

## Examining Critical Race Theory: Outsider Jurisprudence and HIV/AIDS—a Perspective on Desire and Power

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### PROLOGUE

I am delighted to be part of this symposium celebrating Professor Delgado's fortieth year in teaching law. I've said before that I rarely look for heroes in the academy, primarily because I've found it to be a disappointing search. Something about careerism, or the sadomasochistic march to tenure, or both, makes it a disappointing search. But there are those rare moments when one meets someone whose work one has long admired, and one finds that the person is more generous, kinder, warmer, and more brilliant than one had even imagined. That's the way it was when I met Professor Delgado for the first time. I can say, unequivocally, that he is a hero of mine. I don't think there's a scholar of my generation writing about issues of inequality who is not in debt to Professor Delgado's amazingly prolific career—and I should add that it's absolutely fitting that *Law & Inequality* should host this gathering, since Richard has done as much as any scholar now living to contend with inequality. Not only have I benefited from his work—his writing—but I've also benefited from his mentorship in a more personal sense. Both he and Jean have been unflaggingly generous to me over the years. I am grateful for that and so happy to pay Richard the homage he deserves.

This is a symposium titled "Examining Critical Race Theory: Honoring Richard Delgado." I rely specifically on Professor Delgado's work to make my case that HIV-specific criminal laws are unconstitutional. But I want to set out, beyond the simple observation that Critical Race Theory is Outsider jurisprudence

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with substantial inflections in feminism and gay liberation, the ways in which my chosen topic relates specifically to Critical Race Theory.

We know that HIV is a problem of disproportionate consequence to poor communities and communities of color.<sup>1</sup> We also know that the disproportionately alarming rates at which Black women seem to be getting infected with the virus have been fodder for the White press and the Black press, such as it is, to vilify and stereotype gay African American men as “down low”—as cheating on their wives in disproportionate numbers, and as the carriers of disease.<sup>2</sup> Black intellectuals and pop culture guardians, like Oprah Winfrey and Tyler Perry, have done much to perpetuate these stereotypes—although there is little factual basis for believing they actually exist—in the process of reinforcing inferiority and victimhood for Black women.<sup>3</sup> And, in eerie ways, old, *Birth of a Nation*-style stereotypes of Black men were behind a surge in HIV-specific statutes, motivated by news reports of a now-infamous case of a Black man infecting numerous White women.<sup>4</sup>

Indeed, the foundational myth of AIDS in America, the myth of Patient Zero, largely owes its celebrity to the successful book *And the Band Played On*, in which gay author Randy Shilts purported to identify the man to which all HIV cases in the United States could be traced. Shilts laid the blame—quite erroneously and simple-mindedly, it now appears—on a French-Canadian flight attendant<sup>5</sup>—a convenient piece of propaganda that fed neatly into American xenophobic tendencies. HIV, this great invader, could now be personified as an invader-outsider: something and someone from “across the border.”<sup>6</sup>

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1. Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2009).

2. *Id.*

3. *Id.*

4. See Jennifer Frey, *Jamestown and the Story of ‘Nushawn’s Girls,’* WASH. POST, June 1, 1999, at C1; see also Robinson, *supra* note 1, at 1515–16 (discussing the highly publicized case of Nushawn Williams).

5. Shilts did not invent the Patient Zero myth (the CDC had done that—one of the many things CDC researchers got horribly, sloppily wrong), but his bestselling, gossipy, judgmental book forever cemented “Patient Zero” as a part of the story of AIDS in America. See RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 23 (1987) (identifying French-Canadian flight attendant Gaetan Dugas as responsible for AIDS in the United States).

6. Interestingly, not until 2010 was a U.S. ban on HIV-positive visitors and immigrants allowed to expire. See Devin Dwyer, *U.S. Ban on HIV-Positive Visitors, Immigrants Expires*, ABC NEWS (Jan. 5, 2010), <http://abcnews.go.com/Politics/united-states-ends-22-year-hiv-travel-ban/story?id=9482817>.

Moreover, HIV-specific laws have been leveraged against the very populations for which Critical Race Theory operates: those people whom we understand, through the lens of multiple consciousness, to be Othered and rendered vulnerable because of their outsider status.<sup>7</sup> In this case, namely gay men and African American men who may or may not identify as gay, as well as homeless and prostituted people.<sup>8</sup>

## INTRODUCTION

This Article analyzes the trend in the United States of criminalizing the sexual activity of HIV-positive people. In some jurisdictions, including my home state of North Carolina, an HIV-positive individual is breaking the law any time he has sex without a condom—even when transmission of the virus does not occur; even under circumstances in which transmission is, in fact, impossible or of substantially decreased risk; and even with the informed consent of an HIV-negative partner, or when both partners are already HIV-positive.<sup>9</sup> Some jurisdictions demand disclosure of HIV-positive status regardless of whether a condom is used, although informed consent may be a defense to criminal liability.<sup>10</sup> This Article concludes that HIV/AIDS has replaced “sodomy” as the metonym for gay male existence and that, consequently, the criminalization of sex when a sexual actor is HIV-positive is an effort to revive and perpetuate the legal category of “sodomite,” supposedly obliterated by the Supreme Court’s decision in *Lawrence v. Texas*,<sup>11</sup> in the guise of public

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7. For a discussion of multiple consciousness, see Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297, 299 (1992) (“[M]ultiple consciousness . . . is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed.”).

8. See Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 573 (2011) (stating that, of the 164 HIV-exposure convictions between 1986 and 2001, “[m]ore than 70% of all prosecutions arose from behavior already illegal under general criminal laws, such as nonconsensual sex, assault, or prostitution”) (citing Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J. L. MED. & ETHICS 239, 244–45 (2002)).

9. See *infra* note 12.

10. See, e.g., IDAHO CODE ANN. § 39-608(3)(a) (1988) (“It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity.”).

11. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding that a Texas statute criminalizing sodomy violated the Due Process Clause) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty

health. This Article also mounts an argument that such criminalization is, in fact, unconstitutional after *Lawrence*.

Two incidents principally led me to this topic. First, several years ago now, I was contacted by a young man in his twenties who wanted to discuss appealing his conviction under a North Carolina health regulation that says when one is HIV-positive one must do two things: 1) disclose one's status; 2) never have any kind of sexual contact unless a condom is used.<sup>12</sup> In this case, the young man claimed that he had disclosed his status, but that fact was in dispute. Furthermore, at least some, if not all, of the conduct at issue was oral intercourse, which has definitively been established not to transmit HIV.<sup>13</sup> In any event, the young man was "undetectable"<sup>14</sup>—meaning he was compliant with antiretroviral therapy and thus had no virus in his blood or semen to transmit to a third party. He received a sentence suspended to three years supervised probation. In addition, part of his sentence was that he was forbidden to enter any gay night club. Since he made his living as a disc jockey at gay clubs, he was, in effect, deprived by the court of his livelihood. This particular dimension of the sentence unmasks the degree of homophobia of the judge, who apparently thought that that's what we do in those clubs—you know, we're just fornicating in the darkest corner. The judge also refused to close the courtroom to the media, so the young man was all over the news. His life was ruined. I was stunned.

Secondly, I am interested in this topic because of where my latest book, *The End of Straight Supremacy*, took me.<sup>15</sup> *The End of*

under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

12. The regulation provides in relevant part: “(1) Infected persons shall: (a) refrain from sexual intercourse unless condoms are used . . . [and] (e) notify future sexual intercourse partners of the infection . . . .” 10A N.C. ADMIN. CODE 41A.0202 (2007), available at <http://reports.oah.state.nc.us/ncac/title%2010a%20-%20health%20and%20human%20services/chapter%2041%20-%20epidemiology%20health/subchapter%20a/10a%20ncac%2041a%20.0202.pdf>; see also N.C. GEN. STAT. §§ 130A-144(f) (requiring compliance with “control measures, including submission to examinations and tests, prescribed by the Commission . . .”).

13. Even the CDC, which in my estimation is about the last organization to embrace reliable HIV/AIDS science, has admitted that saliva cannot transmit HIV. See *HIV Basics: HIV Transmission*, CDC (Jan. 16, 2015), <http://www.cdc.gov/hiv/basics/transmission.html>.

14. See *infra* notes 30–37 and accompanying text.

15. SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* (2011). Given the extent to which Richard Delgado has influenced my thinking and my work, I was interested when, during a presentation I was giving on *The End of Straight Supremacy*, at the University of San Francisco School of Law, Professor Ron Wheeler spontaneously exclaimed, “You could call this queer critical theory.” Shannon Gilreath, *Equality and Speech: the Gay Liberationist*

*Straight Supremacy* was really something of an intellectual explosion. It surprised even me. And I ended up talking about topics I hadn't planned to address in a law book. One of the things I discussed in the last chapter, which I entitled "Flaming, but Not Burning," was how AIDS has been leveraged to snuff out gay liberation and to shut down—for example, in the case of bathhouse closure laws—sites for community organizing.<sup>16</sup>

What I've discovered is that there have been hundreds of prosecutions under HIV-specific laws.<sup>17</sup> Forty-five states have HIV-specific laws.<sup>18</sup> In some states, having sex without disclosing one's status, regardless of whether one is therapy compliant and undetectable, and regardless of whether a condom has been used, requires life-time sex-offender registration.<sup>19</sup> Generally, the health status of the defendant—in terms of whether the virus is active or dormant—doesn't matter.<sup>20</sup> Often, it doesn't matter if condoms were actually used, if there is no disclosure.<sup>21</sup> And certainly in statutes where "exposing" someone to HIV is the crime in question, whether there was in fact HIV transmission is

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Perspective, Workshop at the University of San Francisco (Feb. 29, 2012).

16. GILREATH, *supra* note 15, at 286–88. Although my discussion of HIV/AIDS was brief, it drew significant criticism. See Dennis Altman, *Can the Revolution Be Recovered?*, 19 GAY & LESBIAN REV. WORLDWIDE 30 (2012) (reviewing SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* (2011)) ("Gilreath appears to know little about the social history of AIDS and has no interest in what has happened outside the U.S.").

17. It is very difficult to come up with an exact number of prosecutions, since no reliable prosecution data is available nationwide. There have been two jurisdiction-wide surveys, one in Nashville, Tennessee, and the other in Michigan (statewide). Both surveys suggest an increase in prosecutions between 2000 and 2010, and 2008 and 2013, respectively. See Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000–2010*, 17 AIDS & BEHAV. 2624, 2628 (2013); Trevor Hoppe, *From Sickness to Badness: The Criminalization of HIV in Michigan*, 101 SOC. SCI. & MED. 139 (2014).

18. See Rachel Nuwer, *In 45 States, It's Illegal to Keep Your HIV Status Secret*, SMITHSONIAN.COM (June 26, 2012), <http://www.smithsonianmag.com/smart-news/in-45-states-its-illegal-to-keep-your-hiv-status-secret-140737864/?no-ist>.

19. For example, Nick Rhoades, a gay man in Iowa, was undetectable and wore a condom during the sex that ultimately resulted in a twenty-five year prison sentence and registration as a sex-offender. However, the Supreme Court of Iowa granted Rhoades post-conviction relief in June 2014, holding that transmission of HIV was not "reasonably possible under the facts and circumstances of the case . . ." Rhoades v. State, 848 N.W.2d 22, 28 (Iowa 2014).

20. See *id.* at 26–27 ("A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person's . . . virus status is positive, does any of the following . . .") (emphasis added) (citing IOWA CODE § 709C.1 (repealed 2014)).

