jan. 6, 2014), <http://www.aidsmap.com/Life-expectancy-now-considerably-exceeds-the-average-in-some-people-with-HIV-in-the-US/page/2816267/#item2816270> (“[S]ome groups of people with HIV . . . now have life expectancies equal to or even higher than the US general population.”).

84. *See HIV Treatment*, *supra* note 62 (giving a brief overview of an HIV regimen).

85. *Id.*; *see also* Danute Rasimavičiute, *This Is an Open Letter from an HIV-Positive 22-Year Old: Here’s How I Learned at Age 20 That I Was HIV Positive*, A PLUS (Jan. 8, 2015), <http://aplus.com/a/open-letter-from-an-hiv-positive-22-year-old> (“I am HIV positive. I will take a combination of therapies. Every day. For the rest of my life.”).

86. *See* Rasimavičiute, *supra* note 85.

87. *Id.* (“With each new sexual partner, [a] condom is necessary.”).

that, the cost of treatment and medicines is very expensive, especially for those without medical insurance.<sup>88</sup>

Because transmitting HIV has such severe consequences, criminal liability is used to deter such actions.<sup>89</sup> In 1990, the federal government passed the Ryan White Comprehensive AIDS Resources Emergency Act<sup>90</sup> which conditioned states' receipt of federal health funds upon states having criminal statutes for those who intentionally transmit HIV.<sup>91</sup> However, this Act did not give states a specific direction on the type of criminal laws, nor guidelines for punishments, that should apply.<sup>92</sup> Because of this, states take different approaches in prosecuting HIV transmission.<sup>93</sup> This difference leads to drastically different punishments for those convicted despite actions being substantially similar.<sup>94</sup>

### III. CASE LAW ANALYSIS

Currently, many states have statutes specifically concerning the transmission of HIV.<sup>95</sup> These statutes range from criminalizing the intentional exposure of another to HIV, whether

---

88. See *HIV/AIDS: HIV Cost-Effectiveness*, *supra* note 81 (stating that the “estimate of lifetime HIV treatment costs was . . . \$379,668 in 2010 dollars”); see Rasimaviciute, *supra* note 85 (stating that a French girl who is HIV positive goes through therapy that “costs more than 1000 euros per month”).

89. DICKSON, *supra* note 50, at 104.

90. Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990, 42 U.S.C. §§ 300ff to 300ff-48 (2012).

91. DICKSON, *supra* note 50, at 103, 110; see McGuire, *supra* note 5, at 1802. However, this provision has since been repealed. See 42 U.S.C. § 300ff-47 (repealed 2000).

92. 42 U.S.C. §§ 300ff-300ff-47 (§ 300ff-47 repealed 2000) (providing that “the Secretary may not require a State to enact any statute”); see also McGuire, *supra* note 5, at 1802–09 (discussing different statutes states enacted in order to receive federal funds).

93. See *State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools*, CTR. FOR HIV L. & POL'Y, <http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%202010-21-13.pdf> (last updated Oct. 21, 2013) (comparing the laws of the 34 states that have HIV-specific statutes); see also McGuire, *supra* note 5, at 1802–09 (discussing how some states enacted disclosure statutes, some enacted consent statutes, and others relied on general statutes).

94. See *Criminal Transmission of HIV*, *supra* note 5 (noting that sentences for HIV transmission range from “a small fine to life in prison”). Compare *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. App.—Dallas July 14, 2009, pet. ref'd), *writ of habeas corpus granted*, No. AP-76969, 2013 WL 458063 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication) (upholding a conviction for aggravated harassment of a public official when the defendant spat on an officer), with *People v. Plunkett*, 971 N.E.2d 363, 368 (N.Y. 2012) (overturning a conviction for aggravated assault for a defendant who bit an officer).

95. See *HIV/AIDS: State HIV Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/policies/law/states/index.html> (last updated Mar. 18, 2015) (showing the various states with HIV-transmission statutes).

or not transmission occurs,<sup>96</sup> to criminalizing the nondisclosure of a person's HIV-positive status before engaging in sexual acts.<sup>97</sup>

There are a few states, like Texas and Oregon, without a specific HIV-transmission statute.<sup>98</sup> Instead, prosecutors use general statutes such as attempted murder,<sup>99</sup> aggravated harassment of a public official,<sup>100</sup> or aggravated sexual assault<sup>101</sup> in order to prosecute HIV-transmission cases. Some courts affirmed convictions under these statutes holding that bodily fluids potentially containing HIV constitute a "deadly weapon."<sup>102</sup> However, other courts have reached the opposite conclusion holding that bodily fluids potentially containing HIV are not a "deadly weapon."<sup>103</sup> Because of this discrepancy, punishments for similar crimes can vary depending on where the actions took place.<sup>104</sup> Thus, this section will show why an HIV-transmission-specific statute is good policy.

#### A. *Attempted Murder Convictions for Possible Transmission of HIV*

While states should not diminish the seriousness and reprehensibility of transmitting any disease, especially HIV, prosecuting an individual for attempted murder for potentially transmitting HIV is not a just result. More importantly, based on

---

96. CAL. HEALTH & SAFETY CODE § 120291 (West 2012) (criminalizing the transmission of HIV when done intentionally and making it a felony).

97. FLA. STAT. ANN. § 384.24(2) (West 2014) (requiring an HIV-positive individual to disclose his or her status to another before engaging in sexual activities).

98. See *HIV/AIDS: State HIV Laws*, *supra* note 95 (showing that neither Texas nor Oregon has such a statute).

99. See *State v. Hinkhouse*, 912 P.2d 921, 922 (Or. Ct. App. 1996); *Weeks v. State*, 834 S.W.2d 559, 560 (Tex. App.—Eastland 1992, pet. ref'd); see also *DICKSON*, *supra* note 50, at 106–08 (discussing several cases where attempted murder statutes were used to convict a defendant of HIV transmission).

100. See TEX. PENAL CODE ANN. § 22.11 (West 2013) (making it a felony to harass a public official by causing "a public servant to contact the blood, seminal fluid . . . saliva, urine, or feces of the actor, [or] any other person"); *Campbell*, 2009 WL 2025344, at \*5.

101. See TEX. PENAL CODE ANN. § 22.021 (defining what constitutes aggravated sexual assault); *Najera v. State*, 955 S.W.2d 698, 700 (Tex. App.—Austin 1997, no pet.).

102. See *Campbell*, 2009 WL 2025344, at \*3 (adding an enhancement to the punishment due to an aggravated circumstance when the defendant might have transmitted HIV to the public official when the defendant spat on the official).

103. See *People v. Plunkett*, 971 N.E.2d 363, 368 (N.Y. 2012) (overturning a conviction for aggravated assault); see also *Brock v. State*, 555 So. 2d 285, 287–89 (Ala. Crim. App. 1989) (overturning the defendant's conviction of assault in the first degree because the State did not prove beyond a reasonable doubt that HIV could be transmitted through biting).

104. See *Criminal Transmission of HIV*, *supra* note 5 ("The sentences received by . . . individuals [convicted of HIV transmission] vary from a small fine to life in prison.").

a current understanding of HIV transmission and advancements in medicine and science, attempted murder convictions should not occur.<sup>105</sup>

In *Weeks v. Texas*, the defendant was convicted of attempted murder after he spat in an officer's face twice.<sup>106</sup> He told the officers that "he was 'going to take somebody with him when he went,' that he was 'medical now,' and that he was 'HIV-4.'"<sup>107</sup> A jury convicted him of attempted murder, and the appellate court upheld his conviction.<sup>108</sup>

For an attempted murder conviction in Texas, the prosecution must show that the defendant had the specific intent to kill and did something "amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."<sup>109</sup> When the defendant spat on the officer, virtually no risk of transmitting HIV existed.<sup>110</sup> Without any real risk of transmission, it might appear as though impossibility would be a good defense to an attempt charge. However, courts regularly find this situation amounts to factual impossibility which is not a defense for attempt.<sup>111</sup> Based on current treatment measures for

---

105. See *supra* Part II.C (discussing how HIV can and cannot be transmitted and that with current medicine, a person is likely to live for several decades after being infected). Cf. DICKSON, *supra* note 50, at 106 ("Under a common law rule, an act cannot be considered murder unless the victim dies within a year and a day after the commission of the offense. With death being forestalled by medication, then, a prosecution for murder by transmission of HIV is very unlikely." (citation omitted)). Because medication will likely keep an infected victim alive for longer than a year and a day after infection, under that same common law rule, attempted murder will not work either. See DICKSON, *supra* note 50, at 108 ("[T]he State has presented no evidence from which it can reasonably be concluded that death by AIDS is a probable result of Smallwood's actions to the same extent that death is the probable result of firing a deadly weapon at a vital part of someone's body." (quoting *Smallwood v. State*, 680 A.2d 512, 516 (Md. 1996))).

106. *Weeks v. State*, 834 S.W.2d 559, 561 (Tex. App.—Eastland 1992, pet. ref'd).

107. *Id.* By saying these things, he is conveying the message to the police officers that he is HIV positive.

108. *Id.* at 560.

109. TEX. PENAL CODE ANN. § 15.01 (West 2013).

110. See *HIV Transmission Risk*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/policies/law/risk.html> (last updated Nov. 16, 2015) (showing that the risk of HIV transmission through spitting is "negligible"); see also Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization That Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 363–64, 374–75 (2013) (stating that the CDC has long ago established that there is no risk of transmission through saliva and further that there are no documented cases of HIV transmission through biting); *How Do You Get HIV or AIDS?*, AIDS, <http://aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/> (last updated Dec. 31, 2015) (listing saliva as a method by which HIV cannot be transmitted).

111. See DICKSON, *supra* note 50, at 108 ("[T]he issue was not whether the defendant could cause the harm, but whether he subjectively believed he could cause the harm and intended to do so. Impossibility was not a defense.").

HIV, it is difficult to say that an individual would die as a result of his infection.<sup>112</sup> Death caused by contracting AIDS acquired through HIV exposure would be a delayed result, and in some situations, is not necessarily probable.<sup>113</sup> If a person does seek treatment, he can live for a very long time<sup>114</sup> and could very well die of an entirely unrelated cause. Due to this lack of causation and to advancements in medicine, attempted murder does not seem to be a very plausible conviction to seek in transmission of HIV cases, especially when the defendant attempts to transmit HIV through spitting.<sup>115</sup>

In Oregon, a defendant was also convicted of attempted murder for transmission of HIV.<sup>116</sup> In *Oregon v. Hinkhouse*, a jury convicted the defendant of ten counts of attempted murder and ten counts of attempted assault in accordance with Oregon statutes.<sup>117</sup> The defendant slept with a number of women and either did not disclose his HIV status to them or lied about it claiming to be HIV negative.<sup>118</sup> In this case, the defendant did transmit HIV to some of the women.<sup>119</sup>

To obtain a conviction for attempted murder, the State must prove beyond a reasonable doubt that the defendant possessed the intent to kill.<sup>120</sup> The defendant argued on appeal that while he engaged in risky behavior with these women, he did not intend to infect these women with HIV and kill them, but rather just to obtain sexual gratification.<sup>121</sup> While the appellate court upheld the conviction for the attempted murder and attempted sexual

---

112. See *supra* Part II.C (discussing that science and medicine has progressed tremendously over the last few decades and it is presumed that with medication, one's lifetime is not necessarily expected to shorten much, if at all); see also DICKSON, *supra* note 50, at 106.

113. See *supra* Part II.C (discussing the current statistics of how few people die from AIDS with early detection and current medicine); see also Cairns, *supra* note 83 (reporting a US study which "found that some groups of people with HIV . . . now have life expectancies equal to or even higher than the US general population).

114. *About HIV/AIDS*, *supra* note 30 (ART can "dramatically prolong" someone's life).

115. DICKSON, *supra* note 50, at 107–08 (discussing issues with causation for HIV transmission).

116. See *State v. Hinkhouse*, 912 P.2d 921, 925 (Or. Ct. App. 1996) (affirming the attempted murder conviction).

117. *Id.* at 922; see also OR. REV. STAT. ANN. § 161.405 (West 2011) (defining what a criminal attempt includes and listing punishments for various attempts); §§ 163.160–163.185 (classifying the different degrees of assault in Oregon).

118. *Hinkhouse*, 912 P.2d at 922–23.

119. *Id.* at 922.

120. See OR. REV. STAT. ANN. § 161.405 (defining attempted murder as "intentionally engag[ing] in conduct" and classifying it as a Class A felony); see also KAPLAN, *supra* note 1, at 208 ("[A]n attempt to kill is a 'specific intent' crime, requiring an unexecuted intent to kill.").

121. *Hinkhouse*, 912 P.2d at 924.

assault counts, proving intent can be difficult for the prosecution.<sup>122</sup> So, if state prosecutors relied on attempted murder statutes to prosecute HIV-transmission cases, it could be too difficult to obtain a conviction, potentially exempting defendants from punishment.<sup>123</sup>

A specific HIV-transmission statute criminalizing the intentional<sup>124</sup> and knowing<sup>125</sup> transmissions of HIV can help get around this potential issue.<sup>126</sup> These two levels of *mens rea*<sup>127</sup> offer a broader scope of applicability and will make it easier to prosecute a defendant. This HIV-specific statute would also outline a better and more commensurate level of punishment than attempted murder, especially for cases where death is not a very likely result.<sup>128</sup>

*B. HIV May Not Be a “Deadly Weapon” or a “Dangerous Instrument” as Used in Statutes*

In states without a specific HIV-transmission statute, prosecutors use statutes like aggravated harassment of a public servant<sup>129</sup> or aggravated sexual assault<sup>130</sup> to prosecute HIV-transmission cases. To satisfy the aggravated part of these statutes, a defendant must commit the offense with a “deadly

---

122. See DICKSON, *supra* note 50, at 105 (“Where the law requires a showing of an intent to commit the criminal act, short of actual statements by the offender, this . . . is difficult to prove.”); see also *People v. Malone*, 2009 WL 1508534, at \*1 (Cal. Ct. App. 2009) (stating that the trial court dismissed the defendant’s charge of “exposing another to . . . HIV by engaging in unprotected sex with knowledge that he was infected” due to “insufficient evidence that defendant had acted with specific intent to infect the victim”).