21. *Id.*

irrelevant.<sup>22</sup> In many cases in which there have been convictions, there was in fact no transmission of the virus. The sentences are often Draconian—probably Eighth Amendment violations. In Iowa, a man was sentenced to twenty-five years for a one-time sexual encounter during which a condom was used and the virus was not transmitted.<sup>23</sup> In Texas, a homeless man was sentenced to ten years for spitting on a police officer.<sup>24</sup> Some states provide judges with the authority to sentence offenders to up to thirty years in prison, but sentences generally are in the range of one to ten years.<sup>25</sup>

Now, if you've never heard of anyone getting HIV from being spit on, you may have been paying the slightest bit of attention and have acquired the bare-minimum of knowledge that is required in order not to be rendered abjectly hysterical. Lawmakers in many states, however, apparently have not been paying even the slightest bit of attention. Medical advances in the treatment of HIV over the last thirty years have been astonishing. Patients who are compliant with antiretroviral therapy—which often consists of as little as one pill per day—may become “undetectable,” a point at which their viral load is either zero copies per milliliter of blood or otherwise so low as to be unmeasurable.<sup>26</sup> Those in this state cannot pass the virus on to their sex partners, because the virus does not remain in the blood or semen.<sup>27</sup>

In my conversations with gay men about this particular medical fact, I was unsurprised to hear that many of them do not know much about how HIV works. One infectious disease specialist provided me with this analogy: HIV works much like

22. Generally, “the prosecution need only prove that the defendant knew that he or she was infected and then engaged in acts that created some risk of transmission, even if transmission did not actually result.” DAVID W. WEBBER, *AIDS AND THE LAW* § 7.03[H], at 7-47 (4th ed. Supp. 2010).

23. *Rhodes*, 848 N.W.2d at 26.

24. Gabriel Monte, *Jefferson Sentenced to 10 Years for Spitting on, Biting Police Officer*, LUBBOCK AVALANCHE-J. (Oct. 24, 2014), <http://lubbockonline.com/filed-online/2014-10-24/jefferson-sentenced-10-years-spitting-biting-police-officer#.VIHeznI0yU>.

25. See, e.g., CAL. HEALTH & SAFETY CODE § 120291(a) (1998) (prescribing three, five, or eight years in prison); GA. CODE ANN. § 16-5-60(c) (2003) (prescribing up to ten years in prison); IDAHO CODE ANN. § 39-608(1) (1988) (prescribing up to fifteen years in prison); IOWA CODE ANN. §§ 709C.1(3) (repealed 2014), 902.9(2) (2014) (prescribing up to twenty-five years in prison). For an example of what I like to call the “Oscar Wilde Statute,” see LA. REV. STAT. ANN. § 14:43.5.E(1) (1987) (prescribing up to ten years of imprisonment “with or without hard labor”).

26. See *infra* notes 30–37 and accompanying text.

27. *Id.*

the chicken pox. Once one is infected with the virus that causes chicken pox, one always has the antibodies present in the blood, but one is not always in an infectious state. Instead, the virus goes dormant. Its reactivation in the elderly many years later can produce shingles. HIV works basically the same way, in a functional sense. Antiretroviral therapy causes the virus to go dormant and to leave the blood. Antibodies, however, remain present. Thus, once one is diagnosed as HIV-positive, one is always positive—which is to say positive for the antibodies to the virus.<sup>28</sup> In the undetectable state, however, one is not infectious.<sup>29</sup> In 2008, a group of leading Swiss HIV experts concluded after intensive study that “HIV-positive individuals on effective antiretroviral therapy and without sexually transmitted infections (STIs) are sexually non-infectious.”<sup>30</sup> The study has prompted significant shifts in at least two jurisdictions. Based upon the research, the Swiss Federal AIDS Commission has concluded that an HIV-positive individual with an undetectable viral load cannot transmit HIV through sexual contact.<sup>31</sup> Additionally, two appellate level decisions in Sweden have recognized, as a matter of law, that HIV-positive individuals who are therapy-compliant and undetectable cannot transmit the virus during unprotected sex, and thus are not bound to disclose their HIV status to sexual

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28. This fact raises the fascinating (and absurd) potential interplay between these kinds of HIV-specific regulations and any vaccine that may emerge in the near future. A vaccine would produce antibodies and thus an antibody test would be “positive.” Would someone who’d been vaccinated for HIV be required to wear a condom during intercourse? A regulation like North Carolina’s would seem to suggest he would.

29. It is important to keep in mind that HIV can begin to replicate again, thus becoming “detectable” once more, if a patient suddenly discontinues antiretroviral therapy. See Ralph A. DeMasi et al., *Correlation Between Self-Reported Adherence to Highly Active Antiretroviral Therapy (HAART) and Virologic Outcome*, 18 *ADVANCES IN THERAPY* 163, 163–73 (2001).

30. See Edwin J. Bernard, *Swiss Experts Say Individuals with Undetectable Viral Load and No STI Cannot Transmit HIV During Sex*, *NAM* (Jan. 30, 2008), <http://www.aidsmap.com/Swiss-experts-say-individuals-with-undetectable-viral-load-and-no-STI-cannot-transmit-HIV-during-sex/page/1429357/> (citing Pietro Vernazza et al., *HIV-Positive Individuals Not Suffering from Any Other STD and Adhering to an Effective Antiretroviral Treatment Do Not Transmit HIV Sexually*, 89 *BULL. DES MÉDECINS SUISSES* 165 (2008), available at [http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement\\_May%202008\\_translation%20EN.pdf](http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement_May%202008_translation%20EN.pdf)); see also Ronald Baker, *Swiss Experts Claim HIV Patients with Undetectable Viral Load Who Adhere to Treatment Cannot Transmit the Virus to HIV Negative Partners*, *HIVANDHEPATITIS.COM* (Feb. 5, 2008), <http://www.hivandhepatitis.com/hiv-aids/hiv-aids-topics/hiv-prevention/3789-swiss-experts-claim-hiv-patients-with-undetectable-viral-load-who-adhere-to-treatment-cannot-transmit-the-virus-to-hiv-negative-partners>.

31. Bernard, *supra* note 30.

partners.<sup>32</sup> Condoms remain important for purposes of avoiding other sexually transmitted infections,<sup>33</sup> but this should not be confused with the seemingly widely-held belief that individuals with undetectable viral loads can continue to transmit the virus.

A recent two-year study of men who have sex with men (“MSM”), where one partner is HIV-positive but undetectable and one partner is HIV-negative, adds further support to the 2008 report by Swedish researchers. Study findings, presented at the 2014 Conferences on Retroviruses and Opportunistic Infections, revealed that none of the HIV-negative partners became HIV-positive as a result of sexual contact with their HIV-positive, undetectable partners.<sup>34</sup> No measures, aside from the HIV-partner being undetectable, were taken to mitigate risk, and the partners had frequent anal intercourse without condoms, and the HIV-negative partners were not taking prophylactic antiretroviral therapy (PrEP).<sup>35</sup> It is important to underscore that more than 16,000 sexual encounters over a period of two years did not result in a single seroconversion in the 282 MSM couples followed.<sup>36</sup> When asked to pinpoint the risk involved in such serodiscordant couples when the HIV-positive partner is undetectable, researcher-presenter Alison Rodger replied: “Our best estimate is it’s zero.”<sup>37</sup>

## I. The Homosexualization of HIV/AIDS

The most apparent motivation for HIV-specific criminal laws—and it should be noted that no other infectious disease, let alone any other sexually transmitted disease, is specifically targeted by the criminal law<sup>38</sup>—is fear of a communicable disease.

32. See *Sweden: Court of Appeals Acquits ‘HIV Exposure’ Case, Recognises National Board of Health and Welfare Endorsement of ‘Swiss Statement’, Minister of Social Affairs Will Consider Reviewing Application of Law*, HIV JUST. NETWORK (Oct. 29, 2013), <http://www.hivjustice.net/news/sweden-court-of-appeal-acquits-hiv-exposure-case-recognises-national-board-of-health-and-welfare-endorsement-of-swiss-statement/>.

33. Bernard, *supra* note 30.

34. See Mark King, *Study: Undetectable Guys Do Not Transmit HIV to Negative Partners*, QUEERTY (Mar. 5, 2014), <http://www.queerty.com/study-undetectable-guys-do-not-transmit-hiv-to-negative-sex-partners-20140305>.

35. *Id.*

36. The study also followed 485 heterosexual couples. No seroconversions took place in any of the heterosexual couples either. See James Wilton, *Insight into HIV Transmission Risk When the Viral Load Is Undetectable and No Condom Is Used*, CATIE (Apr. 10, 2014), <http://www.catie.ca/en/catienews/2014-04-10/insight-hiv-transmission-risk-when-viral-load-undetectable-and-no-condom-used>.

37. King, *supra* note 35.

38. See, e.g., Ellen Rosner Felg, *Can You Sue over Transmission of a Sexual*



The scale of the fear evident is, however, an anachronism bound to the time in which most such laws emerged.<sup>39</sup> When the Reagan administration finally got around to prioritizing combatting the spread of HIV in the United States—after more than 20,000 people had died<sup>40</sup>—President Reagan created the Presidential Commission on the Human Immunodeficiency Virus Epidemic in 1987.<sup>41</sup> HIV transmission statutes are generally traceable to this Commission's report a year later, which urged states to use the criminal law to combat the spread of HIV.<sup>42</sup> In 1990, Congress passed the Ryan White Comprehensive AIDS Resources Emergency Act, which provided federal funds to states for the purposes of dealing with the HIV epidemic through treatment and prevention.<sup>43</sup> The funds were contingent, however, on certification by the recipient states that they would use their criminal codes to combat the spread of HIV.<sup>44</sup> States had to certify that they would either create HIV-specific criminal laws or satisfy Congress that existing state criminal law could effectively be used to prosecute the intentional transmission of HIV.<sup>45</sup> By the time the certification requirement expired in 2000, every state had certified that it had met one of these alternative requirements for federal funding.<sup>46</sup>

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*Disease?*, LEGALZOOM (Dec. 2009), <https://www.legalzoom.com/articles/can-you-sue-over-transmission-of-a-sexual-disease> (discussing examples of criminal and civil prosecution of HIV, yet noting that most other “sexually transmitted diseases fall under tort law”). Certainly, diseases like syphilis can result in criminal sanction, but only when the infected party fails to present as compliant with the antibiotic therapy regimen necessary to render him noninfectious. Here, I am talking about HIV-positive individuals who are already therapy compliant and noninfectious.

39. See Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal Exposure Laws*, 32 J.L. MED. & ETHICS 327, 336 (2004) (noting that “[m]any extant HIV exposure laws were drafted early in the epidemic and reflect beliefs and attitudes that have since been discredited”). Of course, even the proposed remedies for fairer regulations offered by the authors are now, themselves, out of pace with what we know to be the medical realities of HIV transmission.

40. See Jeff Smith, *AIDS and Activism Part II: Reagan, DeVos and the 1980s Crisis*, GRAND RAPIDS INST. FOR INFO. DEMOCRACY (Nov. 27, 2012), <http://griid.org/2012/11/27/aids-and-activism-part-ii-reagan-devos-and-the-1980s-crisis/>.

41. See Exec. Order No. 12,601, 52 Fed. Reg. 24129–30 (June 29, 1987); see also Frontline, *Interview Larry Kramer*, PBS (May 30, 2006), <http://www.pbs.org/wgbh/pages/frontline/aids/interviews/kramer.html>.