123. While there is the possibility for a defendant being convicted of a lesser included offense, this Comment will argue that some of the lesser included offenses should not work either. See *infra* Part III.B.

124. See TEX. PENAL CODE ANN. § 6.03 (West Supp. 2015) (defining what constitutes “intentional” for the purposes of *mens rea*).

125. See *id.* (defining what constitutes “knowing” for the purposes of *mens rea*).

126. See *infra* Appendix (proposing a statute for criminal transmission of HIV).

127. See PENAL § 6.02 (requiring a culpable mental state, or *mens rea*, in order to be prosecuted for any crime); KAPLAN, *supra* note 1, at 181–84 (discussing what *mens rea* is and describing why it is necessary for criminal prosecutions).

128. See *supra* Part II.B–C (discussing the possibility of death from contracting AIDS due to HIV); see *infra* Part V, Appendix (proposing that such a statute should be adopted and outlining different punishments for the offense).

129. See *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. App.—Dallas July 14, 2009, pet. ref’d), *writ of habeas corpus granted*, No. AP-76969, 2013 WL 458063 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication) (upholding a conviction for aggravated harassment of a public official).

130. See *Najera v. State*, 955 S.W.2d 698, 699 (Tex. App.—Austin 1997, no pet.) (affirming a conviction for aggravated sexual assault).

weapon”<sup>131</sup> or a “dangerous instrument.”<sup>132</sup> Depending on which state you are in, a court may or may not find that HIV potentially present in saliva is a “deadly weapon”<sup>133</sup> or a “dangerous instrument.”<sup>134</sup> This results in large discrepancies in punishments for similar acts strictly based on jurisdiction location.<sup>135</sup>

1. *Aggravated Harassment of a Public Servant.* A Texas court of appeals recently upheld a conviction for a defendant convicted of “harassing a public servant and found that [the defendant] used or exhibited a deadly weapon during the offense.”<sup>136</sup> An officer arrested the defendant for public intoxication, and the defendant became unruly while in the officer’s vehicle.<sup>137</sup> The officer stopped the car and pulled the defendant out of the vehicle to calm him.<sup>138</sup> While the officer tried to restrain the defendant, the defendant, who was HIV positive, spat in the officer’s face—a claim denied by the defendant.<sup>139</sup>

The defendant challenged his conviction, arguing the lower court’s holding that his saliva was a “deadly weapon” was both legally and factually insufficient.<sup>140</sup> The appellate court upheld the conviction, applying a very deferential standard of review.<sup>141</sup> Regarding the defendant’s challenge of factual insufficiency, the appellate court held it would only overturn the conviction if one of two situations existed: (1) the evidence supporting the finding that saliva from an HIV-positive person is a deadly weapon is *too weak to support the jury’s finding* beyond a reasonable doubt; or (2) the

---

131. See *Campbell*, 2009 WL 2025344, at \*3 (discussing a penalty enhancement for the use of a “deadly weapon”).

132. See N.Y. PENAL LAW § 10.00(13) (McKinney 2009) (defining “dangerous instrument”).

133. Compare *Campbell*, 2009 WL 2025344, at \*3 (finding that HIV potentially present in saliva could constitute a deadly weapon and upholding a conviction for aggravated harassment of a public official), with *People v. Plunkett*, 971 N.E.2d 363, 368 (N.Y. 2012) (holding that saliva, whether or not it contained HIV, was not a dangerous instrument and overturning defendant’s aggravated assault conviction).

134. *Plunkett*, 971 N.E.2d at 368.

135. Compare *Ex parte Campbell*, No. AP-76969, 2013 WL 458063, at \*1 (Tex. Crim. App. Feb. 6, 2013) (showing that Campbell received thirty-five years in prison for spitting on a public servant), with *Plunkett*, 971 N.E.2d at 364, 368 (overturning an aggravated assault conviction for a defendant who bit an officer).

136. *Campbell*, 2009 WL 2025344, at \*1; see also TEX. PENAL CODE ANN. § 22.11 (West Supp. 2015) (defining “harassment of a public servant”); § 1.07(17) (defining “deadly weapon”).

137. *Campbell*, 2009 WL 2025344, at \*1.

138. *Id.*

139. *Id.* at \*2 (arguing that because HIV cannot be transmitted through saliva, there was no way that the officer could have become infected with HIV, even if the defendant did in fact spit in the officer’s face).

140. *Id.*

141. *Id.*

2016] *CRIMINAL TRANSMISSION OF HIV LAWS* 1195

*contravening evidence is so strong* that the State could not have met its burden of proof.<sup>142</sup>

In challenging the legal sufficiency of the lower court's holding that saliva from an HIV-positive person could be a deadly weapon, the court said that the "record must demonstrate that: (1) the object meets the statutory definition of a deadly weapon; (2) the deadly weapon was used or exhibited during the charged offense; and (3) someone was put in actual danger."<sup>143</sup> For this claim, the court said, "Although we may disagree with the jury's conclusions, we must also exercise appropriate deference to avoid substituting our judgment for that of the jury . . . ."<sup>144</sup> The court then upheld the conviction, concluding that it could not say whether the evidence was factually or legally insufficient.<sup>145</sup> This very deferential language used by the court suggests the court may not believe saliva from an HIV-positive individual is a "deadly weapon" within the meaning of the statute.<sup>146</sup> Thus, a future defendant, basing his argument on this deferential language and implication, could argue that saliva potentially containing HIV is not a deadly weapon. However, as the law stands in Texas, there is a very real possibility that juries will continue to find that saliva from an HIV-positive person is a "deadly weapon" and the appellate courts will not step in to overturn it.<sup>147</sup>

A statute directly dealing with HIV transmission can solve this potential issue because it would be directly on point.<sup>148</sup> Further, a modernized HIV-transmission-specific statute could prevent an unjust result wherein someone is sent to prison for a very long time when there was only a "negligible" risk of transmission.<sup>149</sup>

2. *Aggravated Sexual Assault.* In *Najera v. Texas*, the defendant was convicted of aggravated sexual assault when he engaged in unprotected sex while being HIV positive.<sup>150</sup> The court

---

142. *Id.*

143. *Id.* (citing *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005)).

144. *Id.*

145. *Id.* at \*3.

146. *Id.* at \*4–5.

147. *Id.* at \*3.

148. McGuire, *supra* note 5, at 1801–02; see BEST PRACTICES GUIDE, *supra* note 24 (discussing issues with laws that allow for criminalization of low-risk HIV transmission).

149. See *HIV Transmission Risk*, *supra* note 110 (showing that the risk of HIV transmission through spitting is "negligible"); see *infra* Appendix (proposing a modernized HIV-transmission-specific statute).

150. *Najera v. State*, 955 S.W.2d 698, 699–700 (Tex. App.—Austin 1997, no pet.); see

held that HIV is a “deadly weapon” within the meaning of the aggravated sexual assault statute.<sup>151</sup> The appellate court affirmed the aggravated sexual assault conviction, holding “the jury could rationally conclude beyond a reasonable doubt that [the defendant] intentionally or knowingly used his penis and bodily fluids in a manner capable of causing death to [the victim] by infecting her with HIV.”<sup>152</sup> The court went on to say:

Appellant does not refer us to any exculpatory evidence with regard to the deadly weapon issue. He merely notes that Oscar [other victim] did not testify that he saw appellant ejaculate. . . . We believe the jury’s conclusion that appellant used his penis and bodily fluids as a deadly weapon is *not contrary to the great weight and preponderance of the evidence*.<sup>153</sup>

The deferential language used by the court to uphold the conviction could indicate that equating bodily fluids potentially containing HIV to a “deadly weapon” may be suspect.<sup>154</sup> However, facing a deferential standard of review, the argument that bodily fluids potentially containing HIV are not a deadly weapon, seems unlikely to prevail.<sup>155</sup>

With advancement in science and medicine, there is a strong argument that HIV is not a “deadly weapon.”<sup>156</sup> First, there is no guarantee that HIV will actually be transmitted to the victim,<sup>157</sup> and second, even if transmission occurs, HIV is treatable.<sup>158</sup> Furthermore, using an aggravated sexual assault statute can lead

---

also TEX. PENAL CODE ANN. § 22.021 (West Supp. 2015) (defining aggravated sexual assault and classifying it as a felony in the first degree).

151. *Najera*, 955 S.W.2d at 700–01.

152. *Id.* at 701.

153. *Id.* (emphasis added).

154. *Id.*

155. *Id.*

156. *See supra* notes 81–88 and accompanying text (discussing how treatment and medication keep people alive much longer); *see also The HIV/AIDS Epidemic in the United States*, HENRY J. KAISER FAM. FOUND. (Apr. 7, 2014), <http://kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states/> (finding that HIV treatment has “substantially reduced AIDS-related morbidity and mortality and extended the lives of many” individuals).

157. *HIV Transmission Risk*, *supra* note 110 (showing that the risk of HIV transmission is estimated at about eight out of ten thousand for “[r]eceptive penile-vaginal intercourse”). However, please note that these estimates are for one-time encounters, but in the *Najera* case, the defendant had engaged in sexual intercourse more than once, meaning the odds would increase for each sexual encounter. *Najera*, 955 S.W.2d at 700.

158. *See supra* Part II.C (discussing how current treatment of HIV keeps people alive for a long time); *see also Guidelines for the Use of Antiretroviral Agents in HIV-1-Infected Adults and Adolescents*, *supra* note 73 (outlining and proposing treatment methods for various types of individuals infected with HIV).

to extremely harsh punishments,<sup>159</sup> especially if little to no risk of transmission of HIV exists and no transmission occurs.

If Texas courts accept the argument that bodily fluids potentially containing HIV are not a “deadly weapon,” it would prevent future convictions under statutes with an aggravating circumstance.<sup>160</sup> In a situation where an individual intended to, and did in fact, transmit HIV, the State would not be able to seek a conviction under any aggravating statute.<sup>161</sup> While the defendant would not likely escape all criminal liability, the State would likely seek a conviction under a statute with less severe penalties, like assault, which may not be sufficient punishment for the crime.<sup>162</sup> However, an HIV-transmission-specific statute would likely provide more appropriate criminal liability that fits the crime.<sup>163</sup>

3. *Bodily Fluids/Saliva Potentially Containing HIV Is Neither a “Deadly Weapon” nor a “Dangerous Instrument.”* The New York Court of Appeals recently overturned a conviction of aggravated assault upon a police officer.<sup>164</sup> The defendant, Plunkett, was HIV positive and was so charged when he bit an officer.<sup>165</sup>

The State argued that because the defendant was HIV positive and because he bit the officer, the assault occurred with a “dangerous instrument.”<sup>166</sup> In prosecuting a defendant for aggravated assault of a police officer in New York, the State had to show that the defendant had the “intent to cause serious physical injury to a person whom he knows or reasonably should know to be a police officer or a peace officer engaged in the course of performing his official duties, [and that] he cause[d] such injury by means of a *deadly weapon or dangerous instrument.*”<sup>167</sup> The

---

159. TEX. PENAL CODE ANN. § 22.021 (West Supp. 2015) (outlining the punishment for aggravated sexual assault).

160. *Id.*

161. *See* People v. Plunkett, 971 N.E.2d 363, 364, 368 (N.Y. 2012) (overturning a conviction for aggravated assault and finding that saliva and any body part cannot be a “dangerous instrument” or a “deadly weapon”). While this was a case from New York, a court in Texas could very easily adopt a similar rationale and overturn a conviction.

162. *See* Brock v. State, 555 So. 2d 285, 286 (Ala. Crim. App. 1989) (stating that the jury convicted Brock of a lesser included offense).

163. *See infra* Appendix (proposing an HIV-transmission-specific statute and sentencing guidelines).

164. *See* Plunkett, 971 N.E.2d at 364, 368.

165. *Id.* at 364.

166. *Id.* at 365 (arguing that HIV is dangerous and could have been transmitted to the officer through the biting).

167. N.Y. PENAL LAW § 120.11 (McKinney 2009) (emphasis added) (outlining what is necessary for aggravated assault and classifying it as a Class B felony).