42. JAMES D. WATKINS, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130–31 (1988).

43. Pub. L. No. 101-381, 104 Stat. 576, 603 (codified as amended at 42 U.S.C. § 300ff-47 (1990) (repealed 2000)).

44. *Id.*

45. See Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 841 (2004).

46. *Id.*

There has been fierce debate as to whether a criminal law approach has ever, in fact, had any meaningful deterrent effect countering the spread of HIV. There has even been suggestion—not unfounded, in my opinion—that HIV exposure laws actually directly undermine the end to which they are a purported means, which is to say: criminalizing HIV actually increases the risk of spreading it.<sup>47</sup> In any event, the debate over the laws' efficacy dovetails nicely with the primary focus of this Article: the rationality, legally, of such laws. "Rationality," as such—which is to say "rationality" with specific legal meaning, as opposed to simply another way of asking whether a law is "good" in the sense of good policy—is generally associated with constitutional litigation involving due process or equal protection challenges.<sup>48</sup> As I show in this Article, it is incontrovertible medical fact that the conduct targeted by the majority of these laws poses only *de minimis* risk—if, indeed, any risk at all—of transmitting HIV.<sup>49</sup> Yet in every constitutional challenge to such regulations, the regulations have been upheld.

In this Article, I argue that HIV exposure laws are generally unconstitutional. They are irrational, failing to bear any relationship to a legitimate state goal. I accept Richard Delgado's premise that every law which significantly curtails a defendant's freedom through imprisonment should bear the burden of "developmental rationality"—which should be a justiciable and judicially-enforceable value. A law that no longer relates to material reality because of evolved facts—in other words, a law

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47. See, e.g., Scott Schoettes, *Criminalizing HIV Does Not Make Us Safer*, HUFFINGTON POST (June 18, 2012), [http://www.huffingtonpost.com/scott-schoettes/criminalizing-hiv-does-no\\_b\\_1601616.html](http://www.huffingtonpost.com/scott-schoettes/criminalizing-hiv-does-no_b_1601616.html); see also Fan, *supra* note 8, at 572 ("[T]he criminalization of knowing or intentional transmission of an STD provides a perverse incentive not to find out one's disease status and gives those who do not get tested and treated a windfall defense of lack of mens rea. Because most criminal laws require, at a minimum, knowledge of one's disease status, those who avoid testing and treatment lack the minimum mens rea for conviction. The influence of criminal law, if any, on sexual health decisions is a disputed and complex phenomenon. At a minimum, however, criminal law's regimes operate to benefit those who do not get tested, whether to avoid liability or for some other reason, such as fear of finding out about infection with a dangerous and stigmatizing disease.") (internal citations omitted); Nuwer, *supra* note 18; *Anti-Gay Laws Hinder HIV Treatment*, TIMESLIVE (July 9, 2012), <http://www.timeslive.co.za/lifestyle/2012/07/09/anti-gay-laws-hinder-hiv-treatment>.

48. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring). Regardless of whether the most deferential level of rational basis review—what some scholars call "low-level rational basis"—is employed, or some form of heightened scrutiny, the requirement that a law be "rational" conclusively controls.

49. See *supra* notes 29–35 and accompanying text.

which is proven through the existence of second-order evidence to have been enacted on the basis of faulty legislative fact finding at the time of its implementation (or, indeed, by no fact finding at all), or a law that is rendered irrational by virtue of evolving facts—for example, by the evolution of science and medical treatment—should not be given deference by the courts.<sup>50</sup> Second, and relatedly, the specific explication of rationality review in the U.S. Supreme Court's decision in *Lawrence v. Texas*, which involved an irrational law impinging on the liberty of sexual expression,<sup>51</sup> requires that factually-faulty HIV-specific laws be struck down as unconstitutional. Part IV, below, makes this argument in detail.

Of course, the other probable motivator is disgust, revulsion, whatever you want to call it. Martha Nussbaum, in a marvelous little book, calls it “the politics of disgust.”<sup>52</sup> Certainly, if you look at the literature about gay people and homosexuality generally, you see that these disgust campaigns are very evident. One can examine the work of Anthony Comstock<sup>53</sup> or, more recently, Paul Cameron, for examples.<sup>54</sup> You certainly see it in the literature about HIV as the so-called “gay disease.”<sup>55</sup> This is so even inside of the gay community itself. If you look at online dating services for gay men, for example, you will frequently see ads in search of “clean” men, which everyone understands is a metaphor for HIV-negative men. The inference is to dirt and dirtiness on the part of HIV-positive men.

In this world of disgust and revulsion, people with HIV are transformed into things—creatures, monsters, carriers of a vile disease. They are taken to be a threat to others simply because they have this virus. The people themselves are transformed into a contagion. Of course, gay people ourselves have long been personified in this way—this was the impetus for sodomy laws, at

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50. See Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature after Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 171 (2008).

51. *Lawrence*, 539 U.S. at 558.

52. MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 2* (1st ed. 2010).

53. See *id.* at 2–8.

54. See SHANNON GILREATH, *SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY* 13 (2007).

55. This identification is traceable to the Centers for Disease Control, which first identified AIDS as “Gay Related Immune Syndrome” or “GRID.” See Caroline Palmer & Lynn Mickelson, *Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 457 (2001).

least in part. The belief that feelings of disgust for those branded “other” are sufficient motivation to punish—and to punish harshly—has been the foundation of the West, and most of the rest of the world for that matter. Certainly, it has been the guiding principle of the Judeo-Christian system, is the guiding principle of Islam, motivating legislation in Nigeria and Uganda prescribing the death penalty for gays who are also HIV-positive (HIV-negative gays are merely eligible for life imprisonment, in such places). At least in Uganda, certain U.S. evangelists have been the supposedly “expert” witnesses for the Ugandan parliament about the efficacy of this approach,<sup>56</sup> which has caused President Obama problems with gay rights groups who, from my perspective, understandably have been ticked off that he continued to attend the National Day of Prayer breakfast organized by these same killers.<sup>57</sup>

Disgust has been the guiding principle behind the civil prohibition of so-called sodomy in the modern age,<sup>58</sup> with famous and respected advocates—Devlin in the United Kingdom;<sup>59</sup> Justices Byron White and Warren Burger,<sup>60</sup> Ronald Reagan<sup>61</sup> and the two Bushes, and Mike Huckabee<sup>62</sup> and Ron Paul in the United States. Law makers, who are nearly invariably politicians, love a good disgust campaign. In Nussbaum’s book, in which she debates, among other things, laws prohibiting sex in public places, she calls the approach most lawmakers and judges take to sex a

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56. Jeffrey Gettleman, *Americans’ Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES (Jan. 3, 2010) at A1, available at <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html>.

57. Cavan Sieczkowski, *President Obama Prayer Breakfast Offends Gays Due to Conservative Backer’s Ties*, HUFFINGTON POST (Dec. 8, 2014), [http://www.huffingtonpost.com/2013/02/07/obama-prayer-breakfast-gays\\_n\\_2639593.html](http://www.huffingtonpost.com/2013/02/07/obama-prayer-breakfast-gays_n_2639593.html).

58. NUSSBAUM, *supra* note 52, at 2.

59. See Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 986–88 (1966).

60. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (citing the “ancient roots” of prohibitions on homosexual conduct); *id.* at 196–97 (Burger, J., concurring) (discussing the Judeo-Christian moral condemnation of homosexual conduct).

61. *Biography: Ronald Reagan*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/biography/reagan-ronald/> (last visited Feb. 23, 2015) (stating that Reagan “viewed homosexuality as an ‘abomination’ on religious grounds,” but “was reluctant to make pronouncements against individuals”).

62. Nick Wang, *Mike Huckabee ‘Ick Factor’ Comments Slammed by Gay Rights Groups*, HUFFINGTON POST (June 22, 2010, 3:47 PM), [http://www.huffingtonpost.com/2010/06/22/mike-huckabee-ick-factor\\_n\\_621284.html](http://www.huffingtonpost.com/2010/06/22/mike-huckabee-ick-factor_n_621284.html) (reporting that Mike Huckabee’s opposition to marriage equality is rooted in his belief that gay sex is icky); see also Igor Volsky, *Huckabee Clarifies that He Opposes Gay Rights Because He’s Disgusted by Gay Sex*, THINKPROGRESS (June 23, 2010, 3:47 PM), <http://thinkprogress.org/politics/2010/06/23/104142/huckabee-gay-sex/> (same).

“politics of disgust.”<sup>63</sup> I am indebted to Nussbaum especially for pointing out the work of Tim Dean on condomless sex where HIV infection *is intended*,<sup>64</sup> which has been extremely useful to me in *The End of Straight Supremacy* and in this project. But with all due respect to Professor Nussbaum, I think she isn’t quite right on this—she’s missed the mark a bit, or at least she’s understated what’s going on. You see, it isn’t really revulsion toward sex per se that fuels any “politics of disgust” as much as a visceral revulsion to gay sex and that which is paradigmatically gay. When it comes to these HIV statutes, in particular, it’s a perfect storm: gays, sex, HIV, all rolled into one—a gift on a platter for homophobic prosecutors. Never mind that in the U.S., as well as the rest of the world, AIDS is a heterosexual problem.<sup>65</sup> Outside of the West, AIDS is a thoroughly heterosexual problem.<sup>66</sup>

Given this reality of the homosexualized nature of HIV in both popular imagination and law, part of the work of this Paper is simply to problematize the legal response to HIV transmission (or, actually, to non-transmission) by comparing it to activity that is equally dangerous but unregulated or weakly regulated; activity that is sometimes, in fact, celebrated because it is paradigmatically heterosexual. For example, more people die of pneumonia in the U.S. each year than from AIDS,<sup>67</sup> but we don’t criminalize going into public with pneumonia or a cold. We can kiss an elderly person—the population at greatest risk—right on the mouth, if we feel like it. Tuberculosis is often prosecuted, but only as a misdemeanor health code violation—in most places the worst that will happen to you is that you can be locked up until treatment makes the virus dormant.<sup>68</sup> With the HIV cases that

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63. *Id.*

64. See *infra* note 97 and accompanying text.

65. See *HIV and AIDS in America: A Snapshot*, CDC (Nov. 2014), <http://www.cdc.gov/nchhstp/newsroom/docs/HIV-and-AIDS-in-America-A-Snapshot-508.pdf> (showing that heterosexuals compose approximately a quarter of all HIV and AIDS contraction).

66. See David Gisselquist & John Potterat, *Heterosexual Transmission of HIV in Africa: An Empiric Estimate*, 14 INT’L J. OF STD & AIDS 162, 162 (2003) (attributing approximately 90% of HIV cases in Africa to heterosexual transmission).

67. Compare *FastStats, Pneumonia*, CDC (Feb. 6, 2015), <http://www.cdc.gov/nchs/fastats/pneumonia.htm> (noting that 53,282 people died of pneumonia in 2013), with *HIV in the United States: At a Glance*, CDC (Nov. 25, 2014), <http://www.cdc.gov/hiv/statistics/basics/ata glance.html> (noting that 13,834 people with an AIDS diagnosis died in 2013, and that the cause of those deaths can be AIDS-related or not).

68. See *Menu of Suggested Provisions for State Tuberculosis Prevention and Control Laws*, CDC (Sept. 1, 2012), <http://www.cdc.gov/tb/programs/Laws/menu/>

are the focus of this Paper, the defendants are already treatment-compliant with dormant viruses/undetectable viral loads.

## II. Social Construction Theory and Irrational Responses to HIV/AIDS

In order to really shake things up—in order to really expose the heteronormativity of this whole thing, which is important—let's think about the transmission of the *condition* of AIDS: AIDS is not a disease; it is a physical condition, the point at which the t-cell count drops below 200, a point at which the body can no longer repel so-called “opportunistic infections.”<sup>69</sup> Let's compare the transmission of AIDS, the condition, with another *condition* transmitted in a virtually identical way: that condition is pregnancy. Transmitted in the same way, pregnancy, particularly when the pregnancy is unwanted, can have profound health effects.<sup>70</sup> It can certainly alter life, especially for women, in profound ways, and it can certainly be medically disadvantageous.<sup>71</sup> Women do die from complications resulting from child birth.<sup>72</sup> The number of women who die in the United States from such complications every year is significantly greater than the total number of people who die from HIV/AIDS each year in the United States: the maternal mortality ratio roughly doubled between 1987, when there were 6.6 deaths per 100,000 births, and 2006, when there were 13.3 deaths per 100,000 births.<sup>73</sup> As shocking as these statistics are, Amnesty International has noted that the maternal mortality rate in the U.S. may be significantly greater than these numbers indicate, since there are no federal requirements to report these outcomes and since data collection at the state and local levels needs to be improved.<sup>74</sup> When these numbers are contrasted to the HIV/AIDS mortality ratio, which is at 3.1 deaths per 100,000 cases, pregnancy is shown to have a significantly greater public health

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caseid.htm.

69. See *What Is HIV/AIDS?*, AIDS.GOV (last revised Apr. 29, 2014), <http://aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/>.

70. The Supreme Court admitted as much in *Planned Parenthood v. Casey*, 505 U.S. 833, 838 (1992).

71. See AMNESTY INT'L, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA 1 (2010).

72. See *id.*

73. *Id.*

74. *Id.* at 4.

impact than HIV.<sup>75</sup> Worldwide, of course, the numbers are far worse—staggering, in fact.<sup>76</sup>

Unlike HIV though, the legal response to pregnancy has been to incentivize it—and this is to say nothing, of course, of the social cult around it. It is romanticized, left largely unregulated, except of course for cases of rape, which the law rarely recognizes unless a woman is left beaten and bloody. Self-help measures of avoiding pregnancy, however, *are* heavily regulated.<sup>77</sup> Despite the fact that Mitt Romney didn't know this,<sup>78</sup> some states did ban the sale of contraceptives as late as 1965.<sup>79</sup> Other measures of avoiding pregnancy are still substantially regulated if not made impossible, including the “morning after” pill and abortion itself.<sup>80</sup> One federal circuit has even upheld the criminalization of the sale of sex toys and self-pleasure devices,<sup>81</sup> which may be the ultimate and safest barriers to pregnancy.

These are facts. Yet, whenever I have employed this analogy of HIV to pregnancy, the usual reaction is one of abject disgust.

75. In fact, death is only the severest consequence of pregnancy for women. According to Amnesty International, “[s]evere complications that result in a woman nearly dying, known as a ‘near miss,’ increased by 25 per cent between 1998 and 2005.” *Id.* at 1. And “[m]ore than a third of all women who give birth in the USA – 1.7 million women each year – experience some type of complication that has an adverse effect on their health.” *Id.* (internal citations omitted).

76. See *Maternal Mortality: Fact Sheet No. 348*, WHO (last updated May 2014), <http://www.who.int/mediacentre/factsheets/fs348/en/> (“The maternal mortality ratio in developing countries in 2013 is 230 per 100 000 live births versus 16 per 100 000 live births in developed countries. There are large disparities between countries, with few countries having extremely high maternal mortality ratios around 1000 per 100 000 live births.”).

77. *Emergency Contraception State Laws*, NCSL (last updated Aug. 2012), <http://www.ncsl.org/research/health/emergency-contraception-state-laws.aspx> (showing twenty-one states with statutes regulating emergency contraception access).

78. In response to a question by moderator George Stephanopolos about whether states should be able to make contraceptives illegal, Romney responded that the question was silly and wondered aloud whether any state would ever want to do such a thing. See Felicia Somnez, *2012 ABC/Yahoo!/WMUR New Hampshire GOP Primary Debate (Transcript)*, WASH. POST (Jan. 7, 2012), [http://www.washingtonpost.com/blogs/post-politics/post/2012-abcyahoowmur-new-hampshire-gop-primary-debate-transcript/2012/01/07/gIAk2AAiP\\_blog.html](http://www.washingtonpost.com/blogs/post-politics/post/2012-abcyahoowmur-new-hampshire-gop-primary-debate-transcript/2012/01/07/gIAk2AAiP_blog.html).

79. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (overturning state ban on contraception as unconstitutional).

80. See *Emergency Contraception State Laws*, *supra* note 77 (discussing Plan B, an emergency contraceptive that can prevent pregnancy when taken within seventy-two hours after sex).

81. See *Williams v. Alabama*, 378 F.3d 1232, 1250 (2004) (finding no precedent for sale of sex toys as a right, reversing district court's decision and reinstating ban of sex toys as constitutional).

How could I say such a dastardly thing?! (If you can get a room full of law professors agitated about anything to the point that one or more of them actually walks out on you, you know you're onto something.) More measured replies generally insist that procreation is a "good," (clearly, in the *a priori* sense) not a public health problem. We need procreation to continue to replenish society and to continue the human race, so the argument goes. I have yet to have any one of my detractors, without my prompting, examine why we should care about such a thing as perpetuation of the species. One could as well say *après moi, le déluge*. And, in any event, responding to unwanted pregnancies with the blunt force of the criminal law—admitting that such pregnancies *are* a public health problem—would hardly have the effect of stopping all procreative intercourse. The fevered reaction evoked by simply pointing out the obvious similarities in pregnancy and HIV transmission is not a rational one. Why?

Richard Delgado explains why in *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*,<sup>82</sup> in which he employs social construction theory to examine the myth of Black crime. Now, Delgado is not suggesting, of course, that Blacks do not commit crimes; rather, he is explaining why crimes committed by Blacks are so much the subject of disproportionate focus and punishment, while crimes primarily thought of as White crimes—for example, crimes of large-scale financial fraud—are punished to a lesser degree, if at all.<sup>83</sup> It's also the case that some crimes become associated with an underclass of people, when, in fact, many more instances of the type of crime are perpetrated by members outside of the paradigm class.<sup>84</sup> A recent example is revealed in Michelle Alexander's work, *The New Jim Crow*, in which she demonstrates that, while Whites actually sell and use illicit drugs at much greater rates than Blacks, drug crimes have been propagandized into Black crimes—and crimes seriously endangering society as a whole (read: White society)—so that punishments under mandatory sentencing guidelines are extreme.<sup>85</sup> In such cases, the myths generated do not match the reality. As Delgado's fictional Rodrigo puts it, "[S]ome people wake up at night, and the burglar is white."<sup>86</sup>

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82. Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

83. See *id.*

84. *Id.* at 507–14.

85. See MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

86. See Delgado, *supra* note 82, at 512.



At some point, certain categories of crimes actually become proxies for the groups with which they are most closely—even if erroneously—associated.<sup>87</sup> For example, violent crimes against the person like muggings and robberies, and drug crimes—which are overwhelmingly propagandized to be violent even if not—become “Black.”<sup>88</sup> Meanwhile, other crimes like white collar financial crimes, which may have even greater impacts, are “White” and get elided or dismissed as harmful only in the abstract.<sup>89</sup> Even when these stereotypes aren’t consciously designed, as Delgado notes, they can serve to entrench hierarchy.<sup>90</sup>

It seems to me that social construction theory also explains the disconnect in the way pregnancy is discussed and socially incentivized on the one hand and the way HIV is discussed and criminalized on the other. It isn’t so different from the way homosexuality and heterosexuality have been historically engaged differently in the social imagination. Power creates the perspective. If you don’t have the power even to articulate a perspective, let alone have yours come out on top, then you are “unnatural,” “degenerate,” “depraved,” “dangerous.” What is natural and desirable is simply a reflection of how the socially dominant see themselves.<sup>91</sup> So something like pregnancy is seen as inevitable, and therefore just. Unwanted pregnancy is also, oddly, just. The response is not to criminalize the man—seeing a perfect binary of perpetrator and victim, as is the case with HIV—but rather to see the woman as somehow also culpable, or to see an unwanted pregnancy as merely an inconvenience, certainly surmountable. By contrast, I see the difference in treatment as

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87. *Id.* at 511–14.

88. *See id.* at 518.

89. *See id.* at 518–19.

90. *Id.* at 514.

91. Dorothy Parker once quipped that heterosexuality isn’t so much natural as it is “common.” It may be more sinister than that. Medical science and technological advances today mean that in a very real sense heterosexual sex is no longer necessary for the perpetuation of the species. Human existence no longer depends on the sort of violation and domination that is the paradigm of heterosexual intercourse. And, yet, phallic identity in men and the corresponding masochistic identity in women persist largely because domination of women is in its own right a source of sexual fulfillment for men. Women, for their part, are schooled in masochism and taught that their value is drawn from their sexual availability and desirability to a man. The cult of motherhood is then the convenient mysticism that is said to transform men and women in this cycle into equals. What pregnancy and motherhood actually accomplish is to turn women into collaborators.

imposed injustice based on contingency—not to mention as a perfect indictment of a “similarly situated” theory of equality.<sup>92</sup>

It is also clear to me that the caste-based dispossession of men who love men has been traditionally intertwined with the cult of pregnancy. This is what gay men who fuck gay men cannot do: impregnate. No less than the great patriarchal poet laureate himself, Norman Mailer, summed up homosexuality thusly, “[f]or whatever else is in the act . . . whole delights of desire, the result can be no more than a transaction . . . when no hint remains of the awe that a life in these circumstances can be conceived.”<sup>93</sup> This is the stuff of which sodomy laws were made. Sex that is paradigmatically procreative is sanctified. Sex that is not paradigmatically procreative is “unnatural,” “abominable,” “detestable.” In other words, do not fuck men as if they were women. As Eldridge Cleaver might have said, echoing a terminology of the barebacking subculture:<sup>94</sup> Do not “seed” men.<sup>95</sup> Women are meant to “contract” something in the sexual exchange; men are not.

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92. For expanded analysis see GILREATH, *supra* note 15, at 10–14.

93. ANDREA DWORKIN, *INTERCOURSE* 194–95 (20th anniversary ed. 2006).

94. Many writers have referred to “barebacking” as a sexual practice of men who have sex with men when there is a risk of HIV transmission. See, e.g., Alex Carballo-Dieguez et al., *Sexual Pleasure and Intimacy Among Men Who Engage in “Bareback Sex,”* AIDS BEHAV. S57, S57 (Mar. 5, 2011) (“‘Barebacking’ is the practice of intentional condomless anal intercourse . . . in which there is risk of HIV transmission.”); Timothy Frasca et al., *Inner Contradictions Among Men Who Bareback*, 22 QUALITATIVE HEALTH RES. 946, 946 (2012) (“The popularization of the term *barebacking*, defined as intentional condomless anal intercourse when risk of HIV transmission is present . . .”) (emphasis in original). To the extent that this is happening, it is aptly described as subculture. Still, my personal experience in the gay community suggests that the terminology of “barebacking” is not reserved for sex in which HIV transmission is considered a “risk,” nor especially in a context in which infection is actively sought. “Bareback” is more often employed as euphemism simply for condomless anal intercourse, even by gay men who are knowledgeable about the absent or reduced risk of HIV transmission in any given sexual encounter. In other words, barebacking and “bug chasing” are generally not synonymous in the popular lexicon of gay men as gay men ourselves deploy it.