State did not try to argue that saliva potentially containing HIV could be a “deadly weapon” because it does not fit within New York’s definition of “deadly weapon.”<sup>168</sup> Instead, the State argued that because Plunkett was HIV positive, his saliva was within the meaning of a “dangerous instrument.”<sup>169</sup>

The court rejected the contention that saliva could be a “dangerous instrument” within the meaning of New York laws.<sup>170</sup> The court, relying on an older case, *People v. Owusu*, held that a body part on an individual was not a “dangerous instrument.”<sup>171</sup> The court held that saliva should be considered a body part and thus could not be a “dangerous instrument.”<sup>172</sup>

While these New York definitions for “deadly weapon” and “dangerous instrument” do not have effect outside New York, states are always welcome to, and do in fact, look to other states for guidance of interpretation.<sup>173</sup> Texas does define “deadly weapon” in its statutes,<sup>174</sup> but there is an argument that saliva from an individual who is HIV positive is not a “deadly weapon”<sup>175</sup>; in other states, it is neither a “dangerous instrument” nor a “deadly weapon,”<sup>176</sup> so it should not be considered as such in Texas. The argument is also based on scientific evidence, which states that risk of HIV transmission through biting and saliva is, at most, “negligible.”<sup>177</sup> Based on this negligible risk of transmission of HIV,

---

168. See PENAL § 10.00(12) (defining deadly weapon as “any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, plastic knuckles, or metal knuckles[,]” leaving saliva conspicuously absent).

169. See *Plunkett*, 971 N.E.2d at 365 (arguing that HIV can cause serious physical injury to an individual and that it could have been transmitted through saliva when the defendant bit the officer); see also PENAL § 10.00(13) (defining a “dangerous instrument” as “any instrument, article or substance, including a ‘vehicle’ . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury”).

170. *Plunkett*, 971 N.E.2d at 368.

171. *People v. Owusu*, 712 N.E.2d 1228, 1229 (N.Y. 1999) (holding that, in reference to Section 10.00(13) of the New York Penal Code, “the statute’s ordinary meaning, its legislative history and [the court’s] jurisprudence persuade [the court] that an individual’s body part does not constitute an *instrument* under the statute”).

172. *Plunkett*, 971 N.E.2d at 368.

173. See *Williams v. Cimarron Ins. Co.*, 406 S.W.2d 173, 175–76 (Tex. 1966) (noting that other states’ authority is only persuasive and applying Ohio law to a Texas state issue); see also Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1173 (2006) (discussing how other courts’ opinions can be viewed as persuasive authority for other courts).

174. TEX. PENAL CODE ANN. § 1.07(17) (West 2011) (defining “deadly weapon”).

175. *Plunkett*, 971 N.E.2d at 368.

176. See N.Y. PENAL LAW § 10.00 (McKinney 2009); *Plunkett*, 971 N.E.2d at 364, 368 (finding that saliva is not a “dangerous instrument”).

177. See *HIV Transmission Risk*, *supra* note 110 (showing that the risk of HIV transmission through biting and spitting is “negligible”); see also *How Do You Get HIV or*

a Texas court should likewise accept the proposition that saliva from an HIV-positive individual cannot be a “deadly weapon.” As it stands now, though, case law in Texas holds that saliva from an HIV-positive person can be considered a “deadly weapon,”<sup>178</sup> even if there is only a negligible risk of transmission and HIV was never actually transmitted. This discrepancy between states again leads to drastically different punishments for similar crimes.<sup>179</sup>

4. *Assault in the First Degree.* Alabama criminalizes the transmission of all STDs equally rather than using a statute specifically dealing with transmission of HIV.<sup>180</sup> HIV is considered an STD and, as such, HIV-transmission cases can be prosecuted under this statute.<sup>181</sup> While this statute exists, it does not preclude the State from bringing charges under other statutes<sup>182</sup> in the hopes of obtaining a harsher punishment.<sup>183</sup>

In *Brock v. Alabama*, the State charged the defendant with one count of attempted murder and two counts of assault in the second degree for the defendant’s attacks on correctional officers.<sup>184</sup> In the first incident, the defendant attacked two officers by striking them with a padlock.<sup>185</sup> In a second incident, a few months later, the defendant bit an officer on the arm when he became enraged by officers confiscating two pens from his cell.<sup>186</sup> For the first incident, the State charged the defendant with two counts of assault in the second degree and, for the

---

*AIDS?*, *supra* note 110 (indicating that HIV is not spread by saliva and that the only documented cases of HIV transmission through biting involved “severe trauma with extensive tissue damage and the presence of blood” and also stating that “[t]here is no risk of transmission if the skin is not broken” for instances of biting).

178. *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. App.—Dallas July 14, 2009, pet. ref’d), *writ of habeas corpus granted*, No. AP-76969, 2013 WL 458063 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication).

179. *Compare Campbell*, 2009 WL 2025344, at \*3 (affirming a conviction for aggravated harassment of a public official), *with Plunkett*, 971 N.E.2d at 368 (overturning a conviction for aggravated assault).

180. ALA. CODE § 22-11A-21(c) (LexisNexis 2006) (criminalizing the intentional and knowing transmission of any STD and making it a Class C misdemeanor).

181. *See* ALA. ADMIN. CODE r. 420-4-1, app. I (2015) (indicating that the Alabama State Board of Health has characterized HIV as an STD).

182. *See Brock v. State*, 555 So. 2d 285, 286 (Ala. Crim. App. 1989) (charging the defendant with one count of attempted murder and two counts of assault in the second degree).

183. *Compare* ALA. CODE § 22-11A-21(c) (LexisNexis 2005) (criminalizing the intentional and knowing transmission of any STD and making it a Class C misdemeanor), *with* § 13A-6-21(b) (making it a Class C felony to commit assault in the second degree).

184. *Brock*, 555 So. 2d at 286.

185. *Id.*

186. *Id.*

second incident, attempted murder.<sup>187</sup> For the attempted murder charge, the State argued that the defendant, who was HIV positive, intended to transmit HIV to the officer through the bite.<sup>188</sup> At trial, the jury rejected the charge of attempted murder and instead convicted the defendant of assault in the first degree.<sup>189</sup>

For a conviction of assault in the first degree in Alabama, the prosecution must show that the defendant has the “intent to cause *serious physical injury* to another person, [and] he causes serious physical injury to any person by means of a *deadly weapon* or a *dangerous instrument*.”<sup>190</sup> On appeal, the court overturned the defendant’s conviction for assault in the first degree because the State did not meet its burden.<sup>191</sup> More specifically, the court said that the State failed to prove that the defendant’s biting of the officer was “highly capable of causing death or serious physical injury.”<sup>192</sup> The State failed to show that HIV or AIDS could be transmitted through saliva or biting, and the court refused to take judicial notice that HIV or AIDS could spread in that manner.<sup>193</sup>

While the *Brock* case dates back to 1989, it correctly supports the fact that HIV is neither a “deadly weapon” nor a “dangerous instrument” as used in states’ general statutes. Thus, convictions made under these statutes should be reversed, or dismissed, because the State cannot meet its burden of proof.<sup>194</sup>

A statute directly dealing with HIV transmission can offer better results in terms of obtaining convictions and more appropriate punishments.<sup>195</sup> It may preclude the State from seeking harsher convictions with longer punishments when it is unjust to do so, and can instead offer a more commensurate punishment for the crime actually committed.<sup>196</sup> It will allow the State to bring a case for HIV transmission without having to rely

---

187. See *id.*; see also ALA. CODE § 13A-4-2 (defining what is necessary to commit an attempt and the punishment for each type of attempt); § 13A-6-2 (defining murder and listing the punishment for committing this offense).