95. In Cleaver’s famous book of essays, *Soul on Ice*, he was intensely critical of James Baldwin, in particular, and of all gay Black men, generally, writing:

The case of James Baldwin aside for a moment, it seems that many Negro homosexuals, acquiescing in this racial death-wish, are outraged and frustrated because in their sickness they are unable to have a baby by a [W]hite man. The cross they have to bear is that, already bending over and touching their toes for the [W]hite man, the fruit of their miscegenation is not the little half-[W]hite offspring of their dreams but an increase in the unwinding of their nerves—though they redouble their efforts and intake of the [W]hite man’s sperm.

See ELDRIDGE CLEAVER, *SOUL ON ICE* 102 (1968).

The pregnancy analogy raises, sharply, two points relevant to the constitutional analysis of HIV-specific criminal laws. First, prohibition of condomless sex likely could not be enforced when the parties are married—an institution that is paradigmatically heterosexual, but increasingly open to homosexuals.<sup>96</sup> The second and related point is more obscure but still extremely relevant: that being the existence of the “subculture” of “barebacking.” There is a growing literature around the subculture of “barebacking”—a euphemism for condomless intercourse. This is where Tim Dean’s work, which I mentioned in the beginning, comes in. Dean, himself gay, wrote a book called *Unlimited Intimacy*, in which he became a participant in the “bug chaser” culture in which HIV-negative men willingly have sex with HIV-positive men for the purpose of contracting HIV.<sup>97</sup> There’s a lot to link this to the all-important heterosexual function of bearing children, including the linguistic register by which it is identified by participants, where ejaculating in the rectum of a man is called “breeding” him.<sup>98</sup> This and other metaphors directly evoke the hetero practice of baby-making.

Now, I’m not suggesting that any of this is neat or tidy or exactly polite dinner conversation. I am, however, suggesting that if the Court wants to wax poetic about gay sex reflecting “bond[s] that [are] more enduring,” as Justice Kennedy put it in *Lawrence v. Texas*,<sup>99</sup> then this qualifies—whether any one of us might find it disgusting or not. Who are we to say it shouldn’t count, especially when it’s consensual and informed—the very limits across which the *Lawrence* majority said the liberty it recognized would not be operative.<sup>100</sup> Importantly, in terms of the codification of disgust,

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96. See *Same-Sex Marriage in the United States*, CNN (last updated Feb. 9, 2015, 12:19 PM), <http://www.cnn.com/interactive/us/map-same-sex-marriage/> (showing over thirty states and DC that currently allow same-sex marriage).

97. See TIM DEAN, *UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING* (2009).

98. On “breeding” and its associated themes in gay men’s lives, see Byron Lee, *It’s a Question of Breeding: Visualizing Queer Masculinity in Bareback Pornography*, 17 *SEXUALITIES* 100 (2014).

99. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

100. *Lawrence* is, in fact, quite a limited victory. After *Lawrence*, society still says authoritatively what sex will look like, when it will be legal, when and under what conditions it may be the basis for social and legal advantage (or disadvantage). People may fuck this way, but not that way. We call this the state’s police power. Gay people particularly have been controlled in this way. Anything controlled in this way cannot be private in the conventional sense. In this sense, the *Lawrence* majority’s insistence on grounding a sexual liberty interest in privacy is exceedingly silly. Essentially, privacy in U.S. law has meant to refer to a space wherein regulation cannot intrude. This is what the Supreme Court recognized in

the Supreme Court has moved from the Devlin approach in matters of sex to a far more Millian approach—Mill, of course, believed that only the imminent prospect of harm to others justified curtailment of liberty—a possibility he very much aligned with unwilling participation.<sup>101</sup> One might think of public nuisance law as the paradigm. Unlike the trajectory of the judicial treatment of sodomy per se, however, courts have flatly refused to apply a Millian theory to HIV-specific criminal laws and have instead upheld them against constitutional challenges.<sup>102</sup> The stigma of having HIV persists—socially and legally. Why?

### III. Stigma and Sodomy Norms

I think a principal explanation lies in the mythology of AIDS. As Susan Sontag recognized in her short but brilliant polemic on the subject, AIDS lends itself to metaphORIZING.<sup>103</sup> Simply calling HIV or AIDS a “disease” is itself metaphORIZING, because AIDS is not a “disease”; it is a condition in which the immune system is suppressed, leaving the body vulnerable to diseases.<sup>104</sup> HIV is, of course, neither of these things, condition or illness, but rather a virus; and people can live with it and experience no negative physical consequences.<sup>105</sup> But because we think HIV/AIDS has a simple cause and because we equate it with physical decay, it lives in the popular imagination as a “disease.” MetaphORIZING AIDS as a contamination (saying, for example, that it is acquired through exposure to so-called contaminated blood products) reinforces the

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*Lawrence v. Texas*, explicitly naming for the first time sex that is paradigmatically “gay” as part of the private. *Id.* at 578. I think there is considerable reason to believe that sex can actually never be private in the ordinary sense, because “society and its police (including priests in religious states) have had too much to do with establishing the terms of the act itself: not just what people do and do not do; but also what people know, how consciousness and self-consciousness are formed, how acts are valued and devalued, how both the license to do and the stigma against doing are then expressed in actual sexual behavior, dread, and longing.” See DWORKIN, *supra* note 93, at 185–86. Understanding sex in this way, which is to say realistically, is to understand the “privacy” courts have afforded it as little more than a fiction. Still, the privacy/liberty decision of the Supreme Court provided gays more protection than we had had.

101. NUSSBAUM, *supra* note 52.

102. No argument that such laws are unconstitutional has followed the approach outlined in this Article.

103. See SUSAN SONTAG, AIDS AND ITS METAPHORS 104 (1989).

104. See *What Is HIV/AIDS?*, *supra* note 69 (“AIDS is a syndrome, rather than a single disease[.]”).

105. *Id.* (“Being diagnosed with HIV does NOT mean a person will also be diagnosed with AIDS.”)

historically-popular vision of gays ourselves as dirty, contaminating influences.

And, of course, the military metaphor is invoked to describe HIV as an invader,<sup>106</sup> an agent of evil. Perhaps because HIV is most frequently transmitted via sexual contact, the mythology surrounding it tracks, in a curious way, understandings we have about sex more generally. For example, sex in the heterosexual paradigm has traditionally been conceptualized as an act of taking. “He *took* her.” “He *had* her.” As Andrea Dworkin put it, “[t]he normal fuck by a normal man is taken to be an act of invasion and ownership undertaken in a mode of predation: colonializing, forceful (manly) or nearly violent; the sexual act that by its nature makes her his.”<sup>107</sup> Similarly, HIV/AIDS in popular mythology is invasive, rapacious, colonizing; and people who are HIV-positive are dangerous predators.

These two observations about what I’m calling the mythology of AIDS inform my reply to an immensely useful, clarifying question that I received from Professor Russell Robinson. In an email, Professor Robinson shared the following observations about my theory sketched in this Article.

Two immediate complications come to mind re: your argument about HIV being the new sodomy. My understanding is that many, if not most, HIV transmission cases involve heterosexual sex. (I wrote about this topic in *Racing the Closet*.) I have yet to see a comprehensive breakdown of cases by sexual orientation, but the few studies/policy reports that review cases mention mostly heterosexual defendants. The other concern—although I suspect it can be overcome—is that apparently many gay men support HIV transmission laws, perhaps because they fear that they are the primary victims. One survey found that about 60% of gay men favored such laws.<sup>108</sup>

As to Robinson’s point about heterosexual defendants, it does appear that they outnumber (nominally, at least) gay defendants in HIV-specific criminal prosecutions. Of course, statistically, there are more heteros than gays to start. In any event, I don’t see this as problematic, especially in light of my perspective on the ways castes are created and perpetuated. First of all, these transmission laws are not new; they date from the early years of the epidemic, when HIV/AIDS was very much a “gay disease.”<sup>109</sup>

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106. See SHILTS, *supra* note 5, at 23.

107. See DWORKIN, *supra* note 93, at 79–80.

108. E-mail from Russell Robinson, Distinguished Haas Chair in LGBT Equity Professor of Law, to author (Jan. 2, 2012) (on file with author).

109. See Cathy Olufs, *The AIDS Time Line*, THE BODY (last visited Feb. 22,

Also, I think that HIV-positive straights in such situations are, in a very real way, being punished because, by virtue of their HIV status, they are associated with gays and the “gay disease.” They are caught in the net of stigma surrounding HIV, socially and legally. Having HIV makes them “bad” straights and, thus, the stigma ordinarily accorded gays attaches.

Of course, prosecution patterns are not so very different from sodomy laws themselves, in which many, if not most, reported cases involve heterosexuals. Certainly, in my home state of North Carolina, heterosexual prosecutions for sodomy account for a majority of such prosecutions.<sup>110</sup> Nevertheless, what the law means for gay identity is clear. The sex that was paradigmatically gay was targeted and marked for especial legal disapprobation. Straights had the paradigm of vaginal intercourse as the ultimate safe-haven; gays had those types of sexual expression most commonly associated with homosexuality—those types of sexual expression which serve as the metonym for the class—foreclosed to them by the criminal law. The social and legal response to the perceived threat of HIV is eerily reminiscent of the social and legal response to the perceived threat of race-mixing. Laws targeting HIV and, particularly, the stigma motivating them, operate a lot like the one drop laws of the Jim Crow era. When a straight person gets HIV, he is effectively homosexualized—in the way that mixed folks were racialized as Black in the Jim Crow system. The HIV-positive person is, at the point his status is known, categorically Other. At this point, and perhaps uniquely, straight and gay identities are bound up together.

It is, moreover, not surprising to me that gays support HIV-specific criminal laws. In the epilogue to *The End of Straight Supremacy*, I write about the ways in which HIV/AIDS has been leveraged (mostly by liberals!) to push a domestication agenda and to divide the “good” gays from the “bad” gays.<sup>111</sup> It has been exceedingly effective, and many gays have internalized this sado-

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2015), <http://www.thebody.com/content/art390.html> (stating that in 1986, twenty states had introduced and passed bills to criminalize the transmission of HIV); see also Palmer & Mickelson, *supra* note 55, at 457.

110. See *North Carolina Still Enforcing Sodomy Law*, THE ADVOCATE (Aug. 27, 2003), [http://www.glapn.org/sodomylaws/usa/north\\_carolina/ncnews22.htm](http://www.glapn.org/sodomylaws/usa/north_carolina/ncnews22.htm) (“Law enforcement officials say they are continuing to use the law because it is the only way they can make arrests for prostitution that involves oral sex, which isn’t covered under the state’s prostitution law.”). Prostitution arrests and prosecutions in North Carolina overwhelmingly involve heterosexuals. See N.C. DEP’T OF JUSTICE, CRIME IN NORTH CAROLINA - 2012 (2013), <http://www.ncdoj.gov/getdoc/9d422e2e-5ee4-4b6a-a175-90b948e857a0/2012-Annual-Summary.aspx>.

111. See GILREATH, *supra* note 15, at 286–88.

sublimation.<sup>112</sup> In any event, it is hypocritical. A recent survey of gay men by the Centers for Disease Control showed a number nearly equal to the statistic Professor Robinson cited for gay men supportive of HIV regulation answering that their most recent anal sex had been condomless.<sup>113</sup> Perhaps believing in the mythical deterrence of criminal regulation is simply another excuse not to analyze one's own behavior.

Surely, though, hypocrisy is an incomplete explanation for the gay community's hostility to its own members living with HIV. There is no particular reason to assume that gay people are exempt from the mythology of AIDS. How could they be? After all, the gay community suffered most from the epidemic. And the social and legal response to the epidemic has created a stigma that has, while utterly irrational, been successfully self-reinforcing. For example, since 1983, the U.S. Food and Drug Administration has imposed a lifetime ban on blood donation by men who have sex with men.<sup>114</sup> The ban suggests that a substantial HIV transmission risk is inherent in any single instance of sex between two men.<sup>115</sup> The ban ignores medically-established facts about HIV transmission risk, including but certainly not limited to whether condoms are used or whether the sex at issue posed no risk (i.e., oral sex) and even whether the man has recently tested negative for HIV.<sup>116</sup> By contrast, heterosexuals are asked only whether they are in prostitution or use IV drugs or whether they have had sexual partners who engaged in these activities in the last year. Thus, a woman who regularly engages in unprotected anal sex with multiple male partners may give blood freely, as long as she is not a sex worker or IV drug user and does not know any of her partners to be.<sup>117</sup> MSM, however, may not give blood even if

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112. *Id.* at x, n.†. (defining sado-sublimation to mean “the diversion by the Heteroarchy of Gay creative energy into assimilationist activities of all kinds”).

113. See CTRS. FOR DISEASE CONTROL, HIV RISK, PREVENTION, AND TESTING BEHAVIORS AMONG MEN WHO HAVE SEX WITH MEN—NATIONAL HIV BEHAVIORAL SURVEILLANCE SYSTEM, 21 U.S. CITIES, UNITED STATES, 2008, 60(14) MORBIDITY AND MORTALITY WEEKLY REPORT 2 (Oct. 28, 2011) (stating that of 8,175 men surveyed 54% reported having had unprotected anal sex with a recent sex partner, 37% reported having unprotected anal sex with a main male partner, and 25% reported having unprotected anal sex with a casual male partner).

114. See *Blood Donations from Men Who Have Sex with Other Men Questions and Answers*, FDA, <http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/QuestionsaboutBlood/ucm108186.htm> (last updated Dec. 23, 2014).

115. *Id.*

116. *Id.*

117. *Id.* I thank Professor Russell Robinson for suggesting the blood ban example and for concisely describing what he so aptly called its “governmental lesson in being gay.”

they've been celibate for years and have tested negative for HIV.<sup>118</sup> The clear message of this policy is that gay sex is inherently dangerous and that virtually every encounter carries with it the risk of HIV transmission. At the same time, heterosexual identity is privileged and virtually whitewashed of any sexual risk whatsoever. It would be unreasonable to expect that gay and bisexual men have not also internalized and performed this governmental construction of gay identity.

Tim Dean's book, purporting to provide a judgment-free, ethnographic account of barebacking "subculture," is one example. The work resists reduction; it can be read on many levels instructively, not the least of these levels being what light it shines on the body of scholarship loosely defined as queer theory and the erotics of death and injury that that work defends.<sup>119</sup> Dean documents the practices of HIV-positive men who have sex with HIV-negative men for the purpose of transmitting HIV. In the world Dean describes, the HIV-positive man (the "gift giver") and the HIV-negative man (the "bug chaser") are engaged in a consensual<sup>120</sup> transaction that has as its primary focus the formation of a kinship based on the virus itself—what Dean describes as a "bug brotherhood"<sup>121</sup>—with the simultaneous consequence of breaking incest taboos.<sup>122</sup> Dean understands the perils of documenting this subculture politically, but he continues nonetheless. Surely, in a political climate in which gay rights groups have been working tirelessly to mold homosexuality in heterosexuality's image, there are costs to this kind of public relations peek-a-boo. Of course, the ways in which Dean's detailed account of a bug chasing, sex-as-injury dimension to some gay men's sex lives actually proves homosexuality's functional equivalence to heterosexuality will go over the heads of the

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118. *Id.*

119. For an extended discussion, see Shannon Gilreath, *Feminism and Gay Liberation: Together in Struggle*, 91 DENVER L. REV. 109–39 (2013).

120. Although, as Marc Spindelman points out in his review of Dean's book, Dean so problematizes the concept of consent as to make what is nonconsensual nearly impossible to recognize in the context of Dean's particular sexual ethic. See Marc Spindelman, *Sexual Freedom's Shadows*, 23 YALE J. OF L. & FEMINISM 179, 246 et seq. (2011) (reviewing DEAN, *supra* note 97).

121. DEAN, *supra* note 97, at 72, 78, 82, 85.

122. "Breeding the virus in other men's bodies creates simultaneously lateral and vertical kin relations: the man whom one infects with HIV becomes his sibling in the 'bug brotherhood' at the same time that one becomes his parent or 'Daddy,' having fathered his virus. If this man also happens to be one's partner or lover, then by 'breeding' him one has transformed what anthropologists call a relational affine into a consanguine; one's 'husband' has become one's 'brother' via a shared bodily substance." *Id.* at 85–86.



mainstream movement. Still, what I find most problematic about Dean's account is exactly how he deals with HIV itself.

By confirming, even exalting, an erotics of death and injury as the *raison d'être* of condomless intercourse between serodiscordant men, Dean constructs an erotics keyed to certain assumptions about the risk inherent in such practices that are in no way predicated on medical facts—indeed, they are, considering what I have just documented as medical reality for HIV-positive men compliant with antiretroviral therapy, contra-factual. What I mean to say here is that the sort of danger and risk that Dean sees as the real purchase price of sexual liberation cannot be—and should not be treated as—real, when they are, in fact, not real. For me, the crucial hook in Dean's explanation of the sexual ethic he lauds is this:

To the extent that [the rhetoric of “safe sex”] deters contact with strangers, it should be subject to ethical critique. And insofar as bareback subculture has generated its own critique of the rhetoric of safety, it remains consonant with the ethical argument that I'm advancing here. Engagement with otherness is never completely safe; contact with the unfamiliar, the strange, always entails risk. . . . [T]he ethical imperative to engage otherness becomes more compelling once we grasp how its risks yield pleasure.<sup>123</sup>

Dean follows this with the imperative that “Openness to contact with the other gives rise to an ethics not of self-sacrifice but of pleasure.”<sup>124</sup> Again, the tension between what Dean is saying and the behavior he is documenting makes his writing and his meaning opaque. One could think that Dean is suggesting that self-sacrifice—most problematically to the point of self-destruction—is not a suitable aim. But he cannot mean this, considering that he has already exalted the willingness to risk even death (as a consequence of contracting HIV) in the pursuit of “unlimited intimacy.”<sup>125</sup> Should there be doubt about my conclusion here, the proof is in what Dean, strategically, does not say. On the same page, he quotes an interview of Michel Foucault with Stephen Riggins, in which Foucault is quoted to observe that “Pleasure is a very difficult behavior.”<sup>126</sup> In short, it entails risk. No pain, no gain. But context is everything. Dean surely did not select this small excerpt from a lengthier interview without reading—and comprehending—the rest of it. Foucault goes on to

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123. *Id.* at 204–05.

124. *Id.* (emphasis in original).

125. *Id.* at 66.

126. *Id.* at 205.

say: [T]he pleasure, the complete and total pleasure . . . it's related to death. Because I think that the kind of pleasure I consider *the* real pleasure would be . . . so overwhelming that I couldn't survive it. I would die."<sup>127</sup>

This, then, for me, is illustrative of the principal problem in Dean's work: he proceeds from a set of assumptions about HIV-risk that are, simply put, untrue. He does not adequately control his thesis to account only for the behavior of men who may know that they are HIV-positive and refuse to comply (or cannot comply) with therapy—a scenario in which a risk of transmission would, indeed, be real.<sup>128</sup> Rather his is a defense of a general erotic ethics of which the exemplar par excellence is a condomless, serodiscordant sexual act—and supremely where transmission is both intended and desired. This risk, and the insistence on pursuing pleasure, on account of—or because of—it, is what lights Dean's fire. But when medical reality is that—in a majority of cases taken in by Dean's ethics—no risk in fact exists, Dean's pursuit of an ethical defense of condomless sex simply succeeds in perpetuating vile stereotypes about HIV and the men who live with it. Dean's assurance that saying such things in the academic environment is likely to do little harm to gays rings hollow.

Marc Spindelman's brilliant review essay, giving readers a clearer picture of what Dean often muddies, suffers from the singular shortcoming of proceeding from a posture that assumes Dean's facts. Neither scholar, both identifying as gay, seriously engages medical reality, which no doubt would seriously compromise Dean's manifesto on the virtues of risk in the pursuit of sexual pleasure by exposing just how little risk there is. Spindelman's reply is unforgiving. He writes:

[I]t's no more than fiat to say that the first two categories of barebacking practice Dean mentions entail no desire for HIV transmission. Critically, viewed against the risks of viral transmission, it could as well be thought that intentional acts

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127. MICHEL FOUCAULT, *Michel Foucault: An Interview by Stephen Riggins*, in 1 THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954-1984, 121, 129 (Paul Rabinow ed., Robert Hurley trans., 1997) (emphasis in original).

128. In many respects, Dean's book is magnificently incoherent. Dean does reference committed barebackers who refuse to be tested for HIV and notes that they are "needless to say . . . unlikely to be taking antiretroviral medication." DEAN, *supra* note 97, at 53. Two fundamental ironies exist here: one is that the (presumed) HIV-positive, yet therapy noncompliant man Dean references would be shielded from legal liability based on his lack of certain knowledge about his serostatus; and, two, Dean here makes an oblique reference to the medical reality of antiretroviral therapy in a book otherwise oblivious to the role the medications may play in the sexual philosophy he touts.

of unprotected anal sex, even if not driven by a conscious desire for viral transmission, may nevertheless intend it, as its 'natural' and 'foreseeable' consequence.<sup>129</sup>

But that which is, medically speaking, impossible—namely the transmission of HIV from one partner to another when the HIV-positive partner is therapy compliant and undetectable—cannot be “natural” or “foreseeable,” much less intended.<sup>130</sup> Indeed, Spindelman himself, in a discussion of “those bug chasers ready to die for sex” notes this medical reality for different effect, when he references a frustrated bug-chasing bottom “who could not seroconvert to save his life.”<sup>131</sup> One reason for this “frustration” could be the effectiveness of modern medicine and the consequent reality that HIV-positive, undetectable tops cannot, no matter how desirous the myth may be to the bug chaser or the critic, transmit the virus. Admittedly, Spindelman’s point here is to expose just how limitless is the ethic—detached from actual reality as Dean presents it. My point is not to fault him for this, but simply to observe how the underlying trope linking HIV with certain death is left unexamined.<sup>132</sup> HIV infection is no longer a death sentence in the United States. With the advent of effective antiretroviral therapy in the 1990s, HIV has gone from a deadly virus to a manageable, but chronic health issue.<sup>133</sup> Today, HIV-positive individuals who are compliant with their antiretroviral regimens can expect a normal lifespan.<sup>134</sup> Thus, all of Dean’s posturing about “barebackers . . . taking on the fundamental limit of death that defines us all; . . . fucking without limits precisely because they don’t want to live forever,”<sup>135</sup> etc., may be just that: posturing. Of course, none of us will live forever. But beyond his concession that he is “not trying to

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129. Spindelman, *supra* note 120, at 190.