188. *Brock*, 555 So. 2d at 286–87.

189. See *id.* at 286; see also ALA. CODE § 13A-6-20 (defining what constitutes assault in the first degree and listing the punishment for committing this offense).

190. See ALA. CODE § 13A-6-20(a)(1) (emphasis added) (defining assault in the first degree).

191. *Brock*, 555 So. 2d at 288.

192. *Id.* at 287.

193. *Id.* at 288.

194. *Id.*

195. See *infra* Appendix (proposing a statute and outlining sentencing guidelines).

196. See *infra* Appendix.

2016] *CRIMINAL TRANSMISSION OF HIV LAWS* 1201

on implausible arguments susceptible to being overturned by an appellate court.<sup>197</sup>

#### IV. ANALYSIS OF VARIOUS HIV-TRANSMISSION STATUTES

Because no cure exists for HIV or AIDS,<sup>198</sup> and because HIV infection changes a person's life forever,<sup>199</sup> there is a strong argument for criminalizing the transmission of HIV, especially when done intentionally<sup>200</sup> or knowingly.<sup>201</sup> Essentially, the argument is that intentional or knowing transmission of HIV is wrong and those that do so should be "brought to justice."<sup>202</sup>

Others argue that a statute specifically criminalizing HIV transmission can create a stigmatization of HIV-positive individuals<sup>203</sup> and are against such statutes.<sup>204</sup> They also argue that such statutes do not really help prevent HIV transmission, as they are more reactive than preventative.<sup>205</sup> Furthermore, they argue without an HIV-transmission-specific statute, states still have other avenues they could pursue to seek convictions for such actions.<sup>206</sup>

However, using general statutes to try and prosecute HIV-transmission cases may force prosecutors to "twist the meaning of these [offenses] to fit the crime of HIV transmission."<sup>207</sup> Further, using general statutes can lead to seemingly harsh and unjust punishments.<sup>208</sup> Having a statute specifically dealing with

---

197. See *Brock*, 555 So. 2d at 288; see also *People v. Plunkett*, 971 N.E.2d 363, 368 (N.Y. 2012) (overturning an aggravated assault conviction).

198. *About HIV/AIDS*, *supra* note 30.

199. See *infra* notes 84–87 and accompanying text (discussing how someone with HIV must take medications on a daily basis for the rest of his life).

200. TEX. PENAL CODE ANN. § 6.03(a) (West 2011) (defining the culpable mental state of "intentional").

201. PENAL § 6.03(b) (defining the culpable mental state of "knowing").

202. See *Criminal Transmission of HIV*, *supra* note 5. For further arguments for and against criminalizing HIV transmission, see *id.*

203. See *id.*

204. See *HIVMA Urges Repeal of HIV-Specific Criminal Statutes*, *supra* note 6 (stating that the HIV Medicine Association (HIVMA) is arguing for the repeal of HIV-specific statutes).

205. See *Policy on the Use of Criminal Sanctions as a Response to the Transmission of HIV*, *supra* note 6 (arguing that criminal HIV-transmission laws are more "reactionary" than preventative).

206. See *CRIMINALIZATION OF HIV TRANSMISSION*, *supra* note 6, at 3.

207. See *McGuire*, *supra* note 5, at 1815; see also *Smallwood v. State*, 680 A.2d 512, 516 (Md. 1996) ("[T]he State has presented no evidence from which it can reasonably be concluded that death by AIDS is a probable result of Smallwood's actions to the same extent that death is the probable result of firing a deadly weapon at a vital part of someone's body.").

208. *Ex parte Campbell*, No. AP-76969, 2013 WL 458063, at \*1, \*5 (Tex. Crim. App. Feb. 6, 2013) (affirming a thirty-five-year prison sentence for spitting on an officer).

HIV transmission can thus be beneficial.<sup>209</sup> It can allow a clear path for prosecution of an individual and a more commensurate punishment.<sup>210</sup> Deciding to enact an HIV-transmission-specific statute would only be step one. Step two would be determining how to draft such a statute.

A. *Statutes Criminalizing Solely the Intentional Transmission of HIV*

Some states have enacted laws that only criminalize the intentional transmission of HIV.<sup>211</sup> Proving intentional transmission is difficult<sup>212</sup> because the State has the burden of proving beyond a reasonable doubt that the defendant intended to transmit HIV to the victim.<sup>213</sup> Other than the defendant stating that he intends to infect another person, there really is not a way to show this.<sup>214</sup> Thus, without showing intent to infect another with HIV, the statute is pretty much rendered useless because it is too “difficult to gain [a] conviction[ ].”<sup>215</sup> At this point, the State would have to resort to a general statute, like assault or aggravated harassment, in order to seek a conviction.<sup>216</sup> But using

---

209. See McGuire, *supra* note 5, at 1801–02 (“[S]tatutes . . . specifically tailored to address HIV exposure . . . can prove more effective in prosecuting those who spread the virus than traditional criminal laws.”); see also *Criminal Transmission of HIV*, *supra* note 5 (arguing that reckless transmission of HIV should be criminalized).

210. See *infra* Appendix (proposing a statute and sentencing guidelines).

211. See CAL. HEALTH & SAFETY CODE § 120291 (West 2012) (criminalizing the transmission of HIV when done intentionally and making it a felony); 720 ILL. COMP. STAT. ANN. 5/12-5.01(a)(1), (e) (LexisNexis Supp. 2015) (criminalizing the intentional transmission of HIV and making it a Class 2 felony).

212. See DICKSON, *supra* note 50, at 105 (“Where the law requires a showing of an intent to commit the criminal act, . . . [it] is difficult to prove.”); see also *People v. Malone*, No. A119368, 2009 WL 1508534, at \*1 (Cal. Ct. App. May 28, 2009) (stating that the trial court dismissed the defendant’s charge of “exposing another to [HIV] by engaging in unprotected sex with knowledge that he was infected” due to “insufficient evidence that defendant had acted with specific intent to infect the victim”).

213. See DICKSON, *supra* note 50, at 105; see also TEX. PENAL CODE ANN. § 2.01 (West 2011) (requiring proof beyond a reasonable doubt before anyone can be convicted of an offense).

214. See DICKSON, *supra* note 50, at 105; see also *Weeks v. State*, 834 S.W.2d 559, 561 (Tex. App.—Eastland 1992, pet. ref’d) (finding intent to transmit HIV when defendant said that “he was ‘going to take somebody with him when he went,’ that he was ‘medical now,’ and that he was ‘HIV-4’”).

215. See DICKSON, *supra* note 50, at 105; see also *In re Winship*, 397 U.S. 358, 364 (1970) (establishing that a person is not guilty of an offense unless the prosecution can prove “beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

216. See *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. App.—Dallas July 14, 2009, pet. ref’d), *writ of habeas corpus granted*, No. AP-76969, 2013 WL 458063 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication) (upholding the defendant’s conviction for aggravated harassment of a public official).

general statutes to prosecute HIV transmission can make it difficult to obtain a conviction<sup>217</sup> or can lead to incongruous punishments.<sup>218</sup> Thus, a statute that criminalizes knowing,<sup>219</sup> as well as intentional, transmission of HIV allows prosecutors to use the HIV-transmission-specific statute and seek a more appropriate punishment.<sup>220</sup>

### *B. Statutes Criminalizing the Transmission of Any STD*

Some states criminalize the transmission of all STDs in one statute.<sup>221</sup> While the transmission of any STD, especially done knowingly or intentionally, is reprehensible, not all STDs should be considered the same.<sup>222</sup> Because there is no cure for people who become infected with HIV, they will have to adopt an HIV regimen for the rest of their life.<sup>223</sup> This is not necessarily the case for every STD.<sup>224</sup> Thus, a statute that treats all STD transmissions the same does not seem to be just.<sup>225</sup>

In Alabama, a defendant convicted under the STD-transmission statute is guilty of a Class C misdemeanor.<sup>226</sup> This amounts to a punishment of “not more than three months.”<sup>227</sup> Because of the relatively low punishment, the strong possibility exists that state prosecutors will instead seek a conviction under some other statute in hopes of securing a

---

217. See *supra* note 207 and accompanying text; see also *Brock v. State*, 555 So. 2d 285, 288 (Ala. Crim. App. 1989) (overturning the defendant’s conviction of assault in the first degree).

218. See *Campbell*, 2009 WL 2025344, at \*3 (upholding a twenty-five-year minimum prison sentence enhancement for spitting on an officer).

219. See TEX. PENAL CODE ANN. § 6.03(b) (West 2011) (defining the culpable mental state of “knowing”).

220. See *infra* Appendix (proposing a statute to be adopted).

221. See, e.g., ALA. CODE § 22-11A-21(c) (LexisNexis 2006) (criminalizing the intentional and knowing transmission of any STD and making it a Class C misdemeanor).

222. Compare *HIV Treatment*, *supra* note 62 (giving an overview of HIV treatment), with CTRS. FOR DISEASE CONTROL & PREVENTION, GONORRHEA – CDC FACT SHEET (Mar. 14, 2014), <http://www.cdc.gov/std/gonorrhea/gon-factsheet-july-2014.pdf> (stating that there is a cure to gonorrhea). In Alabama, both HIV and gonorrhea are considered STDs. See ALA. ADMIN. CODE r. 420-4-1, app. I (2014).

223. See *supra* Part II.C (discussing HIV an regimen and treatment of HIV).

224. See GONORRHEA – CDC FACT SHEET, *supra* note 222.

225. See KAPLAN, *supra* note 1, at 33 (citing John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955)) (“[P]unishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing.”).

226. ALA. CODE § 22-11A-21(c) (LexisNexis 2006).

227. See ALA. CODE § 13A-5-7(a)(3) (LexisNexis 2005) (listing sentencing guidelines for misdemeanors).

harsher punishment.<sup>228</sup> When state prosecutors bypass this STD-transmission statute and seek harsher punishments, it essentially renders the statute moot.

#### V. RECOMMENDATIONS FOR TEXAS ADOPTING AN HIV-TRANSMISSION STATUTE

Texas does not have a statute criminalizing the transmission of HIV or any STD.<sup>229</sup> As such, state prosecutors have sought convictions through other statutes that do not really “fit the crime,”<sup>230</sup> leading to seemingly incongruous punishments.<sup>231</sup> Adopting an HIV-transmission statute should provide a clear path for state prosecutors to seek convictions as necessary to protect the public against the intentional and knowing transmission of HIV.<sup>232</sup>

The statute to be adopted should reflect the advancement of science and knowledge about HIV, AIDS, and HIV transmission.<sup>233</sup> For instance, the statute should not criminalize actions, like spitting, where little to no risk of transmission exists.<sup>234</sup> It should allow for affirmative defenses such as using a condom<sup>235</sup> or informing the other individual,<sup>236</sup> and it should exempt such actions from punishment. It should acknowledge certain mitigating circumstances, like strict adherence to ART treatment

---

228. See *Brock v. State*, 555 So. 2d 285, 286 (Ala. Crim. App. 1989) (charging the defendant with one count of attempted murder and two counts of assault in the second degree for a potential transmission of HIV occurrence).

229. See *HIV/AIDS: State HIV Laws*, *supra* note 98 (showing that Texas does not have a specific law criminalizing HIV transmission).

230. See *supra* Part III.B (discussing whether HIV should really be considered a “deadly weapon” or a “dangerous instrument”); see also *McGuire*, *supra* note 5, at 1801–02, 1815.

231. Compare *Ex parte Campbell*, No. AP-76969, 2013 WL 458063, at \*1 (Tex. Crim. App. Feb. 6, 2013) (showing a defendant was sentenced to a thirty-five-year prison sentence for spitting in an officer’s face), with ALA. CODE § 22-11A-21(c) (LexisNexis 2006) (listing a maximum prison sentence of three months for the intentional and knowing transmission of HIV).

232. *McGuire*, *supra* note 5, at 1801–02; *Criminal Transmission of HIV*, *supra* note 5.

233. See *supra* Part II (discussing general background information on HIV, AIDS, and HIV Transmission); see also *HIV-Specific Criminal Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/policies/law/states/exposure.html> (last updated Mar. 18, 2015) (“State legislatures should consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support public health approaches to preventing and treating HIV.”).

234. *HIV Transmission Risk*, *supra* note 110 (showing that the risk of HIV transmission through biting and spitting is “negligible”). Acts where there is only a negligible risk of transmission could be subject to civil, not criminal, liability.

235. See 720 ILL. COMP. STAT. ANN. 5/12-5.01(a)(1) (LexisNexis Supp. 2015) (allowing for the use of a condom to exempt punishment).

236. See 5/12-5.01(d) (making it an affirmative defense if you tell the other person you are HIV positive and that having sex can transmit HIV to the other individual).

or if the act was oral sex.<sup>237</sup> Furthermore, the statute should create different punishments for intentional and knowing transmission of HIV.<sup>238</sup>

Because knowing transmission is a less heinous offense than intentional transmission, defendants should face a less harsh penalty for such actions.<sup>239</sup> Criminalizing the knowing transmission of HIV is sometimes considered by public health organizations to do more harm than good.<sup>240</sup> These organizations argue the effect of such a law is that individuals will not get tested for HIV as a way of shielding themselves from criminal liability.<sup>241</sup> Not getting tested for HIV is a huge problem when the goal is to prevent HIV transmission because people are more likely to transmit HIV when they do not know they are infected.<sup>242</sup> To alleviate these public health concerns, punishment should not be so severe that it deters people from actively being tested for HIV, especially those who are more likely to be infected.<sup>243</sup> Furthermore, prosecutions for knowing transmission should include, as part of the sentencing, counseling and education programs about HIV and HIV transmission.<sup>244</sup> For

---

237. See Lehman, *supra* note 13, at 1000 (discussing how current HIV-transmission statutes do not generally take into account actions that pose a lower risk of transmission).