130. In any event, even some courts, hardly inclined to be generous, have recognized that HIV-specific criminal laws that require a mens rea of knowing culpability cannot be applied to defendants who did not “intend”—within the ordinary meaning of that word—to transmit the virus. See Kimberly A. Harris, *Death at First Bite: A Mens Rea Approach in Determining Criminal Liability for Intentional HIV Transmission*, 35 ARIZ. L. REV. 237 (1993).

131. Spindelman, *supra* note 120, at 211 (citations omitted).

132. “[A]ll three of the categories of barebacking practice . . . may be permeated by an erotics of injury and death, whether conscious, intentional, or not.” *Id.* at 190.

133. See Global Commission on HIV and the Law, *HIV and the Laws: Risks, Rights & Health* (2012), available at <http://alturl.com/bh35n>.

134. See, e.g., S. Burris & E. Cameron, *The Case Against Criminalization of HIV Transmission*, JAMA 300 (5), 578–81 (2008).

135. DEAN, *supra* note 97, at 66 (citation omitted).

question whether HIV is the cause of AIDS," there is little else in Dean's assessment that cares much about medical fact.<sup>136</sup>

The less dramatic reality (and, to be fair, one that Dean admits) is that the overwhelming majority of HIV-positive men who choose to have sex without a condom are not "gift givers." And here I mean to say that they are neither this in fact, since HIV-positive, undetectable men cannot transmit HIV, but also they are not this in desire or fantasy. Likewise, most HIV-negative men who might willingly engage in sex with HIV-positive men are not Dean's "bug chasers."<sup>137</sup> Perhaps they are simply men who, understanding that the medical reality of having sex with an HIV-positive partner who is undetectable is the reality of nontransmission, determine to indulge in the mythos of unprotected sex as the sexual apogee that heterosexuals have given them.<sup>138</sup> To imprison an HIV-positive man in this context is

136. Although Dean clearly understands the power of antiretroviral drugs, admitting as much in the Introduction to the book (Dean obliquely references antiretroviral drugs and how they change both the reality and perception of HIV. (*Id.* at 2)), he references—in a 237 page book—antiretroviral therapy only nine times, and most of these as only passing, nonsubstantive mentions.

137. After all, Dean is a participatory member of "the subculture of barebacking" by his own admission. He tells us that he engages in behaviors that minimize his risk of infection (*Id.* at 15); that he encounters bareback sex partners who clearly want to minimize their chances of infection (*Id.* at 18); and (with more than a bit of acknowledgement for how it bolsters his moral authority), he informs us that at the time the book went to press he remained HIV-negative (*Id.* at 8).

138. Certainly, studies suggest that HIV-negative men bareback with HIV-specific knowledge about the low risk of transmission, even absent knowledge of whether their partner is undetectable. For example, with the knowledge that as the insertive ("top") partner in anal intercourse one is at very low risk of exposure. See Timothy Frasca, et al., *Inner Contradictions Among Men Who Bareback*, 22 QUALITATIVE HEALTH RESEARCH 946, 950 (2012). The same study suggests that HIV-negative men also approach barebacking with specific knowledge about the reduced infectiousness of men on successful antiretroviral therapy. *Id.*

Moreover, it seems to me that the decision to engage in bareback sex is often undertaken for reasons that, while they may not be altogether divorced from considerations of HIV risk, are compelled by more powerful socializing forces: principally, the cult of romance that has been built around heterosexual intercourse as the paradigm for sexual fulfillment. Thus, as a somewhat aerial observation, what I think is overlooked in Dean's assessment is the degree to which barebacking is valorized because it is how real men (read: straight men) have sex. Real men fuck raw. Pornography reinforces that message at every turn. The exponentially-growing segment of the market is bareback. And if you visit any gay "dating" site, for which the pornographers are the chief advertisers, you see them pushing that product more than any other. This means that the men who use those sites—and there are a lot of them—are bombarded with it. The cue is directly from straight porn, which is virtually 100% condomless.

It's also true that unsafe sex is the backbone of the heterosexual political system. It is the means by which a woman's difference from men is politicized and utilized to make static her political inferiority to men through pregnancy. Bareback sex is even a common heterosexual party theme: we call it the "baby

to hold him to an intellectual standard—indeed, a creative standard—which the heterocrats, who have invented both the mythos of “romance” and the criminal law, have never allowed him, nor any gay man, the imaginative space to develop.<sup>139</sup>

#### IV. Developmental Rationality and HIV-specific Criminal Laws

In indulging the constitutional argument in light of both the medical facts and the sexual reality Dean introduces and Spindelman critiques, the salient question implicit in the tension between Dean’s and Spindelman’s perspectives is whether having sex after having acquired HIV is an injury per se, *simpliciter*, in the way that rape is an injury. Should it, at the widest angle of legal inflection, matter whether transmission even took place? Whether there was trickery or meaningful consent, insofar as we can discern it? At its most constitutionally significant, the question would be framed as whether some rational basis—beyond mere moral disapproval—exists to treat as criminal sex between an HIV-positive man and a consenting HIV-negative man or between two HIV-positive men. None of the harms Spindelman

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shower.” It is thus unsurprising that the slang terminology for unsafe sex is “breeding” or “being bred.” How could one seriously miss the obvious here? While it may be true that barebacking is the eroticization of harm, even to death, as Spindelman suggests via his critique of Dean, I think the obvious paradigm at work here—the like-straight paradigm—is more applicable than it’s made use of. The understanding of homosexual sex in heterosexualized terms of “natural” sex (sex without the artificial barrier of the condom) is so pervasive that gay men are willing to ignore, or at least to live with, collateral HIV risks. In this sense, barebacking is not subculture at all, it is mainstream; and it is wholly in line with the politics of the so-called gay rights movement, which is a politics that values only that which is paradigmatically straight. The need to be “like straight” in the bareback world is at work in powerful, insidious ways, even as barebacking proponents claim it to be otherwise, and this, although it is decidedly beyond the scope of this Essay, ought to be exposed and analyzed.

139. After all, what Dean describes as “subculture” or new, is in fact metacultural—the very basis for most of what we have understood as “history” itself. What he describes as proudly and defiantly gay is in reality a thoroughly heterosexual standard of what sex is and how it functions most efficiently. One could combine Norman Mailer’s revelation that “murder is never not sexual,” with Andrea Dworkin’s equally revelatory “romance is rape embellished with meaningful looks,” and have the shortest (and most accurate) historical treatise yet produced. The only thing remotely inventive about the gay version of this sexual death wish is gay men’s insistence on flouting the rule that *men* should not fuck themselves to death, which has been the principal reason the meager limitations on sex have existed at all. In this way, gay men assume the feminine role—which is the role of sexual object unto death. Guarding against this potential for sexual violability of men is precisely what motivated sodomy prohibitions in the first place: for patriarchy to survive, men cannot be vulnerable in this essentially-gendered way.

sketches in the light of “the ideology of sexual freedom”<sup>140</sup> suggests independent harms producing this independent rationale.

What strikes me about the injuries most troubling to Spindelman, those injuries concededly treated by Dean as defining ingredients of the “subculture of barebacking” he purports to illumine—most egregious, in my opinion, being the fetishization of rape—is that they would be problematic, indeed grossly so, from a sex equality perspective in any circumstance and quite independent of the serostatus of any person involved. Thus, while Spindelman’s lucid explication of the ideology of sexual freedom’s harms-packaged-as-pleasures exposes just how utterly heterosexual an experience homosexual sex can be for many gay men, it surely does not provide a basis for a specific, legally compensable injury—let alone one cognizable under any just notion of the criminal law—any more than Spindelman’s spot-on linkage between Dean’s portrait of barebacking subculture to what Spindelman names “the ideology of sexual freedom” should be taken as a justification for a reinstitution of sodomy laws themselves.

Surely, though, public health—generally a reasonable concern of the state, indeed the epitome of its traditional “police power”—should suffice as a rational basis for criminalizing certain activity that carries with it the risk of HIV transmission. The automatic response seems to be that under traditional rational basis, in the sense that “rational” means any imaginable justification for curtailing sex by an HIV-positive partner—this surely may be enough. In this context, there are two observations worth making about public health justifications invoking HIV exposure risks. First, while I will proceed to argue that something more than low-level rational basis review is required in reviewing HIV-specific criminal laws, it is worth observing that, given medical fact, such laws may fail to survive even such low-level scrutiny. A legal standard of “anything is possible” is generally incompatible with any concept of fairness or due process.<sup>141</sup> Imagine a law, based on public health justifications, that insisted no person could leave his house because the sky may be falling. Surely, no one would argue that such a law is rational simply because no one can “prove” that the sky isn’t falling. Or imagine such thinking in operation in the context of criminal procedure; specifically, consider the reasonable doubt standard. An “anything

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140. Spindelman, *supra* note 120, at 191.

141. Cf. Ari Ezra Waldman, *Exceptions: The Criminal Law’s Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL’Y & L. 550, 566 (2011).

is possible” legal standard would effectively gut the reasonable doubt standard. After all, “there can be no reasonable doubt of anything since anything is possible.”<sup>142</sup>

Certainly, we can’t “prove” that the sky isn’t falling. Saying, in the face of medical evidence to the contrary, that HIV-specific statutes are still rational because somewhere out there may be the one case in which the risk of acquiring the virus by a negative partner from an undetectable partner exists, since it is impossible to prove conclusively the absence of anything—even that which appears by all empirical evidence never to have happened—seems incompatible with the bedrock rationality principles underlying both due process and the criminal law. As Judge Posner put it in the context of considering what constitutes reasonable doubt: “*Anything* is possible; there are no metaphysical certainties accessible to human reason; but a merely metaphysical doubt . . . is not a reasonable doubt for purposes of the criminal law.”<sup>143</sup> As Ari Ezra Waldman has observed,

[i]f mere possibility cannot survive as a reasonable doubt, it cannot survive as proof beyond a reasonable doubt. After all, there can be no reasonable doubt that anything is possible. And, “anything is possible” cannot survive constitutional scrutiny as a basis for criminal conviction . . . If it [could], everyone would be charged with everything, no one would be convicted of anything, and the reasonable doubt standard would have no meaning.<sup>144</sup>

Second, since the Supreme Court has established a more stringent form of rational basis review in cases involving targeting of discrete groups that do not rise to suspect or quasi-suspect status or of conduct that is one or another dimension of a liberty protected by due process, one is obliged to ask what *actually* motivates the legislation in question. In other words: is it *really* rational, not merely imaginarily rational?<sup>145</sup> Under the weight of this kind of inquiry, the surface justification of public health dissolves.

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142. *Id.*

143. *United States v. Ytem*, 255 F.3d 394, 397 (7th Cir. 2001) (emphasis in original).

144. Waldman, *supra* note 141, at 567.

145. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring); *Romer v. Evans*, 517 U.S. 620, 632, 634–35 (1996). In fact, I think this kind of approach to HIV—the approach that says “anything is possible” and adopts that as a legal standard for imposing onerous criminal liability, especially when that standard works significant erosion of a liberty protected by due process—may violate even low-level rational basis review. Even rational basis of this kind requires *rationality*.