238. See *infra* Appendix (proposing a statute with different punishments for intentional and knowing transmission of HIV).

239. Compare TEX. PENAL CODE ANN. § 6.03(a) (West 2011) (defining the culpable mental state of “intentional”), with § 6.03(b) (defining the culpable mental state of “knowing”). When one intends a particular result, it is more wrong than one who does an act knowing that there is a “reasonable certainty” for a particular result. See KAPLAN, *supra* note 1, at 33 (arguing that punishments should be proportional to the wrongdoing).

240. See CRIMINALIZATION OF HIV TRANSMISSION, *supra* note 6, at 4–5 (indicating that criminalizing HIV transmission beyond instances of intentional transmission can undermine HIV prevention).

241. See *id.* (discussing that criminalizing the knowing transmission might deter people from being tested for HIV). If you do not know that you are HIV positive, then you cannot knowingly transmit HIV. *Id.* Thus, some people are deterred from getting tested. *Id.*

242. See THE WHITE HOUSE OFFICE OF NAT’L AIDS POLICY, *supra* note 9, at 7 (“An estimated 21 percent of people with HIV in the United States do not know their status.”). If people do not know they are HIV positive, then there is a greater risk of transmission. *Id.*

243. See *id.* at 10–11 (discussing several groups of people who are at “high risk” of being infected); see also *HIV Risk and Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/risk/index.html> (last updated Dec. 7, 2015) (discussing several groups of people who are more likely to become HIV positive).

244. Cf. WHITE HOUSE OFF. OF NAT’L AIDS POL’Y, *supra* note 9, at viii (“We must also move away from thinking that one approach to HIV prevention will work, whether it is condoms, pills, or information. Instead, we need to develop, evaluate, and implement effective prevention strategies and combinations of approaches including efforts such as expanded HIV testing (since people who know their status are less likely to transmit HIV), education and support to encourage people to reduce risky behaviors . . .”).

those who knowingly transmit HIV on several occasions, i.e., recidivists,<sup>245</sup> the punishment can increase to a Class A or B misdemeanor, which, under Texas law, can allow for prison sentences.<sup>246</sup> With these proposed guidelines, a statute criminalizing HIV transmission can both deter people from transmitting HIV and can address public health concerns of reducing HIV transmission.<sup>247</sup>

## VI. CONCLUSION

A modernized statute directly dealing with criminal transmission of HIV can take account of a current understanding of HIV transmission<sup>248</sup> and would do away with extremely severe punishments.<sup>249</sup> Further, the statute should exempt from criminal liability any act that carries no risk or only a “negligible” risk of transmission of HIV,<sup>250</sup> or should at least lessen the punishment for such an act if similar incidents are repeated. These modernized adoptions in a statute can better serve the public health interest and lead to more commensurate punishments.

While public health organizations have concerns with criminalizing HIV transmission,<sup>251</sup> a modernized statute can work in tandem with those organizations to make sure those convicted under the statute receive counseling. Those convicted would then better understand the disease and means by which they might transmit HIV. While general statutes, like assault, might apply to some situations, there are problems with how those statutes can be abused and can lead to incongruous punishments.<sup>252</sup> Furthermore, those statutes can be off point and may not even apply to many situations. As such, Texas, and other states that do

---

245. See Manuel A. Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct*, 44 HOUS. L. REV. 609, 627 (2007).

246. See TEX. PENAL CODE ANN. § 12.21 (West 2011) (outlining the punishment for a Class A misdemeanor as “(1) a fine not to exceed \$4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement”); PENAL § 12.22 (outlining the punishment for a Class B misdemeanor as “(1) a fine not to exceed \$2,000; (2) confinement in jail for a term not to exceed 180 days; or (3) both such fine and confinement”).

247. See *infra* Appendix (proposing a statute to be adopted).

248. *HIV-Specific Criminal Laws*, *supra* note 233.

249. See *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. App.—Dallas July 14, 2009, pet. ref’d), *writ of habeas corpus granted*, No. AP-76969, 2013 WL 458063 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication) (upholding a conviction for aggravated harassment of a public official).

250. *HIV Transmission Risk*, *supra* note 110 (showing that the risk of HIV transmission through biting and spitting is “negligible”).

251. See *Criminal Transmission of HIV*, *supra* note 5 (discussing how criminal laws might deter people from being tested for HIV).

252. See *supra* notes 217–219 and accompanying text.

2016]      *CRIMINAL TRANSMISSION OF HIV LAWS*      1207

not have an HIV-transmission-specific statute should consider adopting such a statute as proposed in the Appendix.

*James Richardson*

APPENDIX: PROPOSED CRIMINAL TRANSMISSION OF HIV  
STATUTE<sup>253</sup>

(a) A person commits criminal transmission of HIV when he or she intentionally or knowingly:

(1) engages in sexual activity with another without the use of a condom, knowing that he or she is infected with HIV;

(2) transfers, donates, or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration to another, knowing that he or she is infected with HIV; or

(3) dispenses, delivers, exchanges, sells, or in any other way transfers to another any non-sterile intravenous or intramuscular drug paraphernalia, knowing that he or she is infected with HIV.

(b) It is an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.

(c) A person who is guilty of intentional criminal transmission of HIV is guilty of a felony in the second degree.<sup>254</sup>

(d) A person who is guilty of knowing criminal transmission<sup>255</sup> of HIV is guilty of a Class C misdemeanor.<sup>256</sup>

---

253. This proposed statute draws largely from 720 ILL. COMP. STAT. ANN. 5/12-5.01 (LexisNexis Supp. 2015) ("Criminal transmission of HIV").

254. See TEX. PENAL CODE ANN. § 12.33 (West 2011) (outlining the punishment for a felony in the second degree as anywhere between two and twenty years in prison and a fine of up to \$10,000).

255. The statute could consider the scientific understanding that certain kinds of behavior, like oral sex without a condom, offer a much lower chance of transmitting HIV and, as such, would be exempted from criminal punishment. See Lehman, *supra* note 13, at 1002 (discussing how current HIV-transmission-specific statutes do not generally take account of low-risk activities as mitigating circumstances). It would also exempt certain actions that only offer a "negligible" risk of transmission or no risk of transmission like spitting. *Id.* at 1003.

256. See PENAL § 12.23 (outlining the punishment for a Class C misdemeanor as a fine not to exceed \$500).