For a helpful analogy, consider Martha Nussbaum's explanation of what actually motivated the spate of gay bathhouse closures in the 1990s. She explains:

The relevant New York law unambiguously defines *public nuisance* in a Millian way: 'whatever is dangerous to human life or detrimental to health.' But where is the unwilling imposition? The gay community is aware of the virus, the risks it poses, and the mechanism of its transmission . . . [T]he most that can be said is that the bathhouses make it possible for men to engage in risky activities if they choose to do so. But people choose to put themselves at risk in all sorts of ways in all sort of activities. They climb mountains; they race cars; they box; they smoke; they overeat. Nobody suggests outlawing all of these activities. . . . [N]arrower options are pursued: to regulate, to educate, and to hold criminally liable anyone who by fraud lures a nonconsenting party into risks he or she has not agreed to run.<sup>146</sup>

And as Nussbaum points out, "[s]exual activity, *particularly same-sex activity*, is unique in the degree of scrutiny it evokes."<sup>147</sup>

Unique, indeed. One sees the degree of uniqueness when one observes the difference in the way the law treats the risk in any other consensual activity, mountain climbing, or NASCAR racing, for examples, which carry with them inherent risks of injury or death. Like mountain climbing and NASCAR racing, unprotected sex with a HIV-positive partner poses no direct risk for the nonparticipant. That is a critical factor. The sheer obtuseness of a law that refuses to take into account the fact that every "victim" has at his or her disposal the means of protection (the condom), ought to call it into question. Never mind that the actual risk involved in either mountain climbing or driving at 200 miles per hour in a confined space while multiple other drivers do exactly the same is exponentially greater than the risk of contracting HIV from an HIV-positive partner who is receiving therapy and has an undetectable status.<sup>148</sup> So if we return to a Millian definition of what constitutes a public nuisance,<sup>149</sup> that which is "dangerous to human life or detrimental to health,"<sup>150</sup> it bears repeating that there is no such danger present in this kind of circumstance.<sup>151</sup>

146. See NUSSBAUM, *supra* note 52, at 177–78.

147. *Id.* at 178 (emphasis added).

148. See *supra* notes 29–35 and accompanying text. Again, this is true even if I were to go with medically-unverifiable "possibilities" of transmission under such circumstances.

149. NUSSBAUM, *supra* note 52, at 175.

150. *Id.* at 177.

151. I have taken Nussbaum musing on this politics of disgust surrounding HIV to be highly instructive. But it is unclear from her book whether she draws any



Even in a legal system reluctant to embrace scientific reality, the degree of risk is certainly infinitesimal compared to the degree of risk associated with NASCAR racing. So it is, as I have demonstrated, with pregnancy.<sup>152</sup> So what besides irrational fear and loathing of homosexual sex and of people with HIV can be said really to motivate laws harshly punishing sex by HIV-positive people—especially those who are therapy compliant and undetectable—when these other kinds of activities, adjudged as “good” by hetero-dominant society, are not severely curtailed and certainly are not criminally prosecuted?

So, given these facts, what should be the fate of laws criminalizing sex by HIV-positive individuals, if we apply familiar constitutional principles? *Lawrence* protects, in very general terms, the liberty “to engage in [private sexual] conduct without intervention of the government.”<sup>153</sup> In more specific terms, *Lawrence* protects this type of conduct because it may stand as a proxy for a “personal bond that is more enduring.”<sup>154</sup> The *Lawrence* Court is uncritical here. In fact, implicit in the majority’s flowery prose is the idea that these “bonds” are always positive. A sex equality perspective understands that they are sometimes for better, but sometimes for worse.<sup>155</sup> Homosexual intimacy and heterosexual intimacy are indistinguishable in this regard.<sup>156</sup>

Additionally, notwithstanding heterocratic attempts at distinguishing between the two, the *Lawrence* majority explicitly rejects mere majoritarian disapprobation as grounds for the

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meaningful distinction between fraud and nondisclosure. At times she singles out fraud by HIV-positive people as properly within the ambit of the law (“lying about one’s HIV status is already a criminal act”), but within a page she speaks of the criminal law with regard to “nondisclosure” (“[W]e have provisions in the criminal law to deal with nondisclosure”). *Id.* at 180–81. These kinds of laws simply seem unproblematic for Nussbaum.

152. *See supra* Part II.

153. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

154. *Id.* at 567, 605. The overall impression left by Justice Kennedy’s majority opinion is that casual sexual encounters will be protected, but primarily, if not only, because those kinds of encounters contain the potential for something more enduring—i.e., the heterosexual paradigm (however fictional it may have proven to be in practice) of long-term, monogamous, romantic commitment. For sustained criticism of this approach, see GILREATH, *supra* note 15, at 71–108; Shannon Gilreath, *Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas: Privacy, Dominance, and Substantive Equality Theory*, 30 WOMEN’S RTS. L. REP. 442, 442–78 (2009).

155. *See* Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1660 (2004).

156. *See Lawrence*, 539 U.S. at 567.

criminal law.<sup>157</sup> Even if we look at the obviously-weird scenarios of the kind of barebacking subculture Tim Dean identifies in his book, don't we find bonds that may be more enduring? They are at least as enduring (at least until there is a cure for HIV) as those bonds created by pregnancy (what heterosexuals in large numbers often do *intend* when they engage in bareback sex). The very term "breeding" is adopted by men who believe that unprotected sex between men—exchanging sperm—has the same emotional and spiritual dimensions of exalted heterosexual sex. How can this not implicate the place in the universe about which the *Lawrence* majority waxed so eloquent?<sup>158</sup> One need not agree with some gay men's characterization of the sex they choose to have to see the parallels, any more than one must agree that procreation by ordinary heterosexual means is an unmitigated good (I don't; many heterosexuals do). The point is that if *Lawrence* protects a right to consensual sexual intimacy in broad terms—studiously ignoring the varied and varying injuries inherent in its practice—it should protect this kind of sex too.<sup>159</sup>

### Conclusion: A Note on Empathy and False Empathy

In *Rodrigo's Eleventh Chronicle*,<sup>160</sup> Delgado tackles the difficult question of what role, if any, empathy plays in law. His conclusion is sobering: the law is anti-empathic.<sup>161</sup> In fact, Delgado

157. *Id.* at 572–76.

158. I think that it's critical to observe here that the *Lawrence* majority reforms the *Hardwick* majority's characterization of the contraception cases. The *Hardwick* Court made them all about procreation—which, of course, male-on-male sex can't produce. See *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986). *Lawrence* acknowledges the procreative nature of these cases but casts them in decidedly broader terms. For the *Lawrence* Court, the procreative privacy cases were about much more than simply the decision whether to procreate. They were about "defin[ing] one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

159. A primary reason that gay men have reported for engaging in bareback intercourse is "[t]he connection feels closer and more intimate" and that "[t]he sharing of cum on a physical level heightens the sense of sharing on the emotional and spiritual planes." Stephen Gendin, *Riding Bareback: Skin-on-Skin Sex—Been There, Done That, Want More*, POZ (June 1997), available at [http://www.poz.com/articles/241\\_12394.shtml](http://www.poz.com/articles/241_12394.shtml); see also Deann K. Gauthier & Craig J. Forsyth, *Bareback Sex, Bug Chasers, and the Gift of Death*, 20 DEVIANT BEHAV. 85, 91 (1999) (quoting one gay man who engages in bareback intercourse as stating "[Bareback sex] indicates a level of trust, of cohesion, that I don't think is achievable when both partners are primarily concerned with preventing the exchange of bodily fluids") (internal citation omitted).

160. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996).

161. *Id.* at 80 ("Law is structurally biased against any display of empathy.").

concludes that “[o]ur society doesn’t really want empathy for outgroups or minorities, any more than it wants equal treatment for all people.”<sup>162</sup> Analogizing to Gramsci’s concept of false consciousness, in which an oppressed people begins to identify with the oppressor, by adopting the oppressors’ perspectives and values, thus becoming unconscious agents of their own oppression, Delgado identifies a corollary which he labels “false empathy.”<sup>163</sup> As Delgado puts it, through his narrator Rodrigo, false empathy in the race context describes a situation “in which a [W]hite believes he or she is identifying with a person of color, but in fact is doing so only in a slight, superficial way.”<sup>164</sup>

I think that something of a mix of false consciousness and false empathy is at work in the context of HIV-specific criminal regulation of the kind I have described. Clearly, gay men have internalized the heteronormative notion that HIV-positive men are dirty and dangerous. The response of many HIV-negative gay men to HIV-positive gay men reminds me of the conflict between the so-called clean Pariahs and the so-called dirty Pariahs of the Indian caste system.<sup>165</sup> Even among this most despised caste, the oppressor’s hierarchy is apparent in microcosmic form.<sup>166</sup>

But what Delgado describes as false empathy is also at work, as evidenced by the form and function of most HIV-specific laws. Surely, lawmakers have believed that the empathic response to putative “victims” of HIV would be to deter exposure through use of the criminal law. But this is really false empathy.<sup>167</sup> Delgado provides as an example the early Settlement House movement. The upper-class White women who worked to improve the lives of immigrants did not really learn the truth about the immigrants or their lives or customs.<sup>168</sup> Instead, they treated the immigrants they professed to care so much about with a kind of detached, idealized sentimentality.<sup>169</sup> Likewise, a law that doesn’t bother to inquire into the facts about a disease—that treats the entire topic

162. *Id.* at 68.

163. *Id.* at 71.

164. *Id.* at 70.

165. See GILREATH, *supra* note 15, at 33–38.

166. *Id.* at 37, n.19 (“Among Hindu Untouchables there was conscious mimicry of the customs and taboos of higher castes in an effort to improve status. There was also by Untouchables intracaste enforcement of degrading norms for Untouchables obviously designed and effective in perpetuating higher caste status and power. The same phenomena exist today among Gays in the United States and elsewhere.”) (internal citations omitted).

167. *Id.*

168. See Delgado, *supra* note 160, at 70.

169. *Id.* at 71.

in the bluntest, most unsophisticated way possible—cannot be said to show empathy with those affected by any illness. Real empathy, as Delgado notes, requires getting fully inside the mind and experience of another.<sup>170</sup> That's what makes it so rare. But a law that does not even attempt to address medical realities or real-life experiences cannot be said even to come close.

Moreover, false empathy exists here not on the part of legislators alone, but also on the part of HIV-negative gay men. The behavior of so many HIV-negative men perfectly fits Delgado's paradigm for false empathy. As Delgado says,

Someone in the grip of false empathy has a shallow identification with the other... He or she walks on the surface, uses the wrong metaphors and comparisons. It's a little like false piety, like those folks who go to church on Sunday but don't allow themselves to be seized by real religion.<sup>171</sup>

Every time I see a gay personal ad seeking a "clean" partner, I am reminded of the verity of Delgado's observations.

As Delgado has noted, like knowledge, empathy—and the lack of it—has a power dimension. Empathy can reproduce hierarchy.<sup>172</sup> There can be no empathy, nor no real solidarity, in gay men who refuse to learn the basic, scientific realities of a virus that has become so central to the gay male experience. There can be no empathy, nor no real solidarity, so long as gay men who are HIV-positive remain categorically Other to gay men who are HIV-negative.<sup>173</sup> Gay men, especially, bear considerable blame for what is an unutterably cruel approach to HIV, for failing to engage the issue politically in any meaningful way, because it does not fit with their squeaky-clean, domesticated politics. It is high time gay men start asking ourselves how we can possibly envision the law in our lives in a way that is fair and just when our own vision of what and by whom our community is constituted is so limited.

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170. *Id.*

171. *Id.* at 72. Also, Susan Sontag showed compellingly how language and metaphor has been used to dehumanize people living with HIV/AIDS. See SONTAG, *supra* note 103, at 112–13.

172. Delgado, *supra* note 160, at 73.

173. Delgado posits that lack of empathy can be explained by "norm theory," which "holds that our reaction to another person in distress varies according to the normalcy or abnormalcy of his or her plight in our eyes." *Id.* at 76 (internal citations omitted